Space Contractors & Suppliers Investment Limited v Public Procurement Administrative Review Board & 23 others (Civil Appeal E169 of 2023) [2023] KECA 1457 (KLR) (27 November 2023) (Judgment)

Neutral citation: [2023] KECA 1457 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E169 OF 2023

M NGUGI, KI LAIBUTA & GV ODUNGA, JJA

NOVEMBER 27, 2023

BETWEEN

SPACE CONTRACTORS & SUPPLIERS INVESTMENT LIMITED .... APPELLANT

AND

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

THE ACCOUNTING OFFICER, KENYA PORTS AUTHORITY .... 2ND RESPONDENT

KENYA PORTS AUTHORITY .... 3RD RESPONDENT

DAORAB ENTERPRISES .... 4TH RESPONDENT

GEDLINKS GENERAL SUPPLIES & CONSTRUCTION LIMITED .... 5TH RESPONDENT

KAHUNA KAPITAL INVESTMENT LIMITED .... 6TH RESPONDENT

FRANSA AGENCIES .... 7TH RESPONDENT

SENDER SERVICES .... 8TH RESPONDENT

SOMAKIN CONSTRUCTION & TRADING LIMITED .... 9TH RESPONDENT

SULDANKA HARTI LIMITED .... 10TH RESPONDENT

BIZMART ENTERPRISES .... 11TH RESPONDENT

MAEJI KAIHO .... 12TH RESPONDENT

NORGEN ENTERPRISES LIMITED .... 13TH RESPONDENT

MARA SUPPLIES .... 14TH RESPONDENT

SIMCA AGENCIES LIMITED .... 15TH RESPONDENT

FORBES TECHNICS LIMITED .... 16TH RESPONDENT

NAKAJ SERVICES .... 17TH RESPONDENT

ACENTRI LIMITED .... 18TH RESPONDENT

FALCON SECURITY .... 19TH RESPONDENT

ROKEEN ENTERPRISES .... 20TH RESPONDENT

RESOLINK SCC LTD .... 21ST RESPONDENT

REMARC CLEANING SERVICES .... 22ND RESPONDENT

THE XENRY CLEANING SERVICES LTD .... 23RD RESPONDENT

CLEANCO INVESTMENTS ENTERPRISES .... 24TH RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (O. Sewe, J.) delivered on 9th October 2023 in Judicial Review No. E025 of 2023)

JUDGMENT

1. On Monday 5th December 2022, Kenya Ports Authority, the 3rd respondent, through an online advertisement, invited sealed tenders from qualified and interested tenderers in response to Tender No. KPA/075/2022-2023/ADM for the Provision of Housekeeping/Cleaning Services (General) (hereinafter referred to as the "subject tender") by way of open tender method. Subsequently, the 3rd respondent issued four Addenda dated 13th February 2023, 17th February 2023, 22nd February 2023 and 28th February 2023, whose effects were to amend, clarify or extend the period of submission of the tender documents.

2. In response to the advertisement, a total of one hundred and thirty- one (131) tenders were submitted, including the appellant's. After carrying out primary, technical and financial evaluation, the 3rd respondent's Evaluation Committee found that twenty-one (21) tenders, which included the 4th to the 24th respondents', were responsive while the rest of the tenders, including the appellant's, were unresponsive. The evaluation having been approved by the 2nd respondent, the tenderers were notified of the outcome of the evaluation of the subject tender vide letters of Notification of Award dated 10th July 2023.

3. On 31st July 2023, the appellant filed a Request for Review No.52 of 2023 dated 28th July 2023 before the 1st respondent seeking the following orders:

   a. An order that the respondent do produce the original copy of the minutes of the tender evaluation committee and the tender document submitted by the successful bidders of the aforesaid tender;

   b. The entire decision of the respondent made in respect of Tender No. KPA/075/2022-23/ADM for the Provision of Housekeeping/Cleaning Services (General) be annulled in its entirety;

c. A declaration that, pending the proper and regular award of tender for Zones 2, 3, 4, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 27, 35, 36, 37, 38, and 39, the status quo prior to the bidding do remain; and

d. Award of costs to the Applicant

4. In response to the request for review, the 2nd to the 24th respondents filed replying affidavits while the 13th and 19th respondents filed preliminary objections to the review. The request was heard on 16th August 2023 before the 1st respondent, during which it was directed that the preliminary objections be heard as part of the substantive Request for Review in accordance with regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the 'Regulations). The 1st respondent's decision, which was made on 21st August 2023, was based on the two pronged issues as to: whether the applicant's allegations in paragraphs 5, 14, 15, 16, 17, 18, 19, 21, 22, and 24 of the Request for Review were instituted within the statutory period prescribed in section 167(1) of the Act read with regulation 203(2) (c) of the Regulations and, therefore, whether the 1st respondent had jurisdiction to entertain the Request for Review; and whether the applicant had locus standi before the 1st respondent.

5. In its decision, the 1st respondent referred to section 167 of the *Public Procurement and Asset Disposal Act* (hereinafter referred to as 'the *Act*') and regulation 203(1) and (2) of the *Regulations* and held that an aggrieved candidate or tenderer May invoke the jurisdiction of the Board in three instances, namely: (i) before a notification of intention to enter into a contract is made; (ii) when a notification of intention to enter into a contract is made; and (iii) after a notification to enter into a contract has been made. In its view, the option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when the occurrence of breach complained of took place, and should be within 14 days of such occurrence of breach.

6. The 1st respondent found that, from paragraphs 5, 14 15, 16, 17, 18, 19, 21, 22 and 24 of the Request for Review, the Request for Review was anchored on the allegations that the 2nd and 3rd respondents issued four addenda with the aim of favouring some bidders and deliberately doctoring the subject tender; that the 2nd and 3rd respondents were restrained from proceeding with the procurement proceedings in the subject tender by dint of a ruling delivered on 11th May 2023 in Mombasa High Court Petition No. E028 of 2022 - Blue Services Limited v Kenya Ports Authority; that the 2nd and 3rd respondents advertised the subject tender in its Supplier Relationship Management (SRM) portal which was not accessible to the public with the aim of advertising the subject tender to a limited group of people; and that the procurement process of the subject tender was tainted with corruption since the 1st respondent approved the evaluation process in April 2023, yet tenderers were notified in July, with no explanation for the delay.

7. On the 1st respondent's finding that the appellant was aware that the subject tender having been advertised sometime in January 2023 as pleaded at paragraph 1 of the Request for Review, it ought to have challenged the advertisement of the subject tender by the 2nd and 3rd respondents in the alleged inaccessible SRM portal within 14 days of the said advertisement by virtue of regulation 203(2) (c) (i) of the Regulations, noting that occurrence of this alleged breach of duty by the 2nd and 3rd respondents took place way before the subject tender closed on 8th March 2023; that the four addenda complained of were issued between 13th February 2023 and 28th February 2023; that, as such, the appellant being aggrieved by the said addenda ought to have moved the Board by way of an administrative review between 1st March 2023 and 14th March 2023; that the appellant was aware that the 2nd and 3rd respondents were allegedly restrained from proceeding with the procurement proceedings in the

subject tender by dint of the ruling delivered on 11th May 2023 in Mombasa High Court Petition No. E028 of 2022 - *Blue Services Limited v Kenya Ports Authority*; that, the appellant being aggrieved by the 2nd and 3rd respondents' actions of proceeding with the procurement proceedings in the subject tender ought to have moved the Board by way of an administrative review by virtue of regulation 203(2) (c) (i) of the *Regulations* and, therefore, 14 days started running from 12th May 2023 and lapsed on 28th May 2023; and that, in essence, the appellant had between 12th May 2023 and 28th May 2023 to seek administrative review before the Board with respect to its allegation that the 2nd and 3rd respondents were restrained, as it claimed, from proceeding with the procurement proceedings in the subject tender by dint of the ruling delivered on 11th May 2023 in Mombasa High Court Petition No. E028 of 2022.

8. The 1st respondent found, in addition, that the appellant was aware that the procurement process of the subject tender was allegedly tainted with corruption since the 2nd respondent approved the evaluation process in April 2023, yet tenderers were notified in July with no explanation on the delay; and that being aggrieved by this, the appellant ought to have moved the 1st respondent by way of an administrative review by virtue of regulation 203(2) (c) (i) of the *regulations* within 14 days from the date it learnt of the alleged delay in April 2023.

9. In the circumstances, the 1st respondent found that the allegations by the applicant under paragraphs 5, 14, 15, 16, 17, 18, 19, 21, 22, and 24 of the Request for Review were time barred, having been raised outside the statutory period of 14 days of the occurrence of the alleged breach of duty imposed on the 2nd and 3rd respondents by the *Act* in accordance with section 167(1) of the Act read with regulation 203(2) (c) of the *Regulations* thereby ousting the jurisdiction of the Board to hear and determine the same. In support of this position, the 1st respondent referred to, inter alia, the High Court decision in *Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited* [2018] eKLR.

10. Regarding the issue as to whether the appellant had locus standi before the 1st respondent in light of section 167(1) of the *Act*, the 1st respondent referred to this Court's decision in *James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited & 8 others* [2019] eKLR to submit that in seeking an administrative review before the 1st respondent, a candidate or tenderer must, at the very least, claim to have suffered or to be at the risk of suffering loss or damage due to breach of a duty imposed on a procuring entity by the Act or the Regulations. In this case, the appellant's contention was that its tender was rejected for not being the lowest evaluated tenderer. Yet, the tenders by Mara Supply Enterprises (Nairobi) Limited, Norgen Enterprises Limited and Riley Falcon Security ought to have been disqualified for not having a valid tender security, and for having failed to comply with the NSSF requirements. In the 1st respondent's view, that averment failed to meet the requirement of section 167 of the *Act*. Consequently, the 1st respondent held that the appellant lacked the locus standi to seek administrative review.

11. In view of the foregoing, the 1st respondent proceeded to strike out the appellant's Request for Review and directed each party to bear their own costs. It was that decision that provoked the Judicial Review application before the High Court, whose decision is the subject of this appeal.

12. By a Chamber Summons dated 25th August 2023 filed the same day and expressed to be brought pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21, sections 3 and 175 of the *Public Procurement & Asset Disposal Act,* No. 33 of 2015 and Order 53 rules 1, 2 and 3 of the *Civil Procedure Rules*, 2010 the appellant prayed that the Court be pleased to grant it leave to apply for an order of certiorari to quash the decision made on the 21st August 2023 by the 1st respondent in PPARB Application No. 52 of 2023 - Space Contractors & Suppliers Investment Limited v Accounting Officer Kenya Ports Authority and 22 Others, and the consequent award made on 10th July 2023 by the

2nd and 3rd respondents with regard to Tender No. KPA/075/2022-23/ADM for the provision of Housekeeping/Cleaning Services (General) at the Port of Mombasa; that the grant of leave to apply for the judicial review orders sought do operate as a stay against the 2nd and 3rd respondents, their agents and servants from signing any contract with the 4th to 24th respondents with respect to Tender No. KPA/075/2022-23/ADM for the provision of Housekeeping/Cleaning Services (General) at the Port of Mombasa; and that the costs of the application be provided for.

13. On 2nd October 2023, the High Court (Sewe, J.) granted leave and stay as sought and directed that the substantive application be filed and served within 3 days from that date with costs abiding the outcome of the substantive application. Pursuant to the said order, the appellant filed a Notice of Motion on 2nd October 2023 seeking an order of certiorari:

> " to quash the decision made on 21st August 2023 by the respondent in PPARB Application No. 52 of 2023: Space Contractors & Suppliers Investment Limited v Accounting Officer Kenya Ports Authority and 22 Others and that, consequently, the award made on 10th July 2023 by the 1st and 2nd Interested parties with regard to Tender No. KPA/075/2022-23/ADM for the provision of Housekeeping/Cleaning Services (General) at the Port of Mombasa be quashed."

14. The Motion was based on the grounds that the 1st respondent failed to determine the application for Request for Review on its merits by holding that it did not have jurisdiction, thereby abdicating its duties; that the 1st respondent denied the applicant its fundamental right to be heard as provided for in Article 50 of *the Constitution* by failing to hear the Request for Review on its merits; that the applicant was further denied its right to natural justice by being condemned unheard; that the 1st respondent failed to uphold the principle expressed in the phrase ex turpi causa non oritur actio whereby the 1st respondent should not have allowed the 4th to 24th respondents to benefit from the acts of illegality committed by the 2nd and 3rd respondents and some of the other respondents; that the 1st respondent handled the applicant's complaints in a casual and technical manner, and thereby acted in disregard of Article 159 of *the Constitution*, occasioning injustice; and that the 1st respondent's decision failed to take into account Articles 10, 47, 201 and 227 of *the Constitution*, whereby the 1st respondent ought to have stood firmly in defence of legality and regularity in public procurement matters and not to allow itself to be used as a vehicle to sanitize corruption in a public procurement matter.

15. After hearing the matter, the learned Judge distilled the issues for determination before her as to whether the Court had jurisdiction to hear and determine the judicial review application; whether the 1st respondent had the capacity to sue or be sued; and if so, whether the application had merit. The challenge on jurisdiction was two pronged: firstly, that the judicial review proceedings were commenced outside the period prescribed by section 175(3) of the *Act* since the substantive motion was filed outside the said period; and, secondly, that the appellant having instituted Mombasa Judicial Review Application No. E24 of 2023: *Mercy Vosenah Musera v Public Procurement Administrative Board and Kenya Ports Authority and 3 Others*, which was withdrawn, the High Court had become functus officio.

16. As regards the first limb, the learned Judge found that since judicial review has constitutional underpinning, a party is at liberty to choose the statutory or the constitutional procedure and that, therefore, the applicant was at liberty to either file a substantive application directly or seek leave under Order 53 of the *Civil Procedure Rules* as it did; that, accordingly, having opted to file an application for leave on 25th August 2023, the appellant must, in all fairness, be deemed to have commenced in earnest the proceedings for judicial review, albeit at the risk of his application running afoul of section 175(3)

of the Act with regard to the prescribed timelines; that the judicial review application was commenced within time, having been brought within 4 days of the impugned decision; and that the application was competently before the Court for determination.

17. Regarding the second limb, the learned Judge held that Mombasa Judicial Review Application No. E24 of 2023 was withdrawn almost immediately upon filing due to the fact that the documents were erroneously filed before they were signed; that the Court was yet to hear and determine the same on merit; and that the argument that the Court was functus officio was untenable.

18. Regarding the 1st respondent's capacity to sue or be sued, the learned Judge found that, based on Articles 47, 165(6) and 260 as read with section 7(2) (a) of the *Fair Administrative Action Act*, No. 4 of 2015, the 1st respondent was the correct respondent in the proceedings before the court.

19. On the merits, the learned Judge found, based on the reasoning in *Praxidis Namoni Saisi & Others v Director of Public Prosecutions & 2 Others* SC Petition 39 of 2019 Consolidated with SC Petition 40 of 2019, that while judicial review is largely concerned with the decision making process as opposed to the merits of the decision, in the course of a process review, the court is at liberty to engage in some measure of analysis of the merits of the impugned decision to enable it ascertain whether or not the decision was procedurally fair; that the appellant's complaint was not that it was not given a hearing, but that it was unreasonable for the 1st respondent to determine that it had no jurisdiction to entertain the Request for Review, and that the appellant had no locus standi to make the said request; that, in light of the provisions of section 167(1) of the *Act* and regulation 203 of the *Regulations*, the appellant failed to show in what way the 1st respondent's decision on jurisdiction was illegal, irrational or procedurally improper; that what the appellant pressed, namely the appreciation of the word "or" in the aforesaid section was a merit issue; that, based on *James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited & 8 others* [2019] eKLR, the appellant did not plead or claim that it had suffered or risked suffering loss or damage as a result of the breaches complained of in the Request for Review. The application for judicial review was consequently dismissed and each party ordered to bear its own costs.

20. It was this decision that rattled the appellant and provoked this appeal. Before us, the appellant has raised the following grounds: that the High Court erred in failing to find that the 1st respondent's decision was so unreasonable and irrational thereby warranting an order quashing the same; that the High Court erred in failing to find that the 1st respondent's decision on the appellant's application for judicial review required a merit review; that the High Court failed to decide the said application in a manner that would have resulted in ensuring that all the parties in the said dispute were given a fair opportunity of having their respective positions heard and determined on the merits; that the decision of the High Court resulted in a denial of the appellant's right to natural justice; that the High Court failed to uphold the appellant's fundamental right as enshrined in Article 50 of *the Constitution*; that the High Court erred in considering the application in a highly technical manner contrary to Article 159 of *the Constitution*; and that the High Court's decision went against the weight of the evidence and the applicable law. The appellant therefore prayed that we allow the appeal and set aside the decision of the High Court as well as that of the 1st respondent, and the award of the 2nd and 3rd respondents. In the alternative, it was prayed that we direct the 1st Respondent to hear the Request for Review on its merits.

21. The 2nd and 3rd respondents also filed notice of Cross Appeal dated 2nd November 2023 in which they challenged the learned Judge's findings regarding the timelines for the filing of the judicial review application, and the decision by the learned Judge to deny them the costs of the application.

22. We heard this appeal on the Court's GoTo Meeting virtual platform on 15th November 2013 during which learned counsel, Mr Gikandi Ngibuini, appeared for the appellant, Ms Evelyn Kagoi for the 1st

respondent, Mr Kelvin Mbogo for the 2nd and 3rd respondents and Dr. Okubasu appeared for the 12th, 13th, 17th, 20th and 21st respondents. There was no representation on behalf of the other respondents notwithstanding the fact that they had been served with the hearing notice.

23. The appellant's case as presented by Mr. Gikandi was that three of the tenderers who were awarded the tender did not meet the set criteria; that, pursuant to section 167 of the Act, the time for filing the Request for Review started running from 18th July 2023 and, as the appellant filed its Request on 31st July 2023, the same was filed within the prescribed time; that, under section 167 of the *Act*, two avenues are open for one to approach the 1st respondent; that in this case the appellant followed the avenue of filing the Request for Review within 14 days from the date when the results of the awards were sent to it; that, before the receipt of the letter dated 18th July 2023, the appellant could not possibly have known that the 2nd and 3rd respondents had awarded parts of the tender to the three entities that were not qualified; and that the 1st respondent ought to have interpreted section 167 of the Act in a liberal manner.

24. It was further submitted that the High Court determined the judicial review application without evaluating whether the 1st respondent's decision was rational and legal, and whether it passed the procedural propriety test; that it was important that the Court undertakes an evaluation on the merits of the impugned decision; that the type of judicial review envisaged in section 175 of the *Act* encompasses procedural as well as substantive review since the word "grievance" is wide; that this Court should evaluate the decision of the 1st respondent on jurisdiction and locus and find that the interpretation given by the 1st respondent to section 167 of the *Act* was irrational and unreasonable; that the use of the word "or" in section 167 of the Act amounts to a conjunction that links the alternatives thereby providing two avenues for any aggrieved party to approach the 1st respondent either within fourteen (14) days of the occurrence of the breach, or fourteen (14) days of one being notified of the results of the tender.

25. In support of his submissions, Mr Gikandi referred to Speaker of the *National Assembly v Karume Civil Application No. 92 of 1992* on the necessity of complying with the procedure prescribed by the law; *Selex Sistemi Integrati v The Public Procurement Administrative Review Board & Others* [2008] eKLR on strict construction of a provision ousting jurisdiction and an interpretation that preserves the court's jurisdiction where a provision is capable of having two meanings; *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223 and *Republic v K S Bunyasi ex parte AWO & Another* [2019] eKLR both of which dealt with merit evaluation in order to determine whether there was illegality, irrationality or procedural impropriety; and *Blue Sea Services Ltd & Another v Public Procurement Administrative Review Board & Another* [2016] eKLR. for the contention that locking out the Appellant from presenting its case was irrational and unreasonable.

26. Ms Kagoi submitted on behalf of the 1st respondent that the learned Judge's decision was reasonable, rational, sound and fair and did not go against the weight of evidence; that the scope of judicial review is only on the process leading to the making of the decision and not the merits of the decision; that the order seeking nullification of the contracts entered into pursuant to the awards in question has been overtaken by events and is unsustainable; that the Court should invoke the doctrine of utilitarianism and make a decision that is meant to serve the wider public good as opposed to that of an individual. We were urged to dismiss the appeal with costs.

27. In support of her submissions, Ms Kagoi relied on *R v Communications Commission of Kenya ex parte East Africa Televisions Network Limited* [2001] eKLR; and *M/S Master Power Systems Limited v Public Procurement Administrative Review Board & 2 Others* [2015] eKLR for the submission that judicial review is aimed at determining whether the 1st respondent deviated from the procedures in

reviewing the decision of the 2nd and 3rd respondents; *East African Cables Limited v Public Procurement Complaints, Review and Appeals Board & Another* [2007] eKLR on the consideration of public interest in determining judicial review application; *Praxidis Namoni Saisi & Others v Director of Public Prosecutions & 2 Others* (*supra*) on the extent of merit review in judicial review and *Kenya National Examination Council v R, ex parte Geoffrey Gathenji Njoroge* [1997] KLR on the grounds for judicial review.

28. On their part, the 2nd and 3rd respondents sought to have the appeal dismissed. In their submissions, the decision of the 1st respondent was rational, proportionate and well anchored in law, fair administrative principles and was properly upheld by the High Court. According to Mr Mbogo, the issues raised by the appellant in this appeal were not raised before the High Court, and the appellant did not plead illegality, irrationality or procedural irregularity.

29. In addition, it was contended that the learned Judge appreciated that merit issues may be investigated, but noted that the grounds relied upon arose before the tender was awarded, and hence the 1st respondent had no jurisdiction to entertain them. It was also submitted that the issues raised in paragraphs 5,14,15,18,19,21 and 22 of the Request for Review having been discovered, or otherwise ought to have been reasonably within the appellant's knowledge way back in March 2023 and not in August 2023, were improperly taken before the 1st respondent because, by then, the prescribed period of 14 days had lapsed.

30. As regards the Notice of Cross Appeal, the 2nd and 3rd respondents challenged the decision of the learned Judge, reiterating that the application for judicial review ought to have been lodged before the High Court by 4th September 2023. Hence, the application lodged on 2nd October 2023 was outside the 14 days statutory timelines stipulated under section 175(1) of the Act. This position was anchored on the decision of this Court in *R v Communications Commission of Kenya ex parte East Africa Televisions Network Limited* [2001] eKLR. It was submitted that, in this case, the decision sought to be quashed was made on 21st August 2023, yet the substantive motion was filed on 3rd October, 2023, way after the prescribed 14 days period.

31. Reliance was placed on *Aprim Consultants v Parliamentary Service Commission & Another Civil Appeal* No. 039 of 2021 and The *Consortium of TSK Electronica Y Electricdad S.A & Ansaldoenergia v PPARB & 3 Others* Civil Appeal No. E012 of 2022 for the proposition that timelines in public procurement disputes are cast in stone and, upon the lapse of timeline, the jurisdiction of the court ceases. Further reliance was placed on the decision of Elias, JA. in the English Court of Appeal case of *SITA v Manchester Watse Management Authority* (2011) EWCA Civ 156 in which the decision of the European Court of Justice in *Uniplex (UK) Ltd v NHS Business Services Authority* (2010)2 CMLR 47 was cited that time starts to ran with respect to a breach in procurement proceedings once a party has or is reasonably expected to have had sufficient knowledge of the alleged breach of duty.

32. On costs, it was submitted that, the Court having dismissed the appellant's application for judicial review, it ought to have awarded the 2nd and 3rd respondents costs pursuant to section 175(7) of the *Act*. In this regard, the 2nd and 3rd respondents cited *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR. We were urged to dismiss the appeal and allow their Cross- Appeal with costs.

33. Dr Okubasu submitted on behalf of the 12th, 13th, 17th, 20th and 21st respondents that the memorandum of appeal filed by the appellant failed to comply with rules 66 and 88 of this *Court's Rules* in so far as they were long, argumentative and not concise. It was also submitted that the record of appeal was incomplete since some of the documents incorporated in the record were not reproduced in full.

34. According to learned counsel, section 167 of the *Act* prescribes mandatory timelines within which a candidate or tenderer is bound to lodge a Request for Review with the Board; that the appellant filed its Request for review outside the mandatory period of 14 days; that the alleged grievances occurred between January and April 2023, and hence the Request was submitted many months after the occurrence; that the appeal is incompetent and bad in law in view of the fact that it seeks a constitutional interpretation as appears in paragraph 19 of the appellant's submissions; that the appellant was accorded a fair hearing as the matter was heard on 16th August 2023 virtually after the parties had exchanged written submissions; that, although in judicial review applications the court may consider proportionality or procedural impropriety, in this case the grievances revolved around alleged violation of the rules of natural justice, and hence the issue of merit inquiry did not arise; that claims under section 175 of the Act are premised on the principle that business entities need to know early enough whether or not they may proceed with the tender and need not wait till the end of the process when the decision is challenged while it could have been challenged earlier; that the right to Request for Review is in addition to other rights that a party may have; that, the moment a party decides to lodge its Request for Review before the 1st respondent, it must comply with the mandatory provisions of the *Act*. Dr. Okubasu prayed that the appeal be dismissed with costs.

35. We have carefully considered the appeal, the record as put to us, the impugned decision, the rival submissions of the parties, and the authorities relied upon by the parties, and the law.

36. Before we pronounce ourselves on the substantive issues raised in this appeal, we take note of the fact that Dr. Okubasu, learned counsel for the 12th, 13th, 17th, 20th and 21st respondents took issue with the memorandum and the record of appeal. According to learned counsel, the memorandum of appeal contravenes rules 66 and 88 of this *Court's Rules*. Rule 88(1) provides that:

    1. A memorandum of appeal shall concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying—

        a. the points which are alleged to have been wrongly decided; and

        b. the nature of the order which it is proposed to ask the Court to make.

37. This Court, differently constituted, has had occasion to deal with the requirement under rule 88 in *Moses Kipkolum Kogo v David Malakwen* Civil Appeal No. 74 of 1998 (UR) where it held that a memorandum of appeal must set forth concisely the grounds of objection and that, therefore, vague grounds are not to be entertained. However, the Court in *Benjamin Kiiru Wanjau v Samuel Nelson Mwangi Wanjau & Another* Civil Appeal No. 161 of 2003 (UR), noting that rule 84(1) of the *Court of Appeal Rules*, 2010 [now rule 88 of the 2022 Rules], required, inter alia, that a memorandum of appeal sets forth concisely and under distinct heads, without argument or narrative, found that what was stated as grounds of appeal did not conform with the said provisions. However, the Court appreciated that the said provisions are merely for guidance. We associate ourselves with the foregoing decision, but nonetheless take this opportunity to caution parties and their counsel against sloppy drafting of memorandum of appeals. While the Court may not necessarily strike out such documents, failure to comply with the Rules may well lead to denial of costs where otherwise deserved. We wish to say no more on that issue.

38. As regards the missing documents or parts of documents, rule 94(1) of our *Rules* provides that:

> If a respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of the respondent's case, he or she may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or

any additional parts of documents which are, in his or her opinion, required for the proper determination of the appeal.

39. The objecting respondents ought to have taken advantage of this rule if it was their view that some or parts of documents necessary for the purposes of determination of this appeal were omitted. Accordingly, nothing turns on that submission.

40. Having disposed of those preliminary issues, we now turn to the substance of the appeal. In our considered view, the issues that fall for determination before us in this appeal are:

1. Whether the judicial review application was made outside the prescribed time;

2. Whether the learned Judge erred in upholding the decision of the 1st respondent that it had no jurisdiction to entertain the Request for Review on account of it having been brought outside the prescribed period;

3. Whether the learned Judge erred in upholding the 1st respondent's decision that the appellant had no locus before the 1st respondent having failed to claim or plead that it suffered or risked suffering loss or damage due to the breach of a duty; and

4. whether the learned trial Judge erred in not awarding the costs of the application to the 2nd and 3rd respondents.

41. The Court's mandate as re-affirmed in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR is:

> "...to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

42. In the case leading to the impugned decision made by the 1st respondent on 21st August 2023, the appellant filed Chamber Summons dated 25th August 2023 seeking leave to institute judicial review proceedings pursuant to section 175 of the *Act*. That section provides as follows:

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.

43. The issue before us is whether the application for leave made by the appellant on 25th August 2023 was an application for judicial review as contemplated in section 175(1) of the Act. According to the 2nd and 3rd respondents, the application contemplated in that provision is the substantive Notice of Motion filed on 2nd October 2023 pursuant to the orders sought for leave, and which was outside the prescribed time.

44. The 2nd and 3rd respondents relied on the decision of this Court in *R v Communications Commission of Kenya ex parte East Africa Televisions Network Limited* [2001] eKLR where the Court, while appreciating the unique procedure set out in the provisions of Order 53 of the *Civil Procedure Rules*, which are made pursuant to section 9 of the *Law Reform Act*, held that:

> " The proceedings under that order can only start after leave has been granted."

45. However, that decision was rendered in 2001 before the current Constitution was promulgated. The Public Procurement and Assets Disposal Act was, on the other hand, enacted in 2015 after the new Constitution was promulgated. That Act was enacted pursuant to Article 227(2) of *the Constitution*. One of the running themes in the Act is strict timeliness in lodging of complaints or claims arising from public procurement and asset disposal process and the expeditious resolution of such complaints or claims. This was appreciated by this Court in Aprim Consultants v Parliamentary Service Commission & Another (*supra*) in which it was held that:

> " 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 crystallise 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 time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgement returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law."

46. It is our view that the provisions of the Public Procurement and Assets Disposals Act must be interpreted in a manner that does not take away the rights of those aggrieved by the process of public procurement to challenge the process, and also take into account the need to speedily dispose of such grievances. As appreciated in the above case, the Act is a special piece of legislation meant to cater for the needs of public entities which require to procure goods and services, and such processes are of necessity time bound. Being a special piece of legislation, the interpretation of its provisions must be geared towards the realization of the objects of the Act. To interpret the legislation in the manner contended by the 2nd and 3rd respondents that the challenge to the decision of the 1st respondent herein commences only after leave has been granted and the substantive Motion filed would be absurd, and would render

the process of challenging the decisions of the 1st respondent illusory, taking into account the strict timelines provided in the Act. That, in our view, could not have been the intention of Parliament.

47. This Court (Gicheru, JA. as he then was) in *Alfred Muhadia Ngome & Another v George W. Sitati & 2 Others* Civil Application No. Nai. 268 of 1999 (UR) expressed himself as hereunder:

> " The duty of the Court in construing a statute is to ascertain and to implement the intention of the Parliament as expressed therein. Where Parliament has used non-technical legislation (sic) words which, in there (sic) ordinary meaning cover the situation before the Court, the Court will generally apply them literally provided that no injustice or absurdity results. In such case it is a reasonable presumption that Parliament or its draftsman has envisaged the actual forensic situation. But in many cases it will seem probable that Parliament or its draftsman have not envisaged the actual situation before the Court; and the duty of the Court in such circumstances will be to surmise, as best as it can, what Parliament would have stipulated if it had done so...A number of rules, founded on common sense have been evolved to assist the Courts in this task - e.g. Parliament will be presumed not to intend injustice or absurdity or anomaly; but the most useful approach was laid down as long ago as Hydon's Case that the Court will ascertain what was the pre-existing "mischief", (that is to say, defect) which Parliament was endeavouring to remedy; this will often give a guide to what remedy Parliament has provided, and to its extent and its sanction. See *F. v F.* (1970) 1 All ER 200 at 204 and 205."

48. We also refer to the decision of the Supreme Court in Petition No. 10 of 2015 - *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another* at paragraph 56 that:

> " ...legislative intent cannot always be attributable to what it (the legislature) says through statute. To assume that what parliament doesn't say, in the final legislative edict, was never meant to be, is to tread the dangerous path of judicial cynicism. Parliament cannot legislate for every exigency of human existence. Indeed, there is nothing easy when the legislature sits to make laws; just as there is never a straight-forward or clear-cut route when a court of law embarks on the interpretation of a written law."

49. It is our view, and we hereby so hold, that in order to achieve the need to dispose of procurement disputes in a timely and fair manner, a purposive approach leads us to the conclusion that judicial review proceedings for the purposes of section 175 of the *Public Procurement and Assets Disposals Act*, where a party opts for the route prescribed in Order 53 of the *Civil Procedure Rules*, commence from the date when the application for leave to apply for judicial review is filed.

50. The next issue for determination is whether the learned Judge erred in upholding the decision of the 1st respondent that it had no jurisdiction to entertain the Request for Review on account of it having been brought outside the prescribed period. The determination of this issue revolves around the interpretation of section 167(1) of the *Act* as read with rule 203 of the Rules. Section 167(1) of the *Act* 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.

51. Regulation 203(1) and (2) of the *Regulations* provides that:

1. A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

2. The request referred to in paragraph (1) shall—

    (a) ....

    (b) ....

    c. be made within fourteen days of—

        i. the occurrence of the breach complained of, where the request is made before the making of an award;

        ii. the notification under section 87 of the Act; or

        iii. the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

52. Our reading of these provisions reveals that transgressions contemplated under the said provisions may occur at three stages: during the procurement process but before the award is made; at the time of the notification of the award; or after an award is made to the successful party. The first stage may comprise of complaints arising from the tender documents, and this includes the advertisement, addenda, any order restraining the tender process, as well as the conduct of the procuring entity during the tender process; the second stage may arise where the tender is not awarded to the person found to have been the most responsive in the process of the tender; and the third stage may arise if it is discovered, after the tender is awarded, that the person awarded the tender is non-existent.

53. According to Mr Gikandi, time for the purposes of making a Request for Review must start running from the date of notification of the tender. With due respect to Mr Gikandi, our considered view is that Parliament deliberately set out to demarcate the three stages at which Request for Review may be made. To our mind, that deliberate demarcation was meant to ensure that, for example, complaints in the procurement process are resolved as soon as they arise so that a party ought not to wait till the end of the process to lodge a complaint regarding the propriety of the tender documents.

54. The position in *Republic v Public Procurement Administrative Review Board & Another ex parte Sports, Arts and Social Development Fund; Accounting Officer, Sports, Arts and Social Development Fund and Another* [2021] eKLR, therefore largely espouses the correct legal position. In that case the court held that:

> "the application for review for any alleged breach must be filed timeously and, in any event, not later than 14 days from the date of the alleged breach. In that case where the applicant alleged a breach at the technical review stage but waited until the award had been made to seek for review, the 1st respondent accepted as the correct interpretation of the law the argument that the applicant ought to have filed its application for review within 14 days of the breach."

55. We hasten to point out that, as held in *Republic v Public Procurement Administrative Review Board & 2 others Ex- Parte Kemotrade Investment Limited* [2018] eKLR, the determination of when time begins to run will depend upon an examination of the alleged breach, and at what stage the aggrieved tenderer had knowledge of the said breach, or ought to have reasonably known of it.

56. We have carefully examined and re-evaluated the evidence on record as presented by way of affidavits. The appellant's complaints revolved around allegations concerning the manner of the advertisement of the tender; the subsequent issuance of the four addenda; the effect on the tender of the ruling delivered on 11th May 2023 in Mombasa High Court Petition No. E028 of 2022 - *Blue Services Limited v Kenya Ports Authority*; and the allegation that the process was tainted with corruption. All these allegations, which were raised in paragraphs 5, 14, 15, 16, 17, 18, 19, 21, 22 and 24th of the Request for Review, allegedly occurred before the award was made in the subject tender, and before a notification of intention to enter into a contract was made by the 2nd and 3rd respondents. They were matters which were well within the appellant's knowledge. In the circumstances, the appellant ought to have lodged its application for review on the allegations raised in those paragraphs, by virtue of regulation 203(2)(c) (i) of the Regulations, within 14 days of the occurrence of the respective breaches complained of. The appellant having failed to do so, the 1st respondent cannot be faulted for reaching the decision that the Request for Review arising from the alleged breaches was out of time.

57. According to Mr Gikandi, the learned Judge ought to have considered the merits of this ground and ought not to have taken the narrow view that the court was only dealing with the process review. To our mind, the court's jurisdiction in exercise of its judicial review powers under our current legal regime has been the subject of litigation in recent times. However, the controversy seems to have been laid to rest, or so we think, in the Supreme Court decision in the case of *Praxidis Namoni Saisi & Others v Director of Public Prosecutions & 2 Others* (*supra*) where the court expressed itself as follows:

> "73. The present case offers the Court an opportunity to render itself on the issue more authoritatively. The Fair Administrative Actions Act provides the parameters of judicial review to be the power of the Court to review any administrative or quasi-judicial act, omission or decision of any person, body or authority that affects the legal rights or interests of an aggrieved person. The judicial review court examines various aspects of an act, omission or decision including whether the body or authority whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. These parameters are better set out extensively in Section 7 of the *Fair Administrative Actions Act* (FAAA).
>
> ....
>
> 75. In order for the court to get through this extensive examination of Section 7 of the *FAAA*, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of

Appeal in *Judicial Service Commission & another v. Lucy Muthoni Njora*, Civil Appeal 486 Of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against Article 259 of *the Constitution* which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance."

58. The Court further held:

> "76. Be that as it may, it is the Court's firm view that the intention was never to transform judicial review into to (sic) full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in Section 11 (1) and (2) of the *Fair Administrative Actions Act*. Third, the Court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in Section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this Court held in the case of Kenya Vision 2030 Delivery Board v. The Commission on Administrative Justice, the Attorney General and Eng. Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.
>
> 77. For the avoidance of doubt, we see no reason to depart from our findings in SGS Kenya Limited v. Energy Regulatory Commission & 2 others [supra] and John Florence Maritime Services Limited & another v. Cabinet Secretary, Transport and Infrastructure & 3 others [supra]."

59. It is therefore clear that the Supreme Court has disabused the notion that, in light of the provisions of *the Constitution* and the *Fair Administrative Action Act*, there is no longer a distinction between merit review and process review. It is clear that the intention of the enactment of the *Fair Administrative Action Act* was neither to transform judicial review into full-fledged inquiry into the merits of a matter nor to convert a judicial review court into an appellate court.

60. We have considered the submissions of Mr Gikandi, and in our view, the merits of the Request for Review would only have been considered if the 1st respondent had found that it had jurisdiction to deal with the matter. In any case, the appellant's complaint before the High Court and before this Court

largely revolved around the right to be heard. The determination of that issue, in our view, did not require an inquiry into the merits of the case.

61. Mr Gikandi submitted further that the appellant also complained that the tenders of Mara Supply Enterprises (Nairobi) Limited, Norgen Enterprises Limited and Riley Falcon Security ought to have been disqualified for not having a valid tender security, and for not having complied with the NSSF requirements. Consequently, Mr. Gikandi submitted, the 1st respondent ought not to have struck out the Request for Review without determining that issue. In our view, the answer to Mr Gikandi's submission is to be found in section 167(1), which requires that the person seeking administrative review by way of a Request for Review be a candidate or a tenderer who ought to claim that it has suffered, or was at the risk of suffering, loss or damage due to the breach of a duty imposed on a procuring entity by the Act or the Regulations. Therefore, it does not suffice to alleged breach. One must go ahead and plead that it has suffered or risk suffering loss or damage as a result of the breach. In our considered view, it is not enough to simply contend that some of those awarded the tender were not qualified as the appellant contended here. The appellant ought to have pleaded what loss, if any, it suffered or risked suffering as a result thereof. It failed to do so.

62. However, we hasten to point out that we are not suggesting that an irregularity or illegality during the process of tendering ought to go unchecked. 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.

63. Accordingly, any person who wishes to challenge a procurement process by any other mode that is legally recognised is not barred from doing so. However, a party invoking section 175 of the Act must strictly comply with section 167 thereof. We therefore agree with the decision in *James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited & 8 others* [2019] eKLR where it was held that:

> "It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the *PPADA*...It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that section 167(1) was designed of keep out The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge."

64. As the appellant did not comply with the aforesaid mandatory provisions of the Act and Regulations, we find no reason to interfere with the learned Judge's decision. This finding also takes care of the 3rd issue.

65. The 4th and last issue is whether the learned Judge erred in not awarding the costs of the application to the 2nd and 3rd respondents. When making an order that each party bears their own costs, the learned Judge did not give any reason therefor. Section 175(7) of the Act provides that:

> Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

66. We do not take the view that this section means that, where the decision of the 1st respondent is upheld, no cost is payable. In our considered view, in that event, the general rule that costs follow the event applies as held by the Supreme Court in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others (supra) where it was held that the award of costs would normally be guided by the principle that "costs follow the event".

This position was attested to by Murray, C J in Levben Products v Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227 where he stated that:

> " It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

67. The same view was adopted by the Supreme Court of Uganda in *Impressa Ing Fortunato Federice v Nabwire* [2001] 2 EA 383 where it was held that:

> " The effect of section 27 of the *Civil Procedure Act* is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or a judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... While it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are: - (i). Under section 27(1) of the *Civil Procedure Act* (Chapter 65), costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii). A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit."

68. Since there was no reason given by the learned Judge on the basis on which she directed that each party bears their own costs, we find merit in the cross-appeal challenging that decision.

69. In conclusion, we find no merit in this appeal, which we hereby dismiss with costs. We allow the cross-appeal to the extent that we set aside the order directing each party to bear its own costs and substitute therefor an order that the costs in the High Court of the 2nd and 3rd respondents, who cross-appealed, be borne by the appellant. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF NOVEMBER, 2023.

MUMBI NGUGI

....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

...

JUDGE OF APPEAL

G. V. ODUNGA

....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR