IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MAKHANDIA & KANTAI, JJ.A)

CIVIL APPEAL NO. 116 OF 2018

BETWEEN

CENTRAL BANK OF KENYA.....1ST APPELLANT

DE LA RUE INTERNATIONAL LIMITED..... 2ND APPELLANT

AND

OKIYA OMTATAH OKOITI.....1ST RESPONDENT

PUBLIC PROCUREMENT REVIEW AUTHORITY..... 2ND RESPONDENT

DE LA RUE CURRENCY & SECURITY PRINT LTD..... 3RD RESPODNENT

DE LA RUE KENYA EPZ LIMITED..... 4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....6TH RESPONDENT

THE ETHICS & ANTI-CORRUPTION COMMISSION..... 7TH RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (**G. V. Odunga, J.**) delivered on the 9th *day of April, 2018 in* **Petition No. 597 of 2017)**

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Consolidated With Civil Appeal No. 119 Of 2018

JUDGMENT OF THE COURT

By a Petition dated 11th December, 2017, **Okiya Omtatah Okoiti** "*the 1st respondent*" petitioned the High Court for various declarations and orders against the **Central Bank of Kenya** "*the 1st appellant*", **De La Rue International Limited** "*the 2nd appellant*", **Public Procurement Review Authority,** "*the 2nd respondent*", **De La Rue Currency & Security Print Ltd** "*the 3rd respondent*" and **De la Rue Kenya EPZ "***the 4th respondent*". The petition also named the **Attorney General**, the **Director of Public Prosecutions** and the **Ethics and Anti-Corruption Commission** as interested parties and are enjoined in this appeal as the 5th, 6th and 7th respondents respectively. The petition alleged contravention of **Articles 27, 35** and **47** of the Constitution and the national values and principles of governance set out in Articles **1, 2, 3, 10, 231 (3), 232** and **259 (1)** of the Constitution by the appellants and in particular the 1st appellant. The subject matter of the dispute leading to the petition was Restricted Tender for Printing & Supply of New Design Kenya Currency Banknotes, being Tender Reference No. **CBK/37/2017-2018**, "*the tender*". The gravamen of the petition was that the 1st appellant in awarding or purporting to award to the 2nd appellant the tender on 30th November 2017, contravened and or violated the aforesaid provisions of the Constitution, the Public Procurement & Asset Disposal Act, 2015; the Public Procurement & Disposal Act, 2005; the Fair Administrative Action Act, 2015; the Central Bank of Kenya Act and the Statutory Instruments Act, 2013. The petition was also premised on the complaint that in awarding the

tender, the 1st appellant as the procuring entity, not only failed to strictly comply with the law but also rigged the tender in favour of the 2nd appellant with the collusion of the 3rd and 4threspondents.

The background facts are that the 1st appellant, established under Article 231 of the Constitution, has the mandate to issue banknotes and coins bearing images that depict or symbolise Kenya or any aspect of Kenya but do not bear the portrait of any individual. Pursuant to this mandate, it commenced procurement process of new design currency banknotes in 2014 by advertising for pre-qualification for suppliers for production of bank notes, originating material and currency printing services.

This was done locally and internationally by tender No. CBK/043/2013/2014, published in two local dailies, a regional weekly paper and in its website. The advertisements were as follows:

a. Local media – "The Daily Nation" and "East African Standard" of 16th June 2014

b. Regional media – "The East African" for the week of 14th to 20th June 2014

c. International media: CBK website tender portal 16th June to 8th July 2014

Following the pre-qualification, four firms were prequalified by the 1st appellant, namely; the 2nd appellant, **Giesecke & Devrient GmbH, Crane Currency,** and **Oberthur Fiduciaire**. After the pre-qualification, the 1st appellant in the year 2016 floated tender No. CBK/064/2016/2017 for origination material and data set files for the new Kenya currency and bank notes.

On 24th October 2017, 1st appellant issued the tender for printing and supply of new design currency. The tender was restricted to candidates who had prequalified under the earlier prequalification process due to the specialized and complex nature of the goods, works and or services required. On 8th November 2017, the 1st appellant issued an addendum to the tender wherein it informed the candidates of its preferences and reservations which were to be fulfilled by the bidders in the performance of the contract. The preferences and reservations were made pursuant to sections **155** and **157** of the Public Procurement & Asset Disposal Act 2015 ("*PPADA*"), and according to the 1st appellant, were to be applied to bidders who demonstrated that they were entitled to the same. The addendum also provided that the bidders who sought to sub-contract part or whole of the contract were to obtain express authority of the 1st appellant. These addendums were as a result of the clarifications sought by the 2nd appellant and other bidders.

However, before the award of the tender, the 4th and 5th respondents moved to the High Court by way of **Nairobi HC Petition No. 568 of 2017** against 1st appellant challenging the tendering process for allegedly contravening Articles **227** and **231** of the Constitution. They also claimed that they had been unfairly precluded from the process. Of relevance however, is the 2nd respondent's reply to that petition where it deposed that the procurement process commenced in 2014 and was governed by the now repealed Public Procurement & Disposal Act 2005 "*PPDA*" as saved by section **183** of the PPADA, 2015 and the transitional provisions in regulation 1(1) and (2) of the Third Schedule to the Act. The petition was however subsequently withdrawn by consent of the 1st appellant, 3rd and 4th respondents respectively on 30th November 2017.

Following that withdrawal, the tender was evaluated and awarded to the 2nd appellant. In awarding the tender, the 1st appellant applied 15% margin of preference provided for under section **28** of the Public Procurement and Disposal Regulations, 2006.

Aggrieved with the award, Crane AB successfully petitioned the 2nd respondent for review of the decision on the basis that the 2nd appellant was unlawfully awarded the tender after irregular application of the 15% preference margin *inter alia*. The preferential margin had been introduced to promote local industry or marginalized groups. However, the application of the margin in favour of the 2nd appellant allowed it to outbid the other bidders to emerge the winner despite it having emerged at position 3 with Crane AB as the lowest bidder or winner. The 2nd respondent made its decision on the review application on 8th January 2018, wherein it allowed the application and effectively annulled the award of the tender to the 2nd appellant. Undeterred, the appellants moved to the High Court through **Judicial Review Nos. 6 and 7 of 2018,** and in a judgment delivered by **Odunga, J.** On 9th April, 2018, he allowed the two Judicial Review Applications and quashed the 2nd respondent's decision of 8th January 2018. The High Court decision was premised on grounds that the 2nd respondent exceeded its jurisdiction in allowing a party who was not a bidder *to wit* M/s Crane AB to initiate the review proceedings before it.

It is at this juncture that the 1st respondent initiated the petition leading to this appeal. In the petition, the 1st respondent challenged the entire procurement process as *nullity ab initio* for allegedly failing to comply with the law and or misapplication of laws and regulations. Specifically and according to the 1st respondent, the 1st appellant wrongfully invoked or applied the provisions of PPADA in awarding the tender to the 2nd appellant. His view was that the applicable law was the PPDA (now repealed) except where it was saved by the provisions of section **183** of PPADA. The said section provides that the transitional provisions specified in the **Third Schedule** of the Act shall apply. For clarity, it is in these terms:

1. Existing procurement proceedings continued under repealed Act.

2. Procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act.

3. For the purposes of subparagraph (1), procurement proceeding commences when the first advertisement relating to the

procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.

The first advertisement in regard to the now impugned tender ran on 14th June 2014, and according to the 1st respondent, the prevailing and applicable law then was the PPDA and not the PPADA which came into force on 7th January 2017. In that regard, the 1st respondent contended that the application of preferences and reservations provided for under sections **155** and **157** of the PPADA by 1st appellant was a wrongful attempt to apply the law retrospectively when such application was untenable. It was also the 1st respondent's contention that the 1st appellant could not legally apply the preferences and references as provided in the PPADA since in any case, the Cabinet Secretary had not operationalized the provisions by gazetting the regulations required under the Act. It was therefore contended by the respondent that the application of a preference margin of 15% as provided by section **28** of the **Public Procurement and Disposal Regulations, 2006** pursuant to **Legal Notice No. 174** of 30thNovember, 2006 was invalid, null and void as the said Regulations had expired pursuant to section **21** of the **Statutory Instruments Act**.

Furthermore, there was evidence that the 2nd respondent was a foreign controlled company incorporated in the United Kingdom on 16th April, 1962 and was wholly owned by De la Rue Holdings Limited, a United Kingdom Company as well. It was contended that in law, the 2nd appellant was a separate and distinct legal entity from the 3rd and 4th respondents and therefore, the 1st appellant could not purport to apply the preference margin on the basis of its local affiliates which were Kenyan companies. According to the 1st respondent, the 1st appellant purported to use the 2nd appellant's local affiliates to undertake the contract despite them having failed to prequalify or even bid for the tender for that matter. A **Public Accounts Committee** (PAC) report prepared in July 2012, according to the 1st respondent had found that the 3rd and 4th respondents in fact lacked requisite capacity to print modern currency notes as envisaged.

The 1st respondent further challenged the award of the tender on grounds that the tender process failed to comply with Article **227 (1)** of the Constitution and section **2** of PPDA. Read together, those provisions behove a procuring entity to do so fairly, equitably, transparently, efficiently, competitively and in a manner that instils public confidence in government tendering process. These principles according to the 1st respondent were flouted based on the arguments that the 2nd appellant used its locally registered affiliates, the 3rd and 4th respondent to induce the 1st appellant to award the tender to it. This is despite the fact that the said affiliates did not only bid or even qualify for the tender but also failed to obtain approval and consent of 1st appellant to subcontract any portion of the tender. The 2nd appellant also did not qualify for preferential margin or treatment as Kenyan citizens did not own at least 51% of its shares as stipulated in law. It was contended that the 2nd appellant did not demonstrate how its bid qualified for preference by producing evidence of eligibility. According to section **157 (6)** of the PPADA, to qualify for a specific preference or reservation, a bidder ought to provide evidence of eligibility as prescribed.

The award of the tender to the 2nd appellant was also challenged on the basis that it was not cost-effective as it had emerged number three in the tendering process. That without the application of the 15% in favour of the 2nd appellant, Crane AB emerged the lowest bidder, Oberthur Fiduciare second, the 2nd appellant third and Giesecke & Devrient emerged last as the highest bidder.

The Petition was opposed by the 1st appellant on grounds that; the 1st respondent lacked the necessary *locus standi* to initiate and prosecute the petition, the documents annexed in the supporting affidavit of the petition had been illegally obtained in breach of its rights under Articles **31** and **35** of the Constitution; it had complied with the Constitution; the PPADA and other applicable laws and denied all the allegations of conspiracy and or impropriety in the tendering process. It contended that right from the pre-qualification tender, it had intimated that it would not be averse to the use of local affiliates in the execution of the tenders. That the 2nd appellant having prequalified for award of the print tender, had applied for subcontracting parts of it to its local affiliates and had further demonstrated that the goods to be supplied would be partially produced and assembled in Kenya, through its local affiliates. It maintained that it acted within the law in the application of the provisions relating to preferences and reservations and that the 2nd appellant indeed sought its authority to subcontract. Further, that addendum No. 3 as part of tender had been made pursuant to bidders' request for clarification and followed Addendum Nos. 1 and 2 issued on 31st October 2017 and 6th November 2017 respectively which had also been issued following clarifications sought by the bidders as provided for in the tender documents. This was to dispel allegations made by the 1st respondent that addendum No. 3 had been issued as part of a plan to tilt or rig the tender in favour of the 2nd appellant. It went on to aver that the 15% preference margin was not applied on the basis of shareholding but rather on the basis that manufactured materials and supplies being partially mined or produced in Kenya or where applicable, assembled in Kenya to satisfy sections **3 (1)** and **(j)** of the PPADA. The said provision obligates state agencies to be guided by the values and principles of the Constitution and relevant legislation in procurement but also to promote local industry. The 1st appellant relied on section **155** of the PPADA which provided for preferential treatment to local contractors for goods, materials or supplies partially or wholly produced in Kenya or where applicable have been assembled in Kenya.

Contrary to allegations that the tender was awarded without the evaluation of the Tender Evaluation Committee, it was the position of the 1st appellant that indeed the Committee met independently from 23rd to 27th November 2017 and made its recommendations that the tender be awarded to the 2nd appellant. It maintained that the repealed PPDA was not applicable in the subject tender but was used in the pre-qualification process which had commenced in 2014 and concluded before the enactment of PPADA. There was a circular dated 29th March 2016 sent to government agencies by the national treasury informing them of the enactment of the PPADA which had commenced on 7th January 2016 and stated that the new Act was applicable "*to all procurements which commenced on or after 7th January, 2016*."

The 2nd appellant, 3rd and 4th respondents jointly opposed the petition. The 2nd appellant described itself as one of the world's leading currency manufacturers, publicly listed on and subject to the rules of the London Stock Exchange. That as a strategic partner in Her Majesty's Government producing UK passports and Sterling Pounds for the Bank of England, it was subject to a level of transparency and scrutiny unique in the production of currency. It intimated that there was an ongoing agreement between the National Treasury, Kenya and the 2nd appellant to acquire 40% of the shares in the 4th respondent for which the Kenyan Government had already paid sterling pounds 5 million. The 2nd appellant was categorical that it had never claimed to be a citizen contractor in any proceedings or tender documents for that

matter. Justification for qualifying for the 15% preference margin was made on grounds that it was the only bidder with an established modern high security manufacturing plant locally that had supplied the 1st appellant with its currency requirements for almost 25 years; with over 300 Kenyan employees and contributing annually over Ksh 150 million to the economy. Further it was on the basis of manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable, have been assembled in Kenya. It maintained that in the circumstances of this case, preference margin was granted upon it demonstrating that it had sub-contracted substantial portion of the tender and that locally assembled materials, supplies and articles would be used. They both denied any collusion in the award of the tender to the 2nd appellant.

The 2nd and 6th respondents' defence was that the petition was an abuse of court process and the law since there was an established forum and procedure for addressing grievances arising from any processes of public procurement through the **Public Procurement Administrative Review Board** (PPARB) established under the Exchequer and Audit (Public Procurement) Regulations, 2001 which they claimed the 1st respondent ought to have invoked. The parties concurred with the findings of PPARB in **Review No. 108/2017**, that the applicable law was sections **155 (3) (a)** and **157 (8) (b)** of the PPADA which according to them was similar in wording as section **39(8) (b)(i)** of PPDA. According to them, the regulations made under PPDA were still in force pursuant to the Treasury Circular No. 02/2016 dated 29th March 2016. They however maintained that the preference margin in favour of the 2nd appellant was awarded erroneously on the basis that, pursuant to section **155** of the PPADA, such preference could only be granted to a bidder in its own right if it could demonstrate that the manufactured articles, materials and supplies were mined or produced in Kenya or they will be assembled in Kenya by the bidder but not by an affiliate or any other legal entity from the bidder. Further, that the 2nd appellant's request to be allowed to subcontract could only be made once evaluation has been done, the tender awarded and the contract entered into. According to them a party cannot sub contract what they did not have as the ability to subcontract comes into play when a bidder has won a tender and signed the contact and not at the evaluation stage.

The 7th respondent's answer to the petition was that the 2nd respondent had the statutory mandate to monitor the implementation of the law relating to procurement and since no orders were sought against it in the petition, it prayed to be recused from the proceedings which request was granted.

It's on those set of facts that the High Court based its now impugned decision. The learned Judge (**Odunga J.**) found that the 1st respondent had the necessary *locus standi* to institute the petition, on the premise that a person who feels that a public procurement does not meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness under Article **227** of the Constitution, and who has no other recourse known to law, should find solace in the High Court as the court entrusted under Article **165(2)(d)** with the mandate of hearing any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution. This is especially since the 1st respondent could not pursue recourse under the PPADA, as contended by the 2nd appellant, 3rd and 4th respondents since he was not a bidder or candidate for the tender. The High Court also found that to the extent that the 1st appellant was a creation of the Constitution, Article **231(3)** of the Constitution could not be successfully invoked to bar the court from investigating the constitutionality of its actions. The said constitutional provision had been invoked by the 1st appellant for the proposition that in the conduct of its affairs it is not under the direction or control of any person or authority.

The Judge also upheld submissions by the 1st appellant that the 1st respondent had relied on documentary evidence that was obtained in breach of the 1st appellant's right to privacy and those of its communications pursuant to Article **31** of the Constitution**.** This was on the basis that the 1st appellant had sought that the confidentiality of the said tender documents be protected and be expunged from the court record pursuant to or as provided under section **67** of the repealed Act. The Judge therefore expunged from the court record the following tender documents;

1. **Tender Documents Number CBK/64/ 2016-2017 "Exhibit 'OOO-1';**
2. **Tender Documents Number CBK/37/2017-2018 "Exhibit 'OOO-1',**
3. **Tender Documents Number CBK/64/ 2016-2017 "Exhibit 'OOO-1';**
4. **Tender Documents Number CBK/37/ 2017-2018 "Exhibit 'OOO-1';**
5. **Tender Documents Number CBK/64/ 2016-2017 of "Exhibit 'OOO-1';** and
6. **Tender Documents Number CBK/37/ 2017-2018 "Exhibit 'OOO-1';**

The court went on to hold that the subject procurement was to be guided by the provisions of PPDA having established that the 2nd appellant could not qualify to be considered a Kenyan contractor to attract or deserve preferential treatment.

In regard to relying on evidence from **Nairobi HC Petition No. 568 of 2017**, which was withdrawn through the parties' consent, the Judge stated that depositions in an affidavit amounted to evidence and therefore withdrawal of a suit did not amount to withdrawal of evidence adduced therein unless such evidence was expunged from the record.

Ultimately, the Judge issued a declaration that the award of the tender made on 30th November 2017 by the 1st appellant to the 2nd appellant was both unconstitutional and unlawful and, therefore, invalid, null and void. The Judge then proceeded to quash the said award and issued an order compelling the 1st appellant to transparently re-evaluate the bids of all compliant bidders and to award the tender strictly in accordance with the law. Finally, he awarded costs of the petition to the 1st and 2nd respondents to be borne by the 1st appellant.

Aggrieved with the findings and wishing to contest the aforesaid determinations in this court, the appellants filed separate notices of appeal, pursuant to which the two appeals, **Civil Appeal Nos. 116 and 119 of 2018** respectively were subsequently filed.

In its memorandum of appeal, the 1st appellant had a whooping 28 grounds upon which it sought to impugn the judgment of the High Court. However, in its written submissions and oral highlights, the 1st appellant condensed those grounds into 8 broad ones to wit; whether the Judge erred in law and misdirected himself on the applicable law on the tender; erred in holding that the petition met the threshold under Articles 3(1), 22(1) and 258(c) of the Constitution; failed to appreciate that the petition was filed on behalf of a private entity Crane AB, disguised as a public interest litigation; erred in considering expunged tender documents in determining the petition; erred in accepting as evidence in support of the petition pleadings and affidavits in a withdrawn Nairobi HC Petition No. 568 of 2017 as evidence in support of the petition; failed to appreciate that the advertisement dated 14th June 2014 related to tender number CBK/043/2013/2014 and was for pre-qualification of suppliers for production of Banknote Origination Material and Currency Printing Services and not the tender restricted for printing and supply of new design Kenya Currency Banknotes; in holding that the 1st appellant wrongly applied the 15% preference margin to the bid by the 2nd appellant and finally, whether the Judge erred in holding that the process and award of the tender was unconstitutional.

On its part, the 2nd appellant impugned the judgment on 9 grounds which it reduced into 3 broad ones in its written submissions. That is to say, whether the governing law for the evaluation of the tender was PPDA; whether the 15% margin preference awarded to the 2nd appellant was in accordance with the law and lastly, costs.

At the hearing of the appeals, counsel appearing for the respective parties applied to have the appeals consolidated as both rose from the same determination, concerned same parties and similar pleadings. For expedient and efficient disposal, the appeals were consolidated with **Civil Appeal Number 116** being the running file. At the same time, the 7th respondent applied to have itself recused from this appeal since it was neither supporting nor opposing the same. The request was granted. Earlier on, it had been agreed during the case management conference before the Deputy Registrar of this Court that the appeals be canvassed by way of written submissions with limited oral highlights. Subsequently all the parties filed and exchanged respective written submission.

In its written submissions, the 1st appellant submitted that the learned Judge misdirected himself on the applicable law and challenged the Judge's reliance on section **39 (8)** of PPDA to find that the 2nd appellant did not qualify for preferential procurement. The said provision was in terms;

> **"In applying the preferences and reservations under this section—**
>
> **a. exclusive preference shall be given to citizens of Kenya where—**
>
> **i. the funding is 100% from the Government of Kenya or a Kenyan body; and**
>
> **ii. the amounts are below the prescribed threshold.**
>
> **b. a prescribed margin of preference shall be given—**
>
> ***i.* in the evaluation of bids to candidates offering goods manufactured, mined, extracted and grown in Kenya;**
>
> ***or***
>
> **ii. works, goods and services where a preference shall be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed."**

To it the applicable law was the PPADA which stipulated in section **183** that the transitional provisions in the 3rd Schedule to the Act were applicable. The said transitional provisions stipulated that procurement proceedings commence when the first advertisement in relation to the tender is made or where there is no advertisement when the tender was first floated. According to the 1st appellant, the tender was issued on 24th October 2017 and by then the applicable law was the PPADA. It pointed out that the learned Judge had in his ruling in respect of **Judicial Review Nos. 6** and **7** of **2018** which arose from the same tender proceedings determined that the applicable law was the PPADA. It was on this basis that he had quashed the 2nd respondent's ruling. That ruling still stood as no appeal had been proffered. The appellant was therefore of the view that the same Judge could not turn around and invoke PPDA in determining the petition leading to this appeal.

The 1st appellant also advanced the argument that the petition failed to meet the threshold of a constitutional petition as per Articles **3 (1), 22 (1) and 258 (2) (c)** thereof. This was based on grounds that the 1st respondent failed to present specific and or precise injury occasioned to him from the alleged infractions of the Constitution. The 1st appellant accused the 1st respondent of citing omnibus constitutional provisions and failing to detail to the court the manner of infringement which, as a result, prejudiced it in the prosecution of its defence. It reiterated that the petition was disguised as public interest litigation brought on behalf of the public while in the actual sense was instituted on behalf of a private entity, Crane AB., a losing bidder. As such it argued that the petition was actuated by malice and was intended to hinder a duly conducted tendering process. The case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Ors, Civil Appeal No. 290 of 2012** was cited for the proposition that where a person acts for personal gain or for profit or another oblique consideration, the court ought to refrain from allowing itself to be used. According to the 1st appellant, the petition was meant as an instrument to obstruct its independence in carrying out its statutory mandate.

The 1st appellant also submitted that following an application dated 19th December 2017, the learned Judge expunged tender documents already alluded to elsewhere in this judgment which he considered to have been irregularly obtained by the 1st respondent. However, and in an inexplicable manner, the Judge proceeded to rely on the same expunged documents in his determination to its prejudice. It accused the Judge of contravening **Article 50 (4),** of the Constitution which provides that evidence obtained in a manner that violates any right or fundamental freedom ought to be excluded from consideration and for failing to follow the binding Supreme Court's precedent of **Njonjo Mue & Another v Chairperson of IEBC & 3 Others (2017) eKLR** on the issue. According to this decision, once documents had been expunged from the record, a court could no longer rely on them.

Further and according to the 1st appellant, the Judge erred in considering evidence tendered in the **Nairobi HC Constitutional Petition No. 568 of 2017** which had been filed by the 3rd and 4th respondents on the basis that the issues in the petitions were different from those in the instant petition. The appellant further faulted the Judge for failing to appreciate that there was no bar to the 2nd appellant subcontracting its local affiliates.

It was also the 1st appellant's submission that the Judge erred in failing to appreciate that the advertisement of June 2014 related to tender No. CBK/043/2013/2014 and was for *pre-qualification of suppliers for production of Banknotes origination material and currency printing services* and not the tender which was a Restricted Tender for Printing and supply of new Design Kenya Currency notes. According to the 1st appellant the learned Judge failed to appreciate that the two tenders were distinct and stand alone. Further, that the 2nd appellant had sought clarifications on preference and reservations criteria, sub-contracting or use of local affiliates on 6th November 2017. In response, it issued Addendum No. 3 and denied that the same was introduced to favour the 2nd appellant since it was not the only one it had issued. And that sub-contracting was provided for in the special conditions of the tender document; and any bidder was free to seek its express authority. It maintained that the 2nd appellant was entitled to the preference margin as the place of currency printing was in Kenya once materials had been sourced and not based on shareholding. According to it, a candidate who subcontracts was still entitled to the margin. It denied claims of the tendering process being unconstitutional.

The 2nd appellant in its written submissions stated that the 1st appellant's tender for pre-qualification of suppliers was issued in June 2014. That the said tender No. CBK/043/2013/2014 closed on 8th July, 2014 and was evaluated in accordance with PPDA, 2005 as the prevailing law then. From that tender, 4 candidates emerged. On 24th October 2017, the appellant issued the restricted tender to the four prequalified candidates and since by then the PPADA, had commenced, it contended that PPADA and the regulations thereunder as guided by National Treasury Circular No. 2 of 2016 were applicable. It was categorical that the tender was not a continuation of the earlier tender the subject of the June 2014 advertisement. In the circumstances and in its view therefore, the applicable provision was section **183 (2)** of the PPADA, which stated that procurement proceeding commenced when the first advertisement relating to the procurement is published or, *if there is no advertisement, when the first* documents are given to persons who wish to participate in the procurement process.

It also based its argument for the prequalification tender on section **93** of the PPADA. To buttress its point further, it cited the case of **Republic v Chief Magistrates Court Mombasa ex parte Mohamed Mohamed Hashi & 8 Others (2010) eKLR,** where that court held that courts should always turn first to one cardinal rule before all others- courts must presume that what a legislature says in a statute is what it says there.

Accordingly, and having established that the PPADA was the applicable law, the 2nd appellant went further to submit that pursuant to section **155 (3) (a)** thereof, preference was to be given to manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya or firms where Kenyans were shareholders. It explained that the margin was applied on the basis of manufactured goods and or materials partially mined or produced in Kenya or where applicable have been assembled in Kenya. In that regard, it was its submission that it had demonstrated that it had sub-contracted a substantial portion of the print tender and that locally assembled materials, supplies will be used. According to it, the entire procurement process was above reproach.

The 1st respondent came out strongly in opposition to the appeals. He asserted that he was dedicated to upholding the principles of good governance espoused in Article **10** of the Constitution including patriotism, the rule of law, human rights, democracy, transparency and accountability in governance. According to him, the appeals were incompetent and ought to be struck out on account of failure to comply with rule 77(1) of the Court of Appeal rules. He submitted that the High Court orders were being challenged in their entirety. That in particular Order No. 3 directly affected all the bidders making all of them necessary to be enjoined in the appeal. Accordingly, the appellants ought to have served the notice of appeal and record of appeal on all the bidders, being **Crane AB, Oberthur Fiduciarie and Giesecke & Dervient.** This was however not done. To the 1st respondent therefore, by failing to serve the notice of appeal and the record of appeal on the above parties who were directly affected by the appeal, rendered it fatally defective and liable to be struck out with costs. In support of this proposition, the 1st respondent relied on the following cases; **Peter Martin Ahn v Jenifer Wairimu Opend**a **[1982] eKLR, Sheikh v Sheikh & Another [1989] eKLR**, and **M.S.K. v S.N.K. [2010] eKLR.**

The remaining respondents did not make any submissions on this aspect of the appeal either in their written submissions or oral highlights, neither did the 1st appellant.

The 2nd appellant however, in response submitted that there was no single party in the original petition that was not enjoined in this appeal. In any event, the petition was filed by the 1st respondent and not the appellants. He chose the parties. Finally, it was submitted that as parties were waiting for judgment, Crane AB rushed to court seeking to withdraw from the petition. It could not then be made a party to the appeal. As far as the appellant was concerned, every party necessary was joined in the appeal.

The 1st respondent went on to submit that the procurement proceedings commenced in June 2014 as admitted in 1st appellant's replying affidavit dated 17th November 2017, sworn by one **Peter Anthony Wainaina Kigondu** in **Nairobi HC Petition No. 568 0f 2017.** That the four companies that prequalified were all wholly owned foreign companies who under Kenyan procurement laws, including both the PPDA

and PPADA, do not qualify for preferences and reservations. He contended that the 2nd appellant's local affiliates failed to prequalify and were therefore locked out of the tender process. He maintained that without the illegal application of the margin, the 2nd appellant was not the lowest evaluated bidder having emerged at position number three.

The 1st respondent dedicated a significant portion of his submissions to convincing us that he had *locus standi* to institute the petition in the High Court. He based his submissions on the doctrine of public interest litigation. None of the parties herein in this appeal appear to contest his *standi* per se to pursue litigation in public interest though concerns or questions regarding the bona fides of such litigation have been raised. The appellants for instance, have raised the ground of appeal that the High Court failed to appreciate that litigation in this case was not genuine public interest litigation but was disguised or clothed as such. The issue of *locus standi* had been raised before the High Court and was rightly settled or conclusively determined by the Judge. His *locus standi* to institute these proceedings in public interest is therefore uncontested and we do not think is an issue for determination in this appeal.

The 1st respondent further argued that the documents expunged were not crucial to the determination of the matters raised in the petition and denies the allegations made against the Judge that he still went ahead to consider the expunged documents in his judgment. According to the 1st respondent, what the Judge did was to summarize the arguments made by the parties.

The 2nd and 6th respondents filed joint written submissions and supported the learned Judge's findings that the applicable law was PPDA and not the PPADA as contended by both appellants. They also concurred with the High Court findings that the 2nd appellant was not a Kenyan contractor so as to attract or qualify for a preferential margin. According to these respondents, giving the 2nd appellant preferential treatment was contrary to Article **227** of the Constitution since grant of undeserved preference was unfair, unlawful and went against the letter and spirit of the Constitution.

In their joint written submissions, the 3rd and 4th respondents reiterated that the main issue to be appreciated was that the tender was a stand-alone tender seeking purely printing and supply of the new design currency. That the pre-qualification exercise in 2014, was for origination design and printing services. That the first and only tender documents were issued to the bidders in October 2017 and hence the tender could only have been undertaken legally under the PPADA pursuant to section **183 (2)** thereof and section 1 of the Third Schedule to the Act. The case of **R v Public Procurement Administrative Board & Anor exparte University of Eldoret (2017) eKLR** was cited in support of the submission. The respondents reiterated averments made in the High Court that at no time did the 2nd appellant or themselves claim to be citizen contractors, which they submitted, had been captured by the learned Judge in his determination as follows;

> **"Therefore, going the 1*st* *Respondent's case as presented in Nairobi HC Petition No. 568 of 2017 the 3rd Respondent, De La Rue International Limited, could not lawfully qualify for preference under the relevant law. The 1st Respondent, in these proceedings has however contended that in submitting its tender number CBK/37/2017-2018, the 3rd* Respondent applied for sub-contracting and demonstrated that the goods to be supplied to CBK will be produced and assembled locally in Kenya through their affiliate company. Accordingly, the 1st Respondent granted the application of a 15 percent preference as set out in the law to De La Rue International Limited who sought to be granted preference and provided satisfactory evidence in accordance with the provisions of section 155(3)(a) of the PPADA. The margin of preference was not applied on the basis of shareholding but rather on the basis of manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya."**

They however faulted the Judge for proceeding to express doubt that the threshold for grant of preference had not been met despite those sentiments and accused the Judge of ignoring evidence on record and further that Nairobi HC Petition No. 568 of 2017 dealt with the issue whether the 3rd and 4th respondents ought to have been allowed to participate in the proceedings not as citizen contractors but as local companies with the ability to partially/wholly manufacture the new currency design at Ruaraka. These respondents accuse the Judge of misleading himself by finding that there was no satisfactory evidence of collusion but proceeding to determine that the award of the tender did not meet the constitutional threshold of transparency. In their view, that was improper exercise of discretion to warrant this Court's interference with the decision.

According to these respondents, the Public Procurement and Disposal Regulations 2006 under PPDA were still in force and applicable under PPADA and regulation **28 (2) (a)** thereof provided for a 15% margin of preference for goods manufactured locally. That a clause in the tender documents allowed prequalified bidders to apply for preference pursuant to the regulations. It was the respondents' contention that the 2nd appellant successfully applied for preference on the basis that it had local affiliates to whom it was to sub-contract a substantial portion of the print tender and which were to use locally assembled materials or supplies. Another consideration was that the 3rd and 4th respondents had previous engagements with the Kenyan government printing currency for more than 25 years and that there would be technological transfer and creation of employment opportunities for Kenyans. They cited the case of **R v The Public Procurement Administrative Review Board & Anor, Misc Appln. No. 540 of 2008** where the High Court had held that goods wholly or partially manufactured in Kenya would be eligible for preference under the applicable law. According to the respondents, the margin of preference was applicable regardless of whether it was under PPDA or PPADA.

During the oral highlight, **Mr. Ochieng Oduol** and **Mr. Fred Ngatia** appeared for the 1st and 2nd appellants respectively whereas the 1st respondent appeared in person, the 2nd and 5th respondents were represented by **Ms Ngelechei,** while **Mr. Njogu** appeared for 3rd and 4th respondents.

This Court is cognizant of its mandate pursuant to rule **29** of its Rules and as expounded in **Selle & Another v Associated Motor Board Co Ltd & Others, (1968) EA 123**. The mandate is to re-evaluate the evidence tendered and come into its own conclusion.

The issues that fall for determination in our view are as follows; whether the appeals ought to be struck out for want of joinder of essential or

necessary parties; the applicable law to the tender; whether the 15% preference margin was lawfully granted to the 2nd appellant and finally, costs.

With regard to joinder of parties to an appeal, Rule 77(1) of this court's rules, *inter alia*, provides:-

> **"An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal" (***emphasis supplied***)**

This simply means that any person likely to be directly affected by the outcome of the appeal should be served with a notice of appeal and later by the record of appeal so that he/she can participate in the appeal if she/he chooses or desires.

Were all persons directly likely to be affected by this appeal served? We think so. It should be noted that it is the 1st respondent who initiated the petition and named the parties. All those parties named by the 1st respondent and who participated in the proceedings leading to this appeal were all served with the notice of appeal and subsequently with the record of appeal. Indeed they all participated in this appeal. As correctly submitted by Mr. Ngatia, there is no single party named in the petition that was not served or made a party to this appeal. Having initiated the petition and named the parties who all have been enjoined in this appeal, the 1st respondent cannot turn around and blame the appellants for not bringing into the appeal parties he himself felt would not be affected by his petition. The 1st respondent at this late stage cannot be allowed to profit or benefit from his own mischief, if mischief it was.

In any event, even if there was merit in this ground of appeal, rule 84 of this Court's rules bars us from entertaining the drastic step sought by the 1st respondent.

It is in these terms: -

> **"84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.**
>
> **Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."**

From the above provision, the 1st respondent is barred from applying to strike out the appeal at this stage.

In arriving at the finding that the applicable law was the PPDA, the Judge considered the provisions of section **183** of the PPADA which provide that the transitional provisions specified in the Third Schedule would apply. The said Third Schedule provides as follows;

> "(1) **Procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act.**
>
> **2. For the purposes of subparagraph (1), procurement proceeding commences when the first advertisement relating to the procurement proceeding is published *or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding."***

The Judge also considered the deposition made by the 1st appellant in the withdrawn **Nairobi HC Petition No. 578 of 2017** where in its reply, the appellant had deponed that the procurement proceedings began with the advertisement Tender No. CBK/043/2013/2014 by the 1st appellant for the prequalification of suppliers in June 2014. Though arguments have been made that the Judge erred in relying on pleadings and affidavit evidence filed in the withdrawn petition, the 1st respondent has been emphatic in his submissions and correctly so, in our view, that the said evidence was admissible. He contended that the said evidence had never been recanted by the deponent in those proceedings and when the petition was compromised the evidentiary value of the evidence contained in the affidavit was not taken away. Faulting the Judge for considering the said evidence is baseless and unfounded therefor. Such evidence is indeed admissible. **Halsbury's Laws of England, Vol 17 paragraph 196** provides that;

> "**an affidavit made in one proceeding is admissible in evidence in a subsequent proceeding as proof of the facts stated in it, against the party who made the affidavit, or against the party on whose behalf it was made, on its being shown that he knowingly made use of it.**"

See also the case of **Sri Mohammed Abdul Ahmad v Sri Mohammed Abdul Gafoor** C.R.P. No. 237 OF 2012, where it was held that:

> **"Once the affidavit becomes part of record, the party who filed it loses the right and prerogative to change or alter it."**

On the basis of the admission, the Judge held that the applicable law was the PPDA since by then the PPADA had not been enacted.

Before this Court, the appellants fault the Judge for applying the wrong statute. They raise compelling arguments to the effect that the impugned tender was distinct and a stand-alone, that was issued specifically to the pre-qualified bidders on 17th October 2017. They fault the

Judge for failing to appreciate that the subject matter of the 1st respondent's petition in the High Court was the tender floated on 17th October 2017 and not tender No. **CBK/043/2013/2014** carried in the advertisement of June 2014 of which the PPDA applied. According to the appellants the relevant provision was contained in the Third Schedule of PPADA to the effect that '*if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.'* They contend that the first and only documents relating to the tender were issued to the bidders in October 2017 well after the commencement of the PPADA on 7th January 2016. On the other hand, the 1st respondent contended that procurement proceedings can refer to several tenders. Further, that procurement proceedings for the printing and supply of new design currency was done in phases and that the first phase commenced in June 2014.

The learned Judge's finding that the tendering process ought to have been guided by PPDA was supported by the 2nd and 5th respondents. They support the view that the first advertisement relating to the subject matter was published on 14th June 2014 and the applicable law was the PPDA. It is apparent that the 15% preferential margin was applied in favour of the 2nd appellant pursuant to sections **155** and **157** of the PPADA.

The 1st respondent had further maintained that the preferential margin could not legally be granted thereunder because the Cabinet Secretary had not operationalized the provisions by gazetting the regulations required under the Act. Regulation **177** of the Public Procurement and Asset Disposal Regulations, 2017, was intended to operationalise section **157 (8) (b)** of the PPADA but the Regulations were yet to be gazetted and/or to be tabled before Parliament for scrutiny and approval as required by section **11(1)** of the Statutory Instruments Act. Having established so, the Judge however relied on section 182 (2) of PPADA to find that the said regulations were applicable in the absence of any other regulations to operationalize the PPADA. Both the PPDA and the PPADA provided for 15% preferential margin for Kenyan citizens or contractors in promotion of local industry. It is discernable that section **39 8. (b) (i)** of the repealed Act is couched in similar terms as sections **155 (3) (a)** and

157 (8) (b) of the PPADA. It therefore follows that the 15% preferential margin could be lawfully applied under both regimes since the Public Procurement and Disposal Regulations, 2006 were applicable to both depending on the circumstances.

The 1st respondent further pointed to 1st appellant's own admission that the procurement proceedings started with the 14th June 2014 advertisement in the regional newspaper, *The East African* contained in the affidavit of **Peter Anthony Wainaina Kigondu** in the withdrawn petition**.** The date of that advertisement is crucial as it then invokes the provisions of the Third Schedule, sections 1 and 2 of the PPADA which are to the effect that procurement proceedings that commenced before the coming into force of the PPADA should continue under the applicable or prevailing law when they began. Going by the 1st appellant's admission in those proceedings then the applicable law would be the PPDA.

However, in this appeal, appellants as already stated, refute that position and allege that the tender was a stand-alone tender, rather than a continuation of any previous tender, issued on 24th October 2017 specifically to the prequalified candidates from the first prequalification exercise.

Section **93** of the PPADA provides as follows;

> "1) **Subject to provisions of subsection (2), an accounting officer of a procuring entity where applicable, may conduct a pre-qualification procedure as a basic procedure prior to adopting an alternative procurement method other than open tender for the purpose of identifying the best few qualified firms for the subject procurement.**
>
> **2. Pre-qualification shall be for complex and specialized goods, works and services."**

Pre-qualification is defined in section **2** of the PPADA as a procedure to identify and shortlist tenderers that are qualified, prior to invitation of tenders. It becomes apparent after a reading of that provision that the tender now impugned falls squarely under that section being for goods of a specialized nature for which the appellant could conduct a prequalification before subsequent invitation of tenders. It is conceded that the pre-qualification exercise started with the advertisement of 14th June 2014 inviting local and international bids and closed on 8th July, 2014. That process produced the four candidates that on 24th October 2017 bidded for the tender. The applicable law then was the PPADA which had come into force on 7th January 2017 as per the guidance of National Treasury Circular No. 2/2016. In any event, the tender documents also referred to the PPADA as well.

We also agree with the contention that the issues in the withdrawn petition and the issues herein were different though related to the same subject matter and there would have been no need for the 1st appellant in that petition to split hairs or even contemplate the present petition where the issue of commencement of the procurement proceedings would be pegged on its averments therein. In this case, the 2nd respondent in its decision of 8th January 2018 found the applicable law to be the PPADA. The High Court also in its determination of **Judicial Review Nos. 6** and **7 of 2018** arrived at the same conclusion. The departure of the Judge from that position and to revert to the PPDA in determining the impugned decision, therefore, has no rational explanation or basis. As correctly observed by the appellants, it smacks of unnecessary contradiction.

On the issue whether the 15% preference margin was lawfully applied in favour of the 2nd appellant, section **3** of the PPADA provides the guiding principles to state organs and public entities to public procurement and asset disposal. The said section provides as follows;

> **"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—**

a. the national values and principles provided for under Article 10;

b. the equality and freedom from discrimination provided for under Article 27;

c. affirmative action programmes provided for under Articles 55 and 56;

d. principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);

e. the principles of public finance under Article 201;

f. the values and principles of public service as provided for under Article 232;

g. principles governing the procurement profession, international norms;

h. maximisation of value for money"

As such this Court must re-examine whether the basis upon which the 1st appellant applied the preferences and reservations was in accordance with the law. According to the 1st appellant, the preferential margin in favour of the 2nd appellant was made pursuant to section 155 and 157 of the PPADA. Those sections *inter alia*;

"Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.

2. Subject to availability and realisation of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.

3. Despite the provisions of subsection (1), preference shall be given to—

a. manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or

b. firms where Kenyans are shareholders.

4. The threshold for the provision under subsection (3) (b) shall be above fifty-one percent of Kenyan shareholders.

5. Where a procuring entity seeks to procure items not wholly or partially manufactured in Kenya—

a. the accounting officer shall cause a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya; and

b. the procuring entity shall require successful bidders to cause technological transfer or create employment opportunities as shall be prescribed in the Regulations."

Whereas section 157 is in these terms:

"157. Participation of candidates in preference and reservations

1. Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.

2. Subject to subsection (8), the Cabinet Secretary shall, in consideration of economic and social development factors prescribe preferences and or reservations in public procurement and asset disposal.

3. The preferences and reservations referred to in subsection (2) *shall-*

a. be non-discriminatory in respect of the targeted groups;

b. allow competition amongst the eligible persons; and

c. be monitored and evaluated by the Authority.

4. For the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition of discrimination, reservations, preferences and shall apply to-

a. candidates such as disadvantaged groups;

b. micro, small and medium enterprises;

c. works, services and goods, or any combination thereof;

d. identified regions; and

e. such other categories as may be prescribed.

5. An accounting officer of a procuring entity shall, when processing procurement, reserve a prescribed percentage of its procurement budget, which shall not be less than thirty per cent, to the disadvantaged group and comply with the provisions of this Act and the regulations in respect of preferences and reservations.

6. To qualify for a specific preference or reservation, a candidate shall provide evidence of eligibility as prescribed.

7. The Authority shall maintain an up-to-date register of contractors in works, goods and services, or any combination thereof, in order to be cognizant at all times of the workload and performance record.

8. In applying the preferences and reservations under this section –

a. exclusive preferences shall be given to citizens of Kenya where-

i. the funding is 100% from the national government or county government or a Kenyan body; and

ii. the amounts are below the prescribed threshold'

iii. the prescribed threshold for exclusive preference shall be above five hundred million shillings;

b. a prescribed margin of preference shall be given-

i. in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or

ii. works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

9. For purposes of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

10. Despite subsection (2) or any other provisions of this Act, every procuring entity shall ensure that at least thirty percent of its procurement value in every financial year is allocated to the youth, women and persons with disability.

11. Every procuring entity shall ensure that all money paid out to an enterprise owned by youth, women or persons with disability is paid into an account where the mandatory signatory is a youth, woman or a person with disability.

12. The procuring entities at the national and county level shall make a report after every six months to the Authority.

13. A report under subsection (12) shall-

a. certify compliance with the provisions of this section; and

b. provide data disaggregated to indicate the number of youth, women and persons with disability whose goods and services have been procured by the procuring entity.

14. The Authority shall made a report to Parliament after every six months for consideration by the relevant committee responsible for equalization of opportunities for youth, women and persons with disability, which report shall contain details of the procuring entities and how they have complied with the provisions of this section.

15. The Cabinet Secretary shall prescribe the preferences that shall facilitate the attainment of the quota specified in subsection ***10. in order for the State to achieve the objectives of Articles 55 and 227(2) of the Constitution.***

16. The preferences referred to in subsection (15) shall-

a. be prescribed within ninety days after commencement of this Act;

b. be subject to such conditions as the Cabinet Secretary may specify therein but such conditions shall not pose any unnecessary impediment to the youth from participating in public procurement.

17. The National Treasury shall operationalize a preference and reservations secretariat to be responsible for the implementation of the preferences and reservations under this Act which shall be responsible for-

a. Registration, prequalification and certification of the persons, categories of persons or groups as provided for in under Part XII;

b. Training and capacity building of the above target groups;

c. Providing technical and advisory assistance to producing entities in the implementation of the preferences and reservations under t6hs act; and

d. Monitoring and evaluating the implementation of the preferences and reservations under this Act.

18. The National Treasury shall provide adequate staff and resources for the operations of the secretariat."

The 2nd appellant has been adamant that it did not apply for the preferential margin on claims or basis that it was a citizen contractor. Its case was that it applied for preferential margin on the basis that it was the only candidate with locally registered and established affiliates, referring to its subsidiaries, the 3rd and 4th respondents. According to the 2nd appellant it had employed more than 300 Kenyans and contributed more than KES 150 million to the Kenyan economy annually through its affiliates. It also intimated to having an established relationship with the 1st appellant since setting up its affiliates in 1992 and had since then for a period of more than 25 years produced currency for the 1st appellant. That preference was also on the footing that the manufactured articles, materials and supplies would be partially mined, produced or assembled in Kenya. If any candidate was to qualify for the preferential margin then it was definitely a contender.

The 2nd appellant has not denied being a foreign registered company. In fact, it has been categorical that nowhere in these proceedings nor in the tender documents has it claimed or intimated to be a Kenyan contractor. It has explained that it applied for the preferential margin not based on its shareholding or ownership. According to it, justification for applying for the preferential procurement was on grounds that it was the only prequalified candidate with locally registered affiliates. It claimed that it had an established currency manufacturing plant in Ruaraka, referring to the 3rd respondent whom it averred was registered locally in 1992 and employs over 300 Kenyan employees. Further, that it had previously supplied the 1st appellant with its currency requirements for almost 25 years and contributes over Kshs 150 million to the Kenyan economy. It maintained that it qualified for preferential treatment further based on the reason that some of the raw materials and supplies would be partially mined or produced in Kenya or where applicable, have been assembled in Kenya. It maintained that in the circumstances of this case, preference margin was granted upon it demonstrating that it had sub-contracted substantial portion of the tender and that locally assembled materials, supplies and articles would be used.

If that is so, the issue then becomes whether the 2nd appellant could legally sub-contract its local affiliates? This was considered by the learned Judge and who after analysis came to the following conclusion;

"218. According to the Petitioner, no bidder sought and obtained the authority of the procuring entity to subcontract part of or the whole contract. It is not in doubt that pursuant to Addendum Number 3 issued pursuant to clause 2.5.2 of the Tender Document, a successful tenderer wishing to subcontract may seek express authority from the 1*st* *Respondent as already provided for under Clause 3.15 of the Special Conditions of Contract. However, the 3rd Respondent countered that contrary to the Petitioner's contention, the 3rd Respondent indeed applied for leave to subcontract to the local entities in a letter dated 17th* November 2017 and as per the findings of the Public Procurement Administrative Review Board, the request to subcontract was approved by the Governor of Central Bank on 29*th* November 2017. It is on account of the above demonstrated capacity and intention to perform the Tender in Kenya through its Kenyan affiliates using Kenyan workforce and facilities that the 3*rd* Respondent was evaluated more favourably than the other tenderers.

219. In my view, the Petitioner's contention that there was no authority to subcontract does not hold. As to whether the same was valid in other respects is another matter."

The sub-contracting was therefore applied in the 2nd appellants favour pursuant to an addendum to the tender documents. The 2nd appellant had complained that the Judge failed to appreciate that preference was evaluated in accordance with the PPADA together with the tender documents which included the addendum.

Vide a letter dated 6th November 2017, the 2nd appellant sought clarifications from the 1st appellant on preference and reservations criteria, sub-contracting and the use of local affiliates or subsidiaries to execute the tender. The clarifications were sought before any bids had been made by any of the candidates and were pursuant to clause 2.5.1 of the Tender Document. On 8th November 2017, the 1st appellant issued an addendum No. 3 wherein it informed or clarified to the candidates of its preferences and reservations criteria. The preferences and reservations were to be made pursuant to sections **155** and **157** of the *PPADA* and were to be applied to bidders who demonstrated that they were entitled to the same. According to the 1st appellant, addendum No. 3 as part of the tender followed Addendum Nos. 1 and 2 issued on

31st October 2017 and 6th November 2017 respectively following clarifications sought by the bidders as provided for in the tender documents. This was submitted to dispel allegations made by the 1st respondent that addendum No. 3 had been issued by it as part of a plan to tilt or rig the tender in favour of the 2nd appellant. According to the 1st appellant subcontracting by any of the prequalified candidates had been provided for under clause 3.15 of the Special Conditions of Contract on condition that bidders who sought to sub-contract part or whole of the contract were to obtain express authority of the 1st appellant.

Though the 1st respondent submitted that the award of the tender was unfairly tilted or rigged in favour of the 2nd appellant through the issuance of Addendum No. 3, there being no evidence of collusion or sweetheart deal as also found by the High Court, then this Court cannot base its decision on unproven allegations. The addendum was rightly issued pursuant to clarifications sought and it is pursuant to it that the 2nd appellant applied for preferential treatment and subcontracting. Therefore, and as submitted by the 1st appellant, there was no bar to the 2nd appellant to subcontract. The 1st respondent has argued that the 2nd appellant's request to be allowed to subcontract could only be made once evaluation had been done, the tender awarded and the contract entered into. According to him, a party cannot sub contract what they did not have as the ability to subcontract comes into play when a bidder has won a tender and signed the contact and not at the evaluation stage. In our view, that position cannot obtain in every situation and circumstance. In the instant case, the prequalified candidates were to demonstrate eligibility for preferential procurement and had to seek consent of the 1st appellant to subcontract prior to the award of the tender considering the specialized and complex nature of the goods and or services the procuring entity required.

It's apparent that all the four prequalified candidates were foreign controlled entities. Only the 2nd appellant could qualify for the preferential margin as envisaged under the PPADA by any stretch of imagination. That qualification was met upon confirmation by the procuring entity that sub-contracting was allowed and further upon application for the preferential margin under section 155 (3) of the PPADA based on its local affiliates. The 1st appellant in fact submitted that the use of the respondent's premises in Kenya was sufficient proof of eligibility for the preference margin.

The 1st respondent also contended that the PAC report had found the 2nd appellant's local affiliates lacking capacity to undertake the tender. However, the said report was rejected as submitted by the appellants. Nothing therefore turns on it.

The 5th respondent opposed the petition in the High Court. Its position then was that the PPADA allows for preference of tenderers by procuring entities upon the satisfaction of the set criteria. Further, that the grant of preference could not be a ground for alleging constitutional violations unless it could be shown the set criteria under the Act was not met. It would appear that since then, the 5th respondent's position has shifted or changed. It now claims that the Judge misdirected himself in applying the repealed PPDA. It has also, in this appeal, supported the 1st respondent's case that the 2nd appellant was not a Kenyan contractor so as to attract preferential treatment. In its view, no evidence was tendered to prove that the criteria in section **155 (3) (a).** Needless to say, the 5th respondent does not come off as reliable by approbating and reprobating. We do not think that its submissions deserve consideration or should be taken seriously.

Finally, on this aspect of the matter, it was claimed that the Judge relied on expunged documents in reaching its conclusion on the constitutionality of the tender process. The 1st respondent however, disputed the contention and submitted that the Judge only made reference to the expunged documents when he summarised the facts of the case. That the Judge never reverted to those documents in the judgment and indeed they were not the basis of the judgment.

From the record, it is apparent that by an application dated 19th December, 2017, the 1st appellant applied to strike out from the petition the tender documents listed in the application to wit;

Tender Documents numbers:

- CBK/64/2016-2017
- CBK/37/2016-2018
- CBK/64/2016-2017
- CBK/37/2017-2018
- CBK/64/2016-2017 and
- CBK/37/2017-2018

In his judgment, the Judge held that the documents complained of as aforesaid by the appellant had been irregularly obtained and proceeded to expunge them from the record. Having expunged the said documents, it does appear that the Judge however, still went ahead to rely and consider them in determining the merits of the petition to the prejudice of the appellant, we should say. Nowhere in the judgment does the Judge allude to the fact that in arriving at his decision, he had discounted the expunged documents. The submission by the 1st respondent, to the contrary thus, must fail.

In the case of **Njonjo Mue & Another v IEBC** (supra) it was held, as already stated, that once documents have been expunged from the record, the court cannot consider or be led by them. Going by the assertion by the 1st respondent that the aforesaid Supreme Court decision was made *per incuriam* and therefore of no precedential value and that we should be at liberty to depart from it and not to be bound, we cannot help but think that at the back of his mind, the 1st respondent believed that in his judgment, the Judge had actually reverted to the expunged documents. It is not for us nor is it our place to declare decisions of the Supreme Court, *per incuriam*. We are bound by such decision, although we may at times not agree with them.

We would in the circumstances agree with the submissions of the appellants that by considering the contents of the expunged documents, the

Judge contravened Article 50(4) of the Constitution that provides for the exclusion of illegally obtained evidence. Further, by considering the expunged tender documents, the Judge misdirected himself, resulting in the unfair determination of the tender award in his judgment. Upon the documents being expunged, the petition, in our view, had no legs left to stand on.

According to the 1st respondent, it is trite that costs follow the event. The award of cost is at the discretion of court which of course is exercised judiciously having regard to the peculiar circumstances of each case. The Constitutional Court of South Africa in the case of **Biowatch Trust v. Registrar Genetic Resources and Others** (**CCT80/08**) observed that, as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs.

Though the 1st respondent's interest in bringing the petition has been questioned on accusations that he brought it on behalf of a proxy who had interest in the matter, namely M/s Crane AB, such allegations largely remain unproved. Neither the appellants nor any other party for that matter pursued those allegations before this Court and nor were the accusations proved in the High Court. The 1st respondent described himself as a law-abiding citizen and a human rights defender seeking to promote democratic governance, economic development and prosperity. He expressed dedication to public interest litigation in advancement of the national values and principles of governance espoused in Article 10. The litigation undertaken in this case by the 1st respondent though unsuccessful in this Court cannot be termed as frivolous, vexatious or malicious. The 1st respondent cited the Supreme Court's decision of **People's Union for Democratic Rights & Ors v Union of India & Ors 1983 SCR (1) 456**, in which it was expressed as follows;

> **"Public interest litigation is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the Court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them."**

We are also mindful of our mandate to exercise caution and prudence to see that a body of persons or member of public, who approaches the court, is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. See **Tom Mboya Odege v Edick Peter Omondi Anyanga & 2 others [2018] eKLR**.

As already alluded to, allegations of *malfides* and or vested interests were never proved and remained allegations. The 1st respondent's petition met the threshold of public interest litigation as per the **Black's Law Dictionary** which defines "Public Interest Litigation" as:

> "**a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected**".

The Supreme Court in **Jasbir Singh Rai & 3 Others vs Tariochan Singh Rai & 4 Others (2014) eKLR** observed that in matters in the domain of public interest litigation tend to be exempted from award of costs. We shall therefore not penalise the 1st respondent in costs following the success of the appeal.

On the whole, the appeal succeeds. The Judgment and Decree of the High Court in **Petition Number No. 597 of 2017** dated 9th April, 2018 is hereby set aside and substituted with an order dismissing the said petition with no order as to costs in respect of the proceedings both in the High Court and in this Court.

Dated and delivered at Nairobi this 12th day of October, 2018.

E. M. GITHINJI

……..…….

JUDGE OF APPEAL

ASIKE-MAKHANDIA

……..…….

JUDGE OF APPEAL

SANKALE ole KANTAI

……..…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MAKHANDIA & KANTAI, JJ.A)

CIVIL APPEAL NO. 116 OF 2018

BETWEEN

CENTRAL BANK OF KENYA.....1ST APPELLANT

DE LA RUE INTERNATIONAL LIMITED.....2ND APPELLANT

AND

OKIYA OMTATAH OKOITI.....1ST RESPONDENT

PUBLIC PROCUREMENT REVIEW AUTHORITY.....2ND RESPONDENT

DE LA RUE CURRENCY & SECURITY PRINT LTD.....3RD RESPODNENT

DE LA RUE KENYA EPZ LIMITED..... 4TH RESPONDENT

THE HON. ATTORNEY GENERAL..... 5TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....6TH RESPONDENT

THE ETHICS & ANTI-CORRUPTION COMMISSION... 7TH RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (**G. V. Odunga, J.**) delivered on the 9th *day of April, 2018 in* **Petition No. 597 of 2017)**

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Consolidated With

Civil Appeal No. 119 Of 2018

JUDGMENT OF THE COURT

By a Petition dated 11th December, 2017, **Okiya Omtatah Okoiti** "the 1st respondent" petitioned the High Court for various declarations and orders against the **Central Bank of Kenya** "*the 1st appellant*", **De La Rue International Limited** "*the 2nd appellant*", **Public Procurement Review Authority,** "*the 2nd respondent*", **De La Rue Currency & Security Print Ltd** "*the 3rd respondent*" and **De la Rue Kenya EPZ "***the 4th* respondent". The petition also named the **Attorney General**, the **Director of Public Prosecutions** and the **Ethics and Anti-Corruption Commission** as interested parties and are enjoined in this appeal as the 5th, 6th and 7th respondents respectively. The petition alleged contravention of **Articles 27, 35** and **47** of the Constitution and the national values and principles of governance set out in Articles **1, 2, 3, 10, 231 (3), 232** and **259 (1)** of the Constitution by the appellants and in particular the 1st appellant. The subject matter of the dispute leading to the petition was Restricted Tender for Printing & Supply of New Design Kenya Currency Banknotes, being Tender Reference No. **CBK/37/2017-2018**, "*the tender*". The gravamen of the petition was that the 1st appellant in awarding or purporting to award to the 2nd appellant the tender on 30th November 2017, contravened and or violated the aforesaid provisions of the Constitution, the Public Procurement & Asset Disposal Act, 2015; the Public Procurement & Disposal Act, 2005; the Fair Administrative Action Act, 2015; the Central Bank of Kenya Act and the Statutory Instruments Act, 2013. The petition was also premised on the complaint that in awarding the tender, the 1st appellant as the procuring entity, not only failed to strictly comply with the law but also rigged the tender in favour of the 2 nd appellant with the collusion of the 3rd and 4threspondents.

The background facts are that the 1st appellant, established under Article 231 of the Constitution, has the mandate to issue banknotes and coins bearing images that depict or symbolise Kenya or any aspect of Kenya but do not bear the portrait of any individual. Pursuant to this mandate, it commenced procurement process of new design currency banknotes in 2014 by advertising for pre-qualification for suppliers for production of bank notes, originating material and currency printing services.

This was done locally and internationally by tender No. CBK/043/2013/2014, published in two local dailies, a regional weekly paper and in

its website. The advertisements were as follows:

a. Local media – "The Daily Nation" and "East African Standard" of 16th June 2014

b. Regional media – "The East African" for the week of 14th to 20th June 2014

c. International media: CBK website tender portal 16th June to 8th July 2014

Following the pre-qualification, four firms were prequalified by the 1st appellant, namely; the 2nd appellant, **Giesecke & Devrient GmbH, Crane Currency,** and **Oberthur Fiduciaire**. After the pre-qualification, the 1st appellant in the year 2016 floated tender No. CBK/064/2016/2017 for origination material and data set files for the new Kenya currency and bank notes.

On 24th October 2017, 1st appellant issued the tender for printing and supply of new design currency. The tender was restricted to candidates who had prequalified under the earlier prequalification process due to the specialized and complex nature of the goods, works and or services required. On 8th November 2017, the 1st appellant issued an addendum to the tender wherein it informed the candidates of its preferences and reservations which were to be fulfilled by the bidders in the performance of the contract. The preferences and reservations were made pursuant to sections **155** and **157** of the Public Procurement & Asset Disposal Act 2015 ("*PPADA*"), and according to the 1st appellant, were to be applied to bidders who demonstrated that they were entitled to the same. The addendum also provided that the bidders who sought to sub-contract part or whole of the contract were to obtain express authority of the 1st appellant. These addendums were as a result of the clarifications sought by the 2nd appellant and other bidders.

However, before the award of the tender, the 4th and 5th respondents moved to the High Court by way of **Nairobi HC Petition No. 568 of 2017** against 1st appellant challenging the tendering process for allegedly contravening Articles **227** and **231** of the Constitution. They also claimed that they had been unfairly precluded from the process. Of relevance however, is the 2nd respondent's reply to that petition where it deposed that the procurement process commenced in 2014 and was governed by the now repealed Public Procurement & Disposal Act 2005 "*PPDA*" as saved by section **183** of the PPADA, 2015 and the transitional provisions in regulation 1(1) and (2) of the Third Schedule to the Act. The petition was however subsequently withdrawn by consent of the 1st appellant, 3rd and 4th respondents respectively on 30th November 2017.

Following that withdrawal, the tender was evaluated and awarded to the 2nd appellant. In awarding the tender, the 1st appellant applied 15% margin of preference provided for under section **28** of the Public Procurement and Disposal Regulations, 2006.

Aggrieved with the award, Crane AB successfully petitioned the 2nd respondent for review of the decision on the basis that the 2nd appellant was unlawfully awarded the tender after irregular application of the 15% preference margin *inter alia*. The preferential margin had been introduced to promote local industry or marginalized groups. However, the application of the margin in favour of the 2nd appellant allowed it to outbid the other bidders to emerge the winner despite it having emerged at position 3 with Crane AB as the lowest bidder or winner. The 2nd respondent made its decision on the review application on 8th January 2018, wherein it allowed the application and effectively annulled the award of the tender to the 2nd appellant. Undeterred, the appellants moved to the High Court through **Judicial Review Nos. 6 and 7 of 2018,** and in a judgment delivered by **Odunga, J.** On 9th April, 2018, he allowed the two Judicial Review Applications and quashed the 2nd respondent's decision of 8th January 2018. The High Court decision was premised on grounds that the 2nd respondent exceeded its jurisdiction in allowing a party who was not a bidder *to wit* M/s Crane AB to initiate the review proceedings before it.

It is at this juncture that the 1st respondent initiated the petition leading to this appeal. In the petition, the 1st respondent challenged the entire procurement process as *nullity ab initio* for allegedly failing to comply with the law and or misapplication of laws and regulations. Specifically and according to the 1st respondent, the 1st appellant wrongfully invoked or applied the provisions of PPADA in awarding the tender to the 2nd appellant. His view was that the applicable law was the PPDA (now repealed) except where it was saved by the provisions of section **183** of PPADA. The said section provides that the transitional provisions specified in the **Third Schedule** of the Act shall apply. For clarity, it is in these terms:

1. Existing procurement proceedings continued under repealed Act.

2. Procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act.

3. For the purposes of subparagraph (1), procurement proceeding commences when the first advertisement relating to the procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.

The first advertisement in regard to the now impugned tender ran on 14th June 2014, and according to the 1st respondent, the prevailing and applicable law then was the PPDA and not the PPADA which came into force on 7th January 2017. In that regard, the 1st respondent

contended that the application of preferences and reservations provided for under sections **155** and **157** of the PPADA by 1st appellant was a wrongful attempt to apply the law retrospectively when such application was untenable. It was also the 1st respondent's contention that the 1st appellant could not legally apply the preferences and references as provided in the PPADA since in any case, the Cabinet Secretary had not operationalized the provisions by gazetting the regulations required under the Act. It was therefore contended by the respondent that the application of a preference margin of 15% as provided by section **28** of the **Public Procurement and Disposal Regulations, 2006** pursuant to **Legal Notice No. 174** of 30thNovember, 2006 was invalid, null and void as the said Regulations had expired pursuant to section **21** of the **Statutory Instruments Act**.

Furthermore, there was evidence that the 2nd respondent was a foreign controlled company incorporated in the United Kingdom on 16th April, 1962 and was wholly owned by De la Rue Holdings Limited, a United Kingdom Company as well. It was contended that in law, the 2nd appellant was a separate and distinct legal entity from the 3rd and 4th respondents and therefore, the 1st appellant could not purport to apply the preference margin on the basis of its local affiliates which were Kenyan companies. According to the 1st respondent, the 1st appellant purported to use the 2nd appellant's local affiliates to undertake the contract despite them having failed to prequalify or even bid for the tender for that matter. A **Public Accounts Committee** (PAC) report prepared in July 2012, according to the 1st respondent had found that the 3rd and 4th respondents in fact lacked requisite capacity to print modern currency notes as envisaged.

The 1st respondent further challenged the award of the tender on grounds that the tender process failed to comply with Article **227 (1)** of the Constitution and section **2** of PPDA. Read together, those provisions behove a procuring entity to do so fairly, equitably, transparently, efficiently, competitively and in a manner that instils public confidence in government tendering process. These principles according to the 1st respondent were flouted based on the arguments that the 2nd appellant used its locally registered affiliates, the 3rd and 4th respondent to induce the 1st appellant to award the tender to it. This is despite the fact that the said affiliates did not only bid or even qualify for the tender but also failed to obtain approval and consent of 1st appellant to subcontract any portion of the tender. The 2nd appellant also did not qualify for preferential margin or treatment as Kenyan citizens did not own at least 51% of its shares as stipulated in law. It was contended that the 2nd appellant did not demonstrate how its bid qualified for preference by producing evidence of eligibility. According to section **157 (6)** of the PPADA, to qualify for a specific preference or reservation, a bidder ought to provide evidence of eligibility as prescribed.

The award of the tender to the 2nd appellant was also challenged on the basis that it was not cost-effective as it had emerged number three in the tendering process. That without the application of the 15% in favour of the 2nd appellant, Crane AB emerged the lowest bidder, Oberthur Fiduciare second, the 2nd appellant third and Giesecke & Devrient emerged last as the highest bidder.

The Petition was opposed by the 1st appellant on grounds that; the 1st respondent lacked the necessary *locus standi* to initiate and prosecute the petition, the documents annexed in the supporting affidavit of the petition had been illegally obtained in breach of its rights under Articles **31** and **35** of the Constitution; it had complied with the Constitution; the PPADA and other applicable laws and denied all the allegations of conspiracy and or impropriety in the tendering process. It contended that right from the pre-qualification tender, it had intimated that it would not be averse to the use of local affiliates in the execution of the tenders. That the 2nd appellant having prequalified for award of the print tender, had applied for subcontracting parts of it to its local affiliates and had further demonstrated that the goods to be supplied would be partially produced and assembled in Kenya, through its local affiliates. It maintained that it acted within the law in the application of the provisions relating to preferences and reservations and that the 2nd appellant indeed sought its authority to subcontract. Further, that addendum No. 3 as part of tender had been made pursuant to bidders' request for clarification and followed Addendum Nos. 1 and 2 issued on 31st October 2017 and 6th November 2017 respectively which had also been issued following clarifications sought by the bidders as provided for in the tender documents. This was to dispel allegations made by the 1st respondent that addendum No. 3 had been issued as part of a plan to tilt or rig the tender in favour of the 2nd appellant. It went on to aver that the 15% preference margin was not applied on the basis of shareholding but rather on the basis that manufactured materials and supplies being partially mined or produced in Kenya or where applicable, assembled in Kenya to satisfy sections **3 (1)** and **(j)** of the PPADA. The said provision obligates state agencies to be guided by the values and principles of the Constitution and relevant legislation in procurement but also to promote local industry. The 1st appellant relied on section **155** of the PPADA which provided for preferential treatment to local contractors for goods, materials or supplies partially or wholly produced in Kenya or where applicable have been assembled in Kenya.

Contrary to allegations that the tender was awarded without the evaluation of the Tender Evaluation Committee, it was the position of the 1st appellant that indeed the Committee met independently from 23rd to 27th November 2017 and made its recommendations that the tender be awarded to the 2nd appellant. It maintained that the repealed PPDA was not applicable in the subject tender but was used in the pre-qualification process which had commenced in 2014 and concluded before the enactment of PPADA. There was a circular dated 29th March 2016 sent to government agencies by the national treasury informing them of the enactment of the PPADA which had commenced on 7th January 2016 and stated that the new Act was applicable "*to all procurements which commenced on or after 7th January, 2016*."

The 2nd appellant, 3rd and 4th respondents jointly opposed the petition. The 2nd appellant described itself as one of the world's leading currency manufacturers, publicly listed on and subject to the rules of the London Stock Exchange. That as a strategic partner in Her Majesty's Government producing UK passports and Sterling Pounds for the Bank of England, it was subject to a level of transparency and scrutiny unique in the production of currency. It intimated that there was an ongoing agreement between the National Treasury, Kenya and the 2nd appellant to acquire 40% of the shares in the 4th respondent for which the Kenyan Government had already paid sterling pounds 5 million. The 2nd appellant was categorical that it had never claimed to be a citizen contractor in any proceedings or tender documents for that matter. Justification for qualifying for the 15% preference margin was made on grounds that it was the only bidder with an established modern high security manufacturing plant locally that had supplied the 1st appellant with its currency requirements for almost 25 years; with over 300 Kenyan employees and contributing annually over Ksh 150 million to the economy. Further it was on the basis of manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable, have been assembled in Kenya. It maintained that in the circumstances of this case, preference margin was granted upon it demonstrating that it had sub-contracted substantial portion of the tender and that locally assembled materials, supplies and articles would be used. They both denied any collusion in the award of the tender to

the 2nd appellant.

The 2nd and 6th respondents' defence was that the petition was an abuse of court process and the law since there was an established forum and procedure for addressing grievances arising from any processes of public procurement through the **Public Procurement Administrative Review Board** (PPARB) established under the Exchequer and Audit (Public Procurement) Regulations, 2001 which they claimed the 1st respondent ought to have invoked. The parties concurred with the findings of PPARB in **Review No. 108/2017**, that the applicable law was sections **155 (3) (a)** and **157 (8) (b)** of the PPADA which according to them was similar in wording as section **39(8) (b)(i)** of PPDA. According to them, the regulations made under PPDA were still in force pursuant to the Treasury Circular No. 02/2016 dated 29th March 2016. They however maintained that the preference margin in favour of the 2nd appellant was awarded erroneously on the basis that, pursuant to section **155** of the PPADA, such preference could only be granted to a bidder in its own right if it could demonstrate that the manufactured articles, materials and supplies were mined or produced in Kenya or they will be assembled in Kenya by the bidder but not by an affiliate or any other legal entity from the bidder. Further, that the 2nd appellant's request to be allowed to subcontract could only be made once evaluation has been done, the tender awarded and the contract entered into. According to them a party cannot sub contract what they did not have as the ability to subcontract comes into play when a bidder has won a tender and signed the contact and not at the evaluation stage.

The 7th respondent's answer to the petition was that the 2nd respondent had the statutory mandate to monitor the implementation of the law relating to procurement and since no orders were sought against it in the petition, it prayed to be recused from the proceedings which request was granted.

It's on those set of facts that the High Court based its now impugned decision. The learned Judge (**Odunga J.**) found that the 1st respondent had the necessary *locus standi* to institute the petition, on the premise that a person who feels that a public procurement does not meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness under Article **227** of the Constitution, and who has no other recourse known to law, should find solace in the High Court as the court entrusted under Article **165(2)(d)** with the mandate of hearing any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution. This is especially since the 1st respondent could not pursue recourse under the PPADA, as contended by the 2nd appellant, 3rd and 4th respondents since he was not a bidder or candidate for the tender. The High Court also found that to the extent that the 1st appellant was a creation of the Constitution, Article **231(3)** of the Constitution could not be successfully invoked to bar the court from investigating the constitutionality of its actions. The said constitutional provision had been invoked by the 1st appellant for the proposition that in the conduct of its affairs it is not under the direction or control of any person or authority.

The Judge also upheld submissions by the 1st appellant that the 1st respondent had relied on documentary evidence that was obtained in breach of the 1st appellant's right to privacy and those of its communications pursuant to Article **31** of the Constitution**.** This was on the basis that the 1st appellant had sought that the confidentiality of the said tender documents be protected and be expunged from the court record pursuant to or as provided under section **67** of the repealed Act. The Judge therefore expunged from the court record the following tender documents;

1. **Tender Documents Number CBK/64/ 2016-2017 "Exhibit 'OOO-1';**

2. **Tender Documents Number CBK/37/2017-2018 "Exhibit 'OOO-1',**

3. **Tender Documents Number CBK/64/ 2016-2017 "Exhibit 'OOO-1';**

4. **Tender Documents Number CBK/37/ 2017-2018 "Exhibit 'OOO-1';**

5. **Tender Documents Number CBK/64/ 2016-2017 of "Exhibit 'OOO-1';** and

6. **Tender Documents Number CBK/37/ 2017-2018 "Exhibit 'OOO-1';**

The court went on to hold that the subject procurement was to be guided by the provisions of PPDA having established that the 2nd appellant could not qualify to be considered a Kenyan contractor to attract or deserve preferential treatment.

In regard to relying on evidence from **Nairobi HC Petition No. 568 of 2017**, which was withdrawn through the parties' consent, the Judge stated that depositions in an affidavit amounted to evidence and therefore withdrawal of a suit did not amount to withdrawal of evidence adduced therein unless such evidence was expunged from the record.

Ultimately, the Judge issued a declaration that the award of the tender made on 30th November 2017 by the 1st appellant to the 2nd appellant was both unconstitutional and unlawful and, therefore, invalid, null and void. The Judge then proceeded to quash the said award and issued an order compelling the 1st appellant to transparently re-evaluate the bids of all compliant bidders and to award the tender strictly in accordance with the law. Finally, he awarded costs of the petition to the 1st and 2nd respondents to be borne by the 1st appellant.

Aggrieved with the findings and wishing to contest the aforesaid determinations in this court, the appellants filed separate notices of appeal, pursuant to which the two appeals, **Civil Appeal Nos. 116 and 119 of 2018** respectively were subsequently filed.

In its memorandum of appeal, the 1st appellant had a whooping 28 grounds upon which it sought to impugn the judgment of the High Court. However, in its written submissions and oral highlights, the 1st appellant condensed those grounds into 8 broad ones to wit; whether the

Judge erred in law and misdirected himself on the applicable law on the tender; erred in holding that the petition met the threshold under Articles 3(1), 22(1) and 258(c) of the Constitution; failed to appreciate that the petition was filed on behalf of a private entity Crane AB, disguised as a public interest litigation; erred in considering expunged tender documents in determining the petition; erred in accepting as evidence in support of the petition pleadings and affidavits in a withdrawn Nairobi HC Petition No. 568 of 2017 as evidence in support of the petition; failed to appreciate that the advertisement dated 14th June 2014 related to tender number CBK/043/2013/2014 and was for pre-qualification of suppliers for production of Banknote Origination Material and Currency Printing Services and not the tender restricted for printing and supply of new design Kenya Currency Banknotes; in holding that the 1st appellant wrongly applied the 15% preference margin to the bid by the 2nd appellant and finally, whether the Judge erred in holding that the process and award of the tender was unconstitutional.

On its part, the 2nd appellant impugned the judgment on 9 grounds which it reduced into 3 broad ones in its written submissions. That is to say, whether the governing law for the evaluation of the tender was PPDA; whether the 15% margin preference awarded to the 2nd appellant was in accordance with the law and lastly, costs.

At the hearing of the appeals, counsel appearing for the respective parties applied to have the appeals consolidated as both rose from the same determination, concerned same parties and similar pleadings. For expedient and efficient disposal, the appeals were consolidated with **Civil Appeal Number 116** being the running file. At the same time, the 7th respondent applied to have itself recused from this appeal since it was neither supporting nor opposing the same. The request was granted. Earlier on, it had been agreed during the case management conference before the Deputy Registrar of this Court that the appeals be canvassed by way of written submissions with limited oral highlights. Subsequently all the parties filed and exchanged respective written submission.

In its written submissions, the 1st appellant submitted that the learned Judge misdirected himself on the applicable law and challenged the Judge's reliance on section **39 (8)** of PPDA to find that the 2nd appellant did not qualify for preferential procurement. The said provision was in terms;

> **"In applying the preferences and reservations under this section—**
>
> **a. exclusive preference shall be given to citizens of Kenya where—**
>
> **i. the funding is 100% from the Government of Kenya or a Kenyan body; and**
>
> **ii. the amounts are below the prescribed threshold.**
>
> **b. a prescribed margin of preference shall be given—**
>
> ***(i)* in the evaluation of bids to candidates offering goods manufactured, mined, extracted and grown in Kenya;**
>
> **or**
>
> **ii. works, goods and services where a preference shall be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed."**

To it the applicable law was the PPADA which stipulated in section **183** that the transitional provisions in the 3rd Schedule to the Act were applicable. The said transitional provisions stipulated that procurement proceedings commence when the first advertisement in relation to the tender is made or where there is no advertisement when the tender was first floated. According to the 1st appellant, the tender was issued on 24th October 2017 and by then the applicable law was the PPADA. It pointed out that the learned Judge had in his ruling in respect of **Judicial Review Nos. 6** and **7** of **2018** which arose from the same tender proceedings determined that the applicable law was the PPADA. It was on this basis that he had quashed the 2nd respondent's ruling. That ruling still stood as no appeal had been proffered. The appellant was therefore of the view that the same Judge could not turn around and invoke PPDA in determining the petition leading to this appeal.

The 1st appellant also advanced the argument that the petition failed to meet the threshold of a constitutional petition as per Articles **3 (1), 22 (1) and 258 (2) (c)** thereof. This was based on grounds that the 1st respondent failed to present specific and or precise injury occasioned to him from the alleged infractions of the Constitution. The 1st appellant accused the 1st respondent of citing omnibus constitutional provisions and failing to detail to the court the manner of infringement which, as a result, prejudiced it in the prosecution of its defence. It reiterated that the petition was disguised as public interest litigation brought on behalf of the public while in the actual sense was instituted on behalf of a private entity, Crane AB., a losing bidder. As such it argued that the petition was actuated by malice and was intended to hinder a duly conducted tendering process. The case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Ors, Civil Appeal No. 290 of 2012** was cited for the proposition that where a person acts for personal gain or for profit or another oblique consideration, the court ought to refrain from allowing itself to be used. According to the 1st appellant, the petition was meant as an instrument to obstruct its independence in carrying out its statutory mandate.

The 1st appellant also submitted that following an application dated 19th December 2017, the learned Judge expunged tender documents already alluded to elsewhere in this judgment which he considered to have been irregularly obtained by the 1st respondent. However, and in an inexplicable manner, the Judge proceeded to rely on the same expunged documents in his determination to its prejudice. It accused the Judge of contravening **Article 50 (4),** of the Constitution which provides that evidence obtained in a manner that violates any right or fundamental freedom ought to be excluded from consideration and for failing to follow the binding Supreme Court's precedent of **Njonjo Mue & Another v Chairperson of IEBC & 3 Others (2017) eKLR** on the issue. According to this decision, once documents had been

expunged from the record, a court could no longer rely on them.

Further and according to the 1st appellant, the Judge erred in considering evidence tendered in the **Nairobi HC Constitutional Petition No. 568 of 2017** which had been filed by the 3rd and 4th respondents on the basis that the issues in the petitions were different from those in the instant petition. The appellant further faulted the Judge for failing to appreciate that there was no bar to the 2nd appellant subcontracting its local affiliates.

It was also the 1st appellant's submission that the Judge erred in failing to appreciate that the advertisement of June 2014 related to tender No. CBK/043/2013/2014 and was for *pre-qualification of suppliers for production of Banknotes origination material and currency printing services* and not the tender which was a Restricted Tender for Printing and supply of new Design Kenya Currency notes. According to the 1st appellant the learned Judge failed to appreciate that the two tenders were distinct and stand alone. Further, that the 2nd appellant had sought clarifications on preference and reservations criteria, sub-contracting or use of local affiliates on 6th November 2017. In response, it issued Addendum No. 3 and denied that the same was introduced to favour the 2nd appellant since it was not the only one it had issued. And that sub-contracting was provided for in the special conditions of the tender document; and any bidder was free to seek its express authority. It maintained that the 2nd appellant was entitled to the preference margin as the place of currency printing was in Kenya once materials had been sourced and not based on shareholding. According to it, a candidate who subcontracts was still entitled to the margin. It denied claims of the tendering process being unconstitutional.

The 2nd appellant in its written submissions stated that the 1st appellant's tender for pre-qualification of suppliers was issued in June 2014. That the said tender No. CBK/043/2013/2014 closed on 8th July, 2014 and was evaluated in accordance with PPDA, 2005 as the prevailing law then. From that tender, 4 candidates emerged. On 24th October 2017, the appellant issued the restricted tender to the four prequalified candidates and since by then the PPADA, had commenced, it contended that PPADA and the regulations thereunder as guided by National Treasury Circular No. 2 of 2016 were applicable. It was categorical that the tender was not a continuation of the earlier tender the subject of the June 2014 advertisement. In the circumstances and in its view therefore, the applicable provision was section **183 (2)** of the PPADA, which stated that procurement proceeding commenced when the first advertisement relating to the procurement is published or, *if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement process*.

It also based its argument for the prequalification tender on section **93** of the PPADA. To buttress its point further, it cited the case of **Republic v Chief Magistrates Court Mombasa ex parte Mohamed Mohamed Hashi & 8 Others (2010) eKLR,** where that court held that courts should always turn first to one cardinal rule before all others- courts must presume that what a legislature says in a statute is what it says there.

Accordingly, and having established that the PPADA was the applicable law, the 2nd appellant went further to submit that pursuant to section **155 (3) (a)** thereof, preference was to be given to manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya or firms where Kenyans were shareholders. It explained that the margin was applied on the basis of manufactured goods and or materials partially mined or produced in Kenya or where applicable have been assembled in Kenya. In that regard, it was its submission that it had demonstrated that it had sub-contracted a substantial portion of the print tender and that locally assembled materials, supplies will be used. According to it, the entire procurement process was above reproach.

The 1st respondent came out strongly in opposition to the appeals. He asserted that he was dedicated to upholding the principles of good governance espoused in Article **10** of the Constitution including patriotism, the rule of law, human rights, democracy, transparency and accountability in governance. According to him, the appeals were incompetent and ought to be struck out on account of failure to comply with rule 77(1) of the Court of Appeal rules. He submitted that the High Court orders were being challenged in their entirety. That in particular Order No. 3 directly affected all the bidders making all of them necessary to be enjoined in the appeal. Accordingly, the appellants ought to have served the notice of appeal and record of appeal on all the bidders, being **Crane AB, Oberthur Fiduciarie and Giesecke & Dervient.** This was however not done. To the 1st respondent therefore, by failing to serve the notice of appeal and the record of appeal on the above parties who were directly affected by the appeal, rendered it fatally defective and liable to be struck out with costs. In support of this proposition, the 1st respondent relied on the following cases; **Peter Martin Ahn v Jenifer Wairimu Openda [1982] eKLR, Sheikh v Sheikh & Another [1989] eKLR**, and **M.S.K. v S.N.K. [2010] eKLR.**

The remaining respondents did not make any submissions on this aspect of the appeal either in their written submissions or oral highlights, neither did the 1st appellant.

The 2nd appellant however, in response submitted that there was no single party in the original petition that was not enjoined in this appeal. In any event, the petition was filed by the 1st respondent and not the appellants. He chose the parties. Finally, it was submitted that as parties were waiting for judgment, Crane AB rushed to court seeking to withdraw from the petition. It could not then be made a party to the appeal. As far as the appellant was concerned, every party necessary was joined in the appeal.

The 1st respondent went on to submit that the procurement proceedings commenced in June 2014 as admitted in 1st appellant's replying affidavit dated 17th November 2017, sworn by one **Peter Anthony Wainaina Kigondu** in **Nairobi HC Petition No. 568 0f 2017.** That the four companies that prequalified were all wholly owned foreign companies who under Kenyan procurement laws, including both the PPDA and PPADA, do not qualify for preferences and reservations. He contended that the 2nd appellant's local affiliates failed to prequalify and were therefore locked out of the tender process. He maintained that without the illegal application of the margin, the 2nd appellant was not the lowest evaluated bidder having emerged at position number three.

The 1st respondent dedicated a significant portion of his submissions to convincing us that he had *locus standi* to institute the petition in the

High Court. He based his submissions on the doctrine of public interest litigation. None of the parties herein in this appeal appear to contest his *standi* per se to pursue litigation in public interest though concerns or questions regarding the bona fides of such litigation have been raised. The appellants for instance, have raised the ground of appeal that the High Court failed to appreciate that litigation in this case was not genuine public interest litigation but was disguised or clothed as such. The issue of *locus standi* had been raised before the High Court and was rightly settled or conclusively determined by the Judge. His *locus standi* to institute these proceedings in public interest is therefore uncontested and we do not think is an issue for determination in this appeal.

The 1st respondent further argued that the documents expunged were not crucial to the determination of the matters raised in the petition and denies the allegations made against the Judge that he still went ahead to consider the expunged documents in his judgment. According to the 1st respondent, what the Judge did was to summarize the arguments made by the parties.

The 2nd and 6th respondents filed joint written submissions and supported the learned Judge's findings that the applicable law was PPDA and not the PPADA as contended by both appellants. They also concurred with the High Court findings that the 2nd appellant was not a Kenyan contractor so as to attract or qualify for a preferential margin. According to these respondents, giving the 2nd appellant preferential treatment was contrary to Article **227** of the Constitution since grant of undeserved preference was unfair, unlawful and went against the letter and spirit of the Constitution.

In their joint written submissions, the 3rd and 4th respondents reiterated that the main issue to be appreciated was that the tender was a stand-alone tender seeking purely printing and supply of the new design currency. That the pre-qualification exercise in 2014, was for origination design and printing services. That the first and only tender documents were issued to the bidders in October 2017 and hence the tender could only have been undertaken legally under the PPADA pursuant to section **183 (2)** thereof and section 1 of the Third Schedule to the Act. The case of **R v Public Procurement Administrative Board & Anor exparte University of Eldoret (2017) eKLR** was cited in support of the submission. The respondents reiterated averments made in the High Court that at no time did the 2nd appellant or themselves claim to be citizen contractors, which they submitted, had been captured by the learned Judge in his determination as follows;

> **"Therefore, going the 1*st* *Respondent's case as presented in Nairobi HC Petition No. 568 of 2017 the 3rd* Respondent, De La Rue International Limited, could not lawfully qualify for preference under the relevant law. The 1*st* *Respondent, in these proceedings has however contended that in submitting its tender number CBK/37/2017-2018, the 3rd* Respondent applied for sub-contracting and demonstrated that the goods to be supplied to CBK will be produced and assembled locally in Kenya through their affiliate company. Accordingly, the 1st Respondent granted the application of a 15 percent preference as set out in the law to De La Rue International Limited who sought to be granted preference and provided satisfactory evidence in accordance with the provisions of section 155(3)(a) of the PPADA. The margin of preference was not applied on the basis of shareholding but rather on the basis of manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya."**

They however faulted the Judge for proceeding to express doubt that the threshold for grant of preference had not been met despite those sentiments and accused the Judge of ignoring evidence on record and further that Nairobi HC Petition No. 568 of 2017 dealt with the issue whether the 3rd and 4th respondents ought to have been allowed to participate in the proceedings not as citizen contractors but as local companies with the ability to partially/wholly manufacture the new currency design at Ruaraka. These respondents accuse the Judge of misleading himself by finding that there was no satisfactory evidence of collusion but proceeding to determine that the award of the tender did not meet the constitutional threshold of transparency. In their view, that was improper exercise of discretion to warrant this Court's interference with the decision.

According to these respondents, the Public Procurement and Disposal Regulations 2006 under PPDA were still in force and applicable under PPADA and regulation **28 (2) (a)** thereof provided for a 15% margin of preference for goods manufactured locally. That a clause in the tender documents allowed prequalified bidders to apply for preference pursuant to the regulations. It was the respondents' contention that the 2nd appellant successfully applied for preference on the basis that it had local affiliates to whom it was to sub-contract a substantial portion of the print tender and which were to use locally assembled materials or supplies. Another consideration was that the 3rd and 4th respondents had previous engagements with the Kenyan government printing currency for more than 25 years and that there would be technological transfer and creation of employment opportunities for Kenyans. They cited the case of **R v The Public Procurement Administrative Review Board & Anor, Misc Appln. No. 540 of 2008** where the High Court had held that goods wholly or partially manufactured in Kenya would be eligible for preference under the applicable law. According to the respondents, the margin of preference was applicable regardless of whether it was under PPDA or PPADA.

During the oral highlight, **Mr. Ochieng Oduol** and **Mr. Fred Ngatia** appeared for the 1st and 2nd appellants respectively whereas the 1st respondent appeared in person, the 2nd and 5th respondents were represented by **Ms Ngelechei,** while **Mr. Njogu** appeared for 3rd and 4th respondents.

This Court is cognizant of its mandate pursuant to rule **29** of its Rules and as expounded in **Selle & Another v Associated Motor Board Co Ltd & Others, (1968) EA 123**. The mandate is to re-evaluate the evidence tendered and come into its own conclusion.

The issues that fall for determination in our view are as follows; whether the appeals ought to be struck out for want of joinder of essential or necessary parties; the applicable law to the tender; whether the 15% preference margin was lawfully granted to the 2nd appellant and finally, costs.

With regard to joinder of parties to an appeal, Rule 77(1) of this court's rules, *inter alia*, provides:-

> **"An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on <u>all persons directly affected by the appeal</u>" *(emphasis supplied)***

This simply means that any person likely to be directly affected by the outcome of the appeal should be served with a notice of appeal and later by the record of appeal so that he/she can participate in the appeal if she/he chooses or desires.

Were all persons directly likely to be affected by this appeal served? We think so. It should be noted that it is the 1st respondent who initiated the petition and named the parties. All those parties named by the 1st respondent and who participated in the proceedings leading to this appeal were all served with the notice of appeal and subsequently with the record of appeal. Indeed they all participated in this appeal. As correctly submitted by Mr. Ngatia, there is no single party named in the petition that was not served or made a party to this appeal. Having initiated the petition and named the parties who all have been enjoined in this appeal, the 1st respondent cannot turn around and blame the appellants for not bringing into the appeal parties he himself felt would not be affected by his petition. The 1st respondent at this late stage cannot be allowed to profit or benefit from his own mischief, if mischief it was.

In any event, even if there was merit in this ground of appeal, rule 84 of this Court's rules bars us from entertaining the drastic step sought by the 1st respondent.

It is in these terms: -

> **"84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.**
>
> **Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."**

From the above provision, the 1st respondent is barred from applying to strike out the appeal at this stage.

In arriving at the finding that the applicable law was the PPDA, the Judge considered the provisions of section **183** of the PPADA which provide that the transitional provisions specified in the Third Schedule would apply. The said Third Schedule provides as follows;

> "(1) **<u>Procurement proceedings commenced before the</u> <u>commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act</u>.**
>
> **<u>2. For the purposes of subparagraph (1), procurement proceeding commences when the first advertisement relating to the procurement proceeding is published</u> or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding."**

The Judge also considered the deposition made by the 1st appellant in the withdrawn **Nairobi HC Petition No. 578 of 2017** where in its reply, the appellant had deponed that the procurement proceedings began with the advertisement Tender No. CBK/043/2013/2014 by the 1st appellant for the prequalification of suppliers in June 2014. Though arguments have been made that the Judge erred in relying on pleadings and affidavit evidence filed in the withdrawn petition, the 1st respondent has been emphatic in his submissions and correctly so, in our view, that the said evidence was admissible. He contended that the said evidence had never been recanted by the deponent in those proceedings and when the petition was compromised the evidentiary value of the evidence contained in the affidavit was not taken away. Faulting the Judge for considering the said evidence is baseless and unfounded therefor. Such evidence is indeed admissible. **Halsbury's Laws of England, Vol 17 paragraph 196** provides that;

> "**an affidavit made in one proceeding is admissible in evidence in a subsequent proceeding as proof of the facts stated in it, against the party who made the affidavit, or against the party on whose behalf it was made, on its being shown that he knowingly made use of it.**"

See also the case of **<u>Sri Mohammed Abdul Ahmad v Sri Mohammed Abdul Gafoor</u>** C.R.P. No. 237 OF 2012, where it was held that:

> **"Once the affidavit becomes part of record, the party who filed it loses the right and prerogative to change or alter it."**

On the basis of the admission, the Judge held that the applicable law was the PPDA since by then the PPADA had not been enacted.

Before this Court, the appellants fault the Judge for applying the wrong statute. They raise compelling arguments to the effect that the impugned tender was distinct and a stand-alone, that was issued specifically to the pre-qualified bidders on 17th October 2017. They fault the Judge for failing to appreciate that the subject matter of the 1st respondent's petition in the High Court was the tender floated on 17th October 2017 and not tender No. **CBK/043/2013/2014** carried in the advertisement of June 2014 of which the PPDA applied. According to the appellants the relevant provision was contained in the Third Schedule of PPADA to the effect that '*if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.*' They contend that the first and only documents relating to the tender were issued to the bidders in October 2017 well after the commencement of the PPADA on 7th January 2016. On the

other hand, the 1st respondent contended that procurement proceedings can refer to several tenders. Further, that procurement proceedings for the printing and supply of new design currency was done in phases and that the first phase commenced in June 2014.

The learned Judge's finding that the tendering process ought to have been guided by PPDA was supported by the 2nd and 5th respondents. They support the view that the first advertisement relating to the subject matter was published on 14th June 2014 and the applicable law was the PPDA. It is apparent that the 15% preferential margin was applied in favour of the 2nd appellant pursuant to sections **155** and **157** of the PPADA.

The 1st respondent had further maintained that the preferential margin could not legally be granted thereunder because the Cabinet Secretary had not operationalized the provisions by gazetting the regulations required under the Act. Regulation **177** of the Public Procurement and Asset Disposal Regulations, 2017, was intended to operationalise section **157 (8) (b)** of the PPADA but the Regulations were yet to be gazetted and/or to be tabled before Parliament for scrutiny and approval as required by section **11(1)** of the Statutory Instruments Act. Having established so, the Judge however relied on section 182 (2) of PPADA to find that the said regulations were applicable in the absence of any other regulations to operationalize the PPADA. Both the PPDA and the PPADA provided for 15% preferential margin for Kenyan citizens or contractors in promotion of local industry. It is discernable that section **39 8 (b) (i)** of the repealed Act is couched in similar terms as sections **155 (3) (a)** and

157 (8) (b) of the PPADA. It therefore follows that the 15% preferential margin could be lawfully applied under both regimes since the Public Procurement and Disposal Regulations, 2006 were applicable to both depending on the circumstances.

The 1st respondent further pointed to 1st appellant's own admission that the procurement proceedings started with the 14th June 2014 advertisement in the regional newspaper, *The East African* contained in the affidavit of **Peter Anthony Wainaina Kigondu** in the withdrawn petition**.** The date of that advertisement is crucial as it then invokes the provisions of the Third Schedule, sections 1 and 2 of the PPADA which are to the effect that procurement proceedings that commenced before the coming into force of the PPADA should continue under the applicable or prevailing law when they began. Going by the 1st appellant's admission in those proceedings then the applicable law would be the PPDA.

However, in this appeal, appellants as already stated, refute that position and allege that the tender was a stand-alone tender, rather than a continuation of any previous tender, issued on 24th October 2017 specifically to the prequalified candidates from the first prequalification exercise.

Section **93** of the PPADA provides as follows;

> "1) **Subject to provisions of subsection (2), an accounting officer of a procuring entity where applicable, <u>may conduct a pre-qualification</u> <u>procedure as a basic procedure prior to adopting an alternative procurement method other than open tender for the purpose of identifying the best few qualified firms for the subject procurement</u>.**
>
> **<u>2. Pre-qualification shall be for complex and specialized goods, works and services</u>."**

Pre-qualification is defined in section **2** of the PPADA as a procedure to identify and shortlist tenderers that are qualified, prior to invitation of tenders. It becomes apparent after a reading of that provision that the tender now impugned falls squarely under that section being for goods of a specialized nature for which the appellant could conduct a prequalification before subsequent invitation of tenders. It is conceded that the pre-qualification exercise started with the advertisement of 14th June 2014 inviting local and international bids and closed on 8th July, 2014. That process produced the four candidates that on 24th October 2017 bidded for the tender. The applicable law then was the PPADA which had come into force on 7th January 2017 as per the guidance of National Treasury Circular No. 2/2016. In any event, the tender documents also referred to the PPADA as well.

We also agree with the contention that the issues in the withdrawn petition and the issues herein were different though related to the same subject matter and there would have been no need for the 1st appellant in that petition to split hairs or even contemplate the present petition where the issue of commencement of the procurement proceedings would be pegged on its averments therein. In this case, the 2nd respondent in its decision of 8th January 2018 found the applicable law to be the PPADA. The High Court also in its determination of **Judicial Review Nos. 6** and **7 of 2018** arrived at the same conclusion. The departure of the Judge from that position and to revert to the PPDA in determining the impugned decision, therefore, has no rational explanation or basis. As correctly observed by the appellants, it smacks of unnecessary contradiction.

On the issue whether the 15% preference margin was lawfully applied in favour of the 2nd appellant, section **3** of the PPADA provides the guiding principles to state organs and public entities to public procurement and asset disposal. The said section provides as follows;

> **"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—**
>
> **a. the national values and principles provided for under Article 10;**
>
> **b. the equality and freedom from discrimination provided for under Article 27;**

c. affirmative action programmes provided for under Articles 55 and 56;

d. principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);

e. the principles of public finance under Article 201;

f. the values and principles of public service as provided for under Article 232;

g. principles governing the procurement profession, international norms;

h. maximisation of value for money"

As such this Court must re-examine whether the basis upon which the 1st appellant applied the preferences and reservations was in accordance with the law. According to the 1st appellant, the preferential margin in favour of the 2nd appellant was made pursuant to section 155 and 157 of the PPADA. Those sections *inter alia*;

"Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.

2. Subject to availability and realisation of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.

3. Despite the provisions of subsection (1), preference shall be given to—

a. manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or

b. firms where Kenyans are shareholders.

4. The threshold for the provision under subsection (3) (b) shall be above fifty-one percent of Kenyan shareholders.

5. Where a procuring entity seeks to procure items not wholly or partially manufactured in Kenya—

a. the accounting officer shall cause a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya; and

b. the procuring entity shall require successful bidders to cause technological transfer or create employment opportunities as shall be prescribed in the Regulations."

Whereas section 157 is in these terms:

"157. Participation of candidates in preference and reservations

1. Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.

2. Subject to subsection (8), the Cabinet Secretary shall, in consideration of economic and social development factors prescribe preferences and or reservations in public procurement and asset disposal.

3. The preferences and reservations referred to in subsection (2) *shall-*

a. be non-discriminatory in respect of the targeted groups;

b. allow competition amongst the eligible persons; and

c. be monitored and evaluated by the Authority.

4. For the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition of discrimination, reservations, preferences and shall apply to-

a. candidates such as disadvantaged groups;

b. micro, small and medium enterprises;

c. works, services and goods, or any combination thereof;

d. identified regions; and

e. such other categories as may be prescribed.

5. An accounting officer of a procuring entity shall, when processing procurement, reserve a prescribed percentage of its procurement budget, which shall not be less than thirty per cent, to the disadvantaged group and comply with the provisions of this Act and the regulations in respect of preferences and reservations.

6. To qualify for a specific preference or reservation, a candidate shall provide evidence of eligibility as prescribed.

7. The Authority shall maintain an up-to-date register of contractors in works, goods and services, or any combination thereof, in order to be cognizant at all times of the workload and performance record.

8. In applying the preferences and reservations under this section –

a. exclusive preferences shall be given to citizens of Kenya where-

i. the funding is 100% from the national government or county government or a Kenyan body; and

ii. the amounts are below the prescribed threshold'

iii. the prescribed threshold for exclusive preference shall be above five hundred million shillings;

b. a prescribed margin of preference shall be given-

i. in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or

ii. works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

9. For purposes of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

10. Despite subsection (2) or any other provisions of this Act, every procuring entity shall ensure that at least thirty percent of its procurement value in every financial year is allocated to the youth, women and persons with disability.

11. Every procuring entity shall ensure that all money paid out to an enterprise owned by youth, women or persons with disability is paid into an account where the mandatory signatory is a youth, woman or a person with disability.

12. The procuring entities at the national and county level shall make a report after every six months to the Authority.

13. A report under subsection (12) shall-

a. certify compliance with the provisions of this section; and

b. provide data disaggregated to indicate the number of youth, women and persons with disability whose goods and services have been procured by the procuring entity.

14. The Authority shall made a report to Parliament after every six months for consideration by the relevant committee responsible for equalization of opportunities for youth, women and persons with disability, which report shall contain details of the procuring entities and how they have complied with the provisions of this section.

15. The Cabinet Secretary shall prescribe the preferences that shall facilitate the attainment of the quota specified in subsectio*n 10. in order for the State to achieve the objectives of Articles 55 and 227(2) of the Constitution.*

16. The preferences referred to in subsection (15) shall-

a. be prescribed within ninety days after commencement of this Act.

b. be subject to such conditions as the Cabinet Secretary may specify therein but such conditions shall not

pose any unnecessary impediment to the youth from participating in public procurement.

17. The National Treasury shall operationalize a preference and reservations secretariat to be responsible for the implementation of the preferences and reservations under this Act which shall be responsible for-

a. Registration, prequalification and certification of the persons, categories of persons or groups as provided for in under Part XII;

b. Training and capacity building of the above target groups;

c. Providing technical and advisory assistance to producing entities in the implementation of the preferences and reservations under t6hs act; and

d. Monitoring and evaluating the implementation of the preferences and reservations under this Act.

18. The National Treasury shall provide adequate staff and resources for the operations of the secretariat."

The 2nd appellant has been adamant that it did not apply for the preferential margin on claims or basis that it was a citizen contractor. Its case was that it applied for preferential margin on the basis that it was the only candidate with locally registered and established affiliates, referring to its subsidiaries, the 3rd and 4th respondents. According to the 2nd appellant it had employed more than 300 Kenyans and contributed more than KES 150 million to the Kenyan economy annually through its affiliates. It also intimated to having an established relationship with the 1st appellant since setting up its affiliates in 1992 and had since then for a period of more than 25 years produced currency for the 1st appellant. That preference was also on the footing that the manufactured articles, materials and supplies would be partially mined, produced or assembled in Kenya. If any candidate was to qualify for the preferential margin then it was definitely a contender.

The 2nd appellant has not denied being a foreign registered company. In fact, it has been categorical that nowhere in these proceedings nor in the tender documents has it claimed or intimated to be a Kenyan contractor. It has explained that it applied for the preferential margin not based on its shareholding or ownership. According to it, justification for applying for the preferential procurement was on grounds that it was the only prequalified candidate with locally registered affiliates. It claimed that it had an established currency manufacturing plant in Ruaraka, referring to the 3rd respondent whom it averred was registered locally in 1992 and employs over 300 Kenyan employees. Further, that it had previously supplied the 1st appellant with its currency requirements for almost 25 years and contributes over Kshs 150 million to the Kenyan economy. It maintained that it qualified for preferential treatment further based on the reason that some of the raw materials and supplies would be partially mined or produced in Kenya or where applicable, have been assembled in Kenya. It maintained that in the circumstances of this case, preference margin was granted upon it demonstrating that it had sub-contracted substantial portion of the tender and that locally assembled materials, supplies and articles would be used.

If that is so, the issue then becomes whether the 2nd appellant could legally sub-contract its local affiliates? This was considered by the learned Judge and who after analysis came to the following conclusion;

"218. According to the Petitioner, no bidder sought and obtained the authority of the procuring entity to subcontract part of or the whole contract. It is not in doubt that pursuant to Addendum Number 3 issued pursuant to clause 2.5.2 of the Tender Document, a successful tenderer wishing to subcontract may seek express authority from the 1*st* *Respondent as already provided for under Clause 3.15 of the Special Conditions of Contract. However, the 3rd Respondent countered that contrary to the Petitioner's contention, the 3rd Respondent indeed applied for leave to subcontract to the local entities in a letter dated 17th November 2017 and as per the findings of the Public Procurement Administrative Review Board, the request to subcontract was approved by the Governor of Central Bank on 29th November 2017. It is on account of the above demonstrated capacity and intention to perform the Tender in Kenya through its Kenyan affiliates using Kenyan workforce and facilities that the 3rd Respondent was evaluated more favourably than the other tenderers.*

219. In my view, the Petitioner's contention that there was no authority to subcontract does not hold. As to whether the same was valid in other respects is another matter."

The sub-contracting was therefore applied in the 2nd appellants favour pursuant to an addendum to the tender documents. The 2nd appellant had complained that the Judge failed to appreciate that preference was evaluated in accordance with the PPADA together with the tender documents which included the addendum.

Vide a letter dated 6th November 2017, the 2nd appellant sought clarifications from the 1st appellant on preference and reservations criteria, sub-contracting and the use of local affiliates or subsidiaries to execute the tender. The clarifications were sought before any bids had been made by any of the candidates and were pursuant to clause 2.5.1 of the Tender Document. On 8th November 2017, the 1st appellant issued an addendum No. 3 wherein it informed or clarified to the candidates of its preferences and reservations criteria. The preferences and reservations were to be made pursuant to sections **155** and **157** of the *PPADA* and were to be applied to bidders who demonstrated that they were entitled to the same. According to the 1st appellant, addendum No. 3 as part of the tender followed Addendum Nos. 1 and 2 issued on 31st October 2017 and 6th November 2017 respectively following clarifications sought by the bidders as provided for in the tender documents. This was submitted to dispel allegations made by the 1st respondent that addendum No. 3 had been issued by it as part of a plan to tilt or rig the tender in favour of the 2nd appellant. According to the 1st appellant subcontracting by any of the prequalified candidates had

been provided for under clause 3.15 of the Special Conditions of Contract on condition that bidders who sought to sub-contract part or whole of the contract were to obtain express authority of the 1st appellant.

Though the 1st respondent submitted that the award of the tender was unfairly tilted or rigged in favour of the 2nd appellant through the issuance of Addendum No. 3, there being no evidence of collusion or sweetheart deal as also found by the High Court, then this Court cannot base its decision on unproven allegations. The addendum was rightly issued pursuant to clarifications sought and it is pursuant to it that the 2nd appellant applied for preferential treatment and subcontracting. Therefore, and as submitted by the 1st appellant, there was no bar to the 2nd appellant to subcontract. The 1st respondent has argued that the 2nd appellant's request to be allowed to subcontract could only be made once evaluation had been done, the tender awarded and the contract entered into. According to him, a party cannot sub contract what they did not have as the ability to subcontract comes into play when a bidder has won a tender and signed the contact and not at the evaluation stage. In our view, that position cannot obtain in every situation and circumstance. In the instant case, the prequalified candidates were to demonstrate eligibility for preferential procurement and had to seek consent of the 1st appellant to subcontract prior to the award of the tender considering the specialized and complex nature of the goods and or services the procuring entity required.

It's apparent that all the four prequalified candidates were foreign controlled entities. Only the 2nd appellant could qualify for the preferential margin as envisaged under the PPADA by any stretch of imagination. That qualification was met upon confirmation by the procuring entity that sub-contracting was allowed and further upon application for the preferential margin under section 155 (3) of the PPADA based on its local affiliates. The 1st appellant in fact submitted that the use of the respondent's premises in Kenya was sufficient proof of eligibility for the preference margin.

The 1st respondent also contended that the PAC report had found the 2nd appellant's local affiliates lacking capacity to undertake the tender. However, the said report was rejected as submitted by the appellants. Nothing therefore turns on it.

The 5th respondent opposed the petition in the High Court. Its position then was that the PPADA allows for preference of tenderers by procuring entities upon the satisfaction of the set criteria. Further, that the grant of preference could not be a ground for alleging constitutional violations unless it could be shown the set criteria under the Act was not met. It would appear that since then, the 5th respondent's position has shifted or changed. It now claims that the Judge misdirected himself in applying the repealed PPDA. It has also, in this appeal, supported the 1st respondent's case that the 2nd appellant was not a Kenyan contractor so as to attract preferential treatment. In its view, no evidence was tendered to prove that the criteria in section **155 (3) (a).** Needless to say, the 5th respondent does not come off as reliable by approbating and reprobating. We do not think that its submissions deserve consideration or should be taken seriously.

Finally, on this aspect of the matter, it was claimed that the Judge relied on expunged documents in reaching its conclusion on the constitutionality of the tender process. The 1st respondent however, disputed the contention and submitted that the Judge only made reference to the expunged documents when he summarised the facts of the case. That the Judge never reverted to those documents in the judgment and indeed they were not the basis of the judgment.

From the record, it is apparent that by an application dated 19th December, 2017, the 1st appellant applied to strike out from the petition the tender documents listed in the application to wit;

Tender Documents numbers:

- CBK/64/2016-2017
- CBK/37/2016-2018
- CBK/64/2016-2017
- CBK/37/2017-2018
- CBK/64/2016-2017 and
- CBK/37/2017-2018

In his judgment, the Judge held that the documents complained of as aforesaid by the appellant had been irregularly obtained and proceeded to expunge them from the record. Having expunged the said documents, it does appear that the Judge however, still went ahead to rely and consider them in determining the merits of the petition to the prejudice of the appellant, we should say. Nowhere in the judgment does the Judge allude to the fact that in arriving at his decision, he had discounted the expunged documents. The submission by the 1st respondent, to the contrary thus, must fail.

In the case of **Njonjo Mue & Another v IEBC** (supra) it was held, as already stated, that once documents have been expunged from the record, the court cannot consider or be led by them. Going by the assertion by the 1st respondent that the aforesaid Supreme Court decision was made *per incuriam* and therefore of no precedential value and that we should be at liberty to depart from it and not to be bound, we cannot help but think that at the back of his mind, the 1st respondent believed that in his judgment, the Judge had actually reverted to the expunged documents. It is not for us nor is it our place to declare decisions of the Supreme Court, *per incuriam*. We are bound by such decision, although we may at times not agree with them.

We would in the circumstances agree with the submissions of the appellants that by considering the contents of the expunged documents, the Judge contravened Article 50(4) of the Constitution that provides for the exclusion of illegally obtained evidence. Further, by considering the expunged tender documents, the Judge misdirected himself, resulting in the unfair determination of the tender award in his judgment. Upon the documents being expunged, the petition, in our view, had no legs left to stand on.

According to the 1st respondent, it is trite that costs follow the event. The award of cost is at the discretion of court which of course is exercised judiciously having regard to the peculiar circumstances of each case. The Constitutional Court of South Africa in the case of **Biowatch Trust v. Registrar Genetic Resources and Others** (**CCT80/08**) observed that, as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs.

Though the 1st respondent's interest in bringing the petition has been questioned on accusations that he brought it on behalf of a proxy who had interest in the matter, namely M/s Crane AB, such allegations largely remain unproved. Neither the appellants nor any other party for that matter pursued those allegations before this Court and nor were the accusations proved in the High Court. The 1st respondent described himself as a law-abiding citizen and a human rights defender seeking to promote democratic governance, economic development and prosperity. He expressed dedication to public interest litigation in advancement of the national values and principles of governance espoused in Article 10. The litigation undertaken in this case by the 1st respondent though unsuccessful in this Court cannot be termed as frivolous, vexatious or malicious. The 1st respondent cited the Supreme Court's decision of **People's Union for Democratic Rights & Ors v Union of India & Ors 1983 SCR (1) 456**, in which it was expressed as follows;

> **"Public interest litigation is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the Court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them."**

We are also mindful of our mandate to exercise caution and prudence to see that a body of persons or member of public, who approaches the court, is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. See **Tom Mboya Odege v Edick Peter Omondi Anyanga & 2 others [2018] eKLR**.

As already alluded to, allegations of *malfides* and or vested interests were never proved and remained allegations. The 1st respondent's petition met the threshold of public interest litigation as per the **Black's Law Dictionary** which defines "Public Interest Litigation" as:

> "**a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the commun*ity have pecuniary interest or some interest by which their legal rights or liabilities are affected*"**.

The Supreme Court in **Jasbir Singh Rai & 3 Others vs Tariochan Singh Rai & 4 Others (2014) eKLR** observed that in matters in the domain of public interest litigation tend to be exempted from award of costs. We shall therefore not penalise the 1st respondent in costs following the success of the appeal.

On the whole, the appeal succeeds. The Judgment and Decree of the High Court in **Petition Number No. 597 of 2017** dated 9th April, 2018 is hereby set aside and substituted with an order dismissing the said petition with no order as to costs in respect of the proceedings both in the High Court and in this Court.

Dated and delivered at Nairobi this 12th day of October, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

……..…….

JUDGE OF APPEALask

SANKALE ole KANTAI

……..…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR