IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GITHINJI, VISRAM, NAMBUYE, J. MOHAMMED & ODEK, JJ.A

CIVIL APPEAL NO. 224 OF 2017

BETWEEN

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) ……....APPELLANT

AND

THE NATIONAL SUPER ALLIANCE (NASA) KENYA ……...1ST RESPONDENT

AL GHURAIR PRINTING AND PUBLISHING LLC ……...2ND RESPONDENT

THE ATTORNEY GENERAL ……..3RD RESPONDENT

THE JUBILEE PARTY ……..4TH RESPONDENT

DR. EKURU AUKOT & THE THIRDWAYALLIANCE…...5TH RESPONDENT

SAMUEL WAWERU ……6TH RESPONDENT

STEPHEN OWOKO OGANGA ….……..…7TH RESPONDENT

(Being an appeal from the Judgement and Order the High Court of Kenya at Nairobi (Ngugi, Odunga & Mativo, JJ) dated 7th July, 2017

in

Judicial Review No. 378 OF 2017)
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JUDGMENT OF THE COURT

1. The ***Independent Electoral and Boundaries Commission*** (IEBC)(the Appellant) as the body charged with the responsibility for conducting the

general elections, awarded a tender for the printing and supply of electoral materials for the upcoming general elections to be held on 8th August, 2017, to ***Al Ghurair Printing & Publishing LLC*** (the 2nd Respondent) on 29th May, 2017. A contract to that effect was executed by the parties on 8th June, 2017. The Appellant informed the public of the same vide a media briefing which was held on 15th June, 2017.

2. The ***National Super Alliance Kenya*** (NASA) (the 1st Respondent) took issue with the said award. Citing ***Articles 227*** and ***10*** of the Constitution, NASA complained that the Appellant never consulted with the relevant stake holders and/or allowed public participation before making such a decision, thereby flouting the constitutional precepts of transparency and accountability. NASA argued that the 1st Respondent failed to take into account the negative public perception surrounding the 2nd Respondent following the cancellation of previous tenders awarded in its favour by both the court and the ***Public Procurement Administrative Review Board*** (the Review Board).

3. NASA highlighted, what it believed was it's, and the public's perception, that the award of the tender to the 2nd Respondent by direct procurement was predetermined and calculated to give undue advantage to the incumbent President who was one of the candidates vying for another term. The basis for this perception was that the ***Dubai Chamber of Commerce*** had publicized that the ***Jubilee Party's*** (4th Respondent) presidential candidate had met with its officials, led by ***H.E Majid Saif Al Ghurair*** on 5th October, 2016 to discuss the fostering of economic relations between Kenya and United Arab Emirates (UAE). There were other media reports to the effect that the President had also met on previous occasions with H.E Majid Saif

for undisclosed reasons. H.E Majid Saif was the Chief Executive Officer of ***Al Ghurair Holdings Limited*** which the 1st Respondent believed was affiliated to the 2nd Respondent. The 1st Respondent was not persuaded that it was coincidental that the tender for the supply of election materials had been awarded on several occasions to the 2nd Respondent. The 1st Respondent's apprehension was further compounded by the fact that there were allegations that the 2nd Respondent, who was also involved in the printing of election materials in Zambia and Uganda, played a role in the electoral malpractices in those countries.

4. Despite the 1st Respondent and other stakeholders registering their concerns with regard to the award of the tender to the 2nd Respondent, the Appellant insisted on going on with the contract. On 21st June, 2017 the Appellant announced that the printing of the ballot papers would commence on 23rd June, 2017 save for the presidential ballot papers printing scheduled to commence on 18th July, 2017.

5. All in all, the 1st Respondent was convinced that the Appellant's decision was illegal and in contravention of the Constitution and the **Fair Administrative Action Act**. As a result, the 1st Respondent filed Judicial Review proceedings under ***Order 53 Rule 3(1)*** of the **Civil Procedure Rules** and the **Law Reform Act** seeking *inter alia:*

> ***"a) An order of Certiorari to quash the decision of IEBC made on 29th May 2017 or thereabouts to award the tender for the printing of election materials including ballot papers for the presidential elections scheduled for 8th August 2017 and all consequential actions based on the said decision.***

b) An order of Mandamus compelling the IEBC to reconsider and award the tender for printing of election materials for the presidential elections scheduled for 8th August 2017 and in doing so to take into account the views of the relevant stakeholders in the said elections in its decision.

c) An order of Prohibition restraining the applicant from considering and/or awarding the tender and contract to the 2nd Respondent and/or its affiliates for the printing of election materials for the forthcoming elections."

6. In opposing the application, the Appellant challenged the court's jurisdiction to entertain the application. In its view the 1st Respondent was challenging the merits of its decision to award the tender to the 2nd Respondent which could not properly lie in judicial review proceedings.

7. The Appellant submitted that the tender process was completely above board. Detailing the history of the tendering process, it was deposed on behalf of the Appellant that following an open tender, the 2nd Respondent was awarded the tender on 17th August, 2016 **Tender Ref No. IEBC/01/2016 – 2017** to print and supply the election materials. One of the bidders filed a review against the award at the **Public Procurement Administrative Review Board** (the Review Board) which was dismissed. The resulting contract was signed on 30th November, 2016. However, the 1st Respondent moved the High Court through **Judicial Review No. 637 of 2016** praying for an order to quash the decision of the Review Board. The High Court (Odunga, J.) in a judgment dated 13th December, 2016 allowed the application. The second attempt was by way of a restricted tender process whereby thirteen (13) firms were invited to bid for the contract.

Once again, one of the bidders challenged the process and the Review Board, on 9th May, 2017, terminated the entire process.

8. Taking into account that there were only 80 days then left to the general elections, the Appellant sought a legal opinion on the appropriateness of direct tendering from ***Milcah Chebosis***, a procurement professional. By her report dated 7th June, 2017, she recommended that direct tendering was appropriate in the circumstances. Thereafter, the Appellant in compliance with ***Section 103*** of the **Public Procurement and Asset Disposal Act, 2015** directly awarded **Tender No. IEBC/53/2016 – 2017** to the 2nd Respondent.

9. According to the Appellant, there was no provision under the **Public Procurement and Asset Disposal Act** which called for the invitation of the public to participate in the evaluation or award of a tender. Prior to awarding of the direct tender, the Appellant consulted with the 1st and 4th Respondents through their representatives. Thereafter, on 15th June, 2017 the Appellant also met with the presidential candidates and informed them of the same.

10. The Appellant submitted emphatically that there was no connection between the 2nd Respondent and H.E Majid Saif Al Gharair; and that the 1st Respondent was challenging the award on unproven claims. As it stood, the contract had already been substantially performed. The Appellant explained that the cancellation of the contract would have far-reaching financial consequences on the Government which would still have to pay the colossal amount under the letter of credit. Furthermore, quashing the award would render the scheduled General Elections impossible resulting in a constitutional crisis, given that the date of the elections was sacrosanct, and could not be altered.

11. ***Ganapathy Lakshmanan***, the 2nd Respondent's General Manager, also opposing the application, refuted any connection between the 2nd Respondent and H.E Majid Saif Al Ghurair. He deposed that the 2nd Respondent is part of ***Al Ghurair Investment LLC*** of Postal Address 6999 Dubai UAE and not ***Al Ghurair Holdings Limited***. Though the two companies share the name '*Al Ghurair'* which is a common name in the UAE, they were distinct companies. The said H.E Majid Saif Al Ghurair is neither a director, shareholder nor officer of the 2nd Respondent. In any event Al Ghurair Holdings Limited did not engage in printing business. He emphasised that at no time had the 2nd Respondent's officials met with the President of the Republic of Kenya.

12. ***The Attorney-General*** (3rd Respondent), ***the Jubilee Party*** (4th Respondent), ***Samuel Waweru*** (6th Respondent) and ***Stephen Owoko Oganga*** (the 7th Respondent) reiterated the Appellant's position in the application. The 6th Respondent also challenged the competency of the application on the ground that the decision which the Respondent sought to be quashed had not been annexed to the application for Judicial Review before the High Court.

13. ***Dr. Ekuru Aukot & The Thirdway Alliance*** (the 5th Respondent) supported the 1st Respondent's application in so far as it relates to the printing of the presidential ballot papers only. He deposed that as the party leader of ***Thirdway Alliance Kenya*** he, amongst other presidential candidates, was invited by the Appellant to attend a meeting on 15th June, 2017 wherein the tender in question was discussed.

14. The questions for determination before the High Court were identified to be:

    a) ***First: Is the suit bad in law and is the Court divested of Jurisdiction under doctrine of exhaustion of remedies?***

The question here is whether the Applicant ought, first, to have filed its grievance before the Public Procurement Administrative Review Board.

b) ***Second: Is the Court otherwise divested of jurisdiction in view of the nature of the Application and the reliefs sought? Differently put, are there prudential or other policy-based reasons why the Court should decline to exercise jurisdiction in this particular case?***

c) ***Third: Is the Applicant disentitled to the reliefs it seeks due to material non-disclosure and lack of candour?***

d) ***Fourth: Is the applicable and governing (doctrinal) law Constitutional principles and doctrines emanating thereunder or traditional Common Law principles and doctrines of Judicial Review?***

e) ***Fifth: Is the application fatally defective because the Applicant failed to annex to its Application the impugned decision as required under Order 53 Rule 7 of the Civil Procedure Rules?***

f) ***Sixth: Is the suit barred by the doctrine of res judicata?***

g) ***Seventh: Did IEBC consider extraneous and illegal considerations in its determination to award the tender to the 1st Interested Party or was the decision otherwise actuated by bias?***

h) ***Eighth: Was the IEBC constitutionally obliged to facilitate public participation as part of the tender process for the printing of Election Materials including Ballot papers for Presidential Elections?***

i) ***Ninth: If the answer to (h) above is in the positive, was there sufficient public participation in the award of the tender to print Election Materials including Ballot Papers for Presidential Elections?***

j) Tenth: Should the Court decline to grant the reliefs sought on Public Interest grounds?

k) Eleventh: What orders should the Court grant?

15. Upon considering the above questions identified for determination, the learned Judges (Ngugi, Odunga & Mativo, JJ.) by a judgment dated 7th July, 2017 expressed that they were not satisfied, based on the material before them, that it was impossible or impracticable for the Appellant to comply with the constitutional and statutory provisions with respect to procurement of the printing of election materials and ballot papers for the presidential elections in order to conduct a free, fair and credible presidential elections on 8th August, 2017.

16. The final orders issued by the learned Judges were as follows:

"(a) We hereby issue an order of certiorari removing into this Court for the purposes of being quashed the decision of the Independent Electoral and Boundaries Commission (IEBC) awarding the tender for the printing of election materials including ballot papers for the Presidential elections scheduled for 8th August 2017 to the 1st Interested Party herein which decision is hereby quashed.

(b) An Order of mandamus compelling the Independent Electoral and Boundaries Commission (IEBC) to commence de novo the procurement process for the award of the tender for the printing of election materials for the Presidential elections scheduled for 8th August 2017 in accordance with the Constitution, provisions of the Public Procurement and Asset Disposal Act and the relevant election laws so as to ensure that free, fair, credible and transparent elections are conducted on the said date.

(c) Due to the public nature of these proceedings we will make no order as to costs."

17. It is that decision that has provoked this Main Appeal by the Appellant and the Cross-Appeal by the 1st Respondent. The Main Appeal was anchored on grounds that can be summarized as follows:

(a) The learned judges erred in law in finding that public participation is a mandatory pre-condition in direct procurement conducted pursuant to the provisions of the Public Procurement and Asset Disposal Act, 2015 and the judges further erred in imposing a constitutional threshold of public participation which does not exist

(b) The learned judges erred in law and fact in failing to appreciate that the orders sought by the 1st Respondent were not capable of being granted because they had the effect of splitting the tender in contravention of Section 54 as read with Section 176 (a) of the Public Procurement and Asset Disposal Act, 2015.

(c) The learned judges erred in law and fact by failing to correctly weigh and apply the principle of public interest.

(d) The learned judges erred by ignoring the evidence and submissions of the parties and substituting their own positions and thus arrived at a wrong decision.

(e) The judgment is internally inconsistent and contradictory.

(f) The learned judges erred in law and fact in holding that the suit before them was a constitutional reference under Article 22 of the Constitution whereas the suit was in true essence a challenge of the award of tender and thus regulated by the Public Procurement and Asset Disposal Act, 2015.

18. On the other hand, the Cross-Appeal was premised on the grounds that can be summarised as follows:

(a) The learned judges misapprehended the applicable law in their decision that the 1st Respondent failed to meet the standard of proof of bias.

(b) That the learned judges erred in law and fact in failing to appreciate the contextual circumstances of the case in their appraisal of the evidence of association between the 2nd Respondent and the President of the Republic of Kenya.

(c) The learned judges otherwise fundamentally misapprehended the applicable law in finding that the burden of proof of apparent special relationship rests with the 1st Respondent.

(d) The learned judges erred in law and fact in ignoring the evidence of the Appellant's past conduct and self-evaluation statements in the procurement process leading upto the impugned direct procurement and thereby made an erroneous finding on the propriety of direct tendering in the circumstance.

(e) The learned judges erred in fact and law in their finding that the Appellant's decision to award the impugned tender/contract to the 2nd Respondent was not actuated by bias.

19. The Main Appeal and Cross-Appeal were disposed by written submission as well as oral highlights. Senior Counsel, Mr. Muite leading Mr. Karori and Ms. Odari appeared for the Appellant; Senior Counsel, Mr. Orengo leading Mr. Mwangi, Mr. Sihanya, Mr. Awele and Ms. Opiyo appeared for the 1st Respondent. Mr. Waweru Gatonye appeared for the 2nd Respondent. The Attorney General, Prof. Githu Muigai S.C appeared together with Mr. Bitta and Mr. Kaumba for the 3rd Respondent. Senior Counsel, Mr. Ngatia and Mr. Ahmednasir appeared for the 4th Respondent. Mr. Mutuma represented

the 5th Respondent while Mr. Kinyanjui represented the 6th Respondent. The 7th Respondent appeared in person.

20. During the hearing of this Appeal, the parties filed written submissions and made oral highlights. A detailed examination of the submissions is contained in our re-evaluation of the evidence on record and consideration of the issues raised in the Cross-Appeal and Main Appeal. We now turn to analyse the issues raised in this matter.

ANALYSIS

21. Judicial review orders are discretionary. Whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, we are guided by the principles enunciated in **Mbogo -v- Shah** ***(supra)*****.** We ought not to interfere with the exercise of such discretion unless we are satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and occasioned injustice.

22. The Appellant lodged the Main Appeal and the 1st Respondent lodged a Cross-Appeal. This judgment will consider and determine issues raised in the Cross-Appeal and then consider and determine the grounds raised in the Main Appeal. The final orders of this Court will then be made.

23. We have adopted the format for considering the Cross-Appeal before the Main Appeal because the issues raised in the Cross-Appeal largely relate to issues of fact and re-evaluation of the factual evidence. Further, the inference and deductions to be drawn from the facts need to be established. In contrast, the issues canvased in the Main Appeal relate to application of points of law to facts. It is thus important to re-evaluate and determine the

facts that have been proved in evidence and then apply the law to the set of proved facts.

CROSS-APPEAL

24. The 1st Respondent, ***The National Super Alliance (NASA) Kenya***, by Notice of Cross-Appeal dated 12th July 2017 urged this Court to dismiss the main appeal and allow the Cross-Appeal with costs.

25. The grounds in support of the Cross-Appeal as itemized in the Notice can aptly be condensed as:

(a) The learned judges misapprehended the applicable law in their decision that the 1st Respondent failed to meet the standard of proof of bias.

(b) That the learned judges erred in law and fact in failing to appreciate the contextual circumstances of the case in their appraisal of the evidence of association between the 2nd Respondent and the President of the Republic of Kenya.

(c) The learned judges otherwise fundamentally misapprehended the applicable law in finding that the burden of proof of apparent special relationship rests with the 1st Respondent.

(d) The learned judges erred in law and fact in ignoring the evidence of the Appellant's past conduct and self-evaluation statements in the procurement process leading upto the impugned direct procurement and thereby made an erroneous finding on the propriety of direct tendering in the circumstance.

(e) The learned judges erred in fact and law in their finding that the Appellant's decision to award the impugned

tender/contract to the 2nd Respondent was not actuated by bias.

26. In support of the Cross-Appeal, counsel for the 1st Respondent ***Mr. Jackson Awele*** concurrently argued all the grounds. He submitted that taking into account the conduct of the Appellant from the procurement process that were nullified by the Procurement Review Board and the High Court, there was reasonable apprehension that there was absence of transparency on the part of the Appellant in the election material procurement process; that the opaque nature of the Appellant's conduct infringed upon the right of Kenyans to a free and fair election as provided for in ***Articles 38, 81*** and ***86*** of the Constitution; that the factual circumstances involving the conduct of the Appellant had created impressions in the mind of some voters that make them fear that if the General Elections were to be held, it would not be free and fair. Counsel submitted that the tender awarded by the Appellant to the 2nd Respondent was actuated by extraneous considerations.

27. Counsel emphasised that the electoral process was not an event but a continuum of various activities way before the date of the election. He submitted that the learned judges erred in finding that the 1st Respondent had not met the threshold of bias; that the test of bias was well established under ***Section 7*** of the **Fair Administrative Action Act** – the test is reasonable apprehension; that the High Court erred and applied the wrong test of indisputable and/or unmistakable test or otherwise beyond reasonable doubt; that the Court erred as it did not consider all the contextual circumstances of the case; counsel further urged this Court to find that the High Court failed to appreciate the weight of the totality of the evidence adduced by the 1st Respondent; that the trial court erred in failing to find that

there was an inappropriate association between officers of the 2nd Respondent and one of the candidates who is the President of the Republic of Kenya.

28. The 1st Respondent further faulted the learned judges for dismissing newspaper articles as evidence to prove improper association between the 2nd Respondent and the President of the Republic of Kenya. It was submitted that except for newspaper reports, there was no other way to prove that meetings between the 2nd Respondent and the President took place; that Presidential meetings are not gazetted and the only way to prove Presidential meetings and engagements is through newspaper and media reports. Counsel submitted that the trial judges erred in dismissing media reports and newspaper cuttings and thus erred in failing to appreciate the contextual and surrounding circumstances under which the 1st Respondent was operating.

29. The 1st Respondent's counsel observed that it was not disputed that a Dubai Chamber of Commerce delegation met the President of Kenya on 5th October 2016 and astoundingly the 2nd Respondent was notified of its tender award on 18th October - barely two weeks after the meeting. Counsel noted that whereas the burden of proof is on he who alleges, the evidentiary burden was upon the 2nd Respondent to disprove that the meeting with the President took place. It was submitted that the trial judges ignored the provisions of ***Section 115*** of the **Evidence Act** and did not call upon the 2nd Respondent to discharge its evidentiary burden of proof; that the learned judges erred in isolating and separating the circumstance of the case rather than looking at the disclosed facts as a single surrounding circumstance in the award of the tender contract.

30. Learned Counsel Mr. Mutuma Elias, for the 5th Respondent, supported the Cross-Appeal submitting that the High Court erred in finding that bias on the part of the Appellant in awarding the tender contract to the 2nd Respondent was not proved. He reiterated that the High Court erred on the applicable standard of proof; that a party need only prove suspicion of reasonable bias; that the learned judges ought to have looked at the newspaper cuttings to determine facts constituting reasonable bias and that in the instant appeal, suspicion of improper conduct between the 2nd Respondent and one of the Presidential candidates (President of Kenya) is a fact that points towards reasonable bias.

31. Counsel for the 4th Respondent, Mr. Fred Ngatia, in opposing the Cross-Appeal relied upon written submissions filed in court. He submitted that the learned judges were correct in their evaluation of the evidence on record; it is not disputed that a Dubai Chamber of Commerce delegation visited Kenya and made a courtesy call to the President of the Republic; that the leader of the Dubai delegation is not associated with the 2nd Respondent; that there are two companies bearing almost similar names: one is ***Al Ghurair Investment LLC*** (also known as ***Abdalla Al Ghurair Group of Companies*** and the other is ***Al Ghurair Group*** also known as ***Saif Al Ghurair Group)***. It was submitted that ***Mr. Majid Al Ghurair*** who led the Dubai Chamber of Commerce delegation to Kenya and met the President is the Chief Executive Officer of Al Ghurair Group; that the said Mr. Majid is neither a director nor shareholder of the 2nd Respondent company; that at no time during his meeting with the President was the issue of the contract relating to printing of ballot papers discussed and that the ***Kenya National Chamber of Commerce & Industry*** Chairman ***Mr. Kiprono Kittony*** who was present at

the meeting confirmed that the contract for printing of ballot papers was never discussed.

32. Learned counsel submitted that it was the political leaders of the 1st Respondent who generated the fake news of alleged association and discussion with the President of the Republic and sought the Court to use the fake news reported in the daily newspapers as evidence. It was submitted that it is not enough to find a case on suspicion; likewise, it is not enough to raise suspicion and when you are reported in the daily newspapers you say your own suspicion is the evidence.

33. Counsel urged this Court to find that the Cross-Appeal was an afterthought that should be dismissed; that immediately after the High Court delivered its judgment on 7th July 2017, Senator Orengo Counsel for the 1st Respondent informed the High Court that the 1st Respondent would not appeal the judgment and that on 12th July 2017 a Notice of Cross-Appeal was filed as an afterthought.

34. Mr. Waweru Gatonye for the 2nd Respondent opposed the Cross-Appeal. He submitted that the allegations in the cross appeal throw dust to the commercial integrity of the 2nd Respondent; that Mr. Majid Al Ghurair who met the President of the Republic of Kenya was not a shareholder of the 2nd Respondent printing company on admissibility and weight to be placed on newspaper cuttings, Counsel submitted that the High Court correctly interpreted and applied the law. Counsel cited **Mumo Matemu -v- Trusted Society of Human Rights Alliance & 5 Others –Civil Appeal No. 290 of 2012; [2013] eKLR**. Counsel urged this Court to find that the burden of

proof was on the 1st Respondent to prove reasonable suspicion of bias and the 1st Respondent failed to discharge the burden.

35. In relation to newspaper cuttings, Counsel submitted that in law, newspaper cuttings are inadmissible to prove allegations of a serious nature such as bias and lack of integrity; that the principle of inadmissibility of newspaper cuttings is founded on the basis that it amounts to hearsay as no reporter would be called to give evidence and in most cases, the writing is what has been said by other people. Counsel cited dicta from the case of **Kituo Cha Sheria & another -v- Central Bank of Kenya & 8 Others (supra)** to support the legal proposition that media reports, taken alone, are of no probative value; that relying on newspaper cuttings which has misreported information would be unfair and prejudicial to the 2nd Respondent. Counsel cited the case of **Gabriel Koigi Wamwere & 2 others -v- Attorney General – Petition No. 198 of 2013; [2017] eKLR** in support.

36. Submitting on the allegations of improper association between the 2nd Respondent and the President of the Republic, Counsel stated that the 2nd Respondent company is not related in any way to the Al Ghurair Group; that ***Mr. Majid Saif Al Ghurair*** who led the Dubai Chamber of Commerce delegation to Kenya was neither an officer, director nor shareholder of the 2nd Respondent company; that the 2nd Respondent's shareholders, directors, officers or members of staff have never visited Kenya; that the name Al Ghurair is a very common name in the United Arab Emirates. On this issue, Counsel submitted that the trial court did not err in finding that the 1st Respondent had not led sufficient evidence to link Mr. Majid Saif Al Ghurair with the 2nd Respondent Company.

37. Learned Counsel, Mr. Karori for the Appellant opposed the Cross-Appeal stating that there was no suggestion that any member of IEBC was present at the meeting between the Dubai Chamber of Commerce delegation and the President of the Republic of Kenya; that it is not permissible to use a meeting held by the President and a third party to infer that there was suspicious conduct and bias on the part of the Appellant.

38. Learned Counsel, Mr. Harrison Kinyanjui, for the 6th Respondent opposed the Cross-Appeal urging that there was nothing to grant on the orders sought in the Cross-Appeal. He relied on the written submissions filed by the 6th Respondent before the High Court.

39. The 7th Respondent, ***Mr. Stephen Owoko Oganga*** who appeared in person, opposed the Cross-Appeal urging that the 1st Respondent had an unfounded and unreasonable fear; that the suggestion that some members of the public had negative perception and suspicion of bias on the part of the Appellant was nothing short of brain washing; and that the cross-appeal is founded on fear and speculation not on facts and evidence.

40. We have considered the submissions by all parties in relation to the Cross-Appeal. A number of issues stand out for determination in the Cross-Appeal namely:

(a) Admissibility and probative value of newspaper cuttings as items of evidence.

(b) Burden of proof in relation to the allegation that there was an improper association between the 2nd Respondent and the President of the Republic of Kenya.

(c) Standard of proof in relation to allegations of bias.

(d) Whether the trial court properly evaluated the evidence on record pertaining to the allegation of bias and improper association between the Appellant, the 2nd Respondent and the President of the Republic of Kenya.

ADMISSIBILITY AND PROBATIVE VALUE OF NEWSPAPER CUTTINGS

41. In support of its submission that there was improper association between the 2nd Respondent and the President of the Republic of Kenya, the 1st Respondent tendered in evidence newspaper cuttings with a view to proving that a meeting took place between ***Mr. Majid Saif Al Ghurair*** and the President. It is not in dispute that a ***Mr. Majid Saif Al Ghurair*** led a delegation of Dubai Chamber of Commerce to Kenya. This meeting was reported in the Daily Newspapers and the 1st Respondent tendered newspaper cuttings as proof of the meeting and alleged improper association between the 2nd Respondent and the President.

42. On the newspaper cuttings as an item of evidence, the Appellant contends that newspaper cuttings are inadmissible to prove a fact in issue and if admissible, they are of no probative value. Conversely, the 1st Respondent's case is that in the contextual and surrounding circumstances of this case, only media reports are available to prove meetings between the President and other delegations and as such, the learned judges ought to have given weight and due consideration to the newspaper cuttings and media print-outs.

43. The trial judges at paragraph 137 of the judgment considered the issue and expressed themselves as follows:

"137. We agree with the 1st and 3rd Interested Parties that the evidence tabled falls below the threshold to prove an allegation as serious as that made by the Applicant and the 4th Interested Party. We expressly hold that the newspaper cuttings and various other media print-outs are insufficient to discharge the high burden placed by law on the Applicant to prove its allegations…."

138. …We rely on Andrew Omtata Okoiti & 5 Others -v- Attorney General & 2 Others (2010) eKLR where the High Court held as follows:

> **"This case however, can hardly go far because the Petitioners have solely relied on newspaper cuttings in discharging their evidentiary burden which approach is rather flawed. The probative value of such cuttings is not in line with the requirements of the Evidence Act and most importantly, their probative value points to the direction of hearsay, which then impugns their admissibility. Without diluting the existing principles on the discharge of evidentiary burden, an allegation of such weight cannot be founded on opinion pieces written by authors who most likely sourced their information from 3rd parties."**

140. Finally, we rely on William Muriithi Nyuiri Wahome & 2 others -v- Attorney General [2016] eKLR where this Honourable Court held as follows:

"…. I must first state that it is now well settled that newspaper cuttings are inadmissible…"'

44. On our part, having considered the evidence on record and the law relating to admissibility and probative value of newspaper cuttings, we find that a report in a newspaper is hearsay evidence. We are conscious of ***Section 86(1) (b)*** of the **Evidence Act** which provides that newspapers are one of the

documents whose genuineness is presumed by the Court. This section *prima facie* makes newspapers admissible in evidence. However, a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in court and deposing to have perceived the fact reported. Even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement and cannot be treated as proof of the facts stated in the **newspaper**. On a comparative basis, in the Indian case of **Laxmi Raj Shetty -v- State of Tamil Nadu 1988 AIR 1274, 1988 SCR (3) 706,** the Supreme Court held that a newspaper is not admissible in evidence.

45. Guided by the foregoing local judicial decisions and comparative jurisprudence, we find that the trial court did not err in arriving at the conclusion that the 1st Respondent did not tender tangible and sufficient evidence to prove allegations of close association between the 2nd Respondent and the President of the Republic of Kenya. The trial court did not err when a finding was made at paragraph 145 of the judgment that *"media print outs are not sufficient evidentially to prove lack of integrity on the part of the 1st Interested Party."* We affirm the finding by the trial judges at paragraph 137 of the judgment that newspaper cuttings and various media print outs are insufficient evidence to discharge the burden of proof. We hold that without corroborative evidence, the probative value and weight of newspaper cuttings as items of evidence to prove a fact in issue is low. To this extent, the ground in Cross-Appeal that the learned judges failed to appreciate the contextual circumstances of the case in their appraisal of evidence has no merit.

BURDEN OF PROOF

46. The 1st Respondent in ground 3 of its Cross-Appeal faults the learned judges for fundamentally misapprehending the applicable law in finding that the burden of proof of apparent special relationship rests with the 1st Respondent. It was submitted that in the contextual circumstances of this case, once the 1st Respondent had demonstrated that a meeting had taken place between the President of the Republic of Kenya and one ***Majid Saif Al Ghurair***, the evidentiary burden to prove that the said ***Mr. Majid Saif Al Ghurair*** who met the President was not a representative of the 2nd Respondent shifted and rested upon the 2nd Respondent; that the evidentiary burden was upon the Appellant and 2nd Respondent to prove that the tender for printing ballot papers was not discussed during the meeting between ***Mr. Saif Majid Al Ghurair*** and the President; that once evidence had been adduced that a meeting took place, the evidentiary burden shifted to the 2nd Respondent to prove that the tender was not discussed and to prove there was no improper or suspicious association between the 2nd Respondent and the President of Kenya.

47. The 1st Respondent further submitted that the meeting between the President and ***Mr. Saif Al Ghurair*** took place on 5th October 2016 and on 18th October 2016 the tender contract was suspiciously awarded to the 2nd Respondent. Counsel submitted that these contextual circumstances raise reasonable suspicion that there was bias in the award of the tender and the burden to disprove the suspicion rested upon the Appellant and the 2nd Respondent.

48. We have considered the 1st Respondent's submission on legal and evidentiary burden of proof. The gravamen of the submission is the interplay

between legal burden of proof, shifting or evidentiary burden of proof and burden on facts proving or disproving special relationship.

49. The Supreme Court of Kenya in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 others -Petition No. 2B of 2014; [2014] eKLR** had occasion to illuminate how the legal and evidentiary burden of proof is applied in the law of evidence. The Court analyzed the application of ***Sections 107*** and ***112*** of the **Evidence Act**.

50. ***Section 107*** of the **Evidence Act** provides:

> **"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."**

51. In considering the application of the concept of shifting burden of proof, the Supreme Court expressed itself as follows:

> **"[187] But Section 112 of the Evidence Act is not to be invoked without regard to the preceding sections, especially Section 107 (1) and (2) of the same Act which provide as follows:**
>
> ***"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of facts it is said that the burden of proof lies on that person"***
>
> **"[189] Section 112 of the Evidence Act,…is an exception to the general rule in Section 107 of the same Act.**

Section 112 was not meant to relieve a suitor of the obligation to discharge the burden of proof.

52. In this appeal, the 1st Respondent submitted that the learned Judges erred and failed to appreciate the application of ***Section 115*** of the **Evidence Act**. ***Section 115*** of the **Evidence Act provides**:

> **"When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it."**

53. The submission by the 1st Respondent that ***Section 115*** of the **Evidence Act** applies to the facts of this case is misplaced. Section 115 applies to special relationships that exist in law and are covered by different substantive laws. For instance the section applies to a partnership relationship of landlord/tenant or principal/agent relationship which are all covered by distinct substantive laws. Section 115 should be applied *ejusdem generis* to incorporate special relationships such as director/shareholder of a company or husband/wife. The facts of the instant case are not grounded on a special relationship governed by distinct substantive law that can be construed *ejusdem generis* with other relationships envisaged under ***Section 115*** of the Evidence Act. There is no alleged prior or pre-existing relationship between the President of the Republic of Kenya and the Dubai Chamber of Commerce delegation that is recognized by any substantive law. It is for this reason that ***Section 115*** of the **Evidence Act** is inapplicable to the facts of this case.

54. In **Ali Mahdi -v- Abdullah Mohammed [1961] EA 83 (T)** the Respondent claimed workman's compensation and alleged that the Appellant was his employer. One main issue was whether the Respondent was an employee or a partner of the Appellant. The Respondent gave evidence that a former partnership had been dissolved. The Appellant gave no evidence at all. The Court held that on the evidence available to the trial magistrate it was open to him to find that the Respondent was an employee and not a partner of the Appellant. Thus the burden lying on the Respondent under ***Section 115*** to disprove the special relationship had been discharged.

55. In the instant appeal, drawing analogy and deductions from the Supreme Court appraisal of ***Sections 107*** and ***112***, we are of the view that ***Section 115*** of the **Evidence Act** is an exception to the general rule in ***Section 107*** of the same Act. ***Section 115*** was not meant to relieve the person alleging the obligation to discharge the burden of proof. Before ***Section 115*** can be invoked, the person alleging that there is a special relationship must prove that special relationship; the section comes into play to disprove that there is no such relationship. A condition precedent for ***Section 115*** to shift the burden to a defendant is that the plaintiff/applicant must first prove or establish the special relationship and it is only then that the defendant/Respondent can be called upon to prove that there is no such special relationship.

56. In the instant case, in an attempt to prove that a special relationship existed between the 2nd Respondent and the President of the Republic, the 1st Respondent was content to rely on newspaper cuttings that had no evidential or probative value. On what basis, then, could Section 115 of the Evidence Act be invoked to disprove a special relationship between the President of

the Republic and 2nd Respondent? The 1st Respondent had not tendered relevant, admissible and probative evidence sufficient to activate Section 115 of the Evidence Act. Upon our re-evaluation of the evidence on record, we find that the 1st Respondent tendered newspaper cutting evidence that had little or no probative value and this was insufficient to invoke Section 115 of the Evidence Act and shift the evidential burden to the 2nd Respondent. Further, it is the 1st Respondent who made the allegation that during the meeting between the President of Kenya and the delegation from Dubai Chamber of Commerce the contract for printing ballot papers was discussed. The 1st Respondent neither adduced any credible evidence to prove the allegation nor provided a credible source of the allegation. The allegation that the tender contract was discussed at the meeting is one that needed to be proved or a credible source proving that the tender contract was discussed had to be provided. The general rule of he who alleges must prove applies in this case and the legal burden of proof rests with the 1st Respondent.

57. Accordingly, guided by the analogy in the reasoning of the Supreme Court in ***Gatirau Peter Munya case*** **(supra)** and having re-evaluated the evidence on record, we are convinced and satisfied that the trial judges did not fundamentally misapprehend the applicable law in finding that the burden of proof of apparent special relationship rested with the 1st Respondent. We find that the 1st Respondent had not tendered sufficient probative evidence to activate the provisions of ***Section 115*** of the **Evidence Act**.

STANDARD OF PROOF ON BIAS AND EVALUATION OF THE EVIDENCE ON RECORD

58. The 1st Respondent's grounds 1 and 4 of the Cross-Appeal fault the High Court that it misapprehended the applicable law in relation to standard of proof in the allegation relating to bias. The 1st Respondent takes issue with the statement by the trial court that to prove bias, the facts and evidence must "unmistakably point to likelihood of bias or actual bias". It was submitted that by requiring "unmistakable evidence", the learned judges erred and raised the standard of proof to be above balance of probability and or beyond reasonable doubt. Counsel submitted that the standard of proof in all civil cases (and this includes proof of bias) is on balance of probability.

59. It was submitted that the learned judges misapplied the test for bias embodied in ***Section 7 (2) (a) (iv), (k)*** and **(m)** of the **Fair Administrative Action Act**; that the test is reasonable suspicion of bias. Counsel submitted that given the facts of the present case, it is not necessary for the 1st Respondent to prove actual bias, what was needed was proof of reasonable suspicion of bias. Citing dictum from **Porter and Weeks -v- Magill [2001] UKHL 67** cited with approval in **Judicial Service Commission -v- Gladys Boss Shollei [2014] eKLR,** Counsel emphasized that in assessing whether there had been bias, the court should take all relevant circumstances into account. It was submitted that the trial court erred in failing to look at the impression given to other people by the conduct of the Appellant in consistently awarding the tender contract to the 2nd Respondent; that in the first instance, the Appellant in a botched open tender awarded the contract to the 2nd Respondent and which contract was nullified by the Procurement Review Board; in the second instance, the Appellant adopted the restricted tender method and again awarded the contract to the 2nd Respondent and which contract was nullified by the High Court for violating procurement rules; that in the third instance, the Appellant adopted the direct procurement

method and once again awarded the contract to the 2nd Respondent. The frequent award of the contract to the 2nd Respondent created an impression of bias in right minded persons. In these circumstances, a reasonable suspicion of likelihood of bias and preference of the 2nd Respondent is raised. Counsel stressed that in electoral processes, perception on the impartiality is of great significance. Citing dicta from **Republic -v- Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 Others, [2017] e KLR**, Counsel reiterated that perception plays a major role in the electoral process; that it is more important for the process to be fair and be seen to be fair.

60. We have considered the submission by the 1st Respondent on standard of proof on allegation of bias. Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand. (See **Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at [37]- [39] (CA).)**

61. A claim of apprehended bias requires a finding that a fair minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind. (Apprehended bias has been variously referred to as "apparent", "imputed", "suspected" or "presumptive" bias: See **Anderton -v- Auckland City Council [1978] 1 NZLR 657 at 680 (SC NZ); Australian National Industries Ltd. –v- Spedley Securities Ltd (in Liq) (1992) 26 NSWLR 411 at 414 (NSW**

CA); Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at [38](CA).

62. In **Judicial Service Commission -v- Gladys Boss Shollei & another – Civil Appeal 50 of 2014; [2014] eKLR** it was held that the impression or perception of bias has to be evaluated with reference to a reasonable person who is fair minded and informed about all the circumstances of the case. The East African Court of Justice in **Attorney General of the Republic of Kenya v Prof Anyang Nyongo and others (5/2007) [2007] EACJ 1 (6 February 2007)** stated that:

> "**We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair-minded and informed member of the public…"**

See also **Financial Services Ltd and 2 others -v- Manchester Outfitters Civil Applic No. Nai. 224 of 2006.**

63. In the instant appeal, the 1st Respondent's contention is that proof of bias is premised on the concept of reasonable suspicion of bias on the part of right minded voters. The High Court was faulted for introducing a standard of proof which the Court described as unmistakable likelihood of bias**.** In our considered view, the standard to be applied is proof on a balance of probability. Accordingly, we find that the trial court erred at paragraph 155 of the judgment when it introduced the standard of unmistakable likelihood of bias and stated:

> "**While it's not necessary to prove actual bias, the circumstances, facts and evidence must unmistakably point to likelihood of bias or actual bias or form a clear basis for the conclusion that a reasonable perception of bias is warranted.**"

64. We have re-evaluated the evidence on record to determine if the 1st Respondent tendered evidence on balance of probability to prove reasonable suspicion of bias. In our view, it is not easy to prove actual or reasonable suspicion of bias on affidavit evidence. A foundation for reasonable suspicion of bias should be laid. We note that the 7th Respondent, ***Mr. Stephen Owoko Oganga***, in his submission stated that the alleged reasonable suspicion of bias asserted by the 1st Respondent was founded on brain washing and unreasonable fear. Reasonableness is both a question of fact and law. In the absence of factual foundation to demonstrate the basis of the reasonable suspicion, proof on balance of probability cannot be attained.

65. In the instant case, the record reveals that newspaper cuttings of low probative value and fake news were part of the basis for suspicion; nullification of two previous tender awards and persistent award of the winning contract to the 2nd Respondent formed the other basis for suspicion. The 1st Respondent has urged us to draw an inference that the persistent award of the tender contract to the 2nd Respondent is sufficient proof on balance of probability to raise reasonable suspicion that the Appellant was biased in favour of the 2nd Respondent. We decline to draw such an inference because when a person consistently wins a tender award, an inference could also be drawn that other bidders consistently did not meet the tender criteria. The facts of this case do not lead to one irresistible inference pointing towards bias or preference. In addition, our re-evaluation

of the evidence on record shows there was no linkage between IEBC and the President and the meeting held with the Dubai Chamber of Commerce delegation; there is nothing on record to suggest that the President of the Republic directed the Appellant to award the tender to the 2nd Respondent. In our view, the trial court properly evaluated the evidence and there is no good reason for this Court to interfere with the findings of fact relating to bias by the learned judges. Even if the newspaper reports were to be believed, the report did not bring out the issue that the tender contract was a subject of discussion between the President and the Dubai delegation. For the foregoing reasons, we hold that the learned judges did not err in finding that insufficient evidence had been led towards proof of reasonable suspicion of bias. We also find that the learned judges did not err in their overall evaluation of the evidence relating to bias.

66. Having considered the issues raised in the Cross-Appeal, we now delve into the Main Appeal.

MAIN APPEAL

67. In its Memorandum of Appeal dated 10th July 2017, the Appellant proffers 18 grounds of appeal which can be abridged as follows:

> ***(a) The learned judges erred in law in finding that public participation is a mandatory pre-condition in direct procurement conducted pursuant to the provisions of the Public Procurement and Asset Disposal Act, 2015 and the judges further erred in imposing a constitutional threshold of public participation which does not exist.***

(b) The learned judges erred in law and fact in failing to appreciate that the orders sought by the 1st Respondent were not capable of being granted because they had the effect of splitting the tender in contravention of Section 54 as read with Section 176 (a) of the Public Procurement and Asset Disposal Act, 2015.

(c) The learned judges erred in law and fact by failing to correctly weigh and apply the principle of public interest.

(d) The learned judges erred by ignoring the evidence and submissions of the parties and substituting their own positions and thus arrived at a wrong decision.

(e) The judgment is internally inconsistent and contradictory.

(f) The learned judges erred in law and fact in holding that the suit before them was a constitutional reference under Article 22 of the Constitution whereas the suit was in true essence a challenge of the award of tender and thus regulated by the Public Procurement and Asset Disposal Act, 2015.

(g) Justiciability and enforceability of Article 10 of the Constitution.

68. Each of the above issues shall be considered and determined as hereunder.

JUSTICIABILITY AND ENFORCEABILITY OF ARTICLE 10 OF THE CONSTITUTION

69. ***Article 10*** of the Constitution provides as follows:

> **"(1) The national values and principles of governance in this Article bind all State Organs, State Officers, public officers and all persons whenever any of them –**

(a) Applies or interprets this Constitution;
(b) Enacts, applies or interprets any law;
(c) Makes or implements public policy decisions.

(2) The national values and principles of governance include –

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) good governance, integrity, transparency and accountability and

(d) Sustainable development." (Emphasis added).

70. The Appellant and 4th Respondent submitted that ***Article 10 (2)*** of the Constitution is not justiciable and enforceable. Conversely, the 1st Respondent contends that ***Article 10*** is justiciable and enforceable here and now.

71. In support of non-justiciability of ***Article 10 (2)*** of the Constitution, it was submitted that ***Article 10 (2)*** is aspirational; that aspirational principles and values are not immediately justiciable and enforceable; that they represent a progressive approach to their realization. Senior Counsel Ahmednassir Abdullahi for the 4th Respondent posited the question whether ***Article 10 (2)*** of the Constitution was justiciable and if it could found a cause of action. Counsel submitted that each of the paragraphs in ***Article 10 (2)*** covers distinct subject matter namely political rights, rights of the person, checks and balances and economic issues.

72. Senior Counsel faulted the High Court for neither interpreting ***Article 10 (2)*** nor making a determination on justiciability of the Article; that the High Court erred in failing to interpret ***Article 10 (2)*** using known principles; that at paragraph 160 of its judgment, the court introduces ***Article 10 (2)*** and devotes not a single sentence to interpret the said Article. It was further submitted that ***Article 10 (2)*** expressly provides for participation of the people and the High Court erred in equating "participation of the people" with "public participation". It was submitted that "participation of the people" is different from "public participation"; that the High Court erred at paragraph 165 of its judgment when it referred to the spirit of the Constitution. Counsel opined that when a court resorts to the spirit of the Constitution, the court is erroneously giving itself latitude to substitute its own views while ignoring the letter and literal interpretation of the Constitution.

73. Citing comparative jurisprudence from India and South Africa, Senior Counsel Ahmednassir observed that in India, values and aspirational principles are directive principles and are non-justiciable. Counsel cited dicta from the Indian case of **B. Krishna Bhat -v- Union of India & Others (1990) SCR (2) 1, 1990 SCC (3) 65** where it was stated:

> **"Directive Principles are aimed at securing certain values or enforcing certain attitudes in the law making and in the administration of law. Directive Principles cannot in the very nature of things be enforced in a court of law."**

74. The case of **Akhil Bharatiya Shoshit -v- Union of India & Others, 1981 AIR 298, 1981 SCR (2) 185** was cited to further support the submission that

values and aspirational principles are non-justiciable. The Indian Supreme Court expressed:

> **"Because Fundamental Rights are justiciable and Directive Principles are not, it was assumed, in the beginning, that Fundamental Rights held a superior position under the Constitution than the Directive Principles and that the latter were only of secondary position under the Constitution than the Directive Principles. That way of thinking is of the past and has become obsolete…..Directive principles cannot in the very nature of things be enforced in a court of law."**

75. Counsel cited two South African decisions to demonstrate that general principles are not justiciable. In **Petronella Nellie Neliswe Chirwa -v- Transnet Limited & 2 Others (2007) ZACC 23,** it was expressed:

> "**The values enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of s 1 itself but from the way the Constitution is structured and in particular the provisions of ch 2 which contains the Bill of Rights….. the same considerations apply to other sections of the Constitution….These sections all have reference to government and duties of government, inter alia, to be accountable and transparent…. In any event, these sections do not confer upon the applicants any justiciable rights that they can exercise….."**

76. Taking into account the written and oral submissions by counsel and the authorities cited, the constitutional issue for determination by this Court is whether ***Article 10 (2)*** of the Constitution is justiciable and enforceable. We pose the question: Is ***Article 10 (2)*** aspirational and progressive in its

realization, actualization and implementation? To elucidate on this question, we examine the values in ***Article 10 (2)*** and consider whether justiciability and enforcement of these values are immediate or progressive or aspirational. For instance, is sharing and devolution of power in ***Article 10 (2) (a)*** to be realized immediately or progressively or is it an aspiration? Is respect for the rule of law and democracy aspirational or are they to be realized and enforced immediately? Does the 2010 Constitution immediately or progressively provide for justiciability and enforceability of the principles of democracy and rule of law and participation of the people in ***Article 10 (2) (a)***? What about human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized in ***Article 10 (2) (b)***? Are these aspirational and progressive or justiciable and enforceable immediately? What about good governance, integrity, transparency and accountability and sustainable development? Are these aspirational so that their justiciability and enforceability is progressive and not immediate? If ***Article 10 (2)*** is not justiciable and enforceable, and if realization of these values is progressive, it means that the rule of law in Kenya is not justiciable and enforceable, protection of human rights, dignity and non-discrimination are non-justiciable matters and transparency and participation of the people are aspirational, non-justiciable and non-enforceable. Is this the Constitutional edict in ***Article 10 (2)***?

77. What is the emerging Kenyan jurisprudence on justiciability and enforceability of ***Article 10*** of the Constitution?

78. The Supreme Court in **Communication Commission of Kenya -v- Royal Media Services & 5 Others - Petition No.14 of 2014; [2014] eKLR** expressed itself as follows in relation to ***Article 10*** of the Constitution:

> **"[382]Patriotism means the love of one's country. The regulator, the State, the Government, the national broadcaster and national private broadcasters have a national obligation, decreed by the Constitution to love this country and to not act against its interests. The values of equity, inclusiveness and participation of the people are similarly anchors of patriotism. Integrity too means we are patriotic when we do not take bribes and commissions thereby compromising the national interests of the Motherland. The values of inclusiveness and non-discrimination demand that State, Government, and State organs do not discriminate against any stakeholder. The regulator in particular must seek to protect the interests of the national and international investors in an equal measure. Indeed, there cannot be sustainable development in the country if the State, State organs, and Government fail to protect and promote the public interest in all its projects.**
>
> **[161] It is also instructive that Article 4(2) of the Constitution decrees that Kenya shall be a multi-party democracy founded on values and principles of governance outlined in Article 10.**
>
> **[358] The words in Article 10(1) (b) "applies or interprets any law" in our view includes the application and interpretation of rules of common law and indeed, any statute.**
>
> **[365] Under Article 10 of the Constitution, national values and principles of governance bind "all State organs, State officers, public officers, and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions."**

> **[366] It is very clear to us that in this appeal the values of equity, inclusiveness, integrity, participation of the people, non-discrimination, patriotism, and sustainable development are intrinsically integrated to establishment, licensing, and consequent promotion and protection of media independence and freedom. Constitutional obligations and responsibilities of the State organs, State officers, and public officers implicated in this appeal are also clearly stated….**
>
> **[368] The Constitution itself has reconstituted or reconfigured the Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the principles and values enshrined in Article 10 and the transformative vision of the Constitution. The new Kenyan state is commanded by the Constitution to promote and protect values and principles under Article 10 and media independence and freedom."**

79. While recognizing that the Supreme Court is the apex court in Kenya, other superior courts in Kenya have had occasion to consider the provisions of ***Article 10 (2)*** of the Constitution. In the **Matter of Peter Makau Musyoka and Award of Mining Concessionary Rights to the Mui Coal Basin Deposts - Constitutional Petition Nos 305 of 2012; [2015] eKLR** the High Court noted:

> **"87. We will begin, happily, by stating what is not contested by the parties: They all agree that the precepts of Article 10 of our Constitution are established rights which are justiciable in Kenya. Hence, if any of the allegations made by the Petitioners is factually proven, it would lead to an appropriate relief by the Court.**

> **88. As our case law has now established, public participation is a national value that is an expression of the sovereignty of the people as articulated under Article 1 of the Constitution. Article 10 makes public participation a national value as a form of expression of that sovereignty. Hence, public participation is an established right in Kenya; a justiciable one – indeed one of the corner stones of our new democracy."**

80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that ***Article 10 (2)*** of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in ***Article 10 (2)*** are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by ***Article 259(1)(a)*** which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

81. Consequently, in this appeal, we make a firm determination that ***Article 10 (2)*** of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.

WAS THE CASE A JUDICIAL REVIEW APPLICATION OR A CONSTITUTIONAL PETITION?

82. A further ground urged in this appeal is that the learned judges erred in law and fact in holding that the suit before them was a constitutional reference under ***Article 22*** of the Constitution whereas the suit was in true essence a challenge of the award of tender and thus regulated by the **Public Procurement and Asset Disposal Act, 2015**. This is captured in grounds 6 and 14 of the Memorandum of Appeal. We now consider this ground.

83. At the outset, we quote dicta from Ojwang, J. (as he then was) in **Kenya Transport Association -v- Municipal Council of Mombasa & another (supra),** where he stated:

> ***"… Although counsel for the Respondents urged that the petitioners should have sought a redress by invoking the administrative processes provided for under the Public Procurement and Disposal Act, such a position is not to be upheld, where constitutional rights have been, as in this case, infringed, and the aggrieved persons have opted for enforcement by Court process."***

84. In this appeal, the Attorney General, in supporting the appeal urged us to note that the original application by the 1st Respondent before the High Court was pleaded as a Judicial Review Application grounded on ***Order 53*** of the **Civil Procedure Act and Rules**. He faulted the learned judges for converting a judicial review application into a constitutional petition Application under ***Article 22*** of the Constitution alleging violation of the Bill of Rights. He submitted that the learned judges erred in law and erroneously mutated an ***Order 53*** Judicial Review Application into a constitutional judicial review Application; that what was complained of was not the

process but the outcome of the tender process; that ***Order 53*** is meant to supervise administrative processes and not outcomes. The Attorney General urged us to note that judicial review remedies are discretionary and the High Court erred in exercising its discretion to convert an ***Order 53*** Application into a constitutional review Application.

85. Learned Counsel Mr. Fred Ngatia for the 4th Respondent associated with the Hon. Attorney General's submission re-emphasizing that this Court should ask itself the nature of the case filed at the High Court. He submitted that the trial court erred in holding that the case is an ***Article 22*** Petition; that in so doing, the trial court erred and rejected the ordinary remedies under ***Order 53*** and the **Law Reform Act** and proceeded in error to grant orders under ***Article 23*** of the Constitution; that it was erroneous for the trial court to hold that the original application was an ***Article 22*** Petition. Counsel submitted that the Appellant's legal arguments were affected when the trial court considered the application to be an ***Article 22*** Petition; that under ***Order 53*** of the **Civil Procedure Act and Rules**, if a party applies for an order of *certiorari*, the decision to be quashed must be attached to the application; that since the 1st Respondent never attached the decision sought to be quashed, the trial court erroneously invoked ***Article 159 (2)*** of the Constitution stating that the court is to be enjoined to determine disputes without undue regard to technicalities. Counsel submitted that the original ***Order 53*** application was fatally incompetent and bad in law for not attaching the decision to be quashed and the trial court went out of its way to resuscitate a bad application by converting it into a Constitutional review application under ***Article 22***.

86. Counsel for the 6th Respondent, Mr. Harrison Kinyanjui associated himself with submissions by the Hon. Attorney General and urged this Court to find that the trial court erred in converting a judicial review application into a constitutional review application. He argued that the initial application before the trial court was not a constitutional petition and therefore the application should be determined under the common law judicial review principles and not under ***Articles 22*** and ***23*** of the Constitution and provisions of the **Fair Administrative Action Act**. He submitted that there was a distinction between judicial review and constitutional review; that a party is bound by his pleadings and once you choose judicial review you cannot convert the same into a constitutional petition.

87. The 5th Respondent urged us to find that the trial court erred in failing to disallow the original application to the extent it was grounded as a judicial review application.

88. The trial court in dealing with this issue cited the case of **Suchan Investment Limited -v- Ministry of National Heritage & Culture & 3 Others (2016) eKLR 51, 54** where it was stated that the law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of ***Article 47*** of the Constitution as read with the **Fair Administrative Action Act of 2015**. The trial court concluded at paragraph 101 of its judgment that the right to fair administrative action is no longer just a judicial review remedy but a constitutional one as well. The court at paragraph 105 rejected the contention that the application before it ought to have been disallowed on the basis that the grounds relied upon was best suited for a constitutional petition and not judicial review application.

89. We have considered the submission and argument by all parties and the authorities cited as well as the reasoning by the trial court. On this issue, we are minded to quote dicta from the Supreme Court in **Communication Commission of Kenya -v- Royal Media Services & 5 Others Petition No.14 of 2014** *Consolidated with* **Petition Nos. 14A, 14B and 14 C of 2014.** At paragraph 355 of its judgment, the Supreme Court expressed itself as follows:

> **"However, ...we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the ….Respondents were seeking the intervention of the High Court in the firm belief that, their fundamental rights had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the Appellants (Respondents herein) were entitled to approach the Court and have their grievances resolved on the basis of Articles 22 and 23 of the Constitution."** (Emphasis added).

90. From the above dicta, the Supreme Court recognized that the source of power of any judicial review is now found in the Constitution.

91. Similarly, in the South Africa case of **Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC) at 33**, it was held that:

> **"[t]he common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts". The court went further to say that there**

> **are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."** (Emphasis added).

92. In our considered view presently, judicial review in Kenya has Constitutional underpinning in ***Articles 22*** and ***23*** as read with ***Article 47*** of the Constitution and as operationalized through the provisions of the Fair Administrative Action Act. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. ***Order 53*** of the **Civil Procedure Act and Rules** is a procedure for applying for remedies under the **common law and the Law Reform Act**. These common law remedies are now part of the constitutional remedies that the High Court can grant under ***Article 23 (3) (c)*** and ***(f)*** of the Constitution. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law ***Order 53*** or constitutional and statutory review procedure. It is not fatal to adopt either or both. In the instant case, we have examined the original application filed before the High Court. Whereas the application is stated to be grounded on ***Order 53*** of the Civil Procedure Rules, on the face thereof, ***Articles 10, 38 (2), 47, 88*** and ***227*** of the Constitution are cited. In our view, this correctly reflects the fusion of constitutional and common law judicial review in Kenya as one system for judicial review.

93. Convinced of the soundness of the decision in **Suchan Investment Limited -v- Ministry of National Heritage & Culture & 3 Others (2016) eKLR 51, 54** and the observations by the Supreme Court in the CCK case above and persuaded by the comparative jurisprudence from South Africa, we find no merit in the Appellant and 5th Respondent's contention that the trial court erred in considering the original application as a constitutional petition rather than a judicial review application. We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches.

94. We now consider the ground of appeal that the trial court erred in law in quashing a decision that was neither attached to the application for orders of *certiorari* nor tendered before court.

FAILURE TO PRODUCE THE DECISION TO BE QUASHED

95. Counsel for the 6th Respondent, Mr. Harrison Kinyanjui, submitted that the trial court erred in making an order for *certiorari* when the decision to be quashed was neither exhibited nor tendered in evidence before the court. He reiterated and adopted his submissions before the trial court that the application before the trial court was incompetent because under ***Order 53 Rule 7***, the 1st Respondent was required to lodge a copy of the decision to be quashed with the Registrar. He submitted that failure to lodge or attach the decision to be quashed was fatal to the application.

96. The learned judges in considering the issue cited the case of **Republic -v- The Commissioner of Lands ex-parte Lake Flowers Limited Nairobi**

HCMISC App. No. 1235 of 1998 where it was held that in a deserving case, the court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law. The learned judges further cited the case of **Republic -v- Kajiado Lands Disputes Tribunal & Others ex parte Joyce Wambui & another Nairobi HCMA No. 689 of 2001 (2006) 1 EA 318** where it was held that despite the irregularities a court cannot countenance nullities under any guise since the High Court has a supervisory role to play over inferior tribunals.

97. The trial court in declining to dismiss the 1st Respondent's application for failing to exhibit the decision to be quashed expressed itself as follows at paragraph 110 of the judgment.

> **"Whereas in this case the decision sought to be quashed was not exhibited, since it is not in doubt that the decision in fact exists, to dismiss the Application simply on the technical ground that the decision was not exhibited would amount to elevating procedural rules to a fetish. "**

98. What is the jurisprudence on failure to attach the decision to be quashed? It was argued that the failure by the ex parte applicant to annex the decision being challenged was fatal as without it there was no evidence that such a decision actually existed.

99. ***Order 53 Rule 7(1)*** of the **Civil Procedure Rules** provides:

> **"In the case of an Application for an order of certiorari, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition, or record unless before the hearing of the motion he has lodged a**

copy thereof verified by affidavit or accounts for the satisfaction of the High Court".

100. This provision of the **Civil Procedure Rules** requires that any party seeking an order of *certiorari* must annex to their application a copy of the order they seek to challenge or if not they must give a satisfactory reason for that failure. It has been severally held that this provision is mandatory and failure to comply with ***Order 53 Rule 7(1)*** renders the proceedings incompetent. In the case of **Samson Kirerea M'ruchu -V- Minister for Lands & Settlement CA 21 of 1999**, cited with approval in **Musa Kingori Gaita -v- Kenya Wildlife Service [2006] eKLR** the Court of Appeal held-

> **"Compliance with the above provision is a precondition to seeking an order or certiorari. An applicant who fails to comply with the requirements of that provision disentitles himself to a hearing of his Motion under Order Rule 3 of the Civil Procedure Rules. It would appear to us that the failure to comply with Rule 7 (1) above, does not render the application incompetent ab initio but renders proceedings continued in violation thereof a nullity. We say so advisedly as a copy of the decision sought to be quashed may be lodged before the hearing of the Motion for an order of certiorari".**

101. In **Republic -v- Ruiru District Land Disputes Tribunal & Another Ex Parte Lucia Waithira Muiruri & Another [2014] eKLR** the Court also held that failure to comply rendered the entire application incompetent since the Court was not in a position to determine whether there in fact existed a decision capable of being quashed. (See also **Republic -v- Mwangi S. Kimenyi *Ex-Parte* Kenya Institute For Public Policy and Research Analysis (KIPPRA) [2013].**

102. However, the court in **Ashraf Savani & Another -v- Chief Magistrate's Court Kibera & 4 Others [2012] eKLR** interpreted the above rule to mean that failure to annex the decision being challenged together with the application for leave was not fatal as the same could be produced at a later stage before the hearing of the main motion or if the applicant gives the court a satisfactory reason for his failure. Githua, J. stated as follows:

> ***"In my understanding Order 53 Rule 7 of the Civil Procedure Rules does not provide that the order sought to be quashed by Orders of Certiorari must be attached to the application seeking leave. It only provides that a copy of such an order must be lodged with the courts registrar verified by an affidavit before hearing of the motion in which validity of the order is being challenged.***
>
> ***From a reading of Order 53 Rule 7(1) of the Civil Procedure Rules, I find that though a party challenging validity of an order or decision seeking to have the same quashed by orders of certiorari may attach the impugned decision or order to the verifying affidavit sworn to verify facts in the statutory statement in the application for leave, a party who fails to do so at the leave stage may still do so at a later stage provided copy of the said order or decision verified by affidavit is lodged with the courts registrar before hearing of the Notice of Motion for Judicial Review or a satisfactory reason is given to the court regarding why this has not been done".***

103. The same reasoning was adopted by the court in **Republic -v- Chairman District Alcoholic Drinks Regulation Committee & 4 Others Ex-Parte Detlef Heier & Another [2013]** where the court granted the applicants leave to file the judicial review proceedings even though the decision sought to be quashed had not been annexed. In **Republic -v- Land Dispute Tribunal Court Central Division And Another Ex Parte Nzioka [2006] 1 EA 321**, Nyamu, J**.** (as he then was) held that leave should be granted to lodge the

decision to be quashed, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave. (See also **Agutu Wycliffe Nelly -v- Office Of The Registrar Academic Affairs Dedan Kimathi University Of Technology Dekut [2016] eKLR**).

104. In this appeal, we have considered the submission by the 6th Respondent and the reasoning by the trial court in declining to find that the 1st Respondent's application was fatal for failure to attach the decision to be quashed. The legal issue for our determination is whether there are exceptions to the general rule that the decision to be quashed must be attached. In our considered view, the exceptions include when leave is granted by the trial court to lodge the decision before the final determination of the case. This is the exception revealed by the decisions in amongst others **Ashraf Savani & Another -v- Chief Magistrate's Court Kibera & 4 Others [2012] eKLR** and **Republic -v- The Commissioner of Lands ex-parte Lake Flowers Limited Nairobi HCMISC App. No. 1235 of 1998** and **Republic -V- Chairman District Alcoholic Drinks Regulation Committee & 4 Others Ex-Parte Detlef Heier & Another [2013].**

105. In the present appeal, the record shows that the 1st Respondent neither attached the decision to be quashed nor applied for leave to attach the same. The trial judges observed that it was not in dispute that a decision had been made by the Appellant to adopt direct procurement method. It is our considered view, that the learned judges did not err in observing that a decision had in fact been made by the Appellant and the court did not err in failing to strike out the Application as incompetent for failure to attach the

decision to be quashed. The record shows that there was no dispute that a decision had been made and that the decision existed; there was no dispute as to the nature of the decision. In our view, depending on the peculiar circumstances of each case where it is clear, uncontested and definite that a decision has been made and the nature of the decision is not disputed, a court can either take judicial notice of the decision or the parties can by consent record the nature of the decision. In such cases, the need to attach or produce the decision to be quashed can be waived. We are of this view cognizant of the provisions of ***Article 159 (2) (d)*** of the Constitution which enjoins courts to administer justice without undue regard to technicalities.

106. We now consider the ground of appeal that the trial court erred in granting the orders for *certiorari* and *mandamus* contrary to public interest. Ground 13 of the memorandum of appeal is to the effect that the learned judges erred in law by failing to correctly weigh and apply the principle of public interest.

PUBLIC INTEREST IN RELATION TO THE ORDERS MADE BY THE HIGH COURT

107. Since time immemorial, it has been said over and over again that public interest is an unruly horse. When you ride it, you never know where it will take you. It can take you to the sea or desert or on fertile land. Public interest changes with time and circumstances, it is always in flux and largely depends on who defines it. It is debatable whether it is objective or subjective. It can never be precisely defined, visibly identified or vividly noticeable. Be that as it may, in **Republic -v- County Government Of Mombasa ex parte Outdoor Advertising Association Of Kenya [2014] eKLR** it was held:

> **"There can never be public interest in breach of the law.....because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution."**

108. In **Republic -v- Public Procurement Administrative Review Board & 3 Others ex parte Olive Telecommunications PVT Limited [2014] eKLR**, it was expressed:

> **"We only emphasize that nothing would serve public interest better than adhering to the law on procurement and its objectives, as well as keeping delay in public procurement at the bare minimum…"**

109. In this appeal, the Appellant and the Hon. Attorney General strenuously urged this Court to find that the High Court erred in law in failing to take into account public interest when it granted the orders of *certiorari* and *mandamus*.

110. The 7th Respondent urged us to find that the trial court erred in failing to take into account that public interest militates against public participation in procurement of election material. He opined that if every Tom, Dick and Harry participated in designing the colour, security features and other parameters of the ballot papers, what would prevent Tom, Dick and Harry from printing counterfeit ballot papers? He submitted that there is immense risk in allowing public participation in procurement of election material. He submitted that it was in public interest that the Appellant as the constitutional body responsible for the conduct of elections be accorded its independence to design and procure election material; that it would be

contrary to public interest to allow candidates to be involved in the process of procurement of election materials.

111. In furtherance of his oral submissions, the Attorney General submitted that the orders granted by the High Court were adverse to public interest; that the orders *ipso facto* demonstrate improper exercise of judicial discretion by the learned judges; that by ignoring public interest, the High Court declared the entire contract for the printing of election materials for all six elections to be unconstitutional, illegal and unenforceable. The Attorney General submitted that the trial court ignored the uncontroverted testimony by the Appellant on the timelines needed to print ballot papers; that by ignoring the fact that there is insufficient time to enter into a new contract to procure election materials, the trial court erred and did not take into account the hard reality that Kenya would not in all probability conduct the General Elections on the constitutionally scheduled date of 8th August 2017. He emphasized that the orders of the trial court stands to plunge this Country into an unprecedented constitutional crisis; that since the Constitution prescribes with exactitude the specific date on which the six elections are to be held, failure to do so on the specified date would lead to a constitutional crisis where the entire gamut of elective and appointive processes of the political organs of the State will grind to limbo not to mention the attendant negative effects on the economic, social and political spheres of our nation. He submitted that failure to hold elections on the due date will have direct fiscal bearing as the national budget must be approved and there shall be no Parliament if elections are not held. The Hon. Attorney General submitted that the trial court ignored the timelines given in evidence through the affidavit of ***Mr. Ezra Chiloba*** the CEO of IEBC on the urgency and need to procure election materials. It was submitted that the High Court erred in fact and law by

treating the evidence before it as "a parade of horribles". He urged this Court to find that the orders made by the trial court were erroneous as it ignored public interest and failed to appreciate the evidence on record.

112. The 1st Respondent through learned counsel Mr. Paul Mwangi submitted that there would be no constitutional crisis if the orders granted by the High Court were implemented. He observed that the Hon. Attorney General's submissions bordered on scare mongering. He submitted that time constraints, if any, was a direct consequence of the Appellant's own dilatory conduct; that the Appellant's conduct was calculated to avoid competition contrary to ***Section 103 (1)*** of the **Public Procurement and Assets Disposal Act, 2015** in order to give the pre-determined decision to award the contract to the 2nd Respondent. Counsel submitted that in the instant appeal, the Appellant was well aware that the Procurement Review Board and the High Court had nullified previous tenders that had been issued to the 2nd Respondent; that by failing to timeously initiate a fresh procurement process, it was apparent that the Appellant deliberately caused the delay so as to again re-issue the impugned tender to the 2nd Respondent under the pretext of time constraints. Counsel concluded that the Appellant cannot justify illegality by citing public interest and time constraints.

113. The trial court in evaluating the issue of public interest and the alleged constitutional crisis expressed itself as follows at paragraphs 234, 235 and 237 of its judgment.

> **"234. In this case, we have anxiously considered the arguments by the IEBC and the 2nd Interested Party about the constitutional crisis that they say will be precipitated if the orders sought are granted. In our view, the only basis for the parade of horribles that the**

IEBC and the 2nd Interested Party laid before us for the inference that truly catastrophic consequences will flow if the orders sought are granted is the internal timelines generated by IEBC. Those timelines, as presented, suggest that if the decision by the IEBC to award the tender for the printing of election materials and ballot papers for the presidential election is quashed, then it would be impossible for the IEBC to conduct presidential elections on 8th August as constitutional required.

235. We accept that the IEBC is clothed with the mandate and autonomy to handle its own operational matters and that the IEBC is expected to have the expertise to generate operational programs – including timelines – for conducting the presidential elections. However, for IEBC to persuade the Court that these operational imperatives are such that they should deny a successfully party relief for a constitutional violation when the IEBC itself was the author of the operational difficulties it finds itself in, the IEBC must place before court materials from which the Court can make the permissible inference that the scenario warned against is more likely to happen and that, therefore, public interest militates in favour of denying the orders. The IEBC cannot simply expect the Court to accept as an article of faith its hypothesis on how a constitutional crisis will be precipitated without more.

237. To reiterate, we are not persuaded that public interest militates against the grant of judicial review orders in the circumstances of this case as it has not been demonstrated to us that the grant of the orders will ineluctably make it impossible for the IEBC to conduct presidential elections on 8th August 2017, as constitutionally mandated."

114. On our part, we have considered submissions by all parties on the issue of public interest. We have also considered and reflected on the analysis and evaluation by the trial court on contestations relating to public interest. At paragraph 235 of its judgment, the learned judges suggest that if the IEBC placed material before the court from which it could make the permissible inference that the scenario warned against is more likely to happen, the court may not have granted the orders. The statement by the learned judges is a correct exposition of law taking into account that the orders of *certiorar*i, prohibition and *mandamus* are discretionary orders that may or may not be granted by the court.

115. From the Hon. Attorney General's submission as well as from the 1st Respondent's reply, the contestations relating to public interest revolve on time constraints to conduct the General and Presidential Elections on 8th August 2017. We have re-evaluated the evidence on record and ask ourselves what material was before the trial court in relation to time constraints?

116. The trial court at paragraph 235 of its judgment observes that the IEBC is expected to have the expertise to generate operational programs – including timelines – for conducting the presidential elections. The trial court considers timelines to be an operational issue and that IEBC caused upon itself the operational difficulties it finds itself in.

117. In our considered view, the High Court erred in fact and law in considering timelines for the conduct of elections to be an operational issue to be generated by the IEBC. The timelines for procurement processes is statutorily regulated through Regulations made under the **Public**

Procurement and Disposal Act, 2005; the procuring entity is simply implementing the timelines as statutorily provided. The relevant Regulations on time lines include ***Regulations 36, 40, 46, 54 (5)*** of the **2005 Procurement Act** and ***Section 80 (6)*** of the **Public Procurement and Asset Disposal Act, 2015.**

118. At this juncture it is important to note that the Regulations in force are the **Public Procurement and Disposal Regulations of 2006** vide **Legal Notice No. 174; Kenya Gazette Supplement No. 92** dated 29th December 2006. These Regulations are still in force pursuant to ***Section 24*** of the **Interpretation and General Provisions Act** which states that:

> **"Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder."**

119. The **2006 Regulations** also remain in force pursuant to ***Section 182 (2)*** of the **Public Procurement and Asset Disposal Act of 2015**. (Note: in reading the 2006 Regulations, references to the sections should be construed *mutatis mutandis* to reference to the **Public Procurement and Asset Disposal Act,** 2015 as appropriate.)

120. The relevant Regulations in the **2005 Procurement Act** and ***Section 80*** of the **2015 Procurement Act** are as follows:

Regulation 36: For purposes of Section 71 (c) of the Act, the minimum period of time between advertisement and deadline for submission of international tenders shall be thirty days.

Regulation 40: The minimum time for the preparation of tenders for the purposes of Section 55 (1) of the Act shall be a period of twenty one days.

Regulation 46: A procuring entity shall for purposes of section 66 (6) of the Act, evaluate the tenders within a period of 30 days after the opening of the tender.

Regulation 54 (5): The minimum time for the preparation of tenders for the purposes of Section 73 of the Act shall be a period of fourteen days.

Regulation 55 (2): The notice inviting expressions of interest prepared by the procuring entity pursuant to Section 78 of the Act shall give a minimum period of fourteen days for tenderers to submit their expressions of interest.

Section 80 (6) of the PPDA Act, 2015: The evaluation shall be carried out within a maximum period of thirty days.

121. A cursory glance and simple arithmetic calculation of the timelines provided for in the Procurement Regulations demonstrate that if the Presidential election is to be held on 8th August, 2017 and backward calculations of time lines is done, it is manifest that a procurement method other that direct procurement will not lead to award of tender before the constitutionally ordained date for the conduct of presidential elections. Each procurement entity is mandatorily required to adhere to the time lines for processing of bid documents as stipulated in the Regulations. A court is presumed not only to know all laws but to apply all laws relevant to the case before it. In this case of **R -v- Sheppard [2002] 1 SCR 869, 2002 SCC 26,** it was stated that:

"Judges are presumed to know the law with which they work day in and day out."

122. This is a sound presumption applicable in Kenya. We have perused the record of appeal and note that the trial court did not address its mind to the procurement timelines in the Regulations. The Replying Affidavit of ***Mr. Ezra Chiloba*** dated 27th June, 2017 at paragraph 6 thereof, the Appellant brought to the attention of the High Court that an expert had advised that there was very limited time available to procure the Election Materials. It was stated that the expert's advice was to use direct procurement. In paragraph 5 of his Affidavit, a timetable of key activities and timelines was brought to the attention of the High Court. It is our considered view that had the trial court addressed its mind to the time lines as stipulated in ***Regulations 36, 40, 46, 54 (5)*** of the **Public Procurement and Disposal Act**, **2005** and ***Section 80 (6)*** of the **Public Procurement and Assets Disposal Act 2015**, the learned judges would have appreciated that indeed there was no sufficient time to restart the process for procurement of election materials. To this extent, the learned judges erred in their finding that there was sufficient time to start the procurement process.

123. Notwithstanding the foregoing, we must emphasize that IEBC and all State organs are bound by the values and principles enunciated among others in ***Articles 10, 201, 227 (1)*** of the Constitution. The values and principles of accountability, transparency, free and fair elections can never be sacrificed at the altar of time constraints. It is not worth to hold a non-transparent and flawed General Election at whatever cost simply because time is a constraint. Notwithstanding time constraints, IEBC and all procurement entities must at all times remain accountable and transparent in their

operations and must adhere to the values in ***Articles 10, 201 , 227 and 232*** of the Constitution as incorporated in ***Section 3*** of the **Public Procurement and Asset Disposal Act**. We reiterate and endorse the statement by the trial court at paragraph 153 of its judgment that in the conduct of elections, IEBC must adhere to the standards set in ***Articles 81*** and ***86*** of the Constitution and conduct free and fair elections that are *inter alia* accountable and transparent.

124. We have taken into account some of the submissions made by the Hon. Attorney General, Learned Counsel Mr. Paul Mwangi and the 7th Respondent. Part of their oral submissions termed "scaremongering, brainwashing and dripping of the first blood" was speculative and imaginary and we find it unnecessary to delve into such hypothetical and conjectural issues. We confine ourselves to the finding that time lines for procurement processes are regulated by law and it is to these Regulation timelines that the trial court ought to have considered. In our view, had the trial court considered the time lines as per the Procurement Regulations, it would have been manifest that direct procurement was a viable option. Accordingly, we find merit in ground 12 of the Appeal that the learned judges erred in law when they found that there was still time available to the Appellant to procure election material.

125. Before we conclude the contestations on time lines, the 1st Respondent submitted that the delay and time constraints in procuring election material was caused by dilatory conduct on the part of the Appellant and which conduct was due to a pre-determination to award the tender to the 2nd Respondent. It was submitted that the Appellant and 2nd Respondent should not benefit from their dilatory conduct as this violates ***Section 103 (1)*** of the

Public Procurement and Asset Disposal Act, 2015. We have considered this submission. The record shows that the tenders that were initially awarded were nullified by the Procurement Review Board and the High Court. It is notable that valuable time was spent and lost in the litigation process. Should a party who loses time during litigation be vilified and held responsible for lost time? The 1st Respondent invited the High Court and this Court to focus on the outcome of the nullified tenders and note that in all these cases, the contract was being awarded to the 2nd Respondent. The invitation to make this observation was addressed by the High Court at paragraphs 146, 147 and 151 of its judgment. At paragraph 154 of the judgment, the trial court did not find any preferential award of the tender contract to the 2nd Respondent. The court expressed as follows:

> **"154. However, we are unable on the basis of the facts before us, to conclude that the process followed by the IEBC unmistakably points to the conclusion that the IEBC was actuated by bias and other improper considerations in awarding the tender to the 1st Interested Party."**

126. On our part, we hold that subject *inter alia* to the law on limitation of time, interest and costs; a party who obeys an order or judgment made by a competent Tribunal or Court should not be vilified for time lost in the litigation process. We note that even the Constitution in ***Article 99 (3)*** thereof excludes litigation time in considering disqualification of candidates in the electoral process. It is provided that a person is not disqualified as a Member of Parliament if convicted unless all possibility of appeal or review has been exhausted and decision rendered. We find that there is no material

to lead us to drawn an irresistible inference that in the instant case, the time constraints was caused by dilatory conduct on the part of the Appellant.

127. We now consider the issue of splitting of tender as urged in ground 15 of the Memorandum of Appeal. The Appellant urges that the learned judges erred in failing to appreciate that the orders sought by the 1st Respondent were not capable of being granted because they had the effect of splitting the tender in contravention of the provisions of ***Section 54*** as read together with ***Section 176 (a)*** of the **Public Procurement and Asset Disposal Act, 2015**.

SPLITTING OF TENDER

128. The Appellant and the Hon. Attorney General contend that the trial court erred when it granted *mandamus* compelling the Appellant to commence *de novo* the procurement process for the award of the tender for the printing of election materials for the presidential elections. It was submitted that ***Article 136 (2) (a)*** of the Constitution stipulates that the presidential elections shall be held together with the general elections for Members of Parliament. In line with this provision, six elections are to be held on the scheduled date of 8th August 2017.

129. Guided by ***Article 136 (2) (a)*** of the Constitution, the Appellant contends that it awarded ONE single contract for the printing of election materials to the 2nd Respondent; that being a single contract, the contract cannot be severed; that the trial court erred in severing a single contract without taking into account that it was ONE single contract that had been awarded to the 2nd Respondent. It was further submitted that if the single contract was vitiated for want of public participation in relation to procurement of presidential ballot papers, the trial court erred in fact and law in not ordering *de novo*

procurement for election materials for all the six elections; it was submitted that one sixth of the contract cannot be held invalid and other five sixths valid. The Appellant further submitted that the order made by the High Court was contrary to ***Sections 54 (1)*** as read with ***Section 176 (a)*** of the **Public Procurement and Asset Disposal Act**, 2015.

130. In support of the splitting of the tender, the 1st Respondent submitted that splitting of the tender awarded to the 2nd Respondent was permissible in law and under the terms of contract signed between the Appellant and 2nd Respondent. At paragraph 2.38 of its written submissions, the 1st Respondent noted that in view of the nature of the contract between the Appellant and the 2nd Interested Party i.e. as a framework contract on an "as and when required basis" and taking into account the 1st Respondent's grievances and all the circumstances of the case before it, the High Court was well within its powers to sever the tender and to quash the same in respect only of the Presidential Elections. Counsel submitted that under ***Section 11 (1)*** of the **Fair** Administrative Action Act, the Court has power *inter alia* to grant any order that is just and equitable.

131. We have considered the submission by all parties and ***Sections 54 (1)*** and ***176 (a)*** of the **Public Procurement and Asset Disposal Act, 2015** on the issue of splitting of tenders. ***Section 54 (1)*** of the Act provides that:

> **"54 (1) No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure except where prescribed."**

132. ***Section 176 (a)*** relates to prohibitions and offences under the Act *to wit* a person shall not obstruct or hinder a person carrying out a duty or function or exercising power under the Act.

133. It is the Appellant's submission that whereas ***Section 54 (1)*** prohibits splitting of tenders, ***Section 176 (a)*** prevents the High Court from obstructing the IEBC from carrying out its duty and functions under the Act. Conversely, it is the 1st Respondent's submission that the contract between the Appellant and the 2nd Respondent is a framework agreement that permits severance under Clause 8.2 titled "Severability."

134. The relevant Clauses of the Contract between the Appellant and 2nd Respondent read as follows:

> *"8.2. Severability*: If any provision of this agreement shall be held by any Court of competent jurisdiction or arbitral tribunal to be illegal, void or unenforceable, such provision shall be of no force and effect, but the enforceability of all other provisions of this agreement shall be unimpaired.
>
> *7.15.2 (a):* The Commission (IEBC) by written notice sent to the Contractor, may terminate the contract in whole or in part, at any time for its convenience……
>
> *7.15.3*: In the event the procuring entity terminates the contract in whole or in part, it may procure upon such terms and in such manner as it deems appropriate goods similar to those undelivered and the tenderer shall be liable to the procuring entity for any excess costs for such similar goods."

135. On our part, having considered ***Section 54 (1)*** of the **Public Procurement and Asset Disposal Act, 2015** and ***Clauses 8.2*** and ***7.15.2 (a)*** and ***7.15.3***; it is manifest that the contract signed between the Appellant and 2nd Respondent is severable. ***Section 54 (1)*** and ***176 (a)*** of the **Public Procurement and Asset Disposal Act, 2015** is directed at the procuring entity. ***Section 54 (1)*** is aimed at dealing with the mischief where the procuring entity tries to unlawfully evade the Regulated procurement monetary thresholds through splitting of tenders.

136. Whether or not a contract is severable depends on the terms and conditions of the contract. Where a single contract is signed by the parties, there is a presumption of unity of contract - a presumption that the contract is indivisible and is to be performed as one. Severability turns on the intent of the parties and a court may examine extrinsic evidence-evidence outside the writing-to determine whether the parties actually intended an illegal term to be severable. If the contract makes provision for severability then it is severable; however, if the contract has no provision for severability, a court will determine if the contract is indivisible or severable. Such determination by the court will take into account amongst other things the nature of goods, services or works to be performed.

137. In this appeal, Clause 8.2 of the Contract amongst others foresees and makes provision for severability. Accordingly, we find that the contract between the Appellant and 2nd Respondent is severable in accordance with the contract itself and in law. We find no merit in the Appellant's contention that its contract with the 2nd Respondent is a single, indivisible and non-severable contract.

138. We now consider the application of public participation in direct procurement.

PUBLIC PARTICIPATION IN DIRECT PROCUREMENT

139. The Appellant in its written submissions urged that the High Court misdirected itself when the court at paragraph 196 of its judgment found that public participation in direct tendering is a mandatory component of the principles of transparency and accountability acclaimed in ***Article 227*** of the Constitution; that the learned judges misconstrued the nature of direct procurement as a method of procurement under the **Public Procurement and Asset Disposal Act, 2015** (hereinafter referred to as the PPAD Act); that the judges failed to appreciate that direct procurement by its very nature is an exclusive form of procurement which is only to be resorted to in specific circumstances, including where there is an urgent need; that direct procurement is a last resort and is designed to prevent threat to the welfare of the Kenyan society and that the decision to proceed by way of direct procurement is an exceptional matter and that is why the circumstances under which direct procurement can be resorted to is closely circumscribed.

140. The Appellant submitted that the PPAD Act recognizes that in certain circumstances, resort to open tendering and other forms of procuring that involve advertising and similar steps would be impractical and one of those is when there is urgent need for the specific goods sought to be procured; that urgent need is defined in ***Section 2*** of the PPAD Act to mean the need for goods, works or services in circumstances where there is imminent or actual threat to public health, welfare, safety or of damage to property, such

that engaging in tendering proceedings or other procurement methods would not be practicable.

141. It was submitted for the Appellant that the PPAD Act grants a procuring entity the leeway in exceptional circumstances to proceed and engage a supplier directly without going through a competitive phase; that ***Section 103*** and ***104*** of the PPAD Act outlines the exceptional circumstances in which direct procurement can be done. In support of this submission, the case of **William Ole Ntimama & 2 others -v- Governor, Narok County & 2 Others, High Court Petition No. 43 of 2014; [2014] eKLR[** was cited. In this case, it was stated at paragraph 65 as follows:

> **"65. In fact, due to the requirements of transparency and accountability, no procuring entity would comply with the requirements of PPAD Act if the invitation to tender or to submit Expressions of Interest (EO1's) were not made to the general public. The only exception to this general rule is where the procuring entity applies restricted tendering or direct procurement which methods were not applied and was inapplicable in this case."** (Emphasis ours).

142. Citing the above paragraph from the ***Ntimama case*****, (supra)** the Appellant submitted that the interpretation by the High Court that public participation is a mandatory component of direct procurement ignored the law relating to direct procurement; that in the result, the High Court wrongly interpreted the provisions of ***Article 10*** of the Constitution without giving effect to *Article **227*** of the Constitution and ***Section 103*** of the PPAD Act; that the interpretation by the High Court would render it impossible for public bodies

to effectively procures goods and services noting that at paragraph 63 in the ***Ntimama case*** **(supra)** it was expressed:

> **"63. It would stagnate and hinder the orderly implementation of such laws and policies if citizen participation extended to the routine execution of a County Government's laws and policies such as procurement of services of a revenue collection agent. Besides, in light of the strict timelines on matters of public procurement, there is real danger of defeating such timelines if the County Executive were hamstrung by citizen participation as they are not bound by such timelines."**

143. On behalf of the Appellant it was further submitted that by failing to correctly appreciate the nature of direct procurement, the High Court took away the statutorily provided option available to public entities to procure goods and services in exceptional circumstances where there is an urgent need for such goods and services; that in so doing, the High Court effectively amended ***Sections 103*** and ***104*** of the PPAD Act.

144. The Appellant further faulted the High Court in elevating the general provisions of ***Article 10*** of the Constitution above the specific values stipulated in ***Article 227(1)*** of the Constitution thereby offending the principle of interpretation which stipulates that specific provisions have preference over general provisions; that the High Court erred in directing the Appellant to craft a program of public participation to operationalize ***Article 10*** of the Constitution. It was submitted that at paragraph 182 of the Judgment, the High Court erred and elevated ***Article 10*** over ***Article 227*** of the Constitution; that whereas ***Article 227*** is a stand-alone specific accrued right, the national values and principles of good governance under Article 10

are broad protective principles which underpin state organs, state officers and public officers.

145. The Appellant submitted that the general national values and principles under ***Article 10*** are statements of aspirations as opposed to the specific principles under ***Article 227*** of the Constitution which are concrete rights capable of implementation; that ***Article 227*** specifically identifies the national values and principles of good governance applicable to procurement as fairness, equity, transparency, competitiveness and cost effectiveness; that ***Article 227*** does not include public participation; that where the Constitution intended that there be immediate mandatory public participation, it specifically stated so as such as in ***Articles 69 (d), 118*** and ***119*** of the Constitution; that it was erroneous for the High Court to assert the position that public participation is required in relation to procurements conducted pursuant to ***Article 227*** of the Constitution in the absence of a specific provision to that effect; that the High Court erred in seeking to introduce the general principles in ***Article 10*** as supplanting or adding to the specific values and principles in Article 227; and that the Court erred and ignored the guidelines by given by the Supreme Court **In the Matter of the National Land Commission (supra)** where it was expressed:

> **"74: As Article 81 (b) of the Constitution standing as a general principle cannot replace the specific provisions of Articles 97 and 98, not having ripened into a specific enforceable right as far as the composition of the National Assembly and Senate are concerned, it follows that this is the burden of our opinion on this matter - that it cannot be enforced immediately."**

146. The Appellant further submitted that public participation is a principle that can only be achieved progressively as it is a value that has not fully matured and cannot be applied immediately. (See **In the Matter of the National Land Commission (supra)** at paragraph 74).

147. The Appellant faulted the High Court in finding and holding at paragraph 192 of its Judgment that "the absence of facilitative legislation does not bar the enforcement of national values in Article 10". In support, the Appellant cited dicta from **Amos Kiumo & 19 Others -v- Cabinet Secretary Ministry of Interior & Coordination of National Government & 8 Others Petition No. 16 of 2013; [2014] eKLR** where the need for legislation spelling out how the right to public participation can be actualized and its nature and scope was underscored.

148. We now consider the application of ***Articles 10(2)*** and ***227(1)*** of the Constitution and public participation in the procurement law.

ARTICLES 10(2) and 227 of the CONSTITUTION and PUBLIC PARTICIPATION IN PROCUREMENT LAW

149. The main issue in this appeal is to determine the proper application of public participation in the context of ***Articles 10 (2)*** and ***227*** of the Constitution to procurement of goods and services under the Public Procurement and Asset Disposal Act, 2015. We analyze and consider the issue at two levels: (a) application of public participation to procurement law in general and (b) application of public participation in direct procurement. In both cases, we examine the emerging jurisprudence and consider oral and written submissions by the parties.

150. ***Article 10 (2) (a)*** identifies one of the national values to be democracy and participation of the people. ***Article 227 (1)*** of the Constitution provides 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."**

151. The Preamble to the **Public Procurement and Asset Disposal Act, 2015** stipulates that it is an Act of Parliament to give effect to ***Article 227*** of the Constitution and to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes. From this preamble, it is manifest that the provisions of the Public Procurement and Asset Disposal Act, 2015 are normative derivatives from ***Article 227*** of the Constitution. Any and all provisions of the Act must be read as stemming their legality from the Constitution. Of significance is the provision in ***Article 227 (2) (a)*** which stipulates that the Act of Parliament may provide for categories of preference in the allocation of contracts. This provision constitutionalizes the methods of procurement identified in ***Part VII*** and ***XII*** of the **Public Procurement and Asset Disposal Act, 2015.**

152. ***Section 3*** of the **Public Procurement Act, 2015** stipulates that:

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

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

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

(e) the principles of public finance under Article 201;

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

(g) principles governing the procurement profession, international norms;

(h) maximisation of value for money;

(i) promotion of local industry, sustainable development and protection of the environment; and

(j) promotion of citizen contractors."

153. Pursuant to ***Section 4*** of the Act, the **Procurement Act** applies to all State organs and public entities with respect to: (a) procurement planning; (b) procurement processing; (c) inventory and asset management; (d) disposal of assets; and (e) contract management. It is not in dispute that the Appellant is a State organ and the Act applies to it.

154. A key issue in this appeal is to identify the constitutional and legislative framework for public participation in procurement. Public participation in procurement law is provided for *inter alia* through the following provisions incorporated by ***Section 3*** of the **Public Procurement and Asset Disposal Act**, **2015**:

(i) Article 10 (2) (a) of the Constitution that refers to participation of the people;

(ii) Article 201 (a) of the Constitution that refers to public participation in financial matters;

(iii) Article 232 (1) (d) that requires involvement of the people in the process of policy making;

(iv) Article 232 (1) (f) that requires transparency and provision to the public of timely and accurate information and

(v) Article 232 (1) (g) on fair competition.

(vi) Article 227 (1) which require that procurement of goods and services by procuring entities be competitive."

155. The constitutional and legal issue is the scope, extent and degree of public participation and/or participation of the people in the procurement of goods and services under the **Public Procurement and Asset Disposal Act, 2015** and Asset Disposal Act, 2015. The Supreme Court and other superior courts have had occasion to consider the provisions of ***Section 3*** of the **Public Procurement and Asset Disposal Act, 2015** and ***Articles 10*** and ***227*** of the Constitution in so far as they relate to procurement of goods and services.

156. In **Communication Commission of Kenya -v- Royal Media Services & 5 Others (supra)** the Supreme Court in abridged relevant excerpts expressed itself as follows:

"[381]*Public participation* calls for the appreciation by State, Government and all stakeholders implicated in this

appeal that the Kenyan citizenry is adult enough to understand what its rights are…

[386]Although CCK (now CAK) deployed the procurement procedure in the Public Procurement and Disposal Act, in granting a BSD licence to the 5th Appellant and denying the same to the 1st, 2nd and 3rd Respondents; this Court takes judicial notice of the fact that this was no ordinary procurement of goods and services. This was a licensing process for an extremely important and yet finite public resource-SPECTRUM. The licensing was preceded by years of planning and international engagement. Significant amounts of public funds were expended in policy formulation to prepare the country for migration from analogue to digital transmission of broadcast content.

[387] Yet the decision by CCK to deny a licence to the 1st, 2nd and 3rd Respondents appears in our view not to have been informed by the imperatives of the values of our Constitution as decreed in Article 10. …..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 J.A*'s observation that CCK was operating as if the Constitution did not exist.

[295]We will now consider the issue raised as to the fairness or otherwise of the procurement process. Samuel Kamau Macharia deponed that in May 2011, the 1st Appellant invited expression of interests from parties interested in obtaining a licence for national broadcast-signal distribution. The 1st and 2nd Respondents expressed interest, and submitted relevant documentation through Nation Signal Networks. This application/bid was rejected at the mandatory-evaluation stage, for failing to meet the

bid/bond-security validity period of 120 days. The bond-security was a precondition in the tender process [see paragraphs 18 to 20].

[296] Does the 1st Appellant have powers in law to impose such conditions in the procurement process in respect of a BSD licence? Section 46 (1) grants the 1st Appellant powers to restrict conditions as it may deem necessary, for granting of a BSD licence. The 1st Appellant, therefore, properly exercised a power within its province, to prescribe conditions for the grant of a BSD licence.

[298] The 1st Appellant was conscious of the mandatory requirements of the Public Procurement and Disposals Act (No. 3 of 2005….)

[300] As provided in Section 27(1) of the Public Procurement and Disposal Act, the 1st Appellant had a duty in law to adhere to the procurement regulations before granting a licence to a third party to provide the service of signal distribution. The procurement of signal distribution services was, therefore, a venture sanctioned by law. Further the 1st Appellant's tender committee processes were in consonance with the constitutional stipulation in Article 227, that goods and services be contracted for in a system that is *fair, equitable, transparent, competitive and cost-effective.*

[301] In this context, it is clear that the Court of Appeal's order, that the 1st, 2nd and 3rd Respondents be granted a BSD licence without undergoing the procurement process, lacks a foundation in law….. The Appellate Court's decision, thus, stood in contradiction to Article 227 of the Constitution, and Section 27(1) of the Public Procurement and Disposal Act. With due respect, there was no lawful basis for the orders that the 1st, 2nd and 3rd Respondents be granted a BSD licence as a matter of right.

[415] With regard to the claims of the parties in this case, the Court makes the following Orders:

(a) ***The Orders of the Court of Appeal made on the 28th of March, 2014 are hereby set aside.***

[414]The Court signals certain directions necessitated by the special circumstances of this case, which will have a bearing on appropriate constitutional initiatives by other agencies of governance. These are as follows:

(a) ….

(b)….

(c) …..

(d) …..

(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*****.”** (Emphasis added).

157. So much from the extensive quotation from the Supreme Court. There are several judicial decisions from other superior courts on application of public participation to procurement matters in light of ***Article 10*** and ***227*** of the Constitution.

158. In **Al Ghurair Printing and Publishing LLC –v- Coalition for Reforms and Democracy & 2 others - Civil Appeal No. 63 of 2017; [2017] eKLR**, the Court of Appeal noted that under ***section 44*** of the **Public Procurement Act**, the accounting officer of a public entity has the primary responsibility of ensuring that it complies with all the requirements of the Act.

159. In **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others -v- County of Nairobi Government & 3 Others - Civil Appeal No. 42 of 2014**; **[2014] eKLR** in their petition before the High Court, the Appellants

alleged that the **Nairobi City County Finance Act** was passed in contravention of the provisions of the Constitution that provide for public participation. At paragraph 30 of its judgment, the Court of Appeal expressed that "public participation is also guaranteed under ***Article 10 (2) (b)*** of the Constitution. The Court observed that whereas the Constitution and the relevant statutes are silent on the period of the notice to be given to the public, nevertheless, the notice has to be reasonable. Quoting the words of Chaskalson, CJ in the South African case of **Minister for Health -v- New Clicks South Africa (PTY) Ltd**. it was stated in relation to public participation that "*It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made."* What is necessary is that reasonable notice is given and the views of those who attend are taken into consideration.

160. In **Meru Bar, Wines & Spirits Owners Self Help Group**(*Suing through its secretary*) **Ibrahim Mwika -v- County Government oF Meru Petition No. 32 of 2014; [2014] eKLR** the learned judge expressed herself thus:

> **"48. Under the new Constitutional dispensation, public participation is a requirement in the formulation of legislation. The participation of people is one of the National values and principles of governance** under Article 10(2) (a) of the Constitution of Kenya, 2010. … **I am satisfied that the Respondent effectively and extensively notified, involved and took into account views of the public in the process of enacting the Meru County Alcoholic Control Drinks Act No. 3 of 2013 as required** under Article 10 and 196 of the Constitution of Kenya 210 and section 3(f), 87 and 91 of County Government Act No. 17 of 2013." (Emphasis added).

161. In **Kituo Cha Sheria & another -v- Central Bank of Kenya & 8 others (supra)**, the High Court correctly noted that every case in which an allegation of lack of public participation is alleged must be considered in the peculiar circumstances of the case.

162. In **Kenya Transport Association -v- Municipal Council of Mombasa & another** – **Petition No. 6 of 2011**; **[2011] eKLR**, Ojwang, J. (as he then was) in dealing with a procurement violation of *inter alia* ***Articles 10 (2) (b)*** and ***27*** of the Constitution stated that in parity with the Constitution, the **Public Procurement and Asset Disposal Act, 2015** regulates procurement procedure in detail, guided by the principle that unequal, preferential treatment is not to be accorded to a particular person, to the prejudice of others; and even where open tendering is not required, any alternative method of procurement must comply with certain rules. The learned judge continued:

> ***"I am not in agreement with counsel for the Respondents, that the 1st Respondent had used such alternative tendering procedures; the 1st Respondent employed no organ charged with procurement processes, and simply adopted the un-transparent "approach" to the 2nd Respondent, and awarded to 2nd Respondent a lucrative contract which, it is not even clear, was for the public interest represented by 1st Respondent. It was a discriminatory process which, without lawful cause, entirely excluded those such as the members of the petitioner. As against these members of the petitioner, their fundamental rights and freedoms under Article 27 of the Constitution had been infringed, and their rights to fair administrative action, under Article 47, had been contravened. Although counsel for the Respondents urged that the petitioners should have sought a redress by***

invoking the administrative processes provided for under the Public Procurement and Disposal Act, such a position is not to be upheld, where constitutional rights have been, as in this case, infringed, and the aggrieved persons have opted for enforcement by Court process."

163. In **Erick Okeyo -v- County Government of Kisumu & 2 Others, Petition No. 1 "A" of 2014; [2014] eKLR** the High Court, (Muchelule, J.) in considering the issue of public participation in tendering process expressed himself thus:

"Lastly, the Constitution and the County Governments Act (No 17 of 2012) provide for citizen participation in elections and appointments; legislation; policy formulation, planning and development; effective resources mobilization and use for sustainable development; project identification, prioritisation, planning and implementation; and the alignment of county financial and institutional resources to agreed policy objectives and programmes. Further, the Act requires each County to provide continual and systematic civic education to its residents. This is out of the realization that it is only when citizens are enlightened that they can effectively participate in governance matters affecting them. There was no evidence to show how this solid waste management project was conceived. There was no evidence that the project was as a result of any policy decision and objective in which the residents of the County were engaged. This project is therefore constitutionally and legally indefensible.

I hope I have said enough to show that allowing the Respondents to proceed with this project in this illegal manner would lead to imprudent and irresponsible use of a precious resource without assuring the public that there is value for money. It is for the foregoing reasons that I allow the petition. I declare that:

(a) the decision to enter into a public private partnership in relation to solid waste management was a major policy decision that required public participation;

(b) the decision as to which private entity would help the 1sRespondent in managing solid waste required public procurement under Article 227 (1) of the Constitution and under sections 2, 3, and 4 of the Public Procurement and Disposal Act; and

(c) in so far as the 3rd Respondent was not so procured, the 1st and 2nd Respondents breached the Constitution and the Act and, to that extent the award was null and void."

164. Our analysis of the emerging jurisprudence from the Supreme Court and other superior courts as well as the reading of the express provisions of ***Section 3*** of the **Public Procurement and Asset Disposal Act, 2015** as read with ***Articles 10 (2) (b)*** and **227** of the **Constitution** lead us to find that as a general principle (subject to limited exceptions) public participation is a requirement in all procurement by a public entity. The jurisprudence also reveals that allegation of lack of public participation must be considered in the peculiar circumstances of each case. The mode, degree, scope and extent of public participation is to be determined on a case by case basis.

165. What is critical is a reasonable notice and reasonable opportunity for public participation. In determining what is reasonable notice, a realistic time frame for public participation should be given. In addition, the purposes and level of public participation should be indicated. Reasonableness is also to be determined from the nature and importance of legislation or decision to be made, and the intensity of the impact of the legislation or decision on the

public. The length of consultation during public participation should be given and the issues for consultation. Mechanisms to enable the widest reach to members of public should be put in place; and if the matter is urgent the urgency should be explained.

166. We find and hold that subject to limited exceptions such as provided in ***Sections 4 (2), Sections 6, 91 (2)*** and ***Section 155 (2)*** in **Part XII** of the **Public Procurement and Asset Disposal Act**, **2015** and pursuant to ***Section 3*** of the Act as read with ***Articles 10 (2) (b)*** and ***227*** of the Constitution, public participation is a mandatory requirement in all procurements by a public entity. For this reason, we find and hold that the High Court did not err when it stated the general principle at paragraph 180 of its judgment that:

> **"We therefore expressly hold that public participation must apply to all procurements though the degree and form of such participation will depend on the peculiar circumstances of the procurement in issue…."**

167. We however note that the High Court in stating the general principle did not take into account that there are exceptions to the general principle in which public participation in procurement process is not mandatory.

168. Public participation in procurement process is achieved largely through invitation of members of the public to bid and submit tenders for procurement of goods, works or services. The invitation is ordinarily done through competitive and open advertisement to the public. ***Section 91 (1)*** of **Public Procurement and Asset Disposal Act, 2015** echoes this by stipulating that open tendering shall be the preferred procurement method for goods, works and services. ***Section 91 (2)*** of the **Public Procurement**

and Asset Disposal Act, 2015 permits a procuring entity to use alternative procurement procedure if allowed by law and stipulated conditions are satisfied. A common theme when alternative procurement procedure is adopted is that the scope of public participation through competitive bidding is reduced and progressively eliminated as we approach the direct procurement method.

169. In **Revital Health (Epz) Limited -v- Public Procurement Oversight Authority & 6 Others, Constitutional Petition No. 75 of 2012,** Muriithi, J. sitting at Mombasa 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."***

170. In the instant appeal from which this appeal is proffered, the trial court correctly stated at paragraph 195 of its judgment that:

> **"…..We however hasten to clarify that direct procurement does not necessarily violate the constitutional requirement of competitiveness as long as the constitutional and statutory threshold is met in the process and proper procedure followed."**

171. In **Republic -v- Independent Electoral and Boundaries Commission & 3 Others ex parte Coalition for Reform and Democracy Misc. Application No 637 of 2016,** the High Court held as follows:

> **"Article 227 of the Constitution provided the minimum threshold when it comes to public procurement and asset disposal. Therefore, any procurement, before considering the requirements in any legislation, rules and regulations, had to meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. Any other stipulation in an enactment or in the tender document could only be secondary to what the Constitution dictated….A person who felt that a procurement process did not meet the constitutional threshold provided for under Article 227 of the Constitution, and had no other recourse in law, would find recourse in the High Court. The High Court, under Article 165(3) (d) of the Constitution, has jurisdiction to hear any question on the interpretation of the Constitution and to determine whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of, the Constitution."**

172. The case of **Okiya Omtatah Okoiti & Another -v- Attorney General & 3 Others [2014] eKLR (Nairobi Constitutional and Human Rights Division Petition No. 58 of 2014)** illustrates the exception in ***Section 6 (1)*** of the **Procurement Act**. The Section provides:

> *"***Where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans."**

173. In the ***Okiya Omtata case*** **(supra),** the Petitioners contended *inter alia* that the procurement of the Standard Gauge Railway (SGR) project was in direct violation of the Provisions of the **Public Procurement and Assets Disposal Act, 2015** for failure of the Respondents to take it through a competitive

bidding process. The Respondent submitted that the **Public Procurement and Assets Disposal Act, 2015** did not apply in the procurement of the SGR project because ***Section 6 (1)*** of the Act bars the applicability of that Act in instances of negotiated loans or grants between the Kenyan Government and other governments or other international organs or bodies. In arriving at the determination that the **Public Procurement and Assets Disposal Act, 2015** does not apply to Government to Government Procurement the learned judge expressed himself as follows:

> ***"As is evident, by virtue of the above provision i.e. Section 6(1) of the Public Procurement and Disposal Act the provisions of the said Act would not apply in regard to the contested procurement and I therefore agree with Mr. Kimani that Section 6(1) is clear that the Act does not apply in instances of negotiated loan or grants, because the SGR Project is being financed by a loan from the government of China through Exim Bank of China. This fact is undisputed and being so it follows that the terms and conditions of the loan as negotiated would be applicable in the event there is a conflict with the Public Procurement and Disposal Act. The issue that I must therefore address my mind to is whether there is a conflict between the terms of the loan with Exim Bank and the provisions of the Public Procurement and Disposal Act. I am clear in my mind that there is no conflict at all. I say so, because the Act has laid down procedures to be followed in public procurement of goods and services. In particular, it demands the use of open tendering in procurement with set down procedures and requirements and matters which ought to be evaluated as well as the notification of successful parties and the unsuccessful parties. I have already stated elsewhere above the conditions which the Government of Kenya had to satisfy before the financing of the SGR project. They include the following; the finances required would be met by the Chinese Government and that the mode of procurement of the SGR project had to be in line with the conditions made by Exim Bank; i.e. the 4th Respondent had to be awarded the contract. Whether that***

term of the contract was oppressive or not is not for this Court to interrogate as in fact all evidence before me points to the fact that Parliament has already done so and found it to be lawful. To my mind therefore, the arguments made by the Petitioners that the Government was involved in a restricted tendering or indirect procurement would not be valid. It is obvious therefore that the Public Procurement and Disposal Act does not apply to the issues at hand and I so find……Parliament must have had a reason to exclude them from open tendering and generally the operations of the Public Procurement and Disposal Act. In that regard, my duty is to interpret the law as made by Parliament and not to re-write it to suit popular opinions or beliefs or indeed my own beliefs, strong as they may be in this case."

174. In this appeal, the critical issue is whether public participation is a mandatory requirement whenever direct procurement is adopted as an alternative method to procure goods, works and services. It is the Appellant's contention that public participation is not a mandatory requirement when direct procurement is used. Conversely, it is the 1st Respondent's case that public participation is mandatory prior to making the decision to adopt direct procurement. The trial court in its judgment made a finding that public participation is a mandatory requirement prior to adoption of direct procurement.

175. Senior Counsel Paul Muite for the Appellant submitted that whereas ***section 103*** of the **Procurement Act** permits direct procurement, in the instant case, there was no allegation that there was violation of any provisions and conditions in ***Section 103*** of the Act. It was submitted that a reading of the judgment of the High Court in its entirety reveals that the real reason for the orders made was that there was no public participation in the tender awarded to the 2nd Respondent; that at paragraph 218 of the judgment, the learned judges observe that in this particular case, they were not satisfied that there

was sufficient public participation to meet the constitutional threshold in the decision to use direct procurement for ballot papers for presidential elections. Counsel emphasized that a reading of paragraphs 215 and 216 of the judgment shows that the High Court found that public participation was insufficient because the 5th Respondent in this appeal and other presidential candidates were not informed that a decision had been made to utilize direct procurement as a method to procure election materials and ballot papers for presidential elections to be held on 8th August 2017. On this issue, the High Court expressed itself as follows:

> **"214. Second, even though the IEBC claims that its officials met "stakeholders" on 24th May 2017 to inform them of the decision to award the tender by direct procurement, no evidence whatsoever was tabled to demonstrate who these stakeholders were.**
>
> **215. Third, while it is conceded that the IEBC met with representatives of the Applicant and the 3rd Interested Party to inform them that a decision had been made to utilize direct procurement as the method to procure election materials and ballot papers for presidential elections to be held on 8th August 2017, there was no explanation whatsoever why the 4th Interested Party who is a presidential candidate as much as the party leaders of the Applicant and the 3rd Interested Parties was left out of that meeting if the purpose was to meet the constitutional threshold requirements. There was no demonstration whatsoever that there was an attempt to meet with other presidential aspirants who were known to have declared interest to run by that time and or their party representatives……"**

176. Senior Counsel Paul Muite submitted that the finding by the trial court at paragraph 215 amounts to consideration of individual political rights of presidential candidates; that this finding has nothing to do with public

participation; that an individual right should not supersede public interest and individual political rights do not amount to public participation. Counsel submitted that the trial court erred in holding that presidential candidates ought to have been consulted in order to meet the threshold for public participation; that such a holding is erroneous as it equates individual political rights to public participation.

177. The 7th Respondent in supporting submissions by Senior Counsel Paul Muite stated that the Appellant is an independent commission and it would be wrong to consult candidates on how and from whom to procure presidential election materials.

178. Senior Counsel, Paul Muite stated that a reading of ***Sections 103*** and ***104*** of the Public Procurement Act shows that public participation is not one of the conditions to be fulfilled before direct procurement can be done; that these sections do not envisage public participation in direct procurement.

179. Learned counsel Kamau Karori for the Appellant submitted that direct procurement only applies where there is an urgent need and it is not permissible to inject into direct procurement issues or circumstances that would delay urgent procurement of goods, works or services; that the learned judges by injecting public participation requirement into ***Sections 103*** and ***104*** of the **Public Procurement and Asset Disposal Act, 2015** defeat the urgency envisaged as an objective of direct procurement.

180. The Hon. Attorney General while supporting the appeal submitted that the High Court erred in requiring public participation in direct procurement; that what the trial court did was to re-write the **Public Procurement and Asset Disposal Act, 2015** in a way that Parliament never intended.

181. We have considered the provisions of ***Sections 103*** and ***104*** of the **Public Procurement and Asset Disposal Act, 2015** and submissions by all parties. The architecture of procurement methods stipulated in **Part IX** of the **Public Procurement and Asset Disposal Act, 2015** promotes public participation and competitiveness in procurement process in a progressively decreasing manner. The scope and degree of competitiveness and public participation is progressively reduced as one approaches the direct procurement method. ***Section 91 (1)*** of the **Public Procurement and Asset Disposal Act, 2015** stipulates that Open Tendering shall be the preferred procurement method for procurement of goods, works and services. ***Section 91 (2)*** stipulates that the procuring entity may use alternative procurement procedure only if that procedure is allowed and satisfies the conditions under the **Public Procurement and Asset Disposal Act, 2015** for use of that method. While ***Section 92*** of the **Public Procurement and Asset Disposal Act, 2015** identifies the methods of procurement, ***Sections 103*** and ***104*** provide detailed procedures on when direct procurement may be used and the procedure for direct procurement. It is categorical that a procuring entity may use direct procurement so long as the purpose is not to avoid competition.

182. The procedure for direct procurement is stipulated in ***Section 104*** of the **Public Procurement and Asset Disposal Act, 2015**. It is provided that:

> **"An accounting officer of a procuring entity shall adhere to the following procedures with respect to direct procurement –**
>
> **(a) issue a tender document which shall be the basis of tender preparation by tenderer and subsequent negotiations.**

(b) appoint an ad hoc evaluation committee pursuant to section 46 to negotiate with a person for the supply of goods, works or non-consultancy services being provided;

(c) ensure appropriate approvals under this Act have been granted;

(d) ensure the resulting contract is in writing and signed by both parties."

183. The constitutional and legal issue is whether the conditions stipulated in ***Sections 103*** and ***104*** of the **Public Procurement and Asset Disposal Act, 2015** as read with ***Article 227 (1)*** of the Constitution are exhaustive in relation to direct procurement method. The other issue is whether public participation is non-existent under the provisions of ***Sections 103*** and ***104*** of the Act. The trial court in dealing with this issue placed emphasis on the latter part of ***Section 103*** of the **Procurement Act** which stipulates that direct procurement is allowed so long as the purpose is not to avoid competition. At paragraph 195 of its judgment, the trial court expressed itself as follows:

"195. Our view is that since direct procurement method, which was the method adopted herein, was a restriction on the scope of the application of the principle of competitiveness and as the law expressly bars the adoption of such a method is adopted if the intention is to defeat competition, before such a method is adopted, the procuring entity must involve the public in its decision to opt for direct procurement. We however hasten to clarify that direct procurement does not necessarily violate the constitutional requirement of competitiveness as long as the constitutional and statutory threshold is met in the process and proper procedure followed."

184. We have examined the record of appeal and are unable to find any evidence indicating that the intention of the Appellant to opt for direct procurement was to avoid competition. The uncontroverted evidence on record discernible from the affidavit deposed by ***Mr. Ezra Chiloba*** dated 27th June 2017 provides the reasons why the Appellant opted for direct procurement. At paragraph 6 it is deposed that out of abundance of caution, the Appellant sought legal advice on options available to it under the **Public Procurement and Asset Disposal Act, 2015** in view of the very limited time available to procure the election materials; that the Appellant was advised to consider proceeding by way of direct procurement.

185. In our view, subject to satisfying the requirements for alternative procurement methods (being the conditions stipulated in ***Sections 103*** and ***104*** of the **Public Procurement and Asset Disposal Act, 2015**) direct procurement is constitutional. The trial court made a finding that there must be public participation before a decision to use direct procurement is made. Our reading of ***Sections 103*** and ***104*** of the **Public Procurement and Asset Disposal Act, 2015** and ***Article 227 (1)*** does not impose a mandatory requirement for public participation prior to using or adopting or making the decision to adopt direct procurement. ***Section 103 (2)*** of the **Public Procurement and Asset Disposal Act, 2015** does not provide for public participation as one of the conditions to be satisfied prior to adopting direct procurement.

186. On this analysis, we make a finding that the trial court erred when it imposed a requirement for public participation prior to the Appellant making the decision to adopt direct procurement method to procure election material and ballot papers for presidential elections. So long as a procurement entity

meets the threshold in ***Sections 103*** and ***104*** of the **Public Procurement and Asset Disposal Act, 2015** and it observes the provisions in ***Article 227 (1)*** of the Constitution, direct procurement cannot be unconstitutional. The conditions in these Sections and Article are checks and balances that ensure transparency and accountability in direct procurement. Other provisions safeguarding accountability and transparency to the public in relation to direct procurement include ***Article 35*** of the Constitution on access to information; the role of the Auditor General, the role of the Ombudsman and the supervisory powers of the High Court.

187. The progressive reduction of the scope and degree of competitiveness in alternative methods of procurement amongst other reasons lead us to find that public participation is not a mandatory requirement prior to a procuring entity making the decision to opt for direct procurement.

188. An issue that was urged in this Appeal at ground 9 in the Memorandum of Appeal was that the High Court erred in compelling the Appellant to come up with a framework for public participation when it stated at paragraph 200 of the judgment that the "***IEBC was obligated to craft and implement a meaningful programme of public participation and stakeholder engagement in the process of tendering for the printing of election materials and ballot papers…***" It was contended by the Appellant that this order amounted to the court erroneously directing it to usurp legislative powers. It was also argued that the absence of a legal framework for public participation cannot justify the High Court to usurp parliamentary power and legislate the content, scope and threshold for public participation.

189. We have considered this submission in light of the provisions of ***Article 10 (2)*** of the Constitution and other relevant Articles where public participation is constitutionally required. In our considered view, the absence of a legal framework for public participation is not an excuse for a procuring entity or a State organ to fail to undertake public participation if required by the Constitution or law. A State organ or procuring entity is expected to give effect to constitutional principles relating to public participation in a manner that satisfies the values and principles of the Constitution. We take judicial notice that the Senate is aware of the need for a legal framework for public participation and to fulfill this need the ***Public Participation Bill 2016*** (**Kenya Gazette Supplement No. 175; Senate Bill No. 15)** has been published. The preamble to the Bill states that it is: -

> **"An act of Parliament to provide a general framework for effective public participation: to give effect to the constitutional principles of democracy and participation of the people under articles 1 (2), 10 (2), 35, 69 (1) (d), 118, 174 (c) and (d), 184 (1) (c), 196, 201 (a) and 232 (1) (d) of the Constitution; and for connected purposes."**

APPROPRIATE RELIEF

190. An issue for consideration in this appeal relates to the appropriateness of the relief and orders granted by the trial court. The trial court granted orders of *mandamus* and *certiorari*. The court at paragraph 219 of its judgment considered what type of relief to grant in the matter before it. The court correctly observed that in deciding whether or not to grant the reliefs sought, a court ought to take into account public interest. At paragraph 221 of the judgment, the trial court stated it was of the "firm view that in appropriate circumstances, courts of law and independent tribunals are entitled pursuant

to ***Article 1*** of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt." (See Ruling by Onguto, J. in **Franklin Imbenzi Kalumbo -v- IEBC** in **Nairobi High Court Misc. Application No. 402 of 2017).** Article 1 provides that all sovereign power belong to the people of Kenya.

191. On our part, we now consider the appropriateness of the relief granted by the trial court. The **Fair Administrative Action Act** expands the scope of judicial review reliefs beyond the traditional three – *mandamus,* prohibition and *certiorari*. In this regard, ***Section 11*** empowers the court to grant any order that is "just and equitable" including the ten reliefs expressly listed in the section. The term just and equitable must of necessity be interpreted to mean "appropriate relief" which is the term used in ***Article 23(3)*** of the Constitution. The same has been interpreted by the High Court in **Nancy Makokha Baraza -v- Judicial Service Commission [2012] eKLR** as being wide and unrestrictive and also inclusive rather than exclusive and to allow the court to make appropriate orders and grant remedies as the situation demands and as the need arises. Some of the reliefs outlined in ***section 11*** of **Fair Administrative Action Act** include: a declaration, injunction, a direction to give reasons, prohibition, setting aside and remission for reconsideration, *mandamus*, temporary interdicts and other temporary relief, and an award of costs. The Act elaborates further reliefs in proceedings relating to failure to act. The court may direct the taking of the action, declare the rights of parties, direct parties to do or refrain from doing any act, or make orders as to costs or other monetary compensation.

192. Under ***Article 23 (3)*** of the Constitution, in any proceedings brought under ***Article 22***, a court may grant appropriate relief including:

(a) A declaration of rights;

(b) An injunction;

(c) A conservatory order'

(d) A declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) An order for compensation; and

(f) An order of judicial review.

193. In consonance with ***Article 23 (3)*** of the Constitution and ***Order 53*** of the **Civil Procedure Act and Rules**, the High Court in the instant case granted orders of *certiorari* and *mandamus*.

194. The Hon. Attorney General in his written submission at paragraph 47, submits that the orders granted by the High Court were an abuse of discretion; that the learned judges erred in law and fact in granting the reliefs sought thereby precipitating a constitutional crises. He submitted that judicial review proceedings in their very nature are discretionary and must take into account public interest; that judicial review applications fall within the ambit of public law where determination of disputes usually transcends beyond the protagonists before Court and where issuance of orders sought may affect other parties not privy to the proceedings. Citing **Halsbury's Laws of England 4th Edn. Vol. 1 (1) para, 12 page 270,** the Attorney General submitted that in judicial review proceedings, the court has wide discretion whether to grant relief at all and if so, what form of relief to grant. Dicta from **R -v- Judicial Service Commission ex parte Pareno (2004) 1**

KLR 203-209 was cited by the High Court where it was expressed that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining.

195. What is the local and comparative jurisprudence on the type of orders issued in judicial review on matters relating to tender issues, public participation and where time constraints exist?

196. In ***Nairobi Metropolitan PSV Saccos Union Limited & 25 Others*** **(supra),** the contention was about insufficient public participation in the enactment of Nairobi City County Finance Act. The Court of Appeal held that none of the PSV operator groups who attended the consultative meeting complained that the notice given was too short. In the circumstances, the court declined to annul the Finance Act enacted by the Nairobi City Government.

197. In **Robert N. Gakuru & Others -v- The Governor Kiambu County Nairobi Petition No. 532 of 2013** *Consolidated with* **Petition Nos. 12 of 2014, 35, 36 of 2014);** the High Court having come to the conclusion that there was no public participation as contemplated by the Constitution in the enactment of **Kiambu County Government Finance Act** nullified and declared as null and void the **Kiambu Finance Act 2013**. The court expressed at paragraph 85 of its judgment that "it had not been alleged that any interests have been acquired under the said Act that would militate against the immediate nullification of the said Act". It is unclear whether the learned judge in orbiter meant that if an interest had been acquired there would be no immediate nullification of the Act. An appeal against this

decision was lodged before the Court of Appeal in Nairobi being **Civil Appeal No. 200 of 2014**. In affirming the quashing of the impugned **Kiambu Finance Act** and while dismissing the appeal, the appellate court observed that:

> **"27: …..The Appellants argue that the entire population of Kiambu, including the Respondents, is represented in the County Assembly by elected leaders and so there was no need of consulting the public or the Respondents again. Indeed, they concede they did not subject the Bill to further public participation….Considering the number of petitions filed to challenge the impugned Act,….all the more reason why the Bill should have been subjected again to public participation before enactment. (See Kiambu County Government & others -v- Robert N. Gakuru & Others, Nairobi Civil Appeal No. 200 of 2014)."**

198. In **Kituo Cha Sheria -v- Central Bank of Kenya Nairobi Petition No. 191 of 2011 Consolidated with Petition No. 292 of 2011**, the High Court declined to cancel a tender awarded on the basis of an alleged breach of public participation. In this case, the court did not find violation of constitutional provisions to wit ***Articles 10, 201, 227*** and provisions of the **Public Procurement and Asset Disposal Act, 2015**.

199. In **Erick Okeyo -v- County Government of Kisumu, Kisumu High Court Petition No. 1 "A" of 2014**, the High Court (Muchelule, J.) quashed a tender awarded in violation of ***Article 227 (1)*** of the Constitution for lack of public participation. The court held that the award was null and void. Appeal against this decision was struck out for having been filed out of time without leave of the court. (See County **Government of Kisumu -v- Erick Okeyo & Others**, Kisumu Civil Application No. 62 "A" of 2014).

200. In **Mombasa High Court Petition No. 6 of 2011 Kenya Transport Association -vs- Municipal Council of Mombasa & Another,** the High Court held that a procurement process was null and void if it violates constitutional values. In **Revital Health (EPZ) Limited -v- Public Procurement Oversight Authority (Mombasa Constitutional Petition No. 75 of 2012),** the High Court declared as unconstitutional a tender awarded in violation of the provisions of ***Article 47*** of the Constitution on fair administration and directed quantum of damages to be determined for breach of the right to fair administrative action.

201. In the **Matter of Mining Concession to Mui Coal Basin Deposits ex parte Peter Makau Musyoka -v- Permanent Secretary for Energy, Machakos Constitutional Petition No. 305 of 2012, (Consolidated with Petition N. 34 of 2013 and 12 of 2014 [2105] eKLR**, the dispute related *inter alia* to insufficient public participation in the award of tender in relation to Mui Coal Basin Deposits, failure to follow procedure of the **Public Procurement Act**, allegation that ***Article 10*** of the Constitution was violated. The trial court declined to grant the orders sought and directed the Respondent to continue to engage with the local community and provide reasonable opportunities for public participation.

202. A common thread in all the foregoing cases is that time constraint was not a relevant factor to be taken into account in determining the appropriate relief to be granted. The cases here below have time constraint as a critical factor in determining the appropriate relief.

203. The Supreme Court in **Communication Commission of Kenya -v- Royal Media Services & 5 Others Petition No.14 of 2014** *Consolidated with*

14A, 14B and 14 C of 2014 was faced with crafting an appropriate order in relation to procurement process where time constraint was a relevant consideration. The time constraint related to migration from analogue to digital terrestrial television which Kenya was required to comply with by 17th June 2015 which was the switch off date. The Supreme Court delivered its judgment on 29th September 2014 and directed ***Communication Commission of Kenya*** (CCK) in exercise of its statutory authority and in consultation with all parties to the suit to within 90 days consider setting time lines for the digital migration. CCK was directed to re-align its operations and licensing procedures so as to be in tune with ***Articles 10, 34*** and ***227*** of the Constitution.

204. On a comparative basis, the South African Constitutional Court has considered the issue of crafting an appropriate remedy in a matter involving violation of constitutional values and principles in light of time constraints. In **Black Sash Trust -v- Minister for Social Development, Constitutional Court Case No. 48 of 2017**, in a judgment delivered on 17th March 2017, the South African Constitutional Court agonized on what was an appropriate remedy to give in light of time constraints. Briefly, under the South African Constitution, the ***South African Social Security Agency*** (SASSA) was under an obligation to ensure payment of social grants to beneficiaries from 1st April 2017. On 3rd February 2012, SASSA contracted a company known as Cash Paymaster Services to pay the monies. In a judgment delivered by the Constitutional Court on 29th September 2013, the award of the tender by SASSA and Cash Payment was declared to be constitutionally invalid. Upon the declaration of constitutional invalidity of tender award, SASSA undertook to make the payments itself. This was not to be and as of March 2017, there was no arrangement to make payment and SASSA admitted it

had no capacity to make the payment. A constitutional crisis was in the making because come 1st April 2017, the beneficiaries would not receive payment. To avert the constitutional crises, the South African Constitutional Court declared the initial contract between SASSA and Cash Paymaster as invalid and suspended that declaration of invalidity for a period of 12 months from 1st April 2017 to enable Cash Paymaster to make the payment and SASSA to undertake procurement within the constitutional time lines and procurement framework. In suspending the declaration of invalidity, the Constitutional Court at paragraph 11 of its judgment noted that SASSA will not be able to take over the payment of social grants by 1st April 2017 and may not be able to do so for some time to come; that SASSA intends to enter into a contract with Cash Paymaster without competitive tender process as was required by Section 217 of the Constitution in order to continue payment of social grants. At paragraph 42 of the judgment, the court noted that SASSA had failed to timeously conclude a lawful contract to provide for the payment; that these circumstances provide a different context for the enforcement of a just and equitable remedy.

205. The Constitutional Court at paragraphs 42 and 43 expressed that when the declaration of invalidity was made, the context was a breach of the constitutional and legislative framework for fair, equitable, transparent, competitive and cost-effective procurement. However, as at March 2017, the context had changed to a constitutional crises and the primary concern was the very real threatened breach of the right of millions of people to social assistance in terms of ***Section 27 (1) (c)*** of the Constitution. That it is this intended breach that triggers the just and equitable remedial powers of the court to suspend the declaration of invalidity of the tender award. The Court at paragraph 43 expressed itself thus:

> **"It bears emphasis that this is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution Respondent to its core mandate by preserving the integrity of our constitutional democracy."**

206. The Constitutional Court in exercising its powers to grant a just and equitable relief extended the contract granted by SASSA to Cash Paymaster and extended the period of declaration of the invalidity for the period of extension of the contract. The court observed that the remedy given was done in exceptional circumstances in view of the precipitated national crisis.

207. On the conduct of SASSA and its inability to pay leading to constitutional crisis, the Court expressed as follows at paragraphs 56, 57 and 75 of its judgment:

> **"56: Before concluding, it is necessary to say something about SASSA's conduct. SASSA is an organ of state. It is bound by the basic values and principles governing public administration set out in section 195 of the Constitution. As is evident from this judgment, and the merits judgment, SASSA's irregular conduct has been the sole cause for the declaration of invalidity and for the setting aside of the contract between it and Cash Paymaster…..**
>
> **57: Regrettably, not much has changed, except that this time round the Minister may have contributed to the continued recalcitrance. For purposes of this part of the judgment, the problem to be addressed is the demonstrated inability of SASSA to get its own affairs in order, in relation to the performance of the contract, a competitive bidding process and becoming able to make payment of grants under its own steam.**

58. All this requires explanation and accountability….

75.All these aspects require further scrutiny, but that can only be done after the potentially affected parties are joined to the proceedings in their personal capacities and given an opportunity to explain their conduct in relation to each of these issues."

208. This decision from the Constitutional Court of South Africa is not only informative and persuasive but illustrates the challenges faced by courts in crafting appropriate remedy to avert constitutional crisis when faced with time constraints and violation of constitutional values and principles and the need to balance and uphold public interest. In crafting an appropriate relief a court should take into account public interest while balancing all relevant facts and circumstances.

209. A further ground of appeal that was urged before us is that the judgment by the High Court was internally contradictory. The Appellant submitted that the order of *certiorari* as granted by the High Court contradicts the order of *mandamus* that was also granted; that whereas the order of *certiorari* quashed the contract awarded for all the six elections, the order for mandamus directed a *de novo* tendering for printing of ballot papers for only one election, that is the presidential election. That having quashed the tender for all six elections, the High Court contradicted itself and erred either for not ordering a re-tendering for the other five elections or stating the reasons why the other five elections remained valid despite a single tender contract having being awarded in respect of all the six elections. It was argued that if public participation did not take place in the tender for one election then it also did not take place in the tender for the other five elections. The High Court thus erred in failing to explain this apparent contradiction.

210. The 1st Respondent submitted that there was no internal contradiction in the judgment because all parties are clear in their mind that the procurement of election material for the five elections was not quashed.

211. We have considered submissions by the parties and we go by the terms of the Decree on Record. As per the Decree, the *order of certiorari* quashes the decision of IEBC awarding the tender for the printing of election material including ballot papers for the Presidential elections. On the face of it, it would appear that the entire decision to award the tender was quashed. However, bearing in mind the various findings and final orders of this Court, we find no good reason to delve into the issue of whether the tender that was quashed by the order of *certiorari* was for one or all six elections.

212. As we conclude the issue of appropriate relief, guided by the Kenya Supreme Court approach and the South African comparative jurisprudence, we are of the considered view that the trial court in this matter exercised its discretion wrongly without regard to the Constitutional time lines within which Presidential and General Elections must be held *vis-à-vis* Statutorily Regulated timelines for various procurement activities. Judicial discretion must be exercised judiciously and the trial court ought to have taken the matter before it as an exceptional circumstance requiring exceptional appropriate judicial remedy for any violation of constitutional and or statutory values and principles. In granting the orders of *certiorari* and *mandamus*, the learned judges erred and did not take into account the very real threatened breach of the right of millions of Kenyan voters enshrined in ***Articles 38 (2)*** and ***136 (2) (a)*** of the Constitution being the right to free, fair and regular elections based on universal suffrage. The learned judges have

exercised their discretionary power in error, we find that this is a case in which an appellate court can and should interfere with such exercise of discretion.

DISPOSITION AND FINAL ORDERS

213. After extensive re-evaluation of the evidence on record and upon considering oral and written submissions by all parties and bearing in mind relevant laws and Constitutional principles, we now come to the following conclusions, findings and determinations:

(a) We make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.

(b) We find and hold that subject to limited exceptions inter alia in Sections 4 (2), Section 6 and 91 (2) of the Public Procurement and Asset Disposal Act, 2015, and pursuant to Section 3 of the said Act as read with Articles 10 (2) (b) and 227 of the Constitution, "as a general principle public participation is a mandatory requirement in all procurements by a public entity." We find that there are exceptions to public participation in the procurement process and one such exception relates to direct procurement.

(c) In relation to direct procurement, subject to Article 227 (1) of the Constitution and the law on alternative procurement methods, the conditions stipulated in Sections 103 and 104 of the Public Procurement and Asset Disposal Act, 2015 are mandatory and exhaustive; they cannot be added to nor subtracted from.

(d) There is no constitutional or statutory mandatory requirement that there must be public participation before a decision to adopt or use direct procurement is made. So long as a procurement entity satisfies Sections 103 and 104 of the Act

as read with Article 227 (1) of the Constitution, direct procurement cannot be unconstitutional. However, the decision as to the winning bid and award of contract is the sole responsibility of the procuring entity as the accounting entity.

(e) We find that the High Court in this matter exercised its discretion wrongly without regard to the constitutional time lines within which Presidential and General Elections is to be held vis-à-vis timelines for various procurement activities. In granting the orders of certiorari and mandamus, the learned judges erred and did not take into account the very real threatened breach of the right of millions of Kenyan voters enshrined in Article 38 (2) and 136 (2) (a) of the Constitution being the right to free, fair and regular elections based on universal suffrage.

214. For various reasons stated in this judgment, the final orders of this Court are as follows:

(a) This appeal has merit and is hereby allowed.

(b) The judgment of the High Court dated 7th July 2017 be and is hereby set aside to the extent :

i. that the court erred in finding that public participation is a mandatory requirement in direct procurement.

ii. that the court erred in granting the orders of certiorari and mandamus without due weight and consideration to public interest and the statutorily regulated timelines for the tendering process embodied in Regulations 36, 40, 46, 54 (5) of the 2005 Procurement Regulations 2005, and Section 80 (6) of the Public Procurement and Asset Disposal Act, 2015.

(c) To the extent stated in this judgment, the Cross-Appeal lodged before this Court by way of Notice of Cross-Appeal dated 12th July 2017 be and is hereby dismissed.

(d) The upshot is that the orders of certiorari and mandamus issued by the High Court be and are hereby set aside.

(e) For avoidance of doubt, the Constitutional date for this year's General Elections is 8th August, 2017.

(f) Each party is to bear its/his own costs in this appeal and the High Court.

Dated and Delivered at Nairobi this 20th day of July, 2017

E. M. GITHINJI
……..
JUDGE OF APPEAL

ALNASHIR VISRAM
……..
JUDGE OF APPEAL

R.N. NAMBUYE
……
JUDGE OF APPEAL

J. MOHAMMED
……
JUDGE OF APPEAL

J. OTIENO-ODEK
…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR