Okoiti v Portside Freight Terminals Limited & 12 others (Petition E011 of 2024) [2025] KESC 44 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KESC 44 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION E011 OF 2024

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ

JUNE 30, 2025

BETWEEN

OKIYA OMTATAH OKOITI ..... APPELLANT

AND

PORTSIDE FREIGHT TERMINALS LIMITED ..... 1ST RESPONDENT

PORTSIDE CFS LIMITED ..... 2ND RESPONDENT

HEARTLAND TERMINALS LIMITED ..... 3RD RESPONDENT

KENYA PORTS AUTHORITY ..... 4TH RESPONDENT

CABINET SECRETARY FOR NATIONAL TREASURY & ECONOMIC PLANNING ..... 5TH RESPONDENT

KILINDINI TERMINALS LIMITED ..... 6TH RESPONDENT

MOMBASA GRAIN TERMINAL LIMITED ..... 7TH RESPONDENT

KAPA OIL REFINERY ..... 8TH RESPONDENT

AFRICA PORTS & TERMINALS ..... 9TH RESPONDENT

MULTISHIP INTERNATIONAL ..... 10TH RESPONDENT

KIPEVU INLAND CONTAINERS EPZ LIMITED ..... 11TH RESPONDENT

DOCK WORKERS UNION ..... 12TH RESPONDENT

KATIBA INSTITUTE ..... 13TH RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal at Mombasa (Nyamweya, Laibuta & Odunga, JJ.A.) delivered on 23rd February, 2024 in Civil Appeal No. E130 of 2024)

JUDGMENT

Representation:

Mr, Okiya Omtatah Okoiti, the Appellant (In Person)

Mr. Sanjeev Khagram for the 1st to 3rd Respondents (A.B. & Patel LLP Advocates)

Mr. Dennis Nkarichia for the 4th Respondent (Mohammed Muigai, LLP)

Mr. Kemei for the 5th Repondent (Attorney General's Chambers)

No appearance by the 6th to 12th Respondents

Ms. Eileen Imbosa for the 13th Respondent (Katiba Institute)

A. Introduction

1. This appeal concerns the nature, scope, and application of one of the thirteen procurement methods known as the Specially Permitted Procurement Procedure (SPPP). This method was introduced through *Finance Act* No. 15 of 2017, which amended the Public Procurement and Disposal Act in 2017 by the introduction of Section 114A. Going by the debate in the National Assembly, this development in the procurement process was seen as a grand policy panacea for the eradication of delays and corruption in the procurement of goods and services in the country. To quote one Member of Parliament:

> " Hon. Speaker, I have noted that the Public Procurement and Disposal Act has also been looked at. If there is an area that is most problematic in the management of public affairs, it is public procurement – It is the mother of all corruption. So, I would support anything that would assist in strengthening (sic) and curbing corruption. Anything that would help minimise the delays and bureaucracies in procurement should be welcome. Some of the inefficiencies and failures in Government and public sector have to do with procurement. They take so long until at times the financial year ends without good programmes being implemented. Therefore, the proposal of looking for quicker ways of reaching decisions on public procurement is a good thing and I support it."

See Kenya, National Assembly Official Report, 9th May 2017, 26 (Hon. Onyura) Another member, Hon. Gikaria, agreed stating:

> " The *Public Procurement and Asset Disposal Act* is one of the laws that have had huge hiccups. For instance, when faced with disasters and we need to spend money, the law still requires us to follow due process. An alternative means has been proposed in the Bill and now we will have a special procurement method that will provide an avenue for easy procurement of items whenever we have emergency situations to respond to. When the Independent Electoral and Boundaries Commission (IEBC) wants to purchase items, they are normally told they have to follow due process. Sometimes there is urgency in procurement of items and so, it is important to re-look at the *Public Procurement and Asset Disposal Act* to provide for procurement under emergency and urgent situations".
>
> See Kenya, National Assembly Official Report, 9th May 2017, 38-39 (Hon. Gikaria)

2. The amendment was but only one of the many public procurements reform initiatives, driven by the need for transparency, fairness, efficiency, accountability, and integrity in the procurement of goods and services in the public sector. The enactment of the present law was preceded by the passage of the *Public Procurement and Disposal Act*, 2005, that came into effect in 2007. The Act was then superseded by the *Public Procurement and Asset Disposal Act*, 2015 (now Cap 412C) (PPAD Act), which introduced significant changes and remains the primary legislation. However, it has also undergone further amendments, including those in 2016, 2017, and 2022, intended to further refine the procurement process, by providing for; the establishment of an oversight body, the Public Procurement Regulatory Authority (PPRA), Access to Government Procurement Opportunities (AGPO) to promote the participation of women, youth, and persons with disabilities in government procurement; the need for all public procurements to be undertaken on a digital medium, the e-procurement systems. Along with these legislative changes, the regulatory aspects were equally revised to enhance efficiency and incorporate technology in procurement processes.

3. The procurement under challenge before the Court was initiated by the 1st respondent (Portside Freight Terminals Limited) when it submitted an unsolicited proposal to the 4th respondent, the Kenya Ports Authority (KPA) for the construction and development of a second bulk grain handling facility and island berth at the Port of Mombasa. Pursuant to Section 114A of the *PPAD Act*, KPA granted the application by awarding the license and wayleave to Portside Freight Terminals Limited for the construction and development of a second grain handling facility. This prompted the appellant to petition the High Court, contending that the procurement process contravened Articles 10, 201 and 227 of the *Constitution* as well as the *PPAD Act* for lack of open competition, transparency, fairness and equity.

B. Background

4. In 2004, KPA developed a master plan, a blueprint for its operational activities. The master plan was later reviewed in 2009. Subsequently, in 2019, after engagement with various stakeholders, KPA launched the master plan to run for 30 years from 2017 to 2047. Since the first bulk grain handling facility is located at the Port of Mombasa, the master plan contemplated the construction and operationalisation of a second facility to be located either at Dongo Kundu or Lamu Port.

5. It is common factor that KPA did not tender for the construction and development of the facility proposed in its master plan. However, a number of companies, including Portside Freight Terminals Limited, expressed interest by submitting unsolicited applications and proposals for consideration by KPA. Following receipt of the proposals, KPA's Managing Director established a Technical Committee on 14th July 2020, to review and analyse Portside's proposal. The Committee issued a report dated 28th August 2020, to the Board. It is apparent that two other committees, the Executive Committee (EXCOM) and the Strategy and Operations Committee, also reviewed the report by the Technical Committee. The reports of each of these committees shall, in due course, be examined. In the end, the Managing Director wrote to the National Treasury on 11th March 2021, requesting approval to utilize a Specially Permitted Procurement Procedure (SPPP). The Managing Director advanced the following, among other grounds, to justify the course taken: that the proponent would fully fund the project; that the project's proposed location was strategic; and that the Port being a high security installation, there was a need for security assurance. In response, the Cabinet Secretary, National Treasury (the Cabinet Secretary), on 28th June 2021, authorised the use of the SPPP for the project, subject to the fulfilment of certain conditions precedent, to which we shall revert in due course.

6. Two weeks later, on 15th July 2021, KPA issued an invitation to tender to Portside Freight Terminals Limited, who in another two weeks submitted its bid proposal on 26th July 2021. The next day, on 27th

July 2021, the Procurement Committee of KPA conducted the technical evaluation and found the tender to be responsive. Through a letter dated 28th July 2021, a day later, Portside Freight Terminals Limited was invited for negotiations regarding their proposal. The committee proceeded with the review, holding negotiations on 29th and 30th July 2021. Thereafter, KPA's head of procurement provided his professional opinion on the tender by a letter dated 2nd August 2021 and issued a Notification of Award to Portside Freight Terminals Limited confirming the acceptance of its tender.

C. Litigation History

i. At the High Court

7. The appellant, who describes himself in the Petition before the High Court as a law-abiding citizen and a human rights defender instituted High Court Petition No. 45 of 2021 dated 12th August, 2021 challenging the award to Portside Freight Terminals Limited contending that it was granted contrary to the Port master plan and outside the earmarked areas of Lamu or Dongo Kundu; that the technical team appointed by KPA management reviewed the proposal and found that it was not in conformity with its master plan as it was outside Lamu or Dongo Kundu zone, whereas the proposals submitted by the 6th to 11th respondents were in line with the master plan.

8. The appellant further contended that: the award of the tender to Portside Freight Terminals Limited was illegal, unreasonable and unconstitutional; that the letter to the Cabinet Secretary seeking permission to invoke the SPPP under Section 114A of the *PPAD Act* and Regulation 107 of the *PPAD Regulations* was illegal and unconstitutional; that the process of initiating the SPPP is the role of the accounting officer of KPA and not its Board; that the application of the SPPP was discriminatory to other bidders whose bids were not subjected to a competitive bidding process and instead Portside Freight Terminals Limited was accorded preferential treatment; that there was no equity, transparency, fairness and competitive bidding in the process; and that KPA was bound by Articles 10, 227 and 232 (1) (d)(e) and (f) of the *Constitution* to be accountable and to promote transparency.

9. The appellant asked the High Court to:

    a. declare that the decision of KPA's Board of Directors contained in the letter dated 11th March 2021 to approve the grant of license for the operation of the second bulk grain facility rests with the management and is not a decision of the Board.

    b. declare that KPA's Board of Directors acted *ultra vires*, without jurisdiction and usurped the powers conferred to the management and the accounting officer with respect to the tendering process in purporting to approve and grant Portside Freight Terminals Limited a license to operate a second bulk grain handling facility.

    c. declare that KPA took into account irrelevant factors and consideration that Portside's proposal was attractive due its "uniqueness and creativity deployed" thus meriting the consideration.

    d. declare that KPA's Board of Directors' decision dated 11th March 2021 purporting to approve a proposal that sought to construct a facility outside the approved location under the master plan is excessive, abuse of power and irrational.

    e. declare that the decision dated 11th March 2021 to invoke the use of the SPPP under Section 114A of the *PPAD Act* is in violation of the *Constitution* and does not lie with the Board of Directors but with the Accounting Officer who initiates and undertakes the entire procurement process for a state corporation.

f. declare that the decisions and /or action of KPA and the Cabinet Secretary dated 11th March 2021 and 28th June 2021 in so far as they purport to use Specifically Permitted Procurement Procedures in favour of Portside Freight Terminals Limited, is unconstitutional, illegal and/ or irregular as it contravenes the provisions of the Constitution and Regulation 107(3) of the *PPAD Regulations*.

g. declare that KPA and the Cabinet Secretary's decision to solely consider and approve Portside's proposal, despite the same being in conflict with the master plan, and to adopt the use of SPPP in its favour is unlawful, illegal, irrational and *ultra vires*.

h. declare that it is wrongful and un-procedural to award a contract for the development of the second bulk handling facility at a site that is not projected by KPA's Port master plan, which master plan is yet to be amended or reviewed in order to allow the development of a berth outside its selected areas.

i. declare that the KPA's intended award of contract and license to Portside Freight Terminals Limited for the development of the second bulk grain handling facility gravely violates Articles 10, 201 and 227 of the *Constitution*.

j. declare that the procurement and license for the development of a second bulk grain handling facility has to be procured through competitive bidding as required by the *Constitution* and the laws of Kenya.

k. issue an order of certiorari to quash the decision of the Cabinet Secretary contained in the letter dated 28th June 2021 granting KPA approval to use SPPP for the procurement of a second bulk grain handler facility in favour of the Portside Freight Terminals Limited.

l. issue a mandatory order compelling KPA and the Cabinet Secretary to ensure that the procurement for the development of the second bulk grain handling facility at the Port of Mombasa must be undertaken strictly in accordance with the law, including through competitive bidding.

m. issue an order of Prohibition to restrain the KPA and the Cabinet Secretary from implementing the decision contained in the letter dated 28th June 2021 approving the use of SPPP to award Portside Freight Terminals Limited and the contract for development of the second bulk grain handling facility.

n. grant an order of Prohibition to restrain KPA and the Cabinet Secretary from granting and approving the proposals for way leave and license of a second bulk grain handling facility at the Port of Mombasa without due observance of the procurement procedures laid out under the public procurement laws.

o. an order for the costs of the petition.

10. During the pendency of the petition at the High Court, and the 1st to 4th respondents having failed to supply to the appellant with a certified copy of the license/permit issued to Portside Freight Terminals Limited, the appellant approached the court pursuant to Article 35 of the *Constitution* and the *Access to Information Act*, No. 31 of 2016 and instituted High Court Petition No. E018 of 2022 against the 1st to 4th respondents seeking various declaratory and other orders for failing to provide a certified copy of the license for the second bulk grain handling facility. Related to this, the appellant argued that KPA was also in violation of Executive Order No. 2 of 2018 for failing to publish the license/permit on the Public Procurement Information Portal. Consequently, the appellant sought a compulsory disclosure

of the license/permit issued by KPA; an award in damages of Kshs. 10 million for the violation of his constitutional rights; and costs of the petition. This and High Court Petition No. 45 of 2021 were subsequently consolidated.

11. The 12th respondent, Dock Workers Union, supported the consolidated petition urging that, while the master plan is a policy document, it was a product of a public participation process and therefore the actions of KPA's Board to sidestep in granting the license were an abuse of the stakeholder engagement. They added that KPA neither placed an advert nor invited any applications from the public to submit their proposals for the development of the second bulk grain handling facility at Dongo Kundu or Lamu Port or even at the port itself; that seven other applicants who had previously shown interest were disregarded in favour of Portside Freight Terminals Limited; that KPA failed to meet any criteria set out under Section 114A (2) of the *PPAD Act* as there were no exceptional circumstances to warrant the use of the SPPP; and that KPA acted illegally, irrationally, unreasonably, in abuse of the law and in violation of Articles 227 and 232 of the *Constitution*, the *PPAD Act* and the Port master plan in the manner it award the contract.

12. The 13th respondent, Katiba Institute, similarly supported the petition asserting that: the administrative decisions of KPA could be judicially challenged; KPA's Board acted *ultra vires* and contrary to the *PPAD Act* in granting the award and license to Portside Freight Terminals Limited; that in doing so, the Board exercised authority not conferred to it by the *Constitution* or any other law rendering the decision null and void; that the 6th to 11th respondents had legitimate expectation that their proposals would similarly be evaluated in accordance with the initial bid, specifically Dongo Kundu and Lamu, in terms of the master plan; that the Board acted unlawfully by varying the proposed site of the dry bulk grain handling facility without involving the public; and that the award of the contract and license to Portside Freight Terminals Limited was a procurement for goods and services within the *PPAD Act*, and therefore the Board was duty bound to comply with the provisions of the Constitution and the *PPAD Act*.

13. KPA, in response and opposition to the consolidated petition, argued that the development of a master plan was the responsibility of its Board as a policy document. Further, whereas the master plan was contemplated to run for 30 years, it was subject to amendments anytime or even overlooked altogether, and any infringement thereof cannot attract any constitutional redress. Moreover, KPA argued, it was contemplated in the master plan that any prospective stakeholder or developer could make a proposal for review to its Board for consideration, as was the case in 1992 when the first operator of such a facility, the Grain Bulk Handlers Limited (GBHL), was licensed. The company has subsequently made several requests for review of the terms of their license to accommodate prevailing special circumstances.

14. KPA affirmed that it received several unsolicited proposals from various interested parties, precipitating the establishment of a technical committee to evaluate the proposals. It averred that after the evaluation, the Technical Committee found Portside's proposal attractive, unique, viable, reasonable, cost- effective and in compliance with the master plan for the expansion of the port; and that KPA would not spend any money towards its establishment. KPA urged that its Board, in accordance with Section 10 of the *Kenya Ports Authority Act* (KPA Act), forwarded the proposal to the Cabinet Secretary, who, procedurally approved the adoption of the SPPP method.

15. Regarding the request for information by the appellant, KPA contended that there was no proof that the appellant had in fact applied; that instead, the application KPA received came from an organization known as KEJUDE, to which it had made available all documents requested. For this reason, it was KPA's account that the appellant lacked the capacity to seek any redress as regards the supply of information.

16. The 5th respondent (the Cabinet Secretary) maintained that pursuant to Section 114A of the *PPAD Act* and Regulation 107 of the *PPAD Regulations* 2020, an accounting officer of a procuring entity is allowed to seek the National Treasury's approval to use the SPPP for the procurement of goods and services. Further, the accounting officer of KPA, while requesting for procurement of a second bulk grain handler, explained the existence of exceptional requirements that made it impossible and uneconomical to comply with the Act. The Cabinet Secretary added that the Port of Mombasa, being a sensitive security area, it was imperative that proper vetting be done to accommodate national security considerations in the selection process.

17. Portside Freight Terminals Limited, the 2nd and 3rd respondents were in support of KPA's and the Cabinet Secretary's above stated positions and urged that: the consolidated petition offends the doctrine of exhaustion; that none of the parties joined to the petition either objected to the grant of license to Portside Freight Terminals Limited or claimed to have been discriminated against; no evidence was presented to suggest that the grant of the license to Portside Freight Terminals Limited was not fair, inequitable, opaque, non competitive and uneconomic; and that the petition was without substance or any legal foundation.

18. The High Court (Onyiego, J.) in a judgment dated 18th July 2023, isolated seven (7) issues in order to determine the controversy in the petition. On jurisdiction, the court held that pursuant to an earlier ruling dated 20th April 2022, the court had determined that question and held that it had jurisdiction. As to whether the appellant had *locus standi* to file the petition, the court found in the affirmative stating that the appellant, like any other member of the society, had a right to question certain constitutional violations or threatened violations; in the instant case, what he regarded as the improper award of a licence and the subsequent issuance of a tender in violation of Article 227 of the *Constitution*; and that any citizen could institute proceedings for redress under Article 258 of the *Constitution*.

19. Regarding the third issue, whether KPA's Board decision to review and approve the grant of license to Portside Freight Terminals Limited was unlawful and therefore *ultra vires*, the court expressed the opinion that the office mandated to apply for the permission/authority/license is the accounting officer of a procuring entity pursuant to Section 2 of the *PPAD Act*. As such, KPA's Board was not a procurement entity for purposes of seeking the SPPP. Ultimately, on this issue, the court concluded that the actions of the Board were *ultra vires* its powers under the *KPA Act*; and further that it discriminated against the appellant, the 6th to 11th respondents and the public in general by frustrating their legitimate expectation to participate in the process leading to the award for the construction of the second bulk grain handling facility. While the court appreciated that the Board has powers under Sections 8 and 10 of the *KPA Act* to amend, review or alter the master plan, it held, this could not be done unilaterally but only after engagement with stakeholders as decreed by Article 10 of the *Constitution*.

20. On whether the SPPP was regularly, procedurally and lawfully granted, the court held that KPA acted beyond its powers, irrationally, illegally, unjustly and in bad faith. Equally, the Cabinet Secretary acted improperly and irrationally by issuing an approval before being satisfied that due process was followed, and therefore, the license issued to Portside Freight Terminals Limited was null and void. Moreover, the Board's approval of Portside Freight Terminals Limited, the subsequent issuance of the license by the Cabinet Secretary and the award of tender by the KPA management before amending the master plan were *ultra vires* and void ab initio.

21. On whether the failure to publish a copy of the license/permit granted to Portside and Heartland on the Public Procurement Information Portal was contrary to the Executive Order No. 2 of 2018, the

court held that the said Order was a policy direction breach of which did not amount to a constitutional violation to warrant redress in a constitutional court.

22. On whether the right to access to information was violated, the court agreed with the respondents that the appellant's right to information was not violated, noting that it was KEJUDE Trust, and not the appellant, that had made the request for information.

23. On damages to be awarded, the court found that the appellant failed to specify the nature of the injury suffered by him personally, and the petition having been brought in public interest litigation, the appellant could not personally benefit from it.

24. In the end, the court agreeing with the appellant, held that the award of the contract and license to Portside Freight Terminals Limited for the development of the second bulk grain handling facility violated Articles 10, 201 and 227 of the *Constitution*. Accordingly, it issued:

    i. an order of certiorari quashing the decision of the Cabinet Secretary contained in the letter dated 28th June 2021, granting KPA approval to use the SPPP for the procurement of a second grain bulk handling facility in favour of Portside Freight Terminals Limited;

    ii. a mandatory order compelling the respondents to ensure that the procurement for the development of the second bulk grain handling facility at the Port of Mombasa is undertaken strictly in accordance with the law through competitive bidding;

    iii. an order of prohibition to restrain the respondents from implementing the decision contained in the letter dated 28th June, 2021 approving the use of SPPP to award Portside Freight Terminals Limited the contract for development of the second bulk grain handling facility;

    iv. an order of prohibition to restrain the respondents from granting and approving the proposals for wayleave and license of a second bulk grain handling facility at the Port of Mombasa without due observance of the procurement procedures laid out under the Public Procurement Laws; and

    v. an order that each party bears its own costs as it was a public interest matter.

ii. At the Court of Appeal

25. Aggrieved by the foregoing judgment, Portside Freight Terminals Limited, alongside the 2nd and 3rd respondents, lodged Civil Appeal No. E130 of 2023 at the Court of Appeal, in which they raised 29 grounds. The Court of Appeal, however collapsed these grounds into only six as follows: whether the trial court had jurisdiction over the petition under the *Constitution* and the *PPAD Act*; whether the petition was being pursued in the public interest, and whether the appellant had *locus standi* to pursue the petition; whether the appellant pleaded any violation of the Bill of rights or proved the violation to the required standards; whether the trial court erred in holding that the invocation of the SPPP under section 144A of the *PPAD Act* violated the *Constitution*; whether the trial court erred in holding that KPA Board initiated the procurement in flagrant violation of the *PPAD Act*; and whether the trial court erred in holding that KPA acted *ultra vires* the existing Port master plan.

26. Portside Freight Terminals Limited, the 2nd and 3rd respondents, sought the setting aside of the High Court Judgment, and prayed that it be substituted with an order dismissing the petitions with costs.

27. On the first issue regarding the jurisdiction of the High Court, the Court of Appeal determined that since declarations of unconstitutionality of the actions by KPA and the Cabinet Secretary were sought, the remedies under the *PPAD Act* were not available, efficacious, and sufficient; hence, the High Court had jurisdiction to hear and determine the petition.

28. Regarding the question whether the appellant had *locus standi* to institute the suit, the appellate court respectfully agreed with the learned trial judge that, pursuant to Article 22(1) and 258 of the *Constitution*, the appellant had locus to petition the High Court on behalf of an identified class or group of persons or in the public interest. The court however held that the appellant could not purport to bring the petition on behalf of the 6th to 11th respondents, who were parties to the petition but elected not to participate in the proceedings, denying the court the essential material on the basis of which the trial court could have found that they were discriminated against.

29. On whether the use of the SPPP was unconstitutional or illegal, the appellate court was of the view that while the general rule in Article 227(1) of the *Constitution* is that public entities shall contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost- effective, the said article gives various exceptions that may be provided under a legislative framework, which includes categories of preference in the allocation of contracts. The appellate court, therefore, did not find any evidence that the invocation of the SPPP under the *PPAD Act* violated the *Constitution*. It was satisfied that the Board's actions to guide the management in the conduct of the procurement process did not amount to commencement of the procurement process and therefore found no fault in the Board's actions.

30. On the fourth issue, whether the trial court erred in holding that the KPA acted *ultra vires* the current Port master plan, the court overturned the learned trial Judge and instead found that, whereas it was advisable that a master plan of a public entity developed with the participation of stakeholders, be protected from reviews which substantially go contrary to the original objective, a review could nonetheless be undertaken without the necessity of public participation. Moreover,the trial court made an error in concluding that KPA could not review the master plan merely because public participation was not undertaken.

31. In the end, the Court of Appeal found merit in the appeal, set aside the judgment of the High Court and substituted it with an order dismissing the consolidated petition with no orders as to costs.

iii. At the Supreme Court

32. Dissatisfied, the appellant has filed the instant appeal challenging the decision of the Court of Appeal on the following eleven (11) grounds which, as shall be apparent shortly, we have ourselves condensed. The appellant argues that the learned appellate court Judges erred in law:

    a. In failing to find that KPA violated Article 10 of the *Constitution* by purporting to amend and/ or review the Port master plan in a board meeting, without subjecting such review to public participation.

    b. In their interpretation and application of the provisions of Article 227 of the *Constitution* vis-à-vis the use of SPPP with the intended purpose of benefiting a preferred entity.

    c. In holding that the effect of the SPPP is to give preference by releasing a procuring entity from the requirements and obligations of open competition as set under Article 227 of the *Constitution*.

    d. In failing to find and hold that KPA failed to observe and apply the provisions of Article 227 of the *Constitution* in the procurement procedure.

    e. In failing to find and hold that the procurement process employed by KPA and its Board was discriminatory against the 6th to 11th respondents, who had demonstrated legitimate interest in

the grant of license for the development and construction of the second bulk grain handling facility.

f. By misapplying the provisions of Article 258(2)(b) of the *Constitution* in that they misapprehended the evidence before them that the appellant brought the constitutional petition under the provisions of Article 258(2)(c) and 22(2)(c) as pleaded in the petition.

g. In misdirecting themselves by quoting Article 258(2)(b) to the exclusion of Article 258(2)(c) of the *Constitution*.

h. The appellate court's finding on representation (sic) constitutes an unconstitutional attempt to overthrow a very clear mandate vested on the appellant and other members of the public by Article 258(2)(c) of the *Constitution*.

i. Erred in law and fact in failing to appreciate the provisions of Article 258(1) of the *Constitution*, thereby denying the appellant justice.

j. Failed to appreciate that the petition was presented under Articles 22 (1) and (2) of the *Constitution*.

k. Misquoted and misapplied the provisions of Article 258 of the *Constitution* in holding that the appellant could not purport to bring the petition on behalf of the 6th to 11th respondents, who are members of the public and the appellant filed the petition in the interest of the public.

33. For these reasons, the appellant seeks that we declare that:

i. This appeal has merit and the judgment of the Court of Appeal (Nyamweya, Laibuta and Odunga, JJA) and all consequential orders thereon, rendered on 23rd February 2024 in Mombasa Civil Appeal Number E130 of 2023 be set aside.

ii. The use and effect of the Specially Permitted Procurement Procedure does not release a procuring entity from the requirements and obligations of open competition under Article 227 of the Constitution.

iii. That KPA's Port Master Plan cannot be reviewed and/or amended without conducting public participation with the relevant stakeholders and members of the public.

iv. That Portside Freight Terminals Limited, 2nd, 3rd and 4th respondents bear the costs of this appeal or, in the alternative, this being a public interest matter, each party to bear their own costs.

34. In response to the petition, Portside Freight Terminals Limited, 2nd and 3rd respondents have filed Grounds of Objection, the tenor of which is that this Court does not have jurisdiction to hear and determine the petition for the reason that it is not in compliance with Rule 39 of the *Supreme Court Rules*; that the Notice of Appeal is not in compliance with Rule 36; and that the appeal falls on matters outside interpretation and application of the *Constitution*.

35. It is worth noting at this point that the 12th respondent, the Dock Workers Union, had filed SC Petition No. E010 of 2024 to challenge the judgment of the appellate court. That petition was later consolidated with the present SC Petition No. E011 of 2024. However, upon the Dock Workers Union applying, the former petition was marked as withdrawn, leaving the appellant to pursue the current petition alone.

D. Parties' Submissions

i. The Appellant

36. In his written submissions dated 21st November 2024, the appellant reiterates that the 2017-2047 master plan was preceded by a wide-ranging public participation, and members of the public expressed themselves on the timing and placement of the second bulk grain handling facility. The plan envisaged that the facility would be established at either Dongo Kundu or Lamu Port by 2023. He avers that despite the 6th to 11th respondents submitting their proposals, which identified the sites of interest that did not conflict with the master plan, they were ignored by KPA as none of their proposals were placed before the technical committee for viability review.

37. The appellant contends that: the Board's actions of approving the license to Portside Freight Terminals Limited was in breach of the Constitution and *ultra vires* the master plan; the Board of Directors lacked the capacity to procure on behalf of KPA and indeed usurped the procurement role of KPA's accounting officer, adding that Article 226 of the *Constitution* underscores the accounting officer's accountability for public funds by imposing personal liability for unlawful use. He submits that the procurement method chosen by KPA did not meet the threshold under Article 227 and the values and principles set out under Articles 10, 201, 225 and 232 of the *Constitution* on transparency, efficiency and prudent financial management. He cites this Court's decision in *Kenya Railways Corporation & 2 others v Okoiti & 3 others,* Petition 13 & 18 (E019) of 2020 (Consolidated) [2023] KESC 38 (KLR) to urge that all procurement of goods and services by the national government or a government entity, irrespective of the method adopted is to be carried out in accordance with Article 227 of the *Constitution*.

38. According to the appellant, the unilateral decision to amend the master plan was intended to accommodate the bid by Portside Freight Terminals Limited; and that all the other applicants who had submitted proposals or would have otherwise qualified to submit proposals for consideration for an award of the tender in question, were discriminated against contrary to Article 27 of the *Constitution* and that their proposals were never considered in light of the adopted use of the SPPP, thereby unfairly locking them out of the procurement process. He also questioned the speed at which the process was carried, contending that "the break-neck speed" was itself a manifestation of bias in favour of Portside Freight Terminals Limited.

39. Highlighting these submissions before us, the appellant sought to persuade us that Section 114A aforesaid and Regulation 107 of *PPAD Regulations* 2020 are unconstitutional and therefore void. He argues that this issue, being a matter of law, can be raised at any stage in the proceedings and even by a court on its own motion. He argues that, to the extent that Regulation 107(2) of the *PPAD Regulations* vests powers reserved for the Cabinet Secretary in the accounting officer of a procuring entity, it is unconstitutional, null and void for sanctioning non-competitive procurement practices; and that the Regulation also conflicts with Section 114A (3) of the *PPAD Act* which requires the Cabinet Secretary for National Treasury to approve and then prescribe a customised procedure.

40. In the appellant's opinion, the SPPP was abused considering that there is already a bulk grain handling facility at Mombasa Port, the Grain Bulk Handlers Limited (GBHL) and therefore, the procurement of another facility cannot be said to present a unique procurement challenge that can meet the threshold in Sections 91, 93 and 114A (2) of the *PPAD Act*; that under Section 93 aforesaid, KPA ought to have conducted pre-qualification procedure first to identify the best few qualified firms before adopting the SPPP, an alternative procurement method. He adds that this failure rendered the award of the license to Portside Freight Terminals Limited unlawful, null and void ab initio. To support his arguments,

he cites the persuasive decisions in *Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others* [2018] KEHC 8263 (KLR); *Republic v Public Procurement Administrative Review Board & 3 others ex parte Olive Telecommunication PVT Limited* [2014] eKLR and *James Nyasora Nyarangi & 3 Others v Attorney General* [2008] KEHC 3906 (KLR).

41. Lastly, the appellant urges that the appellate court erred by holding that he could not bring the petition on behalf of the 6th to 11th respondents and that they did not fall under the categories of Articles 22(2)(a) and 258(2)(b) of the *Constitution*. He urges that Articles 22 and 258(2) of the *Constitution* grant every person the right to institute proceedings on behalf of another person or in the public interest. He adds that the non-participation of the 6th to 11th respondents in the proceedings did not affect the quality of the evidence presented before the court, demonstrating discrimination against them. For all these reasons, the appellant urges that his appeal be allowed.

ii. The 13th respondent (Katiba Institute)

42. Katiba Institute filed submissions dated 29th November, 2024 in support of the petition urging that the award of the contract and license to Portside Freight Terminals Limited was a procurement for goods and services and therefore bound by Articles 10, 27, 47, 201 and 227 of the *Constitution* as well as the *PPAD Act* and its Regulations.

43. It argues that the variation of the master plan (2017-2047) project sites from Dongo Kundu or Lamu Port to Mombasa Port was an alteration that substantially contradicted the master plan's original objectives. Additionally, the public, stakeholders, or affected parties were not engaged in the variation. It contends that KPA acted in violation of Articles 10 and 118 of the *Constitution* by failing to subject the variation to public participation. Further, that KPA discriminated against and violated the legitimate expectations of the 6th to 11th respondents and all other parties who had submitted bids and proposals for the award of a license to develop and operate the second dry bulk grain handling facility by failing to inform them of the variations to the master plan project sites.

44. Katiba Institute also questions the use of the SPPP, which, in its view, was unlawful and contrary to Section 114A of the *PPAD Act* in the manner it was executed and that it was used to maliciously circumvent competitive bidding contrary to Articles 10 and 227 of the *Constitution*. It asserts that the use of the SPPP was marred with procedural irregularities and disregard for all other parties who had expressed interest and submitted their bids for the award of the license, and this unduly favoured Portside Freight Terminals Limited. Finally, Katiba Institute argues that, while a developer's financial and technical capacity is a relevant and reasonable consideration in the award of a tender to provide public goods and services, the overarching principle is to ensure a developer provides the best value for money, which is best guaranteed by competitive bidding or a process based on openness, equality, fairness, and transparency.

iii. 1st, 2nd and 3rd respondent's submissions

45. The 1st, 2nd and 3rd respondents rely on their submissions dated 9th November, 2024 in which they submit that the Court lacks jurisdiction to consider or determine new matters being raised before it for the first time on the question of constitutionality of Section 114A of the *PPAD Act*. In support of this statement, they cite this Court's decisions in *Muruatetu & Ano. v Republic, Katiba Institute & 5 others* (Petition 15 & 16 of 2025 (Consolidated) [2017] KESC 2 (KLR) and *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others*, Petition 2 of 2012 [2012] KESC 7 (KLR).

46. The respondents further contend that whereas, pursuant to Article 22(2) of the *Constitution*, such proceedings may be instituted by a person acting on behalf of another, the proviso in Article 22(a)

states that this can only be done on behalf of persons who cannot act in their own name. They argue that the petition at the High Court was confined to the interests of the 6th to 11th respondents on whose behalf the proceedings were instituted and not in public interest. Though joined in the proceedings, none of the said respondents appeared before either the High Court or the Court of Appeal. There was no evidence that the 6th to 11th respondents could not act in their own names, thereby necessitating the appellant's intervention.

47. It is the respondents' case that allegations of discrimination or unfair treatment were not substantiated by the appellant as there was no evidence that another party had made a similar application as Portside Freight Terminals Limited targeting the same location. They cite this Court's decision in *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR), which held that not all cases of distinction amount to discrimination to buttress these averments.

48. The three respondents submit further that, since legitimate expectation is personal and only the persons affected can complain, it is untenable for the appellant, a stranger, to purport to complain on behalf of such a party. Concerning the master plan, they contend that the appellant sought to elevate a company policy document above statutory provisions of the *KPA Act*; and that to insist that, no other bulk grain handling terminal facility ought to be allowed except for Lamu and Dongo Kundu is to suggest that KPA management was helpless unless and until the master plan was reviewed. In any case, the respondents further argue that the Court could not venture into this question since it was not an issue before the Court of Appeal.

49. On the use of the SPPP, the three respondents maintain that Portside Freight Terminals Limited's proposal was unique and given that public interest and national food security risks were involved, the National Treasury granted approval. Further, pursuant to Section 114A (2) of the *PPAD Act* and Regulation 107(2)(a) of the *PPAD Regulations*, such procedure is specifically permissible in matters involving public interest or national security.

50. Finally, they disagree with the argument that the Board of Directors acted *ultra vires*, insisting that from the documents on record, it was the Managing Director, the accounting officer of KPA, who initiated the procurement process and not the Board.

iv. 4th respondent (Kenya Ports Authority)

51. We shall revert to the conduct of KPA in these proceedings but for the moment it suffices to say that having fully participated in the two superior courts below, KPA, the party whose actions are at the centre of this dispute, suddenly seems to have had a change of mind and declared they would not take part in the proceedings. They did not file submissions and appeared before us on the hearing date only to restate their aforesaid position.

iv. 5th respondent (Cabinet Secretary for National Treasury & Economic Planning)

52. The Cabinet Secretary filed submissions dated 5th November, 2024 opposing the appeal, arguing that the prayer seeking declaration of unconstitutionality of Section 114A of the *PPAD Act* for ousting Article 227 of the *Constitution* is being raised too late in the day, as it was neither pleaded nor argued in the superior courts below. And that it has been unprocedurally introduced through submissions before this Court. The Cabinet Secretary relies on the decisions in *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR); *Japhet Nkubitu & Another v Regina Thirindi* [1998] KECA 270 (KLR); and *Avenue Car Hire & Another*

v Slipha Wanjiru Muthegu, Civil Appeal No. 302 of 1997 to urge that this Court does not have jurisdiction to entertain any issue not pleaded, canvassed and decided by the courts below.

53. The Cabinet Secretary further urges that it is crucial that, in evaluating any award of public procurement by a public entity under Article 227 of the *Constitution*, the significance of the circumstances of each procurement should be considered according to their merits. Article 227 (2) of the *Constitution* as read with Section 91 (2) of the *PPAD Act*, allows for a departure from the preferred method in Section 92(1) as long as it conforms to the provisions of Article 227 of the *Constitution*. Furthermore, the SPPP under Section 114A of the *PPAD Act* is an alternative procurement method contemplated under Article 227(2) as read with Section 91(2) of the *PPAD Act*.

54. He asserts that in compliance with Section 114A of the *PPAD Act*, the proposal by Portside Freight Terminals Limited was accepted by KPA after an approval to use the SPPP was granted by the Cabinet Secretary. The justification, rationale or consideration upon which the Cabinet Secretary granted the approval has not been challenged.

55. In conclusion, and for the foregoing reasons, the Cabinet Secretary prays that we declare the appeal to be an abuse of the court process for seeking reliefs not applied for and for introducing new evidence in the submissions without a factual or legal basis.

E. Issues for Determination

56. Having considered the pleadings, the impugned judgment, and the parties' respective submissions and arguments by counsel, we are of the considered view that the following issues suffice to dispose of the appeal:

    i. Whether this Court has jurisdiction to determine the appeal under Article 163(4)(a) of the *Constitution*;

    ii. Whether the appellant had *locus standi* to institute the action;

    iii. Whether KPA's Board of Directors usurped the role of the accounting officer in proposing the use of SPPP and the subsequent grant of license wayleave to Portside Freight Terminals Limited;

    iv. Whether KPA's decision to vary the project sites was *ultra vires* the Port Master Plan and in violation of Articles 10 and 227 of the *Constitution*; and

    v. Whether the decision to grant Portside Freight Terminals Limited the license and wayleave to establish a second grain bulk facility through the Specially Permitted Procurement Procedure under Section 114A of the *PPAD Act* violated Articles 10, 201 and 227 of the *Constitution*.

F. Analysis and Determination

i. Whether this Court has jurisdiction to determine the appeal under Article 163(4)(a) of the Constitution;

57. In *Macharia & another v Kenya Commercial Bank Limited & 2 others* (Application 2 of 2011) [2012] KESC 8 (KLR), this Court affirmed, like the Court of Appeal many years before it in the case of *Owners of The Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR) that jurisdiction is everything; that without it a court must down its tools; that jurisdiction is derived from the Constitution, legislation, or both, and that a court cannot assume jurisdiction beyond what is conferred by law. Accordingly, as a standard practice, the Court must independently ascertain that any appeal brought under Article 163(4) of the *Constitution*, or any other provision, is properly before

it. In the instant case, by their Grounds of Objection as well as their submissions, the 1st, 2nd and 3rd respondents challenge the jurisdiction of this Court to determine the appeal under Article 163(4)(a) of the *Constitution* on the grounds that the appeal involves matters that are outside the interpretation and application of the *Constitution*. The second limb of their objection is that the Court cannot entertain new matters introduced for the first time in the proceedings by way of submissions before this Court, to the effect that Section 114A of the *PPAD Act* is inconsistent with the *Constitution*.

58. Pursuant to Article 163(4)(a) of the *Constitution*, an appeal shall lie from the Court of Appeal to the Supreme Court as of right in any matter involving the interpretation or application of the Constitution. The jurisprudential principles governing the invocation of this appellate jurisdiction are now firmly settled beyond peradventure in a long line of judicial pronouncements by this Court. We cite only two leading ones, *Nduttu & 6000 others v Kenya Breweries Ltd & another* (Petition 3 of 2012) [2012] KESC 9 (KLR) and *Joho & another v Shahbal & 2 others*, (Petition 10 of 2013) [2014] KESC 34 (KLR) where the Court postulated two conditions to clothe it with jurisdiction under Article 163(4)(a); one, that the appellant must establish that the dispute in question entails a constitutional issue that has been subjected to adjudication through the judicial hierarchy; two, an appellant must demonstrate that the reasoning and conclusions reached in the decisions of the superior courts below, engaged in constitutional interpretation or application.

59. The objection to our jurisdiction was dealt with in our Ruling of 26th July 2024. While granting conservatory orders, we made it clear that from the record, there was no doubt whatsoever that the two petitions lodged in the High Court concerned allegations of contravention of fundamental rights and freedoms under Articles 10, 27, 47, 201 and 227 of the *Constitution*. The petitions sought the intervention of the High Court and declaratory reliefs under the *Constitution*. The same question remained the predominant theme in the decision of the High Court that triggered the first appeal to the Court of Appeal. The Court of Appeal's judgment similarly dwelt on the interpretation and application of various constitutional provisions. As regards the appellant's *locus standi*, Articles 22 and 258 of the *Constitution* became the centrepiece of interpretation, while the gravamen of the whole dispute from the High Court to this Court remains, whether the award of license or wayleave to Portside Freight Terminals Limited was in contravention of Article 227 of the *Constitution*. The two provisions remained the constant subject of adjudication and the reasoning and conclusions by the superior courts below engaged in their interpretation and application. The arguments before this Court was similarly about the *locus standi* of the appellant and whether by invoking Section 114A of the *PPAD Act* by KPA contravened Articles 10, 201, 227 and 232 of the *Constitution*. We say no more than to confirm that the appeal is indeed properly before us pursuant to Article 163(4)(a) of the *Constitution* and overrule the objection in the first limb.

60. The second limb of the objection contests the invitation of the Court by the appellant to declare Section 114A of the *PPAD Act* and Regulation 107 of the *PPDA Regulations* unconstitutional. Whereas the appellant concedes that indeed this issue is being raised for the first time before this Court, he, however, insists that the question being a matter of law, can be raised at any stage of the proceedings and even by a court on its own motion. We are, with respect, in agreement with the respondents on this; that the question of unconstitutionality of Section 114A and Regulation 107 aforesaid was not pleaded, canvassed or determined by both the High Court and Court of Appeal.

61. In *Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)* [2016] KESC 12 (KLR), the Court, answering this question, rendered itself as follows:

> " 43. Consequently, the issues of constitutionality of the death penalty and/or its abolition, are not issues presented by the petitioners before this Court. Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed. Further, such issues are matters relating to the interpretation of the Constitution, and we cannot allow them to be canvassed in this Court for the first time, as though it was a Court of first instance. We recognize the hierarchy of the Courts in Kenya, and their competence to resolve these constitutional questions." (Our emphasis)

See also *Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others*, SC Petition No. 2 of 2012, [2012] eKLR.

62. In the command of the language of Article 2, the *Constitution* declares that it is the supreme law of the Republic; that it binds all persons and all State organs. It further proclaims that its validity or legality is not subject to challenge, and that any law that is inconsistent with it is void to the extent of the inconsistency. Declarations of unconstitutionality of a statute issued by a court with jurisdiction have a binding force against the world at large, transcending the parties to the case. This effect follows from the text and context of the above supremacy provision of the *Constitution*. Declaring a law unconstitutional is therefore a critical power of the courts; a power that must be exercised with great caution because of the doctrine of separation of powers and the presumption that the Legislature, in enacting laws, acts with integrity and with a desire to keep within the bounds of the *Constitution*. The question of the unconstitutionality of a statute cannot, for these reasons, be raised in the nonchalant way it was presented before us.

63. It follows, for the reasons given, and on the authority of the above-cited cases, that the appellant was barred from addressing the question of unconstitutionality of Section 114A and Regulation 107 aforesaid, for the first time on a second appeal to this Court. To that extent, the second objection is sustained, and we declare that the Court lacks jurisdiction over the question of unconstitutionality of the two provisions.

ii. Whether the appellant had locus standi to institute the action

64. In his grounds of appeal, the appellant is complaining that the appellate court committed an error of law in its application of Articles 22(1)(2) and 258(2)(c) of the *Constitution* resulting in the holding that the appellant could not purport to bring the petition on behalf of the 6th to 11th respondents, who, though are parties, are nonetheless in fact members of the public in the first place. According to him, the non-participation of the 6th to 11th respondents in these proceedings did not affect the quality of the evidence presented before the court, proving discrimination against them.

65. The 1st, 2nd and 3rd respondents, for their part, maintain that, while Article 22(2) of the *Constitution* allows proceedings to be instituted by a person acting on behalf of another, the proviso to that Article limits this to individuals who are unable to act in their own name. As far as they are concerned, the petition before the High Court focused solely on the interests of the 6th to 11th respondents, on whose behalf the proceedings appear to have been initiated, rather than the public interest. These respondents, though parties, did not participate in the proceedings either before the High Court or the Court of

Appeal, and no evidence was presented to show that they were incapable of acting in their own names, to warrant the appellant's intervention.

66. In determining this question, the High Court noted that the appellant had approached the court claiming to represent the public interest in protesting the violation of Articles 10, 27 and 227 of the *Constitution*. The court appreciated that under Articles 22 and 258, a petitioner need not establish an infringement of his personal rights but rather a breach of the *Constitution* to which any citizen can institute proceedings for redress. Consequently, the High Court was satisfied that the appellant, like any other member of society, had a right to question certain constitutional violations or threats. Based on these factors, the High Court was persuaded that the appellant had established *locus standi* to petition the High Court in the public interest.

67. For their part, the learned judges of the Court of Appeal, while agreeing with the High Court that the appellant had the *locus standi* to file a suit on behalf of an identified class of persons or on behalf of the public, disagreed that as regards the alleged violation of freedom from discrimination under Article 27 of the *Constitution*, the appellant failed to meet the test of pleading the alleged discrimination with precision as enunciated by this Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] KESC 53 (KLR). At any rate, the appellate court went on to emphasize that the appellant could not purport to bring the petition on behalf of the 6th to 11th respondents, who are themselves parties to the proceedings but who elected not to participate in those and these proceedings, denying the court the essential material on the basis of which the trial court could have found that they were discriminated against. It is this last holding that has aggrieved the appellant.

68. We consider first, that in harmony with our decision in *Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] KESC 9 (KLR), this is one of the issues in contestation around the interpretation or application of the *Constitution*. The appellant invites the Court to find that the Court of Appeal erred in its application of Articles 22 and 258 of the *Constitution*. We note the question of interpretation and application of the two Articles has been at the heart of this dispute from the High Court, the Court of Appeal and now before us. It is therefore properly before us and the narrow issue, both courts below being unanimous that the appellant had *locus standi*, is whether he could petition the High Court on behalf of the 6th to 11th respondents.

69. We observe from the onset that the language employed in the two Articles is nearly identical. Article 22 reads:

> "(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
>
> 2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by–
>
> a. a person acting on behalf of another person who cannot act in their own name;
>
> b. a person acting as a member of, or in the interest of, a group or class of persons;
>
> c. a person acting in the public interest; or
>
> d. an association acting in the interest of one or more of its members" (Our emphasis).

Whereas Article 258 provides:

> "(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
>
> 2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by–
>
> a. a person acting on behalf of another person who cannot act in their own name;
>
> b. a person acting as a member of, or in the interest of, a group or class of persons;
>
> c. a person acting in the public interest; or
>
> d. an association acting in the interest of one or more of its members" (Our emphasis).
>
> While Article 22 deals with the Enforcement of Bill of Rights under Chapter Four on the Bill of Rights, Article 258, on the other hand, is concerned with the "Enforcement of this Constitution."

70. Both provisions grant every person, without exception, the right to institute court proceedings, claiming either that some right or fundamental freedom has been denied, violated or infringed, or is threatened, or on the other hand, that any part of the Constitution has been contravened, or is threatened with contravention. The provisions have received judicial interpretation and application in many decisions at all court levels. For instance, in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] KESC 6 (KLR), this Court stated regarding *locus standi*:

> "67. It is to be noted that the promulgation of the 2010 *Constitution* enlarged the scope of *locus standi*, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in

general. In *John Wekesa Khaoya v Attorney General*, Petition No. 60 of 2012; [2013] eKLR the High Court thus expressed the principle (paragraph 4):

> "...the *locus standi* to file judicial proceedings, representative or otherwise, has been greatly enlarged by the Constitution in Articles 22 and 258 of the Constitution which ensures unhindered access to justice..."
>
> The Court went further to explain that:
>
> > "Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution's aim in enlarging *locus standi* in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case-by-case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret the *Constitution* in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance." (Per Njoki, SCJ).

71. In *Kenya Railways Corporation & 2 others v Okoiti & 3 others* case (*supra*) the Court expressed this caution;

> " 97. We find it necessary to caution that, whereas article 22 of the Constitution entitles every person to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened, and article 258 entitles every person to institute court proceedings claiming that the *Constitution* has been contravened or is threatened with contravention, these provisions ought not to be abused in the name of 'public interest'. This is, more so, where the litigants seek to advance private or political interests or other considerations through proxies. Attractive as it may sound, public interest litigation must abide by laid down rules of procedure and the law, and must be aimed at addressing genuine public interests and not used for personal gain or vendetta"

72. In *Steyn v Ruscone* (Application 4 of 2012) [2013] KESC 11 (KLR), this Court, relying on *Black's Law Dictionary* definition of the meaning of "public interest", concluded that it must concern;

> " ...the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes".

To augment the definition, the Court gave an example of public interest litigation in the English case, which bears striking similarity with the present appeal, *Public Interest Lawyers Ltd. v Legal Service Commission* 2010 EWHC 3259, where several solicitors' firms undertaking work of public character sought a protective-costs order, in proceedings which challenged a tendering exercise conducted by the respondent, the Judge found that although the claimant-firms had a private interest, that was not a major factor to be taken into account, given the strong public interest in ensuring that the public tendering process was carried out strictly in accordance with the law.

73. Balancing the rights guaranteed by Articles 22 and 258 together with the right to access to justice under Article 48 on the one hand and the strictures of public interest litigation on the other hand, it is now established that categories of and constitutional bounds of public interest litigation are not exhaustive but will include a demonstration that the litigation;

> " a) Be public interest litigation,
>
> b. Be brought to advance a legitimate public interest,
>
> c. Be one that will contribute to a proper understanding of the law; and
>
> d. Not be aimed at giving the applicant a personal gain."
>
> See the judgment of the High Court in *John Wekasa Khaoya v Attorney-General*, [2013] KEHC 6082 (KLR), which this Court has cited with approval in *Matemu v Trusted Society of Human Rights Alliance & 5 others* (*supra*).

74. To the above list, we may add that for a cause to qualify as a public interest litigation, it must not be hypothetical, abstract or amount to an abuse of the court process. Furthermore, a party invoking Articles 22 and 258 of the *Constitution* has to show the specific rights alleged to be infringed or threatened, as well as the basis of his or her grievance. See *Anarita Karimi Njeru v Republic*, (1979) KLR 154 and *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (*supra*).

75. The High Court in the present case was of the opinion that, under Articles 22 and 258 the appellant did not need to establish a violation or infringement of his own "personal rights strictly but rather, a breach of the constitution to which any citizen can institute proceedings for redress under Article 258". The Court of Appeal on the other hand, after acknowledging that under Articles 22(1) and 258 of the *Constitution* the appellant could bring the petition on his own behalf and on behalf of identified class of persons, or on behalf of the public, faulted the appellant and the trial court for failure to identify with reasonable precision the right that is alleged to have been violated. Picking on paragraphs 50, 61 and 62 of Petition No. E045 of 2021, the appellate court came to the conclusion that;

> "A holistic consideration of the above paragraphs leads us to the conclusion that, as regards the allegation of discrimination, the 1st respondent (the appellant) specifically had in mind the 4th to the 9th (6th to 11th) respondents who were the 2nd to 7th interested parties in petition E045 of 2021. Contrary to the submissions made before us by the 1st respondent (the appellant) that the discrimination was against the public, including the 1st respondent (the appellant), there was no such averment. In our view, in order to justify a finding of an allegation against persons other than the 4th to the 9th (6th to 11th) respondents, the 1st respondent (the appellant) ought to have expressly and specifically pleaded that fact. ...

In the premises, the 1st respondent (the appellant) could not purport to bring the petition on behalf of the 4th to 9th (6th to 11th) respondent." (Our emphasis).

76. The first part of this determination was, with respect, based on a selective reading of the averments in the petition. While the appellant made numerous references to the 6th to 11th respondents, it is not entirely correct to state that the whole petition was about those respondents. Starting with paragraph *62* to which reference was made by the appellate court, the appellant made an explicit averment that:

> "
>
> "(62) ... the respondents have employed the discriminatory use of the Specially Permitted Procurement Procedure to favour the 1st Interested Party (Portside Freight Terminals Limited) to the detriment of the other interested parties who may have qualified for the award of the licence." (Our emphasis).
>
> The statement was not in reference to the 6th to 11th respondents but generally to any person who may have wished to participate in the tender process if given the opportunity.

77. Similarly, in paragraph 63, the appellant made a general statement that;

> "63. The respondents' action and decision violate the principles established under Article 227 of the *Constitution* that stipulates that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair equitable transparent, competitive and cost effective."

78. The appellant described himself in the petition as a law-abiding citizen, a public-spirited individual, and a human rights defender; the Executive Director of Kenya for Justice and Development Trust, a trust incorporated in the Republic of Kenya, set up to promote democratic governance, economic development and prosperity. In what capacity did he petition the High Court?

> "The petitioner brings this petition as a matter of Public Interest, to protect the application of the law and to secure the rights and freedoms of residents of (sic) and petitions against the threat to, and the actual violation to the *Constitution* and the *Public Procurement and Asset Disposal Act* 2015 and *Public Private Partnerships Act*, *Leadership and Integrity Act* 2012, among others"

79. In view of the foregoing, it was erroneous for the appellate court to hold that the appellant did not plead discrimination against the public in general; those who would have wished to be part of the procurement process. In addition, the petition sets out instances of constitutional violations; that by resorting to the SPPP, KPA violated Articles 10, 47, 201 and 227 of the *Constitution*, thereby meeting the requirement in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (*supra*). But of even greater significance, pursuant to Article 258, the appellant did petition the High Court, claiming that the *Constitution* was being contravened, or was threatened with contravention. He cited Articles 47 and 227.

80. While the appellate court was right in holding that under Article 22 (2)(a) of the *Constitution* the appellant could not petition the High Court on behalf of the 6th to 11th respondents, who have all along been named in the proceedings as respondents, we part ways on two fronts at the junction where it found that the petition was not public interest litigation on account of the appellant failing to specify the provisions of the Constitution alleged to have been violated and secondly for concluding that the allegations of discrimination were in reference only to the 6th to 11th respondents.

81. Under Articles 22 and 258 of the *Constitution*, like the High Court found, the appellant did not have to establish a violation or infringement of his personal rights. It was sufficient for him to show that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed, or threatened. Alternatively, he could approach the High Court to stop any breach or threatened breach of the Constitution. In either case, we stress he would be acting in the public interest. The following passage from the Court of Appeal judgment in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR reminds us of the history of *locus standi* in Kenya, which we are very well familiar with. Locus standi had been used, in the last constitutional dispensation, to limit access to justice by stopping litigants from pursuing even the most deserving of causes in the public interest. The Court of Appeal in that case stated as follows;

> "Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under article 10 of the *Constitution* by necessity and logic broadens access to the courts.
>
> In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process...We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus stand to file the petition. Apart from this, we agree with the superior court below that the standard guide for *locus standi* must remain the command in Article 258".

82. Any requirement that purports to ask a litigant acting bona fide for more than the coordinates of Articles 22 and 258 is to repeat history, where it was a condition precedent for a litigant to demonstrate a direct and substantial interest in the subject matter of the litigation.

83. The sentiments expressed by High Court (Lenaola, as he then was, Majanja and Mumbi Ngugi, as she was then, JJ.) in *John Harun Mwau & 3 others v Attorney General & 2 others* [2012] KEHC 5438 (KLR), represent the popular view today with regard to *locus standi*. They explained the application of Articles 22 and 258 thus:

> "The intent of Articles 22 and 23 of the *Constitution* is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the *Constitution* has been violated or is threatened.
>
> ....
>
> In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed.
>
> ...
>
> Our Constitution places a premium on the values of social justice and rule of law, patriotism and participation of the public. Without unhindered access by the public to the courts, these values would be undermined".

84. We have said enough to demonstrate that any person acting bona fide, having real and genuine public interest can alone have a *locus standi* to approach the court to redress any alleged violation of

fundamental rights or genuine infraction of the Constitution, so long as it is not for personal gain or private profit or political motive or any oblique consideration. It is equally true that under Articles 22 and 258 of the *Constitution* the right to institute court proceedings on behalf of another person is restricted to a person who cannot act in their own name.

85. With respect, the appellate court correctly applied Article 22 of the *Constitution* and properly held that the appellant could not petition the High Court and argue discrimination on behalf of the 6th to 11th respondents, who have all through been parties in the proceedings, and who elected not to participate. The appellant's argument that he instituted the action in the public interest but on behalf of persons who he himself joined in the action as respondents is irreconcilable. It is for these reasons that we reject this ground of appeal.

i. Whether KPA's Board of Directors usurped the role of the accounting officer in proposing the use of SPPP and the subsequent grant of license to Portside Freight Terminals Limited.

86. Right from the High Court, the appellant made heavy weather of who ought to have initiated the process of reviewing and approving the SPPP. He remained adamant that the Board's involvement in the process was in breach of the Constitution and *ultra vires* the master plan; that the Board lacked the capacity to procure on behalf of KPA and therefore, by its involvement, usurped the procurement role of KPA's accounting officer enshrined in Article 226 of the *Constitution*.

87. KPA on its part maintained that the procurement process was instituted, undertaken, and discharged solely by the management of KPA, independent, separate, and insulated from any Board participation at the procurement stage; that while the National Treasury, the line Ministry and the Board could advise or give general recommendations, KPA management retained and exercised its statutory duties independently; and that it was the management that lawfully commenced the procurement process and executed it to the end. For example, all procurement and asset disposal committees required under Section 44(b) of the *PPAD Act* were constituted by the Ag. Managing Director, who was also acting as the accounting officer. It was these committees that issued the recommendations that have given rise to this dispute.

88. In determining this question, the High Court was persuaded by the appellant's argument and upheld it; that the office mandated to apply for the permission, authority and license is the procuring entity in terms of Section 2 of the *PPAD Act*; that the Board was not a procurement entity for purposes of seeking a SPPP, which is also the preserve of the accounting officer. Consequently, the court held that the actions of the Board were *ultra vires* its powers under the *KPA Act*.

89. The Court of Appeal, in overturning the foregoing decision, found that there was no evidence to support the contention that the Board was involved in the initiation of the procurement process; that the only role it played was to guide the management in the conduct of the procurement process in the highly technical area. This, the court ruled, did not amount to commencement of the procurement process. In any case, the Board under Section 10(g) of the *KPA Act* has the power to give directions to the Managing Director. It is in the exercise of this mandate that the Board was involved in the pre-procurement steps before the commencement of the procurement process proper. Beyond this stage, Regulation 107(2) kicked in, and the accounting officer took over.

90. Regulation 107 provides:

> "(1) Pursuant to section 114A(2)(f) of the Act, the National Treasury may permit Specially Permitted Procurement Procedure where such procedure is in the public interest or interest of national security.

2. Pursuant section 114A(3) of the Act and in applying the Specially Permitted Procurement Procedure referred to under paragraph (1), an accounting officer shall—

   a. approve and issue written justification for use of the procedure upon considering its uniqueness from the other methods of procurement set forth in the Act;

   b. plan the subject procurement and set it forth in its approved annual procurement plan, where applicable;

   c. prepare tender documents for the subject procurement which shall at least include a specifications, conditions of tendering and contracting; and

   d. submit the tender documents and the proposed procedure to the Cabinet Secretary for approval detailing the justification for the use of the method.

3. The National Treasury shall maintain a register of all Specially Permitted Procedures allowed and notify the Authority for monitoring purposes". (Emphasis added).

91. Regulation 107(3) was made pursuant to Section 114A (3) of the *PPAD Act*. It vests in the accounting officer all the functions outlined under 2(a) to (d) of Regulation 107. Nowhere in the Regulations is the Board given any role. Like the Court of Appeal, we find no evidence on record, such as a board resolution or minutes of the Board meeting to support the allegation that it was the Board that initiated the SPPP. The process was initiated, as noted by the appellate court by the Ag. Managing Director, who was the accounting officer, under whose hand the letter to the Treasury seeking approval to use SPPP was written. It is the Acting Managing Director who constituted committees to evaluate the proposal, which he then submitted to the Board. On this issue, we find no difficulty in upholding the Court of Appeal on its conclusion that it was the Ag. Managing Director and not the Board that initiated the SPPP process. We only need to add that this question does not involve the interpretation or application of any provision of the Constitution.

iv. Whether KPA's decision to vary the project sites was ultra vires the Port master plan and in violation of Articles 10, 118 and 227 of the Constitution;

92. It is the appellant's case that the decision to change the original location was unilateral and in violation of the *Constitution*; that it amounted to amending the master plan without public participation; and that it was made with the sole intention of accommodating Portside Freight Terminals Limited's unsolicited proposal. Katiba Institute supported this claim and added that altering the designated project sites from Dongo Kundu or Lamu Port to Mombasa Port constituted a fundamental deviation from the master plan's original objectives, without public participation contrary to Articles 10 and 118 of the *Constitution*. We note at this point that the citing of Article 118 throughout Katiba's submissions must be in error as the Article concerns public participation in the legislative process and other parliamentary businesses. It has no relevance to the matters under consideration in this appeal.

93. On the need for public participation, KPA, for its part, submitted that the Board retained the discretion to modify, amend, or update the master plan to align it with the evolving operational environment without involvement of the public. It gave two instances where prevailing circumstances

had necessitated changes to the master plan. First, in 2017, when the 6th respondent's application for a license to construct and operate a bulk grain facility at the Port of Mombasa was approved, subject to specific conditions. Second, in 2018, when GBHL's license was reviewed to expand its scope, an issue that was not originally accounted for in the existing master plan. KPA emphasized that the master plan is a policy document subject to revision, alteration, or even repeal when the foundational assumptions upon which it is based shift beyond the anticipated margins of change. It concluded that deviations from the master plan would not constitute constitutional or statutory violations but merely administrative infractions.

94. The learned trial Judge after considering the arguments came to the conclusion that Sections 8 and 10 of the *KPA Act* vests in the Board the general power to oversee efficient and economical operation and use of the Port; that those powers extend and include review or alteration of the master plan; and that the master plan is not cast in stone but is meant to serve its users effectively depending on changing circumstances. However, the court was of the view that to change the location of the second bulk grain facility was irregularly effected in a board room without engaging stakeholders. So that, although, the Board has powers to amend or review the master plan, the learned Judge found that it was improper for it to do so unilaterally, and especially to suit a specific isolated case or interest.

95. The appellate court agreed with the trial court that the question for determination was not whether or not the master plan could be reviewed, but the manner in which such review should be undertaken. The appellate court noted that although the master plan was developed with the participation of stakeholders, its subsequent review of an aspect that did not substantially change the original objective may be undertaken without the necessity of public participation.

96. It is common factor that KPA has had three master plans: the 2004 master plan that survived for 5 years; the 2009 Masterplan applied for 10 years, while the one under review in this appeal has been projected to apply for the next 30 years from 2017 to 2047. It is common ground too that the master plan was developed following extensive public participation, during which members of the public provided input on the timing and location of the second bulk grain handling facility at the coast of Kenya. According to the master plan, the facility was to be established at either Dongo Kundu or Lamu Port by 2023. It is equally not in issue that the planned project for which approval to use SPPP was granted was to be constructed at the Port of Mombasa instead of the two locations identified in the master plan.

97. The narrow question this issue seeks to establish is whether KPA ought to have called for another round of public participation before granting the license and wayleave to Portside Freight Terminals Limited to develop the second grain bulk facility at the Port of Mombasa instead of Dongo Kundu or Lamu.

98. Through policy statements, guidelines, manuals, strategic plans (organizational plans), and handbooks, an organization is able to communicate its vision with the public at large, its members and stakeholders in particular. It is a means of explaining how an organization intends to exercise its statutory discretion and function. The specific policy document in contention in the matter before us is the KPA Port master plan. We reiterate that both courts below are unanimous that a master plan can be reviewed, amended, varied and even repealed.

99. We agree. Indeed, an organization's master plan or strategic plan or blueprint are aspirational goals and frameworks of the organization. They set specific steps, and provide the roadmap to achieve those goals. In master and strategic planning, while the ideal aim is to achieve a goal, it is not always realistic or necessary to meet all the goals fully. This is because evolving circumstances, emerging priorities, and new information often necessitate adjustments and partial progress. That is why flexibility and adaptability are crucial elements for long-term planning.

100. In view of this analysis, can a court set aside such reviews on account of failure to conduct public participation before the review? The answer is no, and we say no more, save only to stress two things in conclusion: that an institution cannot be subjected to an enforcement action for failing to follow its own self-formulated guidelines. Even if an organization seeks public participation in the formulation of its master plan, it is not bound by that fact alone to conduct fresh engagement whenever the need for review arises, as the master plan does not have the force of law. Secondly, while we acknowledge that the KPA Port master plan holds substantial probative value as a strategic, operational, and planning document, and while we emphasize that KPA has a duty to endeavor to implement every aspect of its plans, deviations from any of its terms cannot constitute constitutional or legal violations unless they infringe upon statutory obligations or contractual commitments. Article 10(2)(a) of the *Constitution*, in so far as it relates to the argument that KPA master plan could only be reviewed after public participation we conclude, was not breached.

v. Whether the decision to grant Portside Freight Terminals Limited the license and wayleave to establish a second bulk grain facility through the Specially Permitted Procurement Procedure under Section 114A of the PPAD Act was in violation of Articles 10, 201 and 227 of the Constitution;

101. This, in our view, is perhaps the controlling question in this appeal whose resolution will settle the dispute with finality and provide guidance on the use of the SPPP as a procurement mechanism. The appellant and Katiba Institute jointly contend that the entire process leading to the award of the tender to Portside Freight Terminals Limited was unprocedural, illegal, unreasonable, and unconstitutional. First, that the letter sent to the Cabinet Secretary by KPA seeking approval to invoke the SPPP under Section 114A of the *PPAD Act* and Regulation 107 of the *PPAD Regulations* was unlawful and unconstitutional, serving as a deliberate means to bypass competitive bidding requirements of openness, equality, fairness, and transparency, enshrined in Articles 10 and 227 of the Constitution. Secondly, they contend that the application of the SPPP unfairly favoured Portside Freight Terminals Limited, thereby discriminating against other bidders whose proposals were not subjected to competitive evaluation. Finally, it is their case that, since the master plan was not reviewed to include the Port of Mombasa as an additional location to Dongo Kundu and Lamu for the establishment of a second bulk grain handling facility, the impugned license and wayleave were irregularly and unlawfully issued.

102. For their part, Portside Freight Terminals Limited, the 2nd and 3rd respondents, maintained that their proposal was unique and, given the public interest and national food security risks involved, the National Treasury approved the SPPP method. In addition, the SPPP is expressly permitted in matters concerning public interest or national security by Section 114A (2) of the *PPAD Act* as well as by Regulation 107(2)(a) of the *PPAD Regulations*. The 5th respondent (the Cabinet Secretary) shared this position.

103. Based on these arguments, and in order to answer the question under the Court's immediate consideration, it is our duty to examine the entire procurement process against Article 227 of the *Constitution* without losing sight, as we do so, that the matter is before us on a second appeal. We reiterate that the Court has no jurisdiction to revisit the factual findings of either the High Court or the Court of Appeal that touch on evidence without any constitutional underpinning. See *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR). That is why, in order to answer the question whether the system of procurement employed by KPA was fair, equitable, transparent, competitive and cost-effective in terms of Article 227, it is necessary to consider how KPA arrived at the award.

104. But before doing so, we believe it is vital that we point out two events that occurred in the course of these proceedings, without drawing any inference. It has been observed earlier that KPA, a primary party, having fully and actively participated before the two superior courts below, defending its position in the dispute by insisting that the license was procedurally issued, suddenly, as it were, walked out of these proceedings by declaring that;

> " ...we do not intend to participate in these proceedings and just continue watching brief (sic). We have informed the parties from the word go.....as such, we'll just be silently observing the proceedings going forward...
>
> Your honour, the position we find ourselves in is that the instructions have evolved. We had instructions to defend the petition which precipitated our filing of our application. Subsequently, the client withdrew instructions. Now, between withdrawing instructions and appearance in Court, they modified the instructions to, just appear in Court, withdraw the application and don't participate in the proceedings."
>
> This position was maintained when the appeal came before us for hearing. That notwithstanding, as a Court of record, we shall consider the pleadings filed by KPA in the two superior courts and, as we have stated, we shall draw no inference from its stated position before us.

105. The second event involves the Dockworkers Union. Having been the first party to challenge the judgment of the Court of Appeal in this Court and having previously been a vociferous opponent of the procurement process, the Union took two unprecedented steps considering their past posture. First, their Secretary General, Mr. Simon Sang, had on 16th August 2024, applied to act in person on behalf of the Union in place of the firm of Marende & Nyaundi Associates Advocates. The Union then brought an application for leave to withdraw their appeal, which was granted. In the affidavit in support of the application for withdrawal, Mr. Sang shifted positions and avowed that the Union was no longer interested in the proceedings as the matters in contention were private and did not involve the Union or its members; and further, that the Union and the public in general stood to benefit from a second bulk grain facility. Again, we choose not to draw any conclusions on this turn of events.

106. These developments aside, it is important at this stage to also observe that for over three decades there has been only one bulk grain handling facility located on berths B3-B4 at the Port of Mombasa operated by Grain Bulk Handlers Limited (GBHL) using privately owned equipment conveying the grain directly to an offsite silo. It is on record that GBHL has been operating in a near absolute or pure monopoly environment. It is for this reason, according to KPA, that it became a matter of national strategic diversification to consider involving more players in the bulk grain handling sphere. KPA took into account the need for reducing over- reliance on one provider as an incident affecting the provider would cripple the entire country's strategic food reserves, food security and nutritional needs of Kenyans. According to KPA's master plan, the grain handling berths produced a capacity of approximately 2.4 million tonnes per year. Given these realities, under KPA's strategic goals, it was deemed necessary to introduce competition in the bulk commodity handling sector to ensure diversification and elimination of monopolistic tendencies in compliance with the *Competition Act*.

107. As part of this strategy, the Port master plan envisioned *inter alia*, the modernization of the existing port facilities; development of additional ports, Dongo Kundu and Lamu Port; and revitalization of the Kisumu Port. The master plan indicated that, based on the demand forecast, there was need for a second bulk grain terminal by 2023, which was to be developed in Dongo Kundu and it was to be the first marine berth at the Special Economic Zone.

108. It is on the basis of these future plans by KPA that Portside Freight Terminals Limited, like the 6th to 11th respondents, submitted their respective unsolicited proposals to KPA for the development and operation of the second bulk grain handling terminal. Portside's application to KPA was made on 6th April 2020, and thereafter on 14th July 2020, KPA set up a cross-functional departmental technical committee to review and analyze the proposal. The Terms of Reference for the committee included; to review the proposal by Portside Freight Terminals Limited and to advise management on the specific request and execution modalities; to confirm legal and regulatory compliance; to propose the procurement method applicable; to review and analyze the proposal with regard to its alignment to the *KPA Act*, Port master plan, and future growth of the Port; and to advise on the admissibility of the project vis-à-vis the applicable law and similar project proposals previously received on grain bulk handling.

109. Upon review of the proposal, the Technical Committee gave recommendations in its report dated 28th August 2020 which were that: the project was technically and operationally sound and merited consideration; the project implied a public-private partnership (PPP) arrangement proposal and Section 12 of the *KPA Act* allows for such a contract; the project was 100% privately funded and the issue of procurement did not arise; the committee proposed a common user facility; and noted that, although according to the master plan the envisaged location for a future grain facility was Dongo Kundu or Lamu, the decision to vary the master plan to accommodate the new location lay with the Board.

110. Subsequently, by a Memorandum No. 13 of 2020 to the Board of Directors, the Ag. Managing Director conveyed the findings of the following three separate committees that evaluated the proposal by Portside Freight Terminals Limited, namely, the Technical Committee, the Executive Committee (EXCOM), and the Strategy and Operations Committee "Requesting for Approval for Development of Grain Bulk Terminal Proposal by Portside Freight Terminals Limited (PFTL)."

111. From the record, it is not clear what the Board's decision on this request was. There are no minutes and resolutions by the Board on the subject matter. What appears on record after the Memorandum No. 13 of 2020, is a letter dated 11th March 2021 addressed to the Cabinet Secretary by the Ag. Managing Director requesting permission to use the SPPP.

112. With that brief background, we turn to examine the last question in this judgment: whether the decision to grant Portside Freight Terminals Limited the license and wayleave was in violation of Articles 10, 201 and 227 of the *Constitution*. For the second time in this appeal, the Court is being asked to determine whether the Court of Appeal erred in its application of the *Constitution*, in this instance, Articles 10, 201 and 227. This is important to bear in mind as the appeal is premised on Article 163(4)(a) of the *Constitution*. To answer the question whether the *Constitution* was infringed in the manner claimed, we reiterate that the Court must look at the entire process, including but not limited to Portside's application, the reports by all three committees as well as the terms of the letter of approval by the Cabinet Secretary. We do this not by way of revisiting any of the concurrent factual findings of the High Court and Court of Appeal, but because the application, the reports and the letter of approval have profound constitutional underpinning on the overarching question of whether the system used by KPA in awarding the license and wayleave was fair, equitable, transparent, competitive and cost-effective as demanded by Article 227(1) of the *Constitution*. It is, indeed, on the force of those reports and the letter that the award was made.

113. The first question to answer, therefore, is, what did Portside Freight Terminals Limited apply for? The application was "for licensing of a grain- bulk handling facility at the Port of Mombasa." KPA constituted a technical committee to review the application, and one of its terms of reference was to

advise KPA management on the procurement method that would, in the circumstances, be applicable. The committee, in a report contained in Memorandum No. 13 of 2020, expressed misgivings as to the precise nature of Portside's application. The report reads in part relevant to this issue as follows;

> "However, the proposal by the proponent to implement the project through Design, Finance, Operate, Maintain and Transfer which although not explicitly stated implies PPP arrangement proposal. In this regard if the project is to be considered, it would be important to have an elaboration and explicit clarification on the same, the committee proposes a common user facility." (Our emphasis).

114. The PPP method under the repealed *Public Private Partnerships Act* (PPP Act) No. 15 of 2013 alluded to in the above statement, is a separate and distinct procurement method from the SPPP under the *PPAD Act*, under which the award in question was granted. The 2013 Act was subsequently repealed in 2021 by the *Public Private Partnerships Act* No. 14 of 2021 (now Cap 430).

115. ccording to Section 3 of the *Public Private Partnerships Act*, 2013 the Act only applied to:

1. to every contract for the financing, construction, equipping or maintenance of a project or provision of a public service undertaken as a public private partnership." (Emphasis supplied).

116. The Act provided for a non-compete unsolicited process called the privately initiated investment proposal that is originated by a private party without the involvement of a contracting authority. This procedure would be permitted only in situations where;

> "...there is an urgent need for continuity in the construction, development, maintenance or operation of a facility or provision of a service and engaging in the competitive procurement process would be impractical."
>
> And only if the circumstances giving rise to the risk of disruption were not foreseeable by the contracting authority. It would also be allowed where there exists only one person or firm capable of undertaking the project, maintaining the facility or providing the service or such person or firm has exclusive rights over the use of the intellectual property, trade secrets or other exclusive rights necessary for the construction, operation or maintenance of the facility or provision of the service; or there exists any of the circumstance as the Cabinet Secretary may prescribe.

117. According to the report, the application by Portside Freight Terminals Limited was generally uncertain in its terms, or at best, it mirrored a privately initiated investment proposal (PIIP) under the repealed Act as explained in the previous paragraph. That is why the report recommended that, before the proposal could be considered, "an elaboration and explicit clarification on the same" was necessary. The Acting Managing Director proceeded to seek approval to use the SPPP method, nonetheless. The question of the nature of a procurement system is important because the procurement procedure for the two methods is different. Portside Freight Terminals Limited, in their proposal, specifically sought to develop a "Design, Finance, Build, Operate, Maintain and Transfer" project to be fully financed by them, without any burden on KPA. It also asked that a team be constituted to agree on the terms of the "Build, Operate and Transfer Agreement." This was undoubtedly a PPP project under the *Public Private Partnerships Act*, as explained above. By seeking approval of the SPPP, was Portside Freight Terminals Limited being awarded a tender it did not apply for?

118. Although the discretion as to the method of procurement to be used in any given project must be a matter for the procuring entity to decide, there must never be any confusion as to the project a procuring entity sets out to undertake and what procurement method suits it. KPA ultimately decided,

in its discretion, to adopt the SPPP. We shall return to this question when considering the last issue under this part, whether the terms of the SPPP were satisfied.

119. After receiving the report from the technical committee, we have alluded to the fact that the Acting Managing Director by Memorandum No. 13 of 2020, conveyed to the Board the outcome of the evaluation of the proposal by Portside Freight Terminals Limited. The Memorandum dealt with and furnished to the Board the findings of three committees: the Technical Committee, the Executive Committee (EXCOM) and the Strategy and Operations Committee. We have outlined earlier in this judgment the recommendations of the technical committee and do not wish to repeat them. We only wish to reiterate that despite recommending the proposal, the Technical Committee expressed reservations on the nature of the procurement method that Portside Freight Terminals Limited wished to be considered for: PPP or SPPP? The committee recommended in this regard that there was need to have this clarified before any decision could be made. Secondly, the technical committee was of the view that "in order to determine and confirm technical and operational viability of the proposed project, it would be prudent to have a detailed feasibility proposal/study."

120. The report was considered on 2nd April 2020 by EXCOM, the highest decision-making body for KPA management. EXCOM largely agreed with the technical committee on many aspects of the proposal and even recommended it. However, like the technical committee, it made the following observations on the nature of the proposal:

> "4.3 An observation and explicit clarification on the proposed Design, Finance, Operate, Maintain and Transfer to determine if it should be initiated as a Privately Initiated Investment Proposal (PIIP) as per the *PPP Act*. However, the Technical Committee recommended it to be treated as a common user terminal, this will allow the management to utilize it just like berth 3 and 4." (Our emphasis).
>
> EXCOM also observed that in an earlier but similar application, it had recommended to KPA to undertake a competitive bidding process " to offer an opportunity to all the interested parties to develop multi-purpose conveyor belts to handle dry bulk cargo ...to ensure transparency and fairness in approval for the development of such projects". The question whether the procurement system to be employed was SPPP or PPP persisted.

121. The final committee, whose report is summarized in Memorandum No.13 of 2020, after considering the report of the technical committee, was the Strategy and Operations Committee. The minutes relate to two meetings held on two separate days, 14th and 27th October 2020. Again, despite making profound observations on the application and process, this committee went ahead and recommended the grant of license and wayleave as applied. The following are some of the fundamental questions this committee identified: regarding the recommendation by the technical committee that a further and detailed feasibility study be undertaken in order to determine and confirm technical and operational viability of the proposed project, this committee was concerned that such a course "would mean that the Authority was making a commitment on the Portside proposal."

122. The second observation was that:

> " While the Management had made a disclosure on the evaluation of all grain handling applications so far received by the Authority, the Management had failed to make a full disclosure on the evaluation of each application and how they were ranked vis-à-vis the Portside application. The only explanation given was that the previous applicants had identified specific sites of interest which did not conflict with the proposal submitted by Portside." (Our emphasis).

> The committee, therefore, recommended that it was necessary that an evaluation be undertaken with clear benchmarks and parameters "to enable justification for choosing to escalate the current application to the Board as the best value in terms of given parameters."

123. Thirdly, the committee disagreed with the proposition that KPA, pursuant to Section 12 of the *KPA Act*, was free to enter into an agreement with any entity to offer any service to it. In the committee's view, "the majority of members held a strong view that the proposal ought to be processed under the *Public Private Partnerships Act* as it met all the ingredients of PPP."

124. Based on this view, the committee recommended that since the proposal had met the requirements under PPP, the process under the *PPP Act* ought "to be adhered to the letter, starting with feasibility study and competitive bidding. It would be wrong to support a PIIP when there was enough interest in the market. Moreover, in view of the many applications to handle grains, there was enough interest in the market to warrant a competitive process and obtain the best proposal." The committee, however, did not recommend PIIP and instead suggested that KPA undertake a competitive bidding process under the *PPP Act* to offer an opportunity to all the interested parties.

125. Fourthly, as noted above the committee observed that the proposal did not meet the criteria for a Privately Initiated Investment Proposal (PIIP) as provided for under Section 61 of the repealed *PPP Act*, 2013 and the PPP Regulation 53 of the 2014 Regulations as there was no urgency, and in any case, there were many other entities that could provide the services using other criteria.

126. Fifthly, the committee expressed concern that the proponent did not disclose that the cost of drenching to enable certain vessels to dock would be borne by KPA. It also noted that there was no consideration of value proposition and how it would translate to affordable maize flour for the "common mwananchi," just as there was no clarity in terms of operations and business strategy for KPA.

127. Some of the views expressed in all the three reports go to the crux and the integrity of the entire process. For instance, the question of whether the proposal was to be procured as PPP under the *Public Private Partnerships Act* or SPPP under the *PPAD Act* was not resolved. The technical committee recommended that there be "an elaboration and explicit clarification on the same." It also recommended that, in order to determine and confirm the technical and operational viability of the proposed project, a detailed feasibility proposal ought to be submitted.

128. EXCOM agreed on the need to clarify the proposed project to determine if it should be initiated under the *PPP Act* or as SPPP. The Strategy and Operations Committee flagged fundamental questions that ought to have been resolved before making the award.

129. How did the Cabinet Secretary respond to the request for approval of the SPPP? The role of the Cabinet Secretary is key throughout the procurement process. In respect of the SPPP, by dint of Section 114A (3) of *PPAD Act*, the Cabinet Secretary has prescribed the procedure for carrying out specially permitted procurements. However, Section 114A commands that the SPPP may only be used with the permission of the National Treasury. But, for the National Treasury to allow the use of this procedure, some six (6) conditions must be satisfied. In this matter, the accounting officer for KPA based the justification on Section 114A(2)(a) that: "exceptional requirements make it impossible, impracticable or uneconomical to comply with the Act and the Regulations." We may add that under Regulation 107 (1), there is a further condition: that "the National Treasury may permit Specially Permitted Procurement Procedure where such procedure is in the public interest or interest of national security."

130. Pursuant to the Regulations, and despite the confusion we have alluded to regarding whether the proposal was PPP or SPPP, the accounting officer sought authorization from the Cabinet Secretary to use SPPP. In the letter, the accounting officer gave the following justifications for resorting to SPPP. The location of the proposed project was the first justification, that Portside Freight Terminals Limited has land adjacent to the port, which it intends to use for the construction of ancillary facilities for use with the island berth. In KPA's view, the conventional procurement methods would not be suitable for the identification and harnessing of these strategic advantages.

131. The second justification was the advantage of the strategic partnership that Portside Freight Terminals Limited offered, in terms of adjacent land in close proximity to the Port and the offer to construct a common user island berth facility at its cost. This, according to KPA, presented a desirable opportunity for it to explore a strategic partnership with Portside Freight Terminals Limited. Having a strategic partnership for the purposes of enhancing efficiencies at the Port would not be realized if the conventional procurement methods were to be used, KPA argued.

132. Finally, KPA cited security as the third justification, contending that since the Port of Mombasa is a high security installation, and considering that it neighbours the Kenya Naval Base, it was essential that critical operations at the Port be conducted by persons who have been subjected to adequate security vetting. According to KPA, conventional procurement methods under the *PPAD Act* do not ordinarily embed national security considerations in the selection process.

133. On receiving the letter from the accounting officer, the Cabinet Secretary responded by a letter dated 28th June 2021. In the response, which, in our view was carefully drawn, the Cabinet Secretary did not approve the selection of Portside Freight Terminals Limited, even though the accounting officer's letter made that invitation thus:

> "With permission from the National Treasury the Authority intends to undertake procedure comprising the steps set out hereinbelow, in consideration of the possibility of entering into a grain bulk operating license agreement with PFTL (Portside Freight Terminals Limited)."

134. In a crisp and terse declaration, the Cabinet Secretary wrote back:

> "We have taken into account the aforementioned and the proposed procedure of the onboarding a bulk handling operator. Further, we have reviewed your Tender Document and in our opinion it requires enhancement in terms of incorporation of technical requirements, evaluation criteria and subsequent contractual arrangements.
>
> Accordingly, your application for use of Specially Permitted Procurement Procedure has been granted subject to review of the Tender Document as indicated above.
>
> In applying the procedure, you are advised to ensure adherence to Article 227 of the *Constitution*, the Act and the attendant Regulations and all other applicable laws in order to achieve value for money." (Our emphasis).

135. Two weeks after this response, KPA proceeded, and on 15th July 2021, issued an Invitation to Tender being, Tender No. KPA-SP/001/2021-22/MD. Opening of the tender documents was done on 26th July 2021 and the notification of award of tender was issued to Portside Freight Terminals Limited two days later on 28th July 2021. Consequently, Portside Freight Terminals Limited was invited to begin the negotiation process, which was scheduled for 29th July 2021. Ensuing the negotiations, the committee recommended the award of license and wayleave agreements for the development of a grain handling

facility and the development of an Island Berth at G-Section Area for handling all grains and any other dry bulk cargo as a common user facility with "priority berthing" to Portside Freight Terminals Limited for a "period of 33 years, renewable".

136. The critical question to be answered is whether, pursuant to Regulation 107(1) of the Regulations, the Cabinet Secretary permitted the use of SPPP. Or asked differently, did the letter constitute sufficient permission to warrant KPA to adopt the SPPP procurement method? The answer should be plain. The application was granted on condition that the tender document be reviewed to enhance and incorporate technical requirements, evaluation criteria and subsequent contractual arrangements. They were also reminded to adhere to the provisions of Article 227 of the *Constitution*, the Act, and the attendant Regulations and all other applicable laws. In paragraph *149* below, we have outlined the next statutory steps KPA ought to have taken after satisfying the conditions set by the Cabinet Secretary.

137. We are unable to tell from the record what steps KPA took to satisfy these conditions. What is, however, clear is that immediately the response was received, an Invitation to Tender was issued, followed by opening of the tender documents, notification of award, negotiation process, and recommendation to award of license and wayleave. We come to the conclusion on this point that the conditional approval by the Cabinet Secretary did not amount to an approval without evidence that the conditions were met.

138. Bearing in mind the infractions identified in the foregoing paragraphs, we turn to consider the final issue, which in our view goes to the substance of the entire appeal: whether the award of license and wayleave to Portside Freight Terminals Limited was done in accordance with the Constitution and the law.

139. The answer to this question depends on the construction of Articles 10(2)(c), 201(a) and 227(1) of the *Constitution* vis-à-vis the process detailed in the previous paragraphs and the decision of KPA to award the license. Article 10(2)(c) is on the national values and principles of governance such as integrity, transparency, and accountability. Likewise, Article 201(a), on the principles of public finance, emphasizes the need for openness and accountability in financial matters, while, as already noted elsewhere in this judgment, Article 227(1) requires that whenever a state organ or any other public entity contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. An Act of Parliament passed in furtherance of this Article can make provision for, among other things, categories of preference in the allocation of contracts.

140. One of the legislations envisaged under Article 227(2)(a) is the *PPAD Act*. Under Sections 92 and 114A, a total of thirteen (13) methods of procurement are specified. The 13 methods are: open tender; two-stage tendering; design competition; restricted tendering; direct procurement; request for quotations; electronic reverse auction; low value procurement; force account; competitive negotiations; request for proposals, framework agreements and "any other as may be prescribed in regulations and described in the tender documents". Out of all these methods, the Act declares that:

> "91. (1) Open tendering shall be the preferred procurement method for procurement of goods, works and services."

141. Open tendering is preferred because it significantly enhances procurement processes by promoting competition among suppliers, encourages greater transparency and accountability, and reduces the risk of corruption and favouritism, among other benefits. However, due to limitations of open tendering, such as excessive time consumption and cost of analyzing numerous tenders, the Act permits procuring entities to use "an alternative procurement procedure only if that procedure is allowed and satisfies the conditions under this Act for use of that method." It is stressed that alternative procurement methods

will only be resorted to under the law and in specific situations when open competitive bidding is not feasible or appropriate. Open tender remains the mainstream or traditional method; the rest are alternatives to it.

142. Procuring entities have the discretion to choose any one of the methods depending on diverse factors such as the nature of procurement requirements, timeframe and circumstances. Once the entity settles on a method, the process must comply strictly with the law. This appeal concerns the alternative procurement model provided for under Section 114A of the Act, SPPP. We shall also examine, to the extent relevant, certain methods under the *Public Private Partnerships Act*.

143. Section 114A states that:

> "114A (1) A procuring entity may use a procurement procedure specially permitted by the National Treasury".
>
> The National Treasury may, under this section, allow the use of the specially permitted procedure in six situations. KPA chose to rely on one, namely:
>
> > "(a) where exceptional requirements make it impossible, impracticable or uneconomical to comply with the Act and the Regulations." (Our emphasis).
> >
> > Having chosen the SPPP, the onus was on KPA to demonstrate that there were exceptional requirements that made "it impossible, impracticable or uneconomical to comply with the Act and the Regulations" in addition to showing that the procedure adopted was in the public interest or interest of national security. By the language employed in the section, there has to be some reasonable rationale leading to the decision to invoke the SPPP as opposed to any other procurement procedure under the *PPAD Act* or other statute to ensure that the decision is justifiable, accountable, and does not unduly restrict competition without valid reasons.

144. According to KPA, the SPPP was chosen for the reasons of the location of the proposed project, being adjacent to the Port; because of strategic partnership for purposes of enhancing efficiencies at the Port; and finally for security reasons, the Port being a high security installation, critical operations have to be conducted by persons who have been subjected to adequate security vetting.

145. The other requirement under Regulation 107 is that the National Treasury will approve the SPPP only where it is shown that such procedure is in "the public interest or interest of national security." These terms are not defined. However, they are common terms that have been used in the Constitution and in many statutes and defined in judicial decisions. See *Peter Munya v Kithinji & 2 others* (Application 5 of 2014) [2014] KESC 30 (KLR).

146. Earlier in this judgment, in determining the second issue, we examined public interest but in relation to public interest litigation under Articles 22 and 258 of the *Constitution*. Public interest in the context of public procurement can only refer to some benefits to the general public. It may include the prudent use of public funds for services and goods supplied for the benefit of citizens.

147. National security, according to Article 238 of the *Constitution*, is "the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests." Specific to procurement, it focuses on protecting the interests of the State by ensuring its physical safety, economic stability, and protecting vital infrastructure from threats. This is achieved by ensuring that procurement and procurement practices are aligned with national security laws and policies so as not to compromise national security. While there is no doubt, from the record that the construction of the second bulk grain handling facility at the coast is a matter of both national security and public interest in line with Regulation 107(1) aforesaid, a greater public interest and interest of national security require that the process of identifying proponents to implement the project is above board; fair, equitable, transparent, competitive and cost-effective. In other words, the protection of the supremacy of the *Constitution* is critical and there can be no greater public interest or interest of national security than to uphold the *Constitution*, its values and principles, as well as obeying the law.

148. Regulation 107(2) establishes a four-step roadmap before the Cabinet Secretary can grant approval; first of all, an accounting officer is to issue a written justification for intending to use the procedure. The justification will be informed by the uniqueness of the procedure (SPPP) from the other 12 methods. The second step is for an accounting officer to include the project to be procured in the procuring entity's annual procurement plan (where applicable). Thirdly, the accounting officer must prepare tender documents for the subject procurement, which will include specifications, conditions of tendering and contracting; and lastly, the accounting officer will submit the tender documents and the proposed procedure to the Cabinet Secretary for approval, detailing the justification for the use of the method.

149. Beyond Regulation 107, Section 93 of the *PPAD Act* is critical in the overall determination of this ground. It requires, as a basic procedure prior to adopting any alternative procurement method like SPPP, that a pre-qualification procedure be conducted. This ensures that there is fairness, transparency and competitiveness:

> " 93(1) ...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.
>
> 3. In conducting a pre-qualification procedure an accounting officer of a procuring entity shall publish an invitation notice to candidates to submit applications to be pre-qualified." (Our emphasis)
>
> This requirement resonates with the provisions of Article 227 of the *Constitution* as it embodies the principles enshrined in that Article.

150. A pre-qualification procedure is mandatory in all alternative methods of procurement, as is evident from the elaborate provisions of Sections 93 to 95 of the *PPAD Act*. Although the word "may" is used in Section 93(1), our holistic reading of Sections 93 to 95, inclusive, and the specific context of Article 227 on the need to always adopt a system that is transparent and competitive, leaves us in no doubt that the word "may" is not intended to be permissive or merely directory. See *Sony Holdings Ltd v Registrar of Trade Marks and Another* [2015] eKLR and *Peter Muturi Njuguna v Kenya Wildlife Service* [2017] eKLR. Furthermore, the subsequent statement in that section that a pre-qualification

procedure is a "basic procedure prior to adopting an alternative procurement method," fortifies this conclusion. Further, from the definitions of the phrases "pre-qualification" and " pre-qualification procedure" clearly denote a "condition for being invited to tender or submit proposals."

151. It is elementary learning that although when used in a statute the word "may" is regarded as permissive, however, where it is used in a statute to impose a duty on a public body, then it must be interpreted as mandatory. *Peter Muturi Njuguna v Kenya Wildlife Service* (*supra*). Section 93 imposes a duty on the accounting officer of a procuring entity to conduct a pre-qualification process in order to identify the best few qualified firms for the subject procurement.

152. It is by the same token that we held in *Kenya Railways Corporation & 2 others v Okoiti & 3 others case* (*supra*) that procurement systems, whether open or alternative, must satisfy the constitutional coordinates that they must be fair, equitable, transparent, competitive and cost-effective. It is in furtherance of this obligation on public procuring entities that Sections 93 to 95 were enacted. It is significant to emphasise that in conducting a pre-qualification procedure, Section 93 requires an accounting officer of a procuring entity to "publish an invitation notice to candidates to submit applications to be pre-qualified". In the invitation the entity must outline the nature of the procurement, including the type of goods, works or services and the location and timetable for performance of the contract; key requirements and criteria to pre- qualify; declaration that it is open to bidders who meet the eligibility criteria; and requirement that only bidders with capacity to perform can apply. This is followed by evaluation of applications by the evaluation committee under Section 95. The results of the exercise, together with the recommendations of the evaluation committee and the professional opinion of the head of the procurement unit, are submitted to the accounting officer for approval. Only applicants whose tenders are approved as pre-qualified are invited, and the unsuccessful ones are notified.

153. It should follow from the steps outlined above that the intention of Parliament in enacting Section 93 aforesaid was to align all alternative procurement systems to the *Constitution*. After the Cabinet Secretary's approval and upon KPA meeting the conditions set in the letter of approval, the next phase was to conduct a pre-qualification procedure in accordance with Sections 93 to 95 of the *PPAD Act*. The failure to do so was a significant omission and infraction whose effect was the infringement of Articles 10, 201 and 227 of the *Constitution*.

154. We make reference to *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] KEHC 473 (KLR) as perfect example of the correct procedure for Specially Permitted method of procurement; balancing the special nature of SPPP and constitutional requirement of fairness, equity, transparency, competitiveness, and cost- effectiveness. The Mui Coal Basin case (supra) was about the concession of Coal Blocks for "exploration, exploitation and development" through the SPPP method under the *Public Procurement and Disposal Act*, 2005. After the approval by the Public Procurement Oversight Authority (PPOA), the predecessor of the Cabinet Secretary before the amendment of Section 114A vesting this role in the latter, the procuring entity, namely the Ministry of Energy invited Expressions of Interest, a form of pre-qualification, for the concessioning of the Mui Coal Blocks. Sixteen firms filed their Expressions of Interest as invited. As required, all the firms were subjected to an Evaluation process by a specially formed Committee and assessed by the Ministerial Tender Committee. Out of the sixteen, only eleven firms qualified for the next stage. Again, out of the eleven qualifying firms, only five companies ended up bidding for the concession. After the Technical Evaluation Committee's evaluation of the bids, it recommended only one firm to be invited to tender.

155. This goes to reinforce our conclusion that the SPPP method, though an alternative method to open tender, must truly be seen, in terms of the Constitution, as a "system that is fair, equitable, transparent, competitive and cost- effective" without the other elements of open tender.

156. Before we conclude, it is necessary to return to and examine briefly, in so far as it is relevant to the matter under review, the procurement law under the repealed *Public Private Partnerships Act*, 2013. This is due to the fact that there was confusion over the type of procurement that Portside Freight Terminals Limited had sought in its application for a license and what it was eventually granted. The proposal by Portside was categorical that the proponent wanted to enter into a "Design, Finance, Build, Operate, Maintain, and Transfer" contract with KPA. This form of procurement is unavailable under the *PPAD Act*. Some of the committees' reports suggested, we believe correctly, that this description of the proposal was close to a procurement method under the repealed *Public Private Partnerships Act*. According to Section 19 as read with the Second Schedule of the repealed Act, there are also, like under the *PPAD Act*, thirteen (13) procurement methods under the *PPP Act*.

157. The closest to what Portside proposed is option 5, Build-Own-Operate- Transfer scheme where the private party designs, constructs, finances, operates and maintains an infrastructure facility owned by the private party for a specified period not exceeding thirty years or such longer period as may be agreed, after which the private party transfers the facility to the contracting authority. But of relevance here, Build-Own-Operate-Transfer projects, like Portside's proposal, the project is primarily financed by the proponent, which is also responsible for designing, building, operating, and maintaining the project, while the procuring entity may provide certain concessions, incentives or other reliefs. We repeat that there is no provision for Design, Finance, Build, Operate, Maintain, and Transfer under *PPAD Act*; that none of the thirteen methods of procurement under *PPAD Act* has a provision that grants to a private party to operate the developed facility for a period of 30 years after designing and building it. What KPA granted to Portside under the *PPAD Act* was alien to the Act.

158. Arising from what we have said regarding the two methods of procurement, SPPP and PPP, it is apparent that Portside, just like KPA, did not clearly identify the method to be employed in procuring the proposed project, though finally KPA settled for SPPP. It is also apparent that Portside's application for SPPP was approved prematurely, by KPA, as it were, putting the cart before the horse. The SPPP, as an alternative method of procurement, cannot be used to avoid competition. Once chosen, a procuring entity must follow every step laid down. The non-compete process, namely the privately initiated investment proposal (PIIP) under *PPP Act* as explained in paragraph *116* above, would perhaps be the only option resonating with Portside's proposal.

159. Finally, we must answer the overarching ultimate question: whether the award of license and wayleave to Portside Freight Terminals Limited was done in accordance with the *Constitution* and the law and whether the Court of Appeal erred in sanctioning the award. From the totality of what we have said, there cannot be any doubt that the entire procedure, from conception, application, evaluation, submission for approval up to approval of the procurement method violated Articles 10(2)(c), 201(a) and 227(1). The *Constitution* being the supreme law, any method of procurement provided for under any procurement statute must bear the minimum constitutional dictates of being fair, equitable, transparent, competitive and cost-effective.

160. We reiterate by way of emphasis what we said in *Kenya Railways Corporation & 2 others v Okoiti & 3 others case* (*supra*):

> "137. At any rate, procurement must still conform to the provisions of article 227 even when done pursuant to the obligations of a treaty or agreement

> or any other procedure. The use of any procurement method including direct procurement does not exclude the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness as provided for under article 227 (1) of the *Constitution*." (Our emphasis).

161. In the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, which involved the procurement of a Broadcast Signal Distribution (BSD) licence, this Court similarly stressed the necessity of adhering to Article 227 of the *Constitution* in granting the license. In the context, the Court recommended, inter alia that;

> "(e) Most importantly, CAK must re-align its operations and licensing procedures so as to be in tune with Articles 10, 34 and 227 of the *Constitution*".
>
> In setting aside the judgment of the Court of Appeal, and noting that the appellant resorted to technicalities in denying the 1st, 2nd and 3rd respondents the licence, the Court went on to say that;
>
> > "387. CCK was bound to conduct its affairs more responsibly and transparently in tune with our constitutional values. Instead, the agency chose to be hamstrung by the technicalities of procedure as if this was an ordinary procurement of goods and services. It is in this regard that we agree with Maraga JA's observation that CCK was operating as if the Constitution did not exist".

162. It has also been demonstrated that, contrary to statutory principles explained earlier, KPA did not demonstrate the existence of exceptional requirements and how those requirements would make open competition or conventional bidding impossible, impracticable or uneconomical. While Section 114A of the *PPAD Act* allows for the use of the SPPP, it cannot bypass the stated constitutional principles. With the evidence on record, including evidence from KPA itself that there were a number of firms that had shown and expressed interest in the project, KPA ought to have considered an appropriate method or strictly followed the procedure we have outlined with regard to SPPP to onboard those interests. By proceeding in the manner it did, KPA not only violated the *Constitution*, *PPAD Act*, and the Regulations, but also its own statute, the KPA Act, which enjoins it in Section 8(e) to ensure:

> " that no particular person or body is given any undue preference or is subjected to any undue disadvantage."

163. With this determination, it is our considered view that the conclusion by the Court of Appeal that there was no evidence that the invocation of the specially permitted procurement procedure under Section 144A of the *PPAD Act* violated the Constitution, was made in error. The court committed further error by expressing the view that Article 227(2) of the Constitution gives various exceptions to "the general rule that public entities shall contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective"; that the Specially Permitted Procurement Procedure "is to give preference by releasing a procuring entity from the requirements and obligations of open competition". This was the main reason for holding that the *Constitution* was not violated by the adoption of SPPP. That was a clear misapplication and misinterpretation of Article 227 of the *Constitution*, which declares in no uncertain terms that whatever system a procuring entity adopts, the paramount consideration is that it must be fair, equitable, transparent, competitive and cost- effective.

164. The court cited with approval the High Court decision in the case of *Revital Health (Epz) Limited v Public Procurement Oversight Authority & 6 Others*, Constitutional Petition No. 75 of 2012 [2015] eKLR, where Muriithi, J. held that:

> "Procurement conducted outside the provisions of the *Public Procurement and Asset Disposal Act* was not necessarily unconstitutional. Constitutionality of a procurement process is to be assessed on the basis of Article 227 of the *Constitution*. Article 227 provided that procurement by a State organ or public entity was to accord to a system that was fair, equitable, transparent, competitive and cost- effective."
>
> The second and third lines in the above passage augment the centrality of observance of the principles under Article 227. The court also failed to consider the provisions of Section 93 of the *PPAD Act*.

165. Preference as contemplated in Sub-Article (2) of Article 277 is that Parliament would enact a law to "prescribe a framework within which policies relating to procurement and asset disposal shall be implemented" and may provide for, inter alia, "categories of preference in the allocation of contracts." The framers could not have possibly intended to equate preference to single sourcing. To begin with, the term 'preference' is defined in Section 2 of the Act to mean: -

> "The right or opportunity to select a tenderer from an identified target group that is considered more desirable than another"
>
> The selection for preference is based on one who is considered more desirable than the rest.

166. The entire Part XII of the Act, which is made pursuant to Article 227(2) of the *Constitution*, is devoted to preferences and reservations. Our reading of this Part and the relevant provisions of the Regulations, including Regulations 91(6), does not at all envisage preference in the form alluded to by the Court of Appeal to include SPPP as a procurement method. To the extent that the appellate court misinterpreted and misapplied Article 227 of the *Constitution* to SPPP, we find in answer to the last question posed that the license and wayleave to Portside Freight Terminals Limited were awarded against the Constitution and that the Court of Appeal erred in sanctioning the award.

167. It is our understanding in the context of public procurement that categories of preference in contract allocation alluded to in the Constitution typically refer to mechanisms designed for affirmative action for certain groups in society, especially to address inequities and historical disadvantages. For example, women, youth, persons with disabilities or citizen contractors to address gender inequality, promote youth employment and empowerment, and ensure inclusivity. See Sections 89(f) and 157(4) and (14) of the *PPAD Act*. Even then, the preferences must be applied transparently to avoid unfair advantages. There must be competition among the targeted categories. For these reasons, SPPP does not constitute a preference scheme as contemplated under the *PPAD Act*.

G. Conclusion

168. The choice of the right procurement method frames the whole design of the procurement process in terms of transparency, efficiency and competitiveness. Therefore, to avoid confusion and recalling that there are thirteen distinct procurement methods under the *PPAD Act*, the determination of the procurement method in advance is paramount to both the procuring entity and the proponent or potential bidder.

169. As the basis of all procurements, the *Constitution* lays down important principles aimed at ensuring that all public procurements, regardless of the method, are conducted through a system that is

fair, equitable, transparent, competitive and cost-effective. The provisions of Article 227 are clearly intended to achieve these aspirations through the enactment of laws to prescribe a framework within which policies relating to procurement and asset disposal are to be implemented.

170. This imperative borrows heavily from Article 9 of the *United Nations Convention against Corruption* (UNCAC) to which Kenya is a Party. The Convention requires States parties to "take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption".

171. We come to the ultimate conclusion that in awarding a license and wayleave to Portside, KPA failed to observe and adhere to the minimum threshold of a procurement as contemplated under provisions of Articles 10(2)(c), 201(a) and 227(1) of the *Constitution*. For all the reasons we have given, the appeal succeeds to the extent expressly explained in this judgment.

172. Having found that the Court of Appeal erred when it declared that the invocation of the specially permitted procurement procedure under Section 144A of the *PPAD Act* by KPA did not violate the *Constitution*, it follows in the result that the judgment of the Court of Appeal is for setting aside.

173. Finally, we cannot emphasize enough, as we did in our Ruling of 26th July 2024, the public interest nature of the project, the second bulk grain facility, its importance to the economy, and the urgency of its implementation.

H. Findings

i. This Court is clothed with jurisdiction to determine the instant appeal under Article 163(4)(a) of the *Constitution*.

ii. Although the appellant had *locus standi* to institute the action giving rise to this appeal, he could not do so on behalf of persons who were parties in the case.

iii. KPA's Board of Directors did not usurp the role of the accounting officer at any stage in the procurement process.

iv. KPA had the power to vary the project sites contained in the Port Master Plan without the necessity of a fresh round of public participation.

v. The decision of KPA to grant Portside the license and wayleave to establish a second grain bulk facility through the Specially Permitted Procurement Procedure under Section 114A of the *PPAD Act* was inconsistent with Articles 10(2)(c), 201(a) and 227(1) of the *Constitution*.

I. Costs

174. Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in *Rai & 3 others v Rai & 4 others* [2014] KESC 31 (KLR), like the Court of Appeal, we take note that the appeal is of public interest nature and the order that commends itself to us is to direct parties to bear their own costs.

J. Orders

175. In light of the above, we order that:

i. The Petition dated 21st March 2024 be and is hereby allowed.

ii. The Judgment of the Court of Appeal is hereby set aside in respect of its findings that the trial court erred in holding that the invocation of the Specially Permitted Procurement under Section 144A of the *Public Procurement and Asset Disposal Act* violated the *Constitution*.

iii. The decision of KPA to grant Portside Freight Terminals Limited the license to establish a second grain bulk facility through the Specially Permitted Procurement Procedure was inconsistent with Articles 10(2)(c), 201(a) and 227(1) of the *Constitution*

iv. Each party to bear its own costs.

v. We hereby direct that the sum of Kshs. 6,000 deposited as security for costs upon lodging of this appeal, be refunded to the depositor.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE, 2025.

.....

P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

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

REGISTRAR

SUPREME COURT OF KENYA