Kenya Ports Authority v Public Procurement Administrative Review Board & 2 others (Civil Appeal 347 of 2017) [2024] KECA 1099 (KLR) (19 August 2024) (Judgment)

Neutral citation: [2024] KECA 1099 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 347 OF 2017

MSA MAKHANDIA, K M'INOTI, M NGUGI, F TUIYOTT & JM MATIVO, JJA

AUGUST 19, 2024

BETWEEN

KENYA PORTS AUTHORITY ..... APPELLANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD .... 1ST RESPONDENT

BROOMS LIMITED ..... 2ND RESPONDENT

ATLANTIC INTERTRADE LTD ..... 3RD RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Odunga, J.) dated 28th June 2017 in JR APP. No. 525 of 2016)

Court of Appeal affirms the constitutionality of section 175(3) and (5) of the Public Procurement and Asset Disposal Act which prescribes timelines within which the High Court and the Court of Appeal must determine public procurement disputes

The central issue in the appeal was whether the instant court should overrule its decision in which it upheld the validity of section 175(3) and (5) of the Public Procurement and Asset Disposal Act, which prescribed timelines within which the High Court and the instant court must determine a dispute arising from public procurements. The court found that sections 175(3) and (5) were constitutional and that disputes arising out of procurement processes ought to be resolved within the prescribed timelines. Thus the high court and the Court of Appeal ought to comply with those timelines.

Reported by Kakai Toili

Judicial Review *– judicial review applications – matters to be determined in judicial review applications - whether the constitutionality of a provision in a judicial review application could be determined where the constitutionality of that provision; was not an issue in the application for leave to file the judicial review application; and in the notice of motion; or without having been introduced pursuant to an amendment - whether a party could file a separate application within an application for leave to file for judicial review..*

Statutes *– statutory provisions – ouster clauses - what was the nature of an ouster clause.*

Constitutional Law *– constitutionality of statutes – constitutionality of section 175(3) and (5) of the Public Procurement and Asset Disposal Act - whether section 175(3) and (5) was unconstitutional for prescribing timelines within which the High Court and the Court of Appeal must determine public procurement disputes – Constitution of Kenya, article 159(2)(b); Public Procurement and Asset Disposal Act (cap 412C), section 175(3) and (5).*

Jurisdiction *– jurisdiction of the East African Court of Justice (EACJ) – appellate jurisdiction - whether the EACJ had appellate jurisdiction over decisions of domestic courts of the partner states - Treaty for the Establishment of the East African Community, 1999, article 27.*

Brief facts

The central issue in the appeal was whether the instant court should overrule its decision in *Aprim Consultants v. Parliamentary Service Commission & Another*, Civil Appeal No. E039 of 2021 (the *Aprim* case). In that judgment, the court upheld the validity of section 175(3) and (5) of the Public Procurement and Asset Disposal Act, which prescribed timelines within which the High Court and the instant court must determine a dispute arising from public procurements.

The appellant, Kenya Ports Authority (KPA) awarded the 3rd respondent the subject tender. Aggrieved, the 2nd respondent filed a request for review with the 1st respondent, the Public Procurement Administrative Review Board (the Board). The awarded the 2nd respondent's technical bid sufficient marks to qualify for financial evaluation and further directed KPA to, within 14 days, evaluate its financial bid together with those of the other bidders who had qualified. Aggrieved, KPA filed a judicial review application in the High Court seeking an order of *certiorari* to quash the decision of the Board and an order compelling the Board to give reasons why its decision was not availed to it within a reasonable time.

The High Court issued an order of *certiorari* quashing the decision of the Board and directed KPA, if it was still minded to proceed with the tender, to re-start the entire tender process. KPA was once more aggrieved and lodged the instant appeal. KPA faulted the High Court on only two grounds, namely, that the court erred by directing it to start the tendering process afresh whilst none of the parties had sought that relief; and by granting an order of *certiorari* and yet allowing a fresh tender process to proceed on the basis of the decision of the Board, which the court had quashed.

Going by the time lines and the decision in the *Aprim* case, the judgment of the High Court was rendered out of time because it was delivered on June 28, 2017, whereas the application for judicial review had been filed on November 1, 2016. Similarly, KPA's appeal to the instant court was out of time because, while the notice of appeal was lodged on September 4, 2017, the record of appeal was not filed until September 20, 2017, far beyond the 45 days within which the appeal must be filed and determined.

Issues

i. Whether section 175(3) and (5) of the Public Procurement and Asset Disposal Act was unconstitutional for prescribing timelines within which the High Court and the Court of Appeal must determine public procurement disputes.

ii. Whether the constitutionality of a provision in a judicial review application could be determined where the constitutionality of that provision;
    1. was not an issue in the application for leave to file the judicial review application; and
    2. in the notice of motion; or
    3. without having been introduced pursuant to an amendment.

iii. Whether a party could file a separate application within an application for leave to file for judicial review.

iv. What was the nature of an ouster clause?

v. Whether the East African Court of Justice had appellate jurisdiction over decisions of domestic courts of the partner states.

Relevant provisions of the Law

Public Procurement and Asset Disposal Act (cap 412C)

Section 175 - Right to judicial review to procurement

1. *A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.*
2. *The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.*
3. *The High Court shall determine the judicial review application within forty- five days after such application.*
4. *A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.*
5. *If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.*
6. *A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.*
7. *Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.*

Held

1. Prayer 2 in the notice of motion was not in the application for leave. By dint of section 9(1)(c) of the Law Reform Act, cap 26 as read with Order 53 rule 4 of the Civil Procedure Rules, no new grounds may be introduced in the notice of motion, except those that were in the statement pursuant to which leave was granted. To be able to introduce new grounds that were not in the statement, a party was obliged by Order 53 rule 4(2) to first apply for leave to amend the statement. From the record, there was neither application, nor leave to amend KPA's Statement.
2. There was no prayer, either in the application for leave to apply for judicial review, the statement or the notice of motion for declaration that section 175(3) and (5) of the Public Procurement and Asset Disposal Act was unconstitutional. Without the constitutionality of that provision having been an issue in the application for leave and in the notice of motion, or without having been introduced pursuant to an amendment, there was serious doubt whether the High Court could validly assume and determine the question of the constitutionality of the provision in the application for judicial review.
3. By its own choice and by its pleadings, KPA restricted itself to the remedies available under Order 53 of the Civil Procedure Rules. Therefore, the only remedy it could legitimately pursue was an order of *certiorari* because that was the only remedy the High Court granted it leave to apply for. To pursue any other remedies over and above an order of *certiorari*, KPA was obliged to first obtain leave of the court and amend its statement to include such additional remedies.
4. On November 6, 2016, KPA filed a separate application within the application for judicial review, seeking declaration of section 175(3) and (5) of the Public Procurement and Asset Disposal Act unconstitutional for being inconsistent with article 48, 50(1)and 160 of the Constitution. It was not clear how the second application could be filed and determined within the application for judicial review. That was because the issues in the application for judicial review were, by law, strictly confined to those issues in respect of which the court had granted KPA leave to apply for judicial review. The options open to KPA at that stage were either to apply for amendment of the application for judicial review, file an independent application for judicial review on the constitutionality of section 175 of the Act, or file a constitutional petition.

5. The High Court treated section 175(3) and (5) of the Public Procurement and Asset Disposal Act as classical ouster clauses. An ouster clause properly so called was a clause in a statute that purported to take away or exclude the jurisdiction of the courts to hear and determine a dispute. Such a clause barred or removed from the court its power to hear and determine an action. As regards those clauses, there was always a presumption in favour of the courts' jurisdiction.
6. Section 175(3) and (5) of the Public Procurement and Asset Disposal Act was not a traditional ouster clause. It recognised the jurisdiction of the High Court and that of the Court of Appeal to hear and determine disputes arising from public procurements, but set the time limit within which such disputes must be heard and determined. In a constitutional dispensation like Kenya's that expressly guaranteed its citizens that justice shall not be delayed (article 159(2)(b) of the Constitution), it was not readily apparent how a clause that sought to ensure disputes touching on a critical aspect of the national economy were resolved within stipulated time, could be said to be unconstitutional.
7. As a matter of principle, the legal landscape was littered with examples of provisions that set the time limit within which courts should hear and determine certain types of disputes. The decision of the East African Court of Justice (EACJ) in *Attorney General of Kenya v. Martha Wangari Karua & 2 Others*, Appeal No.4 of 2021 (*Martha Karua* case), had been seriously misunderstood and misrepresented as regards the constitutionality of prescribed timelines for determination of disputes. Under article 27 of the Treaty for the Establishment of the East African Community, the jurisdiction of the EACJ was limited to the interpretation and application of the Treaty and it had no appellate jurisdiction from decisions of either the Supreme Court of Kenya or of any the domestic courts of the partner states.
8. In the *Martha Karua* case, the issue was whether Kenya had violated article 6 of the Treaty (Fundamental Principles of the Community) by denying the petitioner the right of access to justice. The EACJ found in favour of the petitioner, not because prescription of time for determination of a dispute was in violation of the Treaty, but because the failure to determine the petitioner's petition within the prescribed time was occasioned, not by herself, but by an organ of the State whose conduct was attributable to the partner state. That decision could not therefore be considered an authority against prescription of timelines within which to hear and determine disputes.
9. Before concluding that section 175(3) and (5) of the Public Procurement and Asset Disposal Act was unconstitutional for limiting the right to access justice and the right to a fair trial, the High Court was obliged to consider whether the limitation in question was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In undertaking that evaluation, the court was specifically required to consider the nature of the right or fundamental freedom, the importance of the limitation, the nature and extent of the limitation (total ouster of the court's jurisdiction or determination within a given period), the balance between enjoyment of the right and prejudice to the rights of others, the relationship between the limitation and its purpose, and whether there were less restrictive means of achieving the purpose.
10. The judgment impugned in the instant appeal was rendered outside the time prescribed by the Act and, so long as the *Aprim* case was good law, the appeal was incompetent for the additional reason that it was filed outside the prescribed time.

Appeal struck out with no orders on costs.

Citations

Cases

Kenya

1. *ADK Technologies Ltd in consortium with Computer Technologies Ltd v Public Procurement Administrative Review Board & 4 others* [2022] KECA 407 (KLR) - (Mentioned)
2. *Aramat & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR) - (Explained)
3. *Dande & 3 others v Inspector General, National Police Service & 5 others* Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated); [2023] KESC 40 (KLR) - (Explained)

4. *District Commissioner v R & others ex parte Ethan Njau* [1960] EA 109 - (Mentioned)
5. *Energy Sector Contractors' Association v Accounting Officer, Kenya Electricity Transmission Company Limited & another* Civil Appeal E387 of 2022; [2022] KECA 976 (KLR) - (Mentioned)
6. *Eric VJ Makokha & others v Lawrence Sagini & 2 others* Civil Miscellaneous Application 20 of 94; [1994] eKLR - (Mentioned)
7. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR) - (Mentioned)
8. *Joint Venture of Lex Oilfield Solutions Ltd & another v Public Procurement Administrative Review Board & 4 others* [2022] KECA 424 (KLR) - (Mentioned)
9. *Karua v Independent Electoral and Boundaries Commission & 3 others* Petition 3 of 2019; [2019] KESC 26 (KLR) - (Mentioned)
10. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014; [2014] KESC 11 (KLR) (Consolidated) - (Mentioned)
11. *Munya v Dickson Mwenda Kithinji & 3 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Mentioned)
12. *Otieno & another v Council for Legal Education* [2021] KECA 349 (KLR) - (Explained)
13. *Rai & 3 others v Rai & 5 others* Petition 4 of 2012; [2013] KESC 21 (KLR) - (Explained)
14. *Republic v Public Procurement Administrative Review Board & 3 others; ex parte:Techno Relief Services Limited* Judicial Review Miscellaneous Application E049 of 2021; [2021] KEHC 7306 (KLR) - (Mentioned)
15. *Republic v Public Procurement Administrative Review Board ex parte Selex Sistemi Integrati* Miscellaneous Civil Application 1260 of 2007; [2008] eKLR - (Mentioned)
16. *Risk Africa Innovatis Ltd v Smartmatic International Holdings BVA & 3 others* [2022] KECA 427 (KLR) - (Mentioned)
17. *Tononoka Steels Ltd v Eastern & Souther Africa Trade & Development Bank* Civil Application 255 of 1998; [1999] KECA 124 (KLR) - (Mentioned)

Tanzania

Mtenga v University of Dar es Salaam HCCC No 39 of 1971 - (Mentioned)

United Kingdom

Pyx Granite Co Ltd v Minister of Housing [1960] AC 260 - (Mentioned)

Regional Court

1. *Attorney General of Kenya v Martha Wangari Karua & 2 others* Appeal No 4 of 2021 - (Explained)
2. *Davies & another v Mistry* [1973] EA 463 - (Mentioned)
3. *Habre International Co Ltd v Kassam & others* [1999] 1 EA 125 - (Mentioned)

Statutes

Kenya

1. Civil Procedure Act (cap 21) order 53; rule 4(2) - (Interpreted)
2. Constitution of the Kenya articles 20(3),(4); 24; 48; 50(1); 105(2); 140(2); 159(2)(b); 160; 163(7) - (Interpreted)
3. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rules 29, 34(1) - (Interpreted)
4. Elections Act, 2011 (Act No 24 of 2011) sections 74, 75(2), 85A - (Interpreted)
5. Law Reform Act (cap 26) section 9(1)(c) - (Interpreted)
6. Public Procurement & Assets Disposal Act (cap 412 C) sections 167, 171(1); 175(3)(4)(5) - (Interpreted)

Instruments

1. Treaty for the Establishment of the East African Community, article 27

Advocates
None mentioned

JUDGMENT

1. The central issue in this appeal is whether this court should overrule its decision in Aprim Consultants v Parliamentary Service Commission & another, Civil Appeal No E039 of 2021 (the Aprim case). In that judgment, the Court (Okwengu, Kiage & Sichale, JJA) upheld the validity of section 175 (3) and (5) of the *Public Procurement & Assets Disposal Act* (the Act), which prescribe timelines within which the High Court and this court must determine a dispute arising from public procurements: The entire section 175 provides as follows:

> "175 (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.
>
> 2. The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in regulations.
>
> 3. The High Court shall determine the judicial review application within forty-five days after such application.
>
> 4. A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.
>
> 5. If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.
>
> 6. A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.
>
> 7. Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party." Emphasis added.

2. It is apt to emphasise, for clarity, that what was in issue in the decision of this court in the *Aprim* case was not the validity of the entire section 175 of the Act, but only subsections (3)(4) and (5) which set timeframes within which the High Court and this court must render their decisions in public procurement disputes.

3. In upholding the validity of the impugned subsections of section 175, the court expressed itself as follows:

> " A perusal of section 175 of the Act reveals Parliament's unmistakable intention to constrict the time taken for the filing, hearing and determination of public procurement disputes in keeping with the Act's avowed intent and object of expeditious resolution of those disputes.

> Parliament was thus fully engaged and intentional in setting the timelines in the Section. But it did not stop
>
> there. In one of the rarer instances where all discretion is totally shut out, Parliament expressly enacted a consequence to follow default or failure to file or to decide within the prescribed times: the decision of the Board would crystallize and be invested with finality.
>
> Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law."

4. For purposes of considering whether or not to depart from the *Aprim* case, the President of the court empanelled the instant expanded uneven bench pursuant to rule 29 of the *Court of Appeal Rules*.

5. Before we consider the merits of the request to depart from the *Aprim* case, it is necessary to sketch the background to the appeal for clarity and the relevant context.

6. The appellant, Kenya Ports Authority, was the procuring entity in a public procurement, Tender No KRA/149/2015- 16/MO, for provision of mobile/portable toilet services. The 2nd respondent (Brooms Ltd) and the 3rd respondent (Atlantic Intertrade Ltd) were among bidders. For convenience we shall refer to the appellant as "KPA", the 2nd respondent as "Brooms Ltd." and the 3rd respondent as "Atlantic Ltd."

7. After evaluating the bids, KPA found Brooms Ltd non- responsive, declared Atlantic Ltd. as the lowest bidder, and awarded it the tender Brooms Ltd was aggrieved and pursuant to section 167 of the Act, filed a request for review with the 1st respondent, the Public Procurement Administrative Review Board (the Board).

8. After hearing the matter, on October 19, 2016, the Board considered Broom Ltd's technical bid and awarded it sufficient marks to qualify for financial evaluation. The Board further directed KPA to, within 14 days, evaluate Broom Ltd.'s financial bid together with those of the other bidders who had qualified.

9. KPA was aggrieved by the decision of the Board and on November 1, 2016, filed a judicial review application in the High Court seeking an order of certiorari to quash the decision of the Board and an order compelling the Board to give reasons why its decision made on October 19, 2016 was not availed to KPA within a reasonable time.

10. In support of the application KPA contended that on October 19, 2016, the Board made an oral award and did not avail a copy of the same within 21 days as required by section 171(1) of the Act. Ultimately the award was availed on October 27, 2016 but the Board did not give any reasons why it did not avail the award within the prescribed time.

11. After hearing the application, the High Court, by a judgment dated June 28, 2017, issued an order of certiorari quashing the decision of the Board and directed KPA, if it was still minded to proceed with the tender, to re-start the entire tender process.

12. KPA was once more aggrieved and on July 5, 2017, lodged a notice of appeal, followed by a record of appeal dated September 20, 2017. In its memorandum of appeal, KPA faulted the High Court on only two grounds, namely, that the court erred by directing it to start the tendering process afresh whilst

none of the parties had sought that relief; and by granting an order of certiorari and yet allowing a fresh tender process to proceed on the basis of the decision of the Board, which the court had quashed.

13. To get to the stage of hearing its appeal on merits, KPA had first to jump the hurdles of the timelines prescribed by the Act. Going by the said time lines and the decision in the Aprim case, the judgment of the High Court was rendered out of time because it was delivered on June 28, 2017, whereas the application for judicial review had been filed on November 1, 2016. Similarly, KPA's appeal to this court was out of time because, while the notice of appeal was lodged on September 4, 2017, the record of appeal was not filed until September 20, 2017, far beyond the 45 days within which the appeal must be filed and determined (See Emcure Pharmaceuticals Ltd. v. Public Procurement Administrative Review Board & 2 others, CA No E299 of 2023).

14. In fact, KPA readily conceded that if the *Aprim* case which upholds the validity of the prescribed timelines is sustained as good law, then its appeal is awfully out of time and has no legs to stand on. The appeal can only be sustained by overruling the decision in the Aprim case.

15. Turning now to the substance of the attack on the *Aprim* case, Mr Kongere, learned counsel for KPA, relied on written submissions dated October 11, 2022 and submitted that the decision in the Aprim case is bad law. The basis for the submission was that by the time this court delivered its decision in the Aprim case on October 8, 2021 upholding the validity of section 175 (3) and (5) of the Act, the High Court had already, in its judgment dated June 28, 2017, declared section 175 of the Act unconstitutional. It was contended that in the Aprim case, this court did not advert to that critical fact and that when the Court upheld the validity of section 175 (3) and (5), those provisions were no longer in existence.

16. Counsel further submitted that the decision of the High Court which declared section 175 of the Act unconstitutional was neither appealed nor reversed by this court.

17. Mr Kongere added that the effect of declaration of section 175 of the Act unconstitutional by the High Court was to render the provision null and void and non-existent in law. He relied on the decision of this court in *Otieno & another v Council for Legal Education* [2021] KECA 349 (KLR) where this Court held that:

> "Consequently, it is explicit that a court having declared a piece of legislation or a section of an act unconstitutional, that act or law becomes a nullity from the date of inception or enactment and not from the date of the judgment. But it will not be applicable to actions already crystallised whilst the expunged law was in force." Counsel added that the decision in the Aprim case was a nullity and bad law because it was based on a nullity, and as the adage goes, "a nullity begets a nullity".

18. It was Mr Kongere's further submission that subsequent decisions of this court that followed the Aprim case did not interrogate the fact that the decision in that case was a nullity. Counsel named those decisions as *ADK Technologies Ltd in consortium with Computer Technologies Ltd v Public Procurement Administrative Review Board & 4 others* [2022] KECA 407 (KLR); *Joint Venture of Lex Oilfield Solutions Ltd and CFAO Kenya Ltd v Public Procurement Administrative Review Board & 4 others* [2022] KECA 424 (KLR); *Risk Africa Innovatis Ltd v Smartmatic International Holdings BVA & 3 others* [2022] KECA 427 (KLR); and *Energy Sector Contractors Association v Accounting Officer, Kenya Electricity Transmission Co Ltd* [2022] KECA 976 (KLR).

19. Learned counsel urged that even in the *Aprim* case, this court was uncomfortable with the strict timelines set by the Act and opined that the wisdom of such short timelines may be questioned. However, the court upheld the timelines only on the ground that they were set by the law. Counsel

hypothesised that if the court had appreciated that section 175 of the Act had already been declared unconstitutional by the High Court in the judgment that gave rise to the present appeal, the court would not have reached the same conclusion

20. Counsel further cited the decision of the High Court post- Aprim case in *Republic v Public Procurement Administrative Review Board & 3 others ex parte Techno Relief Services Ltd* [2021] eKLR and submitted that Ngaah, J, also unaware that the High Court had already declared section 175 of the Act unconstitutional, opined that the provisions cannot pass muster under article 48 of the Constitution.

21. Next, learned counsel submitted that although courts are normally loath to depart from stare decisis, nevertheless, when circumstances demand it, a court must depart from precedent. Relying on the decision of the Supreme Court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2013] eKLR, Mr Kongere submitted that a court is not bound to follow a previous decision if, for example, it was given per incurium or obiter. In this appeal, he contended that the decision in the *Aprim* case was per incurium in so far as it assumed that section 175 of the Act was still in existence whilst it had already been declared unconstitutional by the High Court.

22. Counsel concluded by submitting that law is a developing jurisprudence and that a wrong decision ought to be identified quickly and declared bad law, instead of allowing it to remain in the law books as a binding judicial precedent. In support of this submission, the decision of this court in *Eric VJ Makokha & others v Lawrence Sagini & 2 others* [1994] eKLR was cited.

23. Neither the Board nor Brooms Ltd filed submissions or appeared for the virtue hearing, although they were duly served with the hearing notice. On its part, Atlantic Ltd. filed submission dated December 18, 2023, which addressed the merits of the appeal rather than whether the decision in the Aprim case was bad law. When learned counsel for Atlantic Ltd, Ms Njuguna, appeared for the virtual hearing, she merely informed the court that she agreed with the KPA's submissions.

24. We have anxiously considered KPA's submissions, the decision in the Aprim case and the other authorities that were cited by Mr Kongere. Subject to what we shall say shortly in this judgment regarding the propriety or otherwise of the purported declaration of section 175 of the Act unconstitutional, and contrary to the submissions by KPA, the High Court, in the matter that gave rise to this appeal, did not declare the entire section 175 of the Act unconstitutional. It was only section 175(3) and (5) which provide timelines within which the High Court and this court should hear and determine disputes arising from public procurements that were declared unconstitutional.

25. We start from an obvious handicap in that what is before us is not an appeal from the judgment of the High Court that declared section 175(3) and (5) of the Act unconstitutional. Yet, in the hierarchy of our judicial system, a decision of the High Court is not binding on this court. In the rare situation where we are invited to declare a decision of this Court to be bad law on account of an earlier decision of the High Court which this Court did not advert to, we must satisfy ourselves of the correctness of the decision on the basis of which we are being asked to depart from a decision of this court. That we must do, even if we are not sitting on appeal from the decision of the High Court on the basis of which the correctness of the decision of this court is challenged.

26. While we appreciate that the decision of the High Court has not been reversed by this court, we are equally aware that it has not been upheld. KPA is urging us to declare a decision of this court bad law based on nothing else other than the said decision of the High Court. For us to be able to do so, we cannot take the said decision of the High Court on face value; we must interrogate the decision and satisfy ourselves that it passes muster to upend a decision of this court.

27. Starting with the decision of the High Court dated June 28, 2017 which purported to declare section 175 of the Act unconstitutional, we note that what was before the High Court was Judicial Review Application No 525 of 2016. In the ex parte chamber summons dated October 28, 2016 for leave to apply for orders of judicial review, KPA prayed for leave to apply for only two substantive remedies worded as follows:

> 2. That the applicant be granted leave to apply for judicial review order of certiorari to remove to this honourable court for purposes of quashing the decision of the respondent made on October 19, 2016 in Public Procurement Administrative Review Board Application No 81 of 2016, Brooms Ltd v Kenya Ports Authority, concerning Tender No KPA/149/2015-16/MO;
>
> 3. The leave granted to apply for the judicial review orders of certiorari to operate as a stay of orders made by the respondent in Public Procurement Administrative Review Board Application No 81 of 2016, *Brooms Ltd v Kenya Ports Authority* pending the hearing and determination of the substantive application for judicial review orders."

28. Even in its Statement in support of the application for leave, these were the only two remedies that KPA sought. The other two incidental prayers in the application were for certification of the application urgent and award of costs.

29. After obtaining leave on October 31, 2016 to apply for judicial review, KPA filed the notice of motion on November 2, 2016. However, the prayers in the motion were worded as follows:

> 1. An order of Certiorari do issue to remove to this honorable court for purposes of quashing the decision of the respondent made on October 19, 2016 in Public Procurement Administrative Review Board Application No B1 of 2076; Brooms Limited v Kenya Ports Authority concerning Tender No KPA/749/2015-16lMO.
>
> 2. Pursuant to section 11(1)(f) of the Fair Administrative Action Act No 4 of 2015, an order be issued compelling the Respondent to forthwith give reasons why the Award made on October 19, 2016 in Public Procurement Administrative Review Board Application No, 81 of 2016 *Brooms Limited v Kenya Ports Authority* could not be made available to the *ex parte* applicant or its advocates within a reasonable time.

30. It is patently clear that prayer 2 in the notice of motion was not in the application for leave. By dint of section 9(1)(c) of the *Law Reform Act*, cap 26 as read with order 53 rule 4 of the *Civil Procedure Act*, no new grounds may be introduced in the notice of motion, except those that were in the Statement pursuant to which leave was granted. To be able to introduce new grounds that were not in the Statement, a party is obliged by order 53 rule 4(2) to first apply for leave to amend the Statement. From the record,there was neither application, nor leave to amend KPA's Statement.

31. More importantly, there was no prayer, either in the application for leave to apply for judicial review, the statement or the notice of motion for declaration that section 175(3) and (5) of the Act was unconstitutional. Without the constitutionality of that provision having been an issue in the application for leave and in the notice of motion, or without having been introduced pursuant to an amendment, we entertain serious doubt whether the High Court could validly assume and determine the question of the constitutionality of the provision in the application for judicial review.

32. Indeed, in *Dande & 3 others v Inspector General, National Police Service & 5 others* [2023] KESC 40 (KLR), the Supreme Court vouched for the existence of a dual approach as far as judicial review is concerned, one founded on the Constitution, and the other on the Law Reform Act and order 53 of the Civil Procedure Rules. The Supreme Court, whose decisions are binding on this court by dint of article

163(7) of the *Constitution*, held that whether to grant constitutional or traditional judicial review remedies is dependent on the pleadings and procedure adopted by the parties. The court expressed itself thus:

> "A court cannot issue judicial review orders under the Constitution if it limits itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings."

33. We entertain no doubt in our minds that by its own choice and by its pleadings, KPA restricted itself to the remedies available under order 53 of the Civil Procedure Rules. Therefore, the only remedy it could legitimately pursue was an order of certiorari because that was the only remedy the High Court granted it leave to apply for. To pursue any other remedies over and above an order of certiorari, KPA was obliged to first obtain leave of the court and amend its statement to include such additional remedies.

34. Instead, on 1November 6, 2016, KPA filed a separate application within the application for Judicial Review, seeking declaration of section 175(3) and (5) of the Act unconstitutional for being inconsistent with article 48, 50(1)and 160 of the *Constitution*. Again, it is not clear to us how the second application could be filed and determined within the application for judicial review. This is because the issues in the application for judicial review were, by law, strictly confined to those issues in respect of which the court had granted KPA leave to apply for judicial review. The options open to KPA at that stage were either to apply for amendment of the application for judicial review, file an independent application for judicial review on the constitutionality of section 175 of the Act, or file a constitutional petition.

35. Be that as it may, the High Court heard the application for judicial review and granted the orders that have aggrieved KPA. The court also entrained the separate Notice of Motion purporting to impugn the constitutionality of section 175(3) and (5) of the Act. As regards that application, the High Court accepted that a court's jurisdiction may be restricted or ousted by legislation. It considered a raft of decisions on ouster clauses, among them *Habre International Co Ltd v Kassam & others* [1999] 1 EA 125, *Mtenga v. University of Dar es Salaam*, HCCC No 39 of 1971 and *District Commissioner v R & others ex parte Ethan Njau* [1960] EA 109, in support of the proposition that courts are reluctant to allow ouster clauses unless they are straightforward, clear and unequivocal. The court quoted in extenso from the decision of the High Court in *Republic v Public Procurement Administrative Review Board ex parte Selex Sistemi Integrati* [2008] eKLR where it was held that there was need to balance between efficiency in public procurements and fairness in adjudication of disputes and that ouster clauses are effective so long as they are proportional and are not unconstitutional or unreasonable.

36. After considering article 48 of the *Constitution* on access to justice, article 50(1) on the right to a fair hearing and the duty of the court to develop the law under article 20(3) and (4) of the *Constitution*, the learned judge concluded thus:

> "I have no hesitation in declaring which I hereby do that section 175(3) and (5) of the Public Procurement and Asset Disposals Act, 2015, is unconstitutional to the extent that it purports to restrict the timelines within which judicial review proceedings are to be determined and is therefore inconsequential." (Emphasis added).

37. The High Court treated section 175(3) and (5) as classical ouster clauses. An ouster clause properly so called is a clause in a statute that purports to take away or exclude the jurisdiction of the courts to hear and determine a dispute. Such a clause bars or removes from the court its power to hear and determine an action. As regards those clauses, there is always a presumption in favour of the courts' jurisdiction.

See *Pyx Granite Co Ltd v Minister of Housing* [1960] AC 260, *Davies & another v Mistry* [1973] EA 463 and *Tononoka Steel Ltd v Eastern & Southern Africa Trade & Development Bank* [1999] eKLR).

38. Strictly speaking, section 175(3) and (5) is not a traditional ouster clause. It recognises the jurisdiction of the High Court and that of the Court of Appeal to hear and determine disputes arising from public procurements, but sets the time limit within which such disputes must be heard and determined. In a constitutional dispensation like ours that expressly guarantees its citizens that "justice shall not be delayed" (see article 159(2)(b) of the Constitution), it is not readily apparent to us how a clause that seeks to ensure disputes touching on a critical aspect of the national economy are resolved within stipulated time, can be said to be unconstitutional.

39. As a matter of principle, our legal landscape is littered with examples of provisions that set the time limit within which our courts should hear and determine certain types of disputes. The most extreme is article 140(2) of the Constitution which requires the Supreme Court to hear and determine a dispute challenging the election of a president- elect within fourteen (14) days after the filling of a petition.

40. Other examples include article 105(2) of the Constitution which requires the High Court to hear and determine an election petition challenging the election of a member of Parliament within six (6) months from the date of the lodging of the petition; section 85A of the *Elections Act* which require this court to hear and determine appeals from the High Court on electoral disputes within six (6) months from the date of filing of the appeal; section 75(2) of the Elections Act which requires both the High Court and the Resident Magistrates Court to hear and determine, respectively, disputes involving election of a Governor and Member of a County Assembly within six (6) months of the lodging of petitions; and section 74 of the *Elections Act* which require the Independent Electoral & Boundaries Commission to hear and determine disputes arising from nomination with ten (10) days after the lodging of a dispute. Indeed, rule 34(1) of the rules of this court requires the court to deliver its judgments and rulings at the close of the hearing or within 120 days.

41. The principle that legislation may legitimately set the time within which a dispute is to be heard and determined has been accepted and upheld by the Supreme Court, particularly in the context of election petitions. Thus, in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* [2014] eKLR the apex court explained that the timelines in electoral disputes were legitimate constitutional imperatives to redress longstanding aberrations.

42. And in *Lemanken Aramat v. Harun Meitamei Lempaka & 2 others* [2014] eKLR, the Supreme Court stated that:

> " We have to note that the electoral process, and the electoral dispute-resolution mechanism in Kenya, are marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the Constitution and the electoral law. The jurisdiction of the court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the court."

The Court ultimately concluded as follows:

> "Upon an extensive consideration of the factor of timelines in the processing of electoral disputes, under the Constitution and the statute law, this court has come to the conclusion that the jurisdiction of the election court is linked to timelines. Consequently, the trial court lacked jurisdiction to entertain the electoral question remitted by the Court of Appeal, once its six-month mandate had lapsed. Indeed, even at the very beginning, the High Court had

lacked jurisdiction to entertain the case, as the petition had been filed belatedly by as much as eight days."

(See also *Evans Odhiambo Kidero & 5 others v Ferdinard Waititu & 4 others*, SC Pet No 18 of 2014, *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014] eKLR, and *Martha Wangari Karua v. Independent Electoral and Boundaries Commission & 3 others* [2019] eKLR)

43. It may be apt at this stage to address the decision of the East African Court of Justice (EACJ) in *Attorney General of Kenya v Martha Wangari Karua & 2 others*, Appeal No 4 of 2021, which we think has been seriously misunderstood and misrepresented as regards the constitutionality of prescribed timelines for determination of disputes. That decision was not an appeal from the decision of the Supreme Court of Kenya, nor did it even remotely suggest that prescribed timelines for hearing and determination of disputes are unconstitutional or in violation of the Treaty for the *Establishment of the East African Community* (The Treaty). Under article 27 of the Treaty, the jurisdiction of the EACJ is limited to the interpretation and application of the Treaty and the EACJ has no appellate jurisdiction from decisions of either the Supreme Court of Kenya or of any the domestic courts of the Partners States.

44. In the *Martha Karua* case, the High Court of Kenya struck out the petitioner's petition for no apparent good reason. On appeal, the Court of Appeal of Kenya reinstated the petition and remitted the same back to the High Court for hearing and determination. By the time the petition was heard and determined by the High Court, the prescribed time for determination of electoral disputes had expired and the ensuing judgment was declared a nullity.

45. Before the EACJ, the issue was simply whether Kenya had violated article 6 of the Treaty (Fundamental Principles of the Community) by denying the petitioner the right of access to justice. The EACJ found in favour of the petitioner, not because prescription of time for determination of a dispute was in violation of the Treaty, but because the failure to determine the petitioner's petition within the prescribed time was occasioned, not by herself, but by an organ of the State whose conduct was attributable to the Partner State. That decision cannot therefore, by any stretch of the imagination, be considered an authority against prescription of timelines within which to hear and determine disputes.

46. The other issue that has caused us considerable concern regarding the judgment on the basis of which we are being asked to declare a decision of this court bad law is the fact that in declaring section 175(3) and (5) of the Act unconstitutional, the High Court never paid any regard to the test set out in article 24 of the *Constitution* pertaining to limitation of fundamental freedoms. Before concluding that section 175(3) and (5) was unconstitutional for limiting the right to access justice and the right to a fair trial, the High Court was obliged to consider whether the limitation in question was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In undertaking that evaluation, the court was specifically required to consider the nature of the right or fundamental freedom, the importance of the limitation, the nature and extent of the limitation (total ouster of the court's jurisdiction or determination within a given period), the balance between enjoyment of the right and prejudice to the rights of others, the relationship between the limitation and its purpose, and whether there were less restrictive means of achieving the purpose.

47. Taking all the foregoing reasons into account, we are not persuaded that there is any good reason to depart from the decision of this court in the Aprim case. If anything, we find that the decision of the High Court dated June 28, 2018 in JR APP No 525 of 2016, as far as the constitutionality of section 175(3) and (5) of the Act is concerned, is of doubtful authority.

48. As KPA readily concedes that the judgment impugned in this appeal was rendered outside the time prescribed by the Act and that, so long as the Aprim case is good law, the appeal is incompetent for

the additional reason that it was filed outside the prescribed time, this appeal is hereby struck out with no orders on costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2024.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

J. M. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR