



**Imwatok (MCA) v Nairobi City County & 7 others; Attorney General & another (Interested Parties) (Civil Appeal 300 of 2018) [2024] KECA 509 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 509 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 300 OF 2018  
A ALI-ARONI, LA ACHODE & PM GACHOKA, JJA  
APRIL 26, 2024**

**BETWEEN**

**HON. PETER A IMWATOK (MCA) ..... APPELLANT**

**AND**

**THE NAIROBI CITY COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**HIS EXCELLENCY MIKE MBUVI SONKO ..... 2<sup>ND</sup> RESPONDENT**

**VESIKA KANGOGO ..... 3<sup>RD</sup> RESPONDENT**

**STEPHEN LEBOO OLE MORINTAT ..... 4<sup>TH</sup> RESPONDENT**

**THE DIRECTOR GENERAL, PUBLIC PROCUREMENT OVERSIGHT  
AUTHORITY ..... 5<sup>TH</sup> RESPONDENT**

**CONTROLLER OF BUDGET ..... 6<sup>TH</sup> RESPONDENT**

**AAR INSURANCE KENYA LIMITED ..... 7<sup>TH</sup> RESPONDENT**

**BLISS GVS HEALTHCARE LIMITED ..... 8<sup>TH</sup> RESPONDENT**

**AND**

**HON ATTORNEY GENERAL ..... INTERESTED PARTY**

**AUDITOR GENERAL ..... INTERESTED PARTY**

*(An appeal against the Ruling and Orders of the High Court of Kenya at Nairobi  
(Ong'udi, J.) delivered on 13th June, 2018 in ACEC Petition No. 9 of 2018)*



## JUDGMENT

1. The question of jurisdiction has been litigated over the years and the courts have a plethora of times, pronounced themselves in the now familiar words; if a court has no jurisdiction, it should down its tools and do no more. However, this is easier said than done as many a time, courts assume jurisdiction that they do not have or decline to assume jurisdiction that they ought to assume. This is the central issue in this appeal.
2. By way of brief abridgment of the facts giving rise to this appeal, the appellant was at the material time the Member of County Assembly Makongeni Ward, Nairobi County. He served as the Minority Chief Whip of the minority party in the Nairobi County Assembly and was a member of the House Business Committee, Finance, Budget and Appropriations & Water and Sanitation Committee. In his own words, he presented the petition in the High Court for and on behalf of members of staff of the County of Nairobi.
3. Based on what he termed as a serious violation of the law, the appellant filed a petition that listed several issues amounting to violation of the law as follows; a breach of several provisions of statute and regulation as follows: section 135 of the *Public Finance Management Act*, regulation 39(9) of *Public Finance Management (County Government ) Regulations*, section 5 of the *Controller of Budget Act* and section 132 of the *Public Procurement and Disposal Act*; that the tender process was flawed and marred with corruption; that the 8<sup>th</sup> respondent could not offer medical services as it only had 73 clinics country wide and therefore could not attend to the over 11000 employees of the 1<sup>st</sup> respondent, and that the respondents had violated chapter 6 of the *Constitution* through fraudulent schemes to siphon public funds.
4. The petition raised several issues. It is important we set out the prayers verbatim as the issues for determination revolve around those prayers. The petitioner prayed for the following:
  - a. A declaration that the 2<sup>nd</sup> respondent abdicated, neglected and/or failed to uphold his duties as envisaged in Article 179 (4) of the *Constitution* and section 128, 135 and 154 of the *Public Finance Management Act* and regulation 39 of the *Public Finance Management (County Government) Regulations 2015*;
  - b. A declaration that the 3<sup>rd</sup> respondent abdicated, neglected and/or failed to uphold his duties as envisaged under section 59 of the *County Government Act* and section 128, 135 and 154 of the *Public Finance Management Act* and regulation 39 of the *Public Finance Management (County Government) Regulations 2015*;
  - c. A declaration that the 4<sup>th</sup> respondent abdicated, neglected and/or failed to uphold her duties as envisaged under section 36 of the *County Government Act* and section 128, 135 and 154 of the *Public Finance Management Act* and regulation 39 of the *Public Finance Management (County Government) Regulations 2015*;
  - d. A declaration that the 5<sup>th</sup> respondent abdicated, neglected and/or failed to uphold her duties as envisaged under section 9 of the *Public Procurement and Asset Disposal Act*, section 128, 135 and 154 of the *Public Finance Management Act* and regulation 39 of the *Public Finance Management (County Government) Regulations 2015*;
  - e. A declaration that the 6<sup>th</sup> respondent abdicated, neglected and/or failed to uphold her duties as envisaged under section 5 of the *Controller of Budget Act*, section 128, 135 and 154 of the



*Public Finance Management Act* and regulation 39 and 41 of the *Public Finance Management (County Government) Regulations 2015*;

- f. A declaration that the cancellation of tender No NCC/PSM/002/2017 – 2018 by the 1<sup>st</sup> respondent was illegal and unprocedural;
- g. A declaration that the 7<sup>th</sup> respondent did not have the authority to sub-contract the services of the 8<sup>th</sup> respondent without the approval of the 1<sup>st</sup> respondent;
- h. A declaration that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents have failed to comply with and/or breached the provisions of the *Constitution*, the *County Government Act*, the *Public Procurement and Asset Disposal Act*, the *Controller of Budget Act*, the *Public Finance Management Act* and the *Public Finance Management (County Government) Regulations 2015* in discharging their duties in gross violation of the law;
- i. A declaration that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents, using their positions and/or power, have involved themselves in corrupt ways and activities;
- j. A declaration that the actions of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents amount to gross misconduct of persons holding their respective offices;
- k. An order do issue that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents herein be surcharged for all the public funds lost in the procurement process of medical insurance cover for members of staff of the 1<sup>st</sup> respondent for the financial years 2016/2017 and 2017/2018;
- l. A declaration that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents are unfit to hold any public office in the Republic of Kenya;
- m. An order that all the monies paid to the 7<sup>th</sup> respondent with respect to the 2 extensions of 1<sup>st</sup> July 2017 to 30<sup>th</sup> September 2017 and 1<sup>st</sup> October 2017 to 31<sup>st</sup> December 2017 be returned back to the 1<sup>st</sup> respondent;
- n. An order do issue for the audit of the financial books of the 7<sup>th</sup> and 8<sup>th</sup> respondents for the financial years 2015/2016, 2016/2017 and 2017/2018 by the 2<sup>nd</sup> interested party;
- o. The Honorable Court be pleased to issue such or further orders, directions and writs as may be necessary to safeguard and prevent the violation of the petitioner’s fundamental rights and freedoms under the *Constitution* of the republic of Kenya;
- p. The costs consequent upon this petition be borne by the respondents in any event.
  - 1. The record shows that the 1<sup>st</sup> respondent’s preliminary objection is dated 7<sup>th</sup> May 2018, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents filed their joint preliminary objection dated 3<sup>rd</sup> May 2018, the 6<sup>th</sup> and 8<sup>th</sup> respondents on the one part and the 7<sup>th</sup> respondent on the other part filed their respective preliminary objections both dated 4<sup>th</sup> May 2018. The 5<sup>th</sup> respondent did not file any.
  - 2. During the hearing of the preliminary objection, the respondents urged the trial court to strike out the petition and the Notice of Motion in limine for the following reasons; that the Notice of Motion was not hinged on any provisions of the law since none were cited; that the affidavit was defective as it was not commissioned and did not comply with section 5 of the Oaths and Statutory Declaration Act and rule 9 of its Rules; that the prayers sought in the Notice of Motion were the rehashed reliefs sought in the petition without purpose; that the court could not make a determination on policy



related issues; that the court lacked jurisdiction to entertain a petition from a member of the County Legislative Assembly in exercise of his oversight authority under Article 183 of the Constitution; that Article 159 (2) (d) of the Constitution ought to be upheld by the court; that Article 35 of the Constitution was not pleaded; that the petition was premature; that no cause of action lay against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 8<sup>th</sup> respondents; that the petition was filed in the wrong forum and; that the trial court was bereft of jurisdiction by dint of Article 93 (1), 96 (3), 119 (1), 125 (1), 195 (1) and 225 of the Constitution, section 9 of the County Government Act and the mandatory provisions of section 9 (1) (h) together with section 8, 34 and 167 as well as part IV of the Public Procurement and Asset Disposal Act.

7. In response, the appellant submitted that the preliminary objections were without merit and ought to be dismissed because they clogged the imposition of justice; that they failed to meet the threshold set out in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696; that the petition was filed in the interest of the public; that the court was the proper forum to address his issues having exhausted all avenues; that the pleadings properly invoked various provisions of the law; that the orders sought in the application were not final and thus differed from those set out in the petition; that the petition was hinged on Article 20 (3) and 35 of the Constitution; that section 9 of the Public Procurement and Asset Disposal Act was not couched in mandatory terms as with section 174 of the said statute offering an alternative remedy; and that the affidavit ought not to be struck out as a matter of form.
8. Upon hearing the parties, the court held that it had no jurisdiction and struck out the petition. The relevant part of the ruling is as follows:

“All these are allegations which if found to exist would lead to criminal charges. A clear procedure has been set out in section 9 (1) of the (PPADA) on how such complaints should be addressed. Secondly, the PFMA sets out how issues of budgeting, supplementary budgeting and all other matters of finance should be dealt with. Sections 196 – 198 of the said PFMA also enumerates the offences under the said Act.

Thirdly, the EACC and the police investigate corruption and economic crime related offences which is part of the petitioner’s complaint. There is nothing in this petition to show that the petitioner at any point made a complaint or report to any of these investigative bodies and no action was taken. These bodies are the ones endowed with the power and machinery to investigate complaints and more so complaints of the nature cited by the petitioner. This court has jurisdiction to deal with constitutional matters but where a clear procedure has been set out, that procedure must first be exhausted. This court cannot be turned into an investigative agency. It’s important that room is given to the various agencies mandated to carry out investigations to do so before a matter is rushed to the court.... I find that the petition herein falls in the same category. The petitioner ought to have filed his numerous complaints with the well- established agencies which have the competencies to investigate them and make decisions. I find the petition to have been filed prematurely before exhausting the laid down procedure, calling for investigations by various bodies and/or agencies.

In the circumstances of this case, I find that this court lacks the jurisdiction to entertain the petition and the Notice of Motion dated 20<sup>th</sup> May, 2018 (sic). That being the case, I have no choice but to down my tools and I find it needless to address the other issues raised by the respondents in the preliminary objections.



The result is that the preliminary objection in respect of the jurisdiction of this court in this specific matter succeeds. The petition and the Notice of Motion dated 20<sup>th</sup> May, 2018 (sic) are hereby struck out with costs.”

9. Aggrieved by those findings, the appellant lodged a notice of appeal on 18<sup>th</sup> June, 2018 and filed a memorandum of appeal dated 23<sup>rd</sup> August 2018, raising 9 grounds. We have taken the liberty to summarize those grounds as follows: that the trial court erred in finding that it lacked jurisdiction to hear and determine the petition, which in its nature, is constitutional; that the trial court adopted a tapered interpretation of Section 9 (1) (h) of the *Public Procurement and Asset Disposal Act*; that it erroneously held that the petitioner had failed to explore the available internal dispute resolution mechanism avenues provided therein; that the authority created by the said statute did not have the jurisdictional mandate to determine constitutional questions; that it was improper for the trial court to find that the petitioner had converted the court into an investigative agency; that the trial court unseemly relied on Article 227 (2) disregarding Article 227 (1) of the *Constitution* and; that the learned Judge wrongly dismissed the petition with costs yet it was a public interest litigation case.
10. During the hearing of the appeal on 29<sup>th</sup> January 2024, learned counsel; Mr. Ashioya for the appellant, Mr. Harrison Kinyanjui, for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, and Ms. Esami holding brief for Mr. Nyamu for 7<sup>th</sup> respondent were present. The 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents were not present despite being duly served with the hearing notice.
11. The appellant filed his submissions which are undated. On their part, the respondents filed written submissions as follows: the 1<sup>st</sup>, 6<sup>th</sup> and 8<sup>th</sup> respondents’ submissions are dated 27<sup>th</sup> September 2023; the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents’ submissions are dated 30<sup>th</sup> July 2023; and the 7<sup>th</sup> respondent’s submissions are dated 5<sup>th</sup> October 2023. The advocates present orally highlighted those written submissions.
12. We note that the submissions raise issues similar to those in the preliminary objections and therefore we need not rehash the same but we shall revert to them where necessary.
13. We have considered the parties rival submissions, examined the record of appeal and analyzed the law. As a first appellate court, an appeal is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make allowance in this respect. [See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR].
14. Looking at the present appeal, the following issues arise for determination: firstly, whether the High Court Anti-corruption and Economic Crimes division had jurisdiction to determine the petition? If the answer to the above is in the negative, whether the dispute ought to have been canvassed before the Public Procurement Regulatory Authority or any well-established agency as held by the trial court? Secondly, whether the petition ought to have been struck out with costs?
15. We begin our analysis by first restating the law on preliminary objections. The same was sagely enunciated by the court in the celebrated case of *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors* (*supra*) that held as follows:

“... A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of



limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold, P. added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

16. The crux of the preliminary objection fell to the court’s jurisdiction. We restate that indeed jurisdiction is everything and without it, a court must down its tools. If a court does not derive its jurisdiction donated by the Constitution or statute, it must immediately cease to act since anything purported to be done by that court would in effect amount to a nullity. The court in *The Owners of the Motor Vessel Lilian ‘S’ v Caltex Kenya Limited* (1989) KLR 1 held as follows and which sentiments are adopted herein:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

17. Article 159 (2) (c) of the Constitution urges all courts and tribunals within the Republic of Kenya to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The essence of a court or tribunal’s jurisdiction, coupled with the principles set out in Article 159 (2) (c) of the Constitution, is what inspires the doctrine of exhaustion. It is defined in Black’s Law Dictionary 10<sup>th</sup> Edition as follows:

“If an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.”

18. As stated earlier, jurisdiction flows from the Constitution or statute. Parties will thus be implored to explore those avenues where available before coming to court. In that vein, parties will seldom be allowed to circumvent the said principle unless a party can aptly demonstrate that the court should invoke an exception based on the circumstances before it. However, it must be borne in mind by the parties that, as held by this Court in *Fleur Investments Limited v Commissioner of Domestic Taxes* <sup>6</sup>



*another* [2018] eKLR, a court will hear a party whose constitutional rights are infringed. The court said:

“Whereas courts of Law are enjoined to defer to specialized Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

19. Turning to the findings of the trial court, as rightly pointed out by the court, Article 227 of the *Constitution* gives provision for procurement of public goods and services. It is on the strength of that provision that the *Public Procurement and Asset Disposal Act* was enacted to prescribe a framework within which policies relating to procurement shall be implemented. In the same vein, section 121 of the *Public Finance Management Act* sets out that the procurement of goods and services and disposal of assets required for the county government or a county government entity are to be carried out in accordance with Article 227 of the Constitution and the *Public Procurement and Asset Disposal Act*.
20. The trial court took cognizance of section 8 of the *Public Procurement and Asset Disposal Act* establishing the Public Procurement Regulatory Authority. The court observed that from the functions set out in section 9, the said Authority was within its reach to listen to the complaints of the petitioner as set out in the petition herein; In particular, under section 9 (1) (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. The court further established that from a reading of section 9 (2), the Authority was within its mandate to refer to other agencies, such as the Ethics and Anti-Corruption Commission, to prefer criminal or civil proceedings. Were those findings proper?
21. Firstly, it can be established from the functions delineated in section 9 (1) of the *Public Procurement and Asset Disposal Act* that none of them speak to the Authority sitting as a court or tribunal on issues of non-compliance with any relevant provisions of that statute. If anything, the most the Authority can do is investigate and inform the relevant agencies. We find no functions vested in them as to determine acts complained of and grant the reliefs as sought in the petition. Secondly, the Authority is only mandated to function within the parameters of the statute. A cursory look at the petition raises Constitutional and statutory breaches across several Acts of Parliament. They are aptly captured in prayer (h) of the petition as follows: the *Constitution*, the *County Government Act*, the *Public Procurement and Asset Disposal Act*, the *Controller of Budget Act*, the *Public Finance Management Act* and the *Public Finance Management (County Government) Regulations 2015*. What then would be the remedy available to the petitioner going by the fact that the breaches complained of were not independent but a web of correlations across various statutes? Thirdly, the petition speaks not of requesting for investigative reliefs since the petitioner himself unearthed all those facts as set out in the petition. It is instructive to note that the petition complains that the respondents conducted themselves in gross violation of both the *Constitution* and several statutes. Lastly, section 9 (1) (2) of the *Public Procurement and Asset Disposal Act* provides:

“If in the course of monitoring in accordance with section 9(1)(a), the Authority is of the opinion that civil or criminal proceedings ought to be preferred against a State Organ, public



entity, state officer or public officer, the Authority shall refer the matter to the relevant authorities.”

22. Examining the petition, we find that the issues therein did not conform to the functions of the Authority set out in section 9 (1) a as to monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution, including Article 227 and make recommendations for improvements. With due respect, the learned Judge misinterpreted the application of that provision since the petition did not concern monitoring, assessment and review of the procurement system. It was therefore untenable since the same would not resolve any of the concerns raised in the petition.
23. In our view, the High Court adopted a narrow interpretation of the scope and functions set out in the Public Procurement and Asset Disposal Act. The petition raised issues that were crosscutting and some of a constitutional nature. These are not issues that fell within the exclusive mandate of the investigative agencies as held by the trial court. Accordingly, we find that the doctrine of exhaustion did not arise herein. The court ought to have allowed the appellant to have his day in court and whether the petition had merit or not is irrelevant at this stage.
24. Article 165 of the Constitution establishes the High Court. Sub- Article 3 (d) provides that the High Court shall have jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of:
  - i. the question whether any law is inconsistent with or in contravention of this Constitution;
  - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
  - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
  - iv a question relating to conflict of laws under Article 191.
25. We find that that indeed the learned Judge erred in finding that the court lacked the requisite jurisdiction. The wordings of Article 165 cited above are unequivocal. The acts complained of vary around impropriety, impunity, corruption and discrimination. Courts and tribunals are time and again called upon to uphold constitutional and statutory dictates in the fight against corruption.
26. The effect of the trial court’s ruling was to in essence clog that fight. The ruling, if left to stand, would create hurdles that will not be easy to jump for any person wishing to complain on issues of irregular procurements and other forms of corrupt or unethical behavior. We find that the issues raised in the petition properly invoke the jurisdiction of the High court which has overarching unlimited jurisdiction to determine constitutional questions as set out in the present petition.
27. As to whether the petition ought to be struck out for violating section 5 of the Oaths and Statutory Declaration Act and rule 9 of its Rules, we find that the same goes to the form rather than jurisdictional cardinal principles. For those reasons, we find that the High Court cannot oust its jurisdiction on this ground. That argument thus must fail.
28. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents introduced another angle to the appeal. In summary, that the appellant’s remedy lay in section 9 (1) (n) of the Public Procurement and Asset Disposal Act or filing a complaint before the Public Procurement Administrative Review Board, the county assembly and the senate; that he could not institute the petition on the strength of Article 185 (3) of the Constitution



and; that the trial court was barred from interfering with the approved budget of a county assembly as set out in Article 195 (1) of the Constitution.

29. In Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others ex-parte Tom Mbaluto [2018] eKLR, this Court held as follows regarding raising new points on appeal;

“It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v Ruth Watiri Kibe*, CA No 39 of 2015 and *Openda v Abn* [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court.... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance.”

30. We find that it was improper for the parties to raise those issues at this stage since they were not highlighted during the hearing of the preliminary objections. Be that as it may, we dissect them as follows; on whether section 9(1)(n) of the Act was applicable to the present dispute, we find the answer in the negative. The issue did not concern a breach of that function. Be that as it may, the wordings therein contemplate a scenario where the Authority takes matters into its own hands without being instigated by a complaint.

31. Further, in our view, the Public Procurement Review Board is incapable of hearing and determining the issues in the petition because the issues are multifaceted, going beyond the procurement of medical services. In addition, we find that the said board would not be within any form of jurisdiction to hear and determine constitutional issues or their interpretation thereof. Indeed, the board can only deal with disputes that arise from procurement proceedings and it's only a candidate as defined in the Act can lodge such a complaint.

32. Lastly, on whether the petitioner was barred from instituting the petition on the strength of Article 185 (3) of the Constitution and that the trial court was barred from interfering with the approved budget of a county assembly as set out in Article 195 (1) of the Constitution, these issues can be properly determined on the merits since they go to the root of interpretation. To dismiss the petition in limine on that ground will gravely occasion a miscarriage of justice.

33. Ultimately, the issues canvassed in the petition do not impact the petitioner but members of staff of the 1<sup>st</sup> respondent. In its nature on face value, the petition falls under a public interest litigation dispute. Thus, in establishing whether the trial court properly exercised its discretion in awarding costs to the respondent, this Court shall be guided by the decision of the Supreme Court of Kenya in Okoti & 2 others v Attorney General & 14 others [2023] KESC 31 (KLR) that held as follows regarding public interest litigation:

“Public interest litigation aims to address genuine public wrongs where legal action is initiated for the enforcement and advancement of constitutional justice and public interest. While doing so, public interest litigants must not themselves fall into the temptation of seeking for costs should they succeed in the litigation because by doing so, self-interest, and not public interest, will be apparent and they would in such situations be amenable



to an adverse order on costs should they not succeed. Again, as we have stated above and reiterated the finding by the Constitutional Court of South Africa in Biowatch, the primary consideration in public interest constitutional litigation should always be seen to be the need to promote access to justice and not self-interest per se.”

34. It is our finding that the trial court misdirected itself in awarding costs. Be that as it may, the appeal succeeds thereby overturning the decision of the trial court.
35. The upshot of the foregoing analysis is that the appeal is merited to the extent that the findings of the trial court dated 13<sup>th</sup> June 2018, striking out the petition and Notice of Motion both dated 20<sup>th</sup> April 2018, and award costs are hereby set aside. We order that the petition and Notice of Motion dated 20<sup>th</sup> April 2018 are hereby placed before a Judge, other than (On’gundi, J.) in the Nairobi High Court Anti-corruption and Economic Crimes division for its disposal on merits. Being a public interest litigation matter, each party shall bear its own costs of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF APRIL 2024.**

**ALI-ARONI**

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**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

**L. GACHOKA C.Arb, FCI Arb.**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

