



**Al Ghurair Printing And Publishing Llc v Coalition For Reforms And Democracy & another; Public Procurement Administrative Review Board (Interested Party) (Civil Appeal 63 of 2017) [2017] KECA 565 (KLR) (26 April 2017) (Judgment) (with dissent - SG Kairu, JA)**  
*Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others [2017] eKLR*  
Neutral citation: [2017] KECA 565 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 63 OF 2017  
DK MUSINGA, SG KAIRU & AK MURGOR, JJA  
APRIL 26, 2017**

**BETWEEN**

**AL GHURAIR PRINTING AND PUBLISHING LLC ..... APPELLANT**

**AND**

**COALITION FOR REFORMS AND DEMOCRACY ..... 1<sup>ST</sup> RESPONDENT  
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**AND**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW  
BOARD ..... INTERESTED PARTY**

*(Being an appeal from the decision of the High Court of Kenya at Nairobi  
(Odunga, J.) dated 13th February, 2017 in Misc. Application No. 637 of 2016)*

**JUDGMENT**

**Introduction**

**Judgment of D. K. Musinga**

1. This judgment is in respect of a decision by Odunga, J. dated 13<sup>th</sup> February, 2017 where the High Court granted, inter alia, an order of certiorari to quash the decision of the 2<sup>nd</sup> respondent to award Tender Number IEBC/01/2016-2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers to the appellant.



2. The appellant was aggrieved by that decision and preferred an appeal to this Court.

### **Background to the Appeal**

3. By a Notice of Motion dated 19<sup>th</sup> December, 2016 the Coalition for Reforms and Democracy (CORD), a duly registered coalition of several political parties, the 1<sup>st</sup> respondent, sought the following orders:
  - “1. That an order of certiorari do issue quashing the decision of the First Respondent to award Tender Number IEBC/01/2016 – 2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers to Al Ghurair Print and Publishing Company Limited of Dubai.
  2. That an order of mandamus do issue compelling the First Respondent to restart the tender process in respect of Tender Number IEBC/01/2016 -2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers and the same be done in compliance with the provisions of the *Public Procurement and Asset Disposal Act* and the Election Laws (Amendment) Act 2016.
  3. That an order of prohibition do issue prohibiting the First Respondent from executing a contract or any transaction in respect to Tender Number IEBC/01/2016 -2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers with Al Ghurair Print and Publishing Company Limited of Dubai or any other company or body.
  4. That an order of certiorari do issue quashing the decision of the Second Respondent contained in the decision or judgment delivered and issued by the Second Respondent in Application Number 93 of 7<sup>th</sup> November 2016 Paarl Media (Pty) Limited v Independent Electoral and Boundaries Commission on 28<sup>th</sup> November 2016.
  5. That the Honourable Court be pleased to grant such other or further relief as it may deem fit and necessary in the circumstances.
  6. That the costs of this application be provided for.”
4. The application was brought under Order 53 of the Civil Procedure Rules and Section 8 of the *Law Reform Act*.
5. The application was premised on grounds, inter alia, that the award of the tender was illegal and not in compliance with Election Laws (Amendment) Act, 2016; the specification of the ballot papers for elections, election result declaration forms and poll registers as contained in the tender documents were not in conformity with the requirements of the Election Laws (Amendment) Act 2016 and the integrated electronic electoral system as established by law; the Independent Electoral and Boundaries Commission, the 2<sup>nd</sup> respondent, was not lawfully constituted in accordance with section 31 of the Election Laws (Amendment) Act 2016 and therefore any act done or implemented or decision taken or made in or after 4<sup>th</sup> October, 2016 was null and void; and that in awarding the aforesaid tender the 2<sup>nd</sup> respondent did not comply with mandatory provisions of *the Constitution* and *Public Procurement and Asset Disposal Act*, 2015 (“PPAD Act”).



6. Further grounds of the application were that the 2<sup>nd</sup> respondent was acting unreasonably, irrationally and recklessly by failing to create an environment for a free, democratic and fair elections; and by failing to take on board views of the applicant, amongst other stakeholders.
7. The 1<sup>st</sup> respondent's verifying affidavit was sworn by Norman Magaya, its Executive Director. The deponent expounded the grounds upon which the application had been brought.
8. Magaya stated that on 7<sup>th</sup> November, 2016 the 1<sup>st</sup> respondent was joined an interested party in Public Procurement Administrative Review Number 93 of 2016, Paarl Media PTY LTD v Independent Electoral Boundaries Commission, in which the Interested Party (the Review Board) dismissed the request by Paarl Media Pty Ltd for review.
9. Mr. Magaya deposed that the 2<sup>nd</sup> respondent did not adhere to the rules of natural justice and its decision was violative of the Election Laws (Amendment) Act 2016, (hereinafter "the ELAA"), that was assented to on 13<sup>th</sup> September, 2016 and commenced on 4<sup>th</sup> October, 2016, *the Constitution*, as well as the PPAD Act. The ELAA establishes an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results and requires that the use of technology be simple, accurate, verifiable, secure, accountable and transparent. It also requires that the acquisition and disposal of information and communication technology assets and systems be done in a transparent manner.
10. The 1<sup>st</sup> respondent further argued that participation of the public including stakeholders such as political parties is critical in implementation of the law, including the making of appropriate regulations.
11. Mr. Magaya further deposed that on 17<sup>th</sup> August, 2016 the 2<sup>nd</sup> respondent published an invitation to tender No. IEBC/01/2016-2017 for the supply and delivery of ballot papers for elections, election results declaration forms and poll registers on "as and when required basis for a period of two years 2016-2018)". The tender documents included an item code IEBC 131:2015 described as a "Principal Register of Voters". However, there is no such register under the *Elections Act* or the ELAA, he contended. In the aforesaid Principal Register of Voters as illustrated in Annex C, there are no features that demonstrate that there shall be biometric data in regard to the identities or attributes of each and every voter and which is capable of being read by an electronic device to identify individual voters, either on inspection of the register or at the time of voting.
12. In addition, there was no evidence to demonstrate that the "Principal Register of Voters" was capable of being maintained on a public web portal in a format that can be inspected or verified for accuracy and can exhibit the biometric data of voters. According to the 1<sup>st</sup> respondent, the poll registers, including the Principal Register, cannot meet the statutory requirements of the ELAA and are not implementable and applicable in the integrated electronic electoral system.
13. The 1<sup>st</sup> respondent cited various other provisions of the law to demonstrate that the statutory forms that were in use at the time of awarding the tender in issue were inconsistent with substantive provisions of the ELAA and therefore the tender as awarded, which is worth more than Kshs.2.5 billion, was unlawful and irrational in view of the changes and reforms in the electoral law.
14. Another issue raised by the 1<sup>st</sup> respondent regarding award of the impugned tender was that it was made before the Independent Electoral and Boundaries Commission (IEBC) had been constituted in accordance with section 31 of the ELAA that provides for a Chairperson and six members of the Commission. It was contended that the secretariat of the Commission could not undertake major



activities without the existence of the legitimate members of the Commission who have power to hold and exercise substantive constitutional and statutory power and authority of the Commission.

15. The 1<sup>st</sup> respondent complained that nine members of the Commission who were in office before their voluntary resignation were unlawfully conducting the business and affairs of the Commission despite the grievances of lack of credibility and integrity that had been made against them. In summary, those are the grounds upon which the 1<sup>st</sup> respondent sought the orders of certiorari, mandamus and prohibition as aforesaid.

## **2<sup>nd</sup> Respondent's Replying Affidavit**

16. The IEBC (the 2<sup>nd</sup> respondent) filed a replying affidavit that was sworn by its Secretary and Chief Executive, Ezra Chiloba, on 26<sup>th</sup> December, 2016.

He stated, inter alia, that the IEBC, as a constitutional Commission, is an independent Commission; not subject to direction and control by any person or authority in the performance of its constitutional mandate; always obliged to honour, respect, uphold and defend the Constitution.

17. Regarding the composition of the Commission at the time of awarding the impugned tender, Chiloba deposed:

“The 1<sup>st</sup> Respondent is lawfully constituted and its decisions are legal and valid. There is no lacuna in the Commission. There are Commissioners of the 1<sup>st</sup> Respondent properly in office as they have not been replaced, while its secretariat is vibrant in execution of the 1<sup>st</sup> Respondent's mandate. Under Article 226 of the Constitution, the Public Procurement and Asset Disposal Act, 2015 and the Public Finance Management Act 2012, I am the Chief Executive Officer, the Accounting Officer of the 1<sup>st</sup> Respondent as a procuring entity.”

18. IEBC averred that in awarding the aforesaid tender it had observed and upheld the provisions of Article 227 of the Constitution, the relevant provisions of the PPAD Act, the principles of natural justice, the rule of law and the legal imperative of public participation, consultations, good governance, integrity, transparency and accountability.
19. Regarding propriety of the Judicial Review Proceedings, IEBC contended that the High Court had no jurisdiction to entertain the application by CORD, the application having been filed outside the 14 days period as required under section 175(1) of the PPAD Act.
20. Responding to the 1<sup>st</sup> respondent's complaint that the tender for the supply and delivery of ballot papers, election result declaration forms and poll registers was not in conformity with the ELAA, Chiloba deposed that the said Act came into force on 4<sup>th</sup> October, 2016, a month after closing of the impugned tender and therefore “there is no logic in the proposition that the tender in question could have contravened the said law which was neither in force nor in existence.”
21. But as regards suitability of the tendered materials vis a vis the ELAA requirements, IEBC averred that it was a misconception on the part of the ex parte applicant that the general election to be held on 8<sup>th</sup> August, 2017 will be wholly electronic. The election shall be substantially manual in the sense that physical ballot papers are still required; and election result declaration forms and poll registers are still necessary, said Chiloba. He added that section 44 (7) of the Elections Act, 2011 as amended states that the technology to be used for the purpose of the first elections upon the commencement of the amendments shall be restricted to the process of voter registration, identification of voters and results transmission.



22. As regards the public interest in the matter that was before the trial court, Chiloba contended that orders of Judicial Review are discretionary in nature; that it was in the public interest that the next general election be held on 8<sup>th</sup> August, 2017, and that the proceedings were likely to occasion delay in procuring the necessary materials. He cited section 44(4) of the *Elections Act*, 2011 which requires IEBC to procure and put in place the technology necessary for the conduct of the general election at least eight months before such election.

### **Interested Party's Case.**

23. On behalf of the Public Procurement Administrative Review Board, Mr. Bitta submitted that there were no grounds upon which the ex parte applicant was challenging the decision of the Review Board. In his view, the Judicial Review application was filed outside the statutory period and that alone rendered it bad in law.

### **The Appellant's Case.**

24. The appellant filed a replying affidavit that was sworn by GanapathyLakshmanan, its General Manager, a resident of the United Arab Emirates. He averred that following IEBC's advertisement of the tender for supply and delivery of ballot papers, election result declaration forms and poll registers, the appellant participated in the tendering process.
25. Subsequently, the appellant received a Notification of Award Letter dated 18<sup>th</sup> October, 2016 from the IEBC informing it that it had been awarded the supply contract and required it to accept the award within 14 days.
26. On 7<sup>th</sup> November, 2016 the appellant was notified by the IEBC that Paarl Media (Pty) Ltd had filed a Request for Review before the Review Board. The Review was heard and a ruling rendered on 30<sup>th</sup> November, 2016 when the request was dismissed.
27. The IEBC and the appellant proceeded to sign a formal contract on 30<sup>th</sup> November, 2016. Under the contract, the appellant was to supply the various materials only when IEBC put in an order; the specifications and the standards of the materials would be specified by the IEBC; and the IEBC reserved the right to inspect the materials at the appellant's premises to ensure that they meet its requirements prior to delivery.
28. The appellant asserted that the specifications for the materials under procurement met the applicable legal requirements as per *the Constitution*, the *Elections Act*, 2011, the ELAA and the applicable Regulations. The appellant added that the coming into effect of the ELAA did not have the effect of nullifying usage of the materials under the subject tender; that the employment of technology under the ELAA is intended to be used jointly with the materials under procurement, and that there is no chance of contradiction, confusion or violation of the applicable law.
29. As regards the ballot papers, the appellant stated that they met the required legal standards in that they contain the requisite features and are fit for electoral processes and contain, among others, security features and such other features to ensure accuracy, transparency and accountability.
30. The appellant further contended that the Judicial Review application had not disclosed any complaint with regard to the decision making process of the Review Board; the application focused on the merits and demerits of the procurement decisions of the IEBC and therefore failed to meet the requisite threshold for grant of Judicial Review orders as sought; and that the application was irretrievably defective, having been filed on 19<sup>th</sup> December, 2016, while the prescribed time for filing such an application lapsed on 13<sup>th</sup> December, 2016.



## The Trial Court's Findings

31. All the parties filed written submissions and counsel highlighted the same. The learned judge identified the main issue for determination to be

“whether the award Tender Number IEBC/01/2016-2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers by the IEBC to Al Ghurair Print (sic) and Publishing Company Limited at Dubai was proper”.

32. The determination of that main issue was based on four broad thematic areas that may be summarized as hereunder:

- i. Whether the High Court had jurisdiction to deal with the Judicial Review application before it;
- ii. Whether the IEBC was properly constituted at the time of award of the tender;
- iii. Whether there was non-compliance with the Election Laws (Amendment) Act, 2016 (ELAA) at the time of award of the tender and whether the ELAA was applicable retrospectively;
- iv. Whether public interest militated against grant of the orders sought in the Judicial Review application.

33. On the issue of jurisdiction, the learned judge rejected the appellant's argument that the court had no jurisdiction to entertain the Judicial Review application because it was filed outside the 14 days period as prescribed under Section 175 of the PPAD Act.

The section states as follows:

- “(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.
2. The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.”

34. The learned Judge held that the grounds upon which the Judicial Review application had been made clearly showed that what was being complained against was not the decision of the Review Board, but were matters of election law which the Board did not have jurisdiction to handle.

35. In paragraph 169 of the judgment, the learned Judge delivered himself as follows:

“169. A holistic consideration of the grounds in the statement clearly show that in these proceedings the dispute concerns what the Review Board termed “matters of election and ....the provisions of the *Elections Act* and the Election Laws (Amendment) Act 2016” which matters the Board found rightly in my view “only the High Court and the Supreme Court while exercising their original jurisdiction or the Court of Appeal while entertaining an appeal from the High Court that are vested with jurisdiction to consider.” The IEBC itself has adopted the same position and has stated that issues in respect of the voting system or the technology to be employed or applied by it in fulfillment of its





constitutional mandate is an issue that is outside the jurisdiction of the Review Board. In fact the IEBC was even more emphatic that the jurisdiction of the Review Board does not extend to applying and enforcing non-procurement laws such as the Election laws when in fact under the *Elections Act* the Election Court is the High Court and appeals therefrom lie to the Court of Appeal. Such an argument, it asserted, would be an invitation for the Review Board to usurp the powers of the High Court and thereby act in excess of its jurisdiction. Further the Review Board would be acting outside its jurisdiction and in contravention of sections 90 and 91 of the *Public Procurement and Asset Disposal Act*, 2015 if it held itself out as directing an independent Commission such as the IEBC on what and when to procure or the method of procurement to be used.”

36. Regarding the legal status of the Commission at the time of the notification of the tender when there were no Commissioners in office, the learned Judge held that the tender was awarded 13 days after publication of the Gazette Notice that declared vacant the office of the Chairperson of the IEBC as well as that of the Commissioners. The court held, inter alia, that:

“.....section 134(1) of the *Public Procurement and Asset Disposal Act* only empowers the accounting officer to prepare and execute the contract. It does not empower him to award the tender. It is therefore my view that the aforesaid provision cannot be the basis of an award of a tender by the accounting officer where the Commission technically does not function.”

37. The court cited Michael Kamau And Others V Ethics And anti-corruption Commission and others [2016] eKLR where it was held, inter alia, that in the absence of Commissioners, the secretariat of the Anti-Corruption Commission had no power to undertake certain acts.

38. Regarding the issue of the alleged non-compliance with ELAA and whether application of that law had retrospective effect, the trial court, without specifying the section of the law that was non-compliant, was of the view that “the award of the tender for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers ought to have taken into account the current legislative framework that has been put into place to ensure the constitutional threshold is attained.”

39. The court observed that by the time the formal contract was being entered into the ELAA had come into operation. The judge opined:

“In my view laws which are enacted with a view to facilitate an event such as the forthcoming elections, if they [are] to achieve their intended purpose ought to be interpreted as if their operationalisation was to have retrospective effect in so far as the preparations for the forthcoming elections are concerned. This interpretation must be so due to the appreciation of the fact general election are a process as opposed to a one off event.”

40. Lastly, as to whether public interest militated against grant of the orders sought, the trial court held that contravention of *the Constitution* or a statute cannot be justified on the plea of public interest. He cited Republic V County Government of Mombasa ex parte Outdoor Advertising Association of Kenya [2014] eKLR where the court held:

“There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest 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.”

41. On the basis of the above summarized findings, the learned judge granted the Judicial Review orders of certiorari in terms of prayers 1 and 2 of the 1<sup>st</sup> respondent’s application.

### **Appeal to this Court**

42. In its Memorandum of Appeal, the appellant faulted the learned judge for failing to draw a clear distinction between the roles of the Commissioners and the Accounting Officer/Secretariat to the IEBC; finding that the Commission was not properly constituted at the time of making the impugned award; for failing to cite specific violations of the ELAA, and for failing to appreciate the overriding public interest of timeously preparing for the forthcoming general election.
43. When the appeal came up for hearing, all the parties relied on their respective written submissions that were briefly highlighted by their respective advocates. Mr. Waweru Gatonye and Mr. Kamau appeared for the appellant, Mr. James Orengo, Senior Counsel, appeared for the 1<sup>st</sup> respondent, Mr. Mutubwa for the 2<sup>nd</sup> respondent and Miss Maina appeared for the Interested Party. The 2<sup>nd</sup> respondent and the Interested Party supported the appeal.

### **Analysis of the Submissions & Determination**

44. My determination of the appeal shall be along the four (4) thematic areas that were argued by the parties as summarized herein.

#### **a. Whether the High Court had jurisdiction to deal with the Judicial Review application.**

45. The appellant’s contention, and which was supported by the 2<sup>nd</sup> respondent as well as the Interested Party, was that the 1<sup>st</sup> respondent had applied to be joined as a party to the proceedings before the Review Board and its application had been granted. The 1<sup>st</sup> respondent argued before the Review Board that the tender in question was awarded in contravention of the ELAA, the Constitution and the PPAD Act; and that the procurement should not proceed as the offices of the Commissioners of the IEBC had been declared vacant.
46. The Review Board dismissed the request and found that the tender was carried out procedurally and in accordance with the law. As regards the argument that the tender did not comply with the provisions of the ELAA, the Board stated:

“The Board additionally wishes to observe that in matters of election and whether the provisions of the Elections Act and the Elections Laws (Amendment) Act 2016, it is only the High Court and the Supreme Court while exercising their original jurisdiction or the Court of Appeal while entertaining an appeal from the High Court that are vested with the jurisdiction to consider such matters. The Board on the other hand is only vested with the powers to deal with procurement disputes although in doing so is bound to consider the provisions of the Constitution and any other statute in so far as the same relates to procurement.”

47. The appellant argued that the entire decision by the Board, even in finding that it did not have jurisdiction to deal with the complaint regarding the alleged breach of election laws, was subject to Judicial Review proceedings under section 175 of the PPAD Act, which requires that such proceedings be instituted within 14 days after the Board’s decision is rendered. The said period expired on





13<sup>th</sup> December, 2016 and therefore the 1<sup>st</sup> respondent's application, having been instituted on 19<sup>th</sup> December, 2016 was time barred, and the High Court had no jurisdiction to entertain it.

48. The appellant further submitted that the Board may have made a jurisdictional error in holding that it had no power to deal with some of the constitutional issues that had been raised by the 1<sup>st</sup> respondent and cited the Supreme Court decision in *Communications Commission Of Kenya & 5 others V Royal Media Services & 5 others* [2014] eKLR, where the Court held that the Board is bound by the Constitution and thus has powers to deal with all complaints raised against it.

49. Further, the appellant argued that the learned Judge, in allowing the 1<sup>st</sup> respondent to question the decision of the IEBC, went against his own stated position in *Public Procurement Administrative Review Board & Another ex parte Avante International Technology Inc* [2013] eKLR, where he held:

“The first issue for determination is whether despite the application for review made pursuant to the provisions of Section 93 of the Act it would still be upon the applicant to challenge the decision of the Commission by way of judicial review. Whereas under Section 99 of the Act it is provided that the right to request a review under this Part is in addition to any other legal remedy a person may have, it is my view that for a party who has opted to apply for review of a decision of a Procuring Entity to invoke the supervisory jurisdiction of the court challenging the decision of the said Entity subsequent to the delivery of the Board's decision, would amount to gambling with the court process and ought not to be entertained by the court.”

50. In response, the 1<sup>st</sup> respondent argued that it did not and could not have qualified to request for administrative review in terms of section 167(1) and (2) of the PPAD Act since it was neither a “candidate” nor a “tenderer”.

51. The section provides as hereunder:

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(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.”

52. Further, the 1<sup>st</sup> respondent argued that under section 175 of the PPAD Act a “person aggrieved” can only be either the person requesting the review under section 167(1) of the Act or the procuring entity; that section 175(2) confirms that the expression “a person aggrieved” can only be a person who had a commercial or business interest in the tender and who is under a duty as an aggrieved party to pay a percentage of the contract value as security fee.

53. The appellant further submitted that the issues that it raised before the High Court could not have been determined by the Board, and the Board so conceded; consequently, it was the court that was vested with jurisdiction to determine them.

54. Commenting on *Communications Commission Of Kenya & 5 others V Royal Media Services & 5 others* (supra) and *Public Procurement Administrative Review Board & Another ex parte Avante International Technology Inc* (supra), the 1<sup>st</sup> respondent submitted that the applicants in those matters



had made a request for review before the Board, unlike itself. The learned Judge had therefore not contradicted himself in so far as the latter decision is concerned.

55. Lastly, the 1<sup>st</sup> respondent supported the learned judge's finding that the remedy of judicial review is now entrenched in our Constitution in addition to the *Law Reform Act*, the *Fair Administrative Action Act* and the Civil Procedure Rules. The High Court therefore has to subject administrative actions of public officers and State organs to principles of constitutionality rather than to the doctrine of ultra vires only.

56. In determining the question whether the High Court had jurisdiction to grant the orders sought, we must bear in mind that the Supreme Court of Kenya in *Samuel Kamau Macharia V Kenya Commercial Bank & 2 others*, [2011] eKLR held that:

“A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

57. Likewise, in *Communications Commission of Kenya V Royalmedia Services LTD* (supra) the Supreme Court held that *the Constitution* of Kenya, 2010 has elevated the process of Judicial Review to a pedestal that transcends the technicalities of common law, and as a result all power of Judicial Review in Kenya is founded upon *the Constitution*, which requires Kenyan courts to go further than *Marbury V Madison* 5U.S. 137 (1803) in exercising its judicial review jurisdiction.

58. Under Article 165(6) of *the Constitution*, the High Court has

“supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function .....”. But as submitted by the appellant, the jurisdiction to be exercised by the court is dependent upon the applicable law and the matter on which the court is called upon to determine. It follows therefore that, whether the High Court has jurisdiction to hear a particular case or not is dependent upon not only the law, but also the facts and circumstances of the case.

59. In *Anisminic V Foreign Compensation Commission* [1969] 2 AC 147, Lord Reid delivered himself thus:

“It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly, meaning, I think, that, if such a provision is reasonably capable of having two meanings that meaning should be taken which preserves the ordinary jurisdiction of the court.”

60. That same view was expressed by Mulenga, JSC in *Habre International Co. Ltd V Kassam And Others* [1999] 1 E.A. 125, in the following words:

“I would caution against the tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily. Unless the legal provision in question is straight forward and clear, it would be better, in my view, to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard.

The jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly.

The interests of justice and the rule of law demand this.”



61. The 1<sup>st</sup> respondent submitted that its Judicial Review application was not in the nature of a review or appeal filed under the *Public Procurement and Asset Disposal Act*. Its contention is that it was neither “a candidate” nor “a tenderer” in terms of section 167, nor was it an aggrieved person under section 175 of the PPAD Act. On the other hand, the appellant and the 2<sup>nd</sup> respondent argued that the application, having been filed outside the 14 days period allowed for filing Judicial Review proceedings in accordance with section 175(1) of the PPAD Act, the court lacked jurisdiction to grant the orders sought.
62. The appellant, in its reply to the 1<sup>st</sup> respondent’s submissions, argued that the 1<sup>st</sup> respondent, having been admitted as an interested party in the review proceedings before the Board, qualified as a “person aggrieved” by the decision of the Board and ought to have filed its Judicial Review application within 14 days from the date of the Board’s decision.
63. Further, even in the absence of an economic interest in the Board’s decision, the 1<sup>st</sup> respondent could still file a Judicial Review application within the stipulated period of time, as long as it was an aggrieved party. The appellant’s learned counsel cited the decision of Nyamu, J. in *John Peter Mureithi & 2 others V Attorney General & 4 Others* [2006] eKLR where the learned judge cited with approval the words of Lord Denning in *A.G. (Gambia) v NJIE* [1961] 1 ALL ER 540 that:
- “The words „person aggrieved? are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busy body who is interfering in things that do not concern him but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests”.
64. However, in the above cited decision by Nyamu, J; the issue was whether the ex parte applicants were “persons directly affected” in terms of Order 53 of the Civil Procedure Rules with legal standing to institute Judicial Review proceedings seeking an order of mandamus against the respondents to implement the recommendations of the Ndung’u Report with respect to certain parcels of land in Nyeri Municipality, which they were contending had been unlawfully acquired from their clan. The court rejected the respondents’ objection that the ex parte applicants had no locus standing to institute the proceedings.
65. In our view, if the 1<sup>st</sup> respondent’s application had been filed under the provisions of PPAD Act only, simply challenging the decision by the Review Board and no more, then perhaps the 1<sup>st</sup> respondent would qualify to be referred to as an “aggrieved party”. However, the Board and IEBC acknowledged that some of the issues raised by the 1<sup>st</sup> respondent were outside the jurisdiction of the Review Board. Only the High Court was able to determine them.
66. The learned judge stated:
- “In fact the IEBC was even more emphatic that the jurisdiction of the Review Board does not extend to applying and enforcing non-procurement laws such as the Election Laws when in fact under the *Elections Act* the Election Court is the High Court and appeals therefrom lie to the Court of Appeal. Such an argument, it asserted, would be an invitation for the Review Board to usurp the powers of the High Court and thereby Act in excess of its jurisdiction.”
67. Taking into consideration the orders that the 1<sup>st</sup> respondent was urging, I am satisfied that the High Court had jurisdiction to deal with the 1<sup>st</sup> respondent’s Judicial Review application. I must therefore reject the first and second grounds of appeal.



**b. Whether the IEBC was properly constituted at the time of making the impugned award.**

68. Article 227(1) of *the Constitution* states as follows:

“ 227

- (1) When a State organ or any other public entity contracts goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.”

The mode of procurement of public goods and services has thus been given constitutional significance. That demonstrates the importance Kenyans attached to public procurement, perhaps out of the realization that huge amounts of public resources are spent in procuring goods and services.

69. The preamble to the *Public Procurement and Asset Disposal Act*, 2015 states that it is:

“ An Act of Parliament to give effect to Article 227 of *the Constitution*; to provide procedures for efficient public procurements and for assets disposal by public entities; and for connected purposes”.

Section 3 of the Act sets out the principles that guide public procurement and asset disposal by State organs and public entities. They include the national values and principles provided for under Article 10 of *the Constitution*; principles of integrity under the *Leadership and Integrity Act*, 2012; the principles of public finance under Article 201 of *the Constitution*, the values and principles of public service as provided for under Article 232; among others.

70. Under section 44 of the Act, the accounting officer of a public entity has the primary responsibility of ensuring that it complies with all the requirements of the Act. The appellant and the 2<sup>nd</sup> respondent argued that the award of the tender was a function of the accounting officer and it was not necessary for Commissioners to be in office at the time of its award; that in any event the Commissioners who had resigned were still in office as they had not been replaced.

71. The 1<sup>st</sup> respondent’s argument was that in the absence of the Commissioners, who play a critical constitutional and statutory role, the Commission was not properly constituted, and therefore the accounting officer had no power to award the impugned tender.

72. The 1<sup>st</sup> respondent submitted that in the performance of the functions and duties of office, the secretary/accounting officer is answerable and reports to the Commission. See section 10(6) of the *Independent Electoral and Boundaries Commission Act*.

73. It is not disputed that on 5<sup>th</sup> October, 2016 vide Gazette Notice No. 8113 published in the special issue of the Kenya Gazette of 6<sup>th</sup> October, 2016, the President of the Republic of Kenya declared the positions of the Chairperson and members of the Commission vacant. That public declaration was subsequent to voluntary resignation from office of the Chairperson and all the members of the Commission.

74. That notwithstanding, the IEBC submitted that there was no legal vacuum in the Commission since the Commissioners were validly in office until they were replaced. With respect, I find that argument illogical and legally unsound. Upon declaration of a vacancy in a constitutional office, how can it be argued that the former holder of that position remains validly in office until he or she is replaced? Upon tender of a notice of resignation to the appointing authority and acceptance of the resignation notice and declaration of a vacancy, the person who has so resigned cannot continue to hold that office, even



if his/her successor is yet to be appointed. If we may draw the analogy of a vacancy in the Office of President, Article 146 of *the Constitution*, states that:

- “(1) The office of President shall become vacant if the holder of the office –
- a. dies;
  - b. resigns, in writing, addressed to the Speaker of the National Assembly; or
  - c. otherwise ceases to hold office under Article 144 or 145 or under any other provision of this Constitution”.

Likewise, the term of the Deputy President comes to an end on his resignation and within fourteen days after a vacancy has arisen the president is required to nominate a person to fill the vacancy.

75. Section 33 of the Election Laws (Amendment) Act (ELAA) No. 36 of 2016 amended the Independent Elections and Boundaries Commission Act, 2011 by inserting section 7A which provides as follows:

“The office of the Chairperson or a member of the Commission shall become vacant if the holder –

- a. dies;
  - b. resigns from office by notice in writing addressed to the President; or
  - c. is removed from office under any of the circumstances specified in Article 251 and Chapter Six of *the Constitution*.
2. The President shall publish a notice of vacancy in the Gazette within seven days of the occurrence of such vacancy.
3. Whenever a vacancy arises under subsection (1), the recruitment of a new chairperson or member, under this Act, shall commence immediately after the declaration of the vacancy by the president under subsection (2).”

76. As earlier stated, the commencement date of the ELAA which, among other things, amended the IEBC Act 2011 by introducing section 7A, was 4<sup>th</sup> October, 2016. On 5<sup>th</sup> October, 2016 the president, by Gazette Notice No. 8113, published a notice of vacancy in the positions of the chairperson and six members of the Commission.

77. Section 7 (3) of the IEBC *Act No. 9 of 2011* states that “The commission shall be properly constituted notwithstanding a vacancy in its membership.” In paragraph 4 of his replying affidavit sworn on 26<sup>th</sup> December, 2016, Ezra Chiloba, the Commission secretary, deposed as follows:

- “4. The 1<sup>st</sup> Respondent is lawfully constituted and its decisions are legal and valid. There is no lacuna in the Commission. There are Commissioners of the 1<sup>st</sup> Respondent properly in office as they have not been replaced, while its secretariat is vibrant in execution of the 1<sup>st</sup> Respondent’s mandate.”

78. Can it be said that on 30<sup>th</sup> November, 2016 when the impugned procurement contract was signed the Commission was lawfully constituted when the position of the chairperson and members of the Commission had officially been declared vacant in accordance with the law? I do not think



so. Section 11A of the IEBC Act sets out the relationship between the Commissioners and the secretariat. The Chairperson and members of the Commission are responsible for the formulation of policy and strategy of the Commission and oversight. The secretariat performs day-to-day administrative functions of the Commission and implements the policies and strategies formulated by the Commission.

The secretariat cannot therefore legally function in the absence of the Chairperson and the Commissioners.

79. Whereas section 7(3) of the IEBC Act states that the Commission shall be properly constituted notwithstanding a vacancy in its membership, there is a distinction between existence of a vacancy in the Commission's membership and total absence of members of the Commission. Under section 5 of the Act, the Commission consists of a chairperson and six other members appointed in accordance with Article 250 (4) of *the Constitution* and the provisions of the Act.

80. In my view, once a holder of a constitutional office resigns and the office is declared vacant, the officer cannot lawfully remain in office and continue to discharge official functions of that position until he/she is replaced, unless the law expressly so permits. No constitutional or statutory provision was cited to us that would have enabled the Commissioners who had resigned to remain in office and continue to discharge constitutional functions as if their resignation had no legal consequences.

81. Expressing himself on the issue, the learned trial judge had this to say:

“ 182. In my view once an office is declared vacant, unless there is a transition clause that deems the holder thereof to be still in office, it would with respect amount to an aberration to contend that the person whose position is declared vacant is still in the office. In my view the declaration of vacancy has the effect of compelling the holder of the office to vacate the office unless otherwise ordered by a Court of competent jurisdiction. Once an office becomes vacant, it is in effect empty and it cannot be contended that an empty office can make decisions. It is in this respect that certain legislation make provision for appointment of persons to take charge in acting capacity. One would imagine a situation in which the Commissioners whose positions had been declared vacant would act in a manner warranting their removal if they were still in office. Would a legal process be instituted to remove them from “office” which had been declared vacant? That kind of reasoning would clearly be irrational in my view.”

I respectfully agree with the learned judge.

82. I find that there was no enabling provision in *the Constitution* to permit the Chairperson and the Commissioners, their offices having been declared vacant, to lawfully remain in office and continue discharging constitutional and statutory duties until other Commissioners are appointed.

83. As regards the argument that the accounting officer lawfully executed the impugned contract notwithstanding the Commissioners' absence from office, I am in agreement with the position taken by the High Court in *Eng. Michael Kamau & others V Ethics and Anti-corruption Commission & others* (supra) that:

“.....it is clear to us that under *the Constitution* and the legislation, the foundation of the powers of the Secretariat is the existence of the Commission. The Secretary and the Secretariat can only carry out the powers vested in their offices when the Commission is in





place exercising its powers since they implement what the Commission has resolved upon. Whereas we appreciate that the staff may, based on their areas of specialization, perform the duties for which they are appointed, to contend that they have a free hand to make binding recommendations arising from their duties without reference to the Commission, in our view would be absurd. The outcome of the tasks undertaken by the Commission's staff must be ratified by the Commissioners if they are to be deemed as the decisions of the Commission".

84. I therefore find that the Commission was not properly constituted as at 30<sup>th</sup> November, 2016 when the procurement contract in issue was executed by the Commission's secretary and accounting officer. The contract was therefore void in law. In the absence of the Chairperson and the Commissioners, the secretary acted ultra vires and the decision of the IEBC was therefore properly quashed. It matters not that the decision of the Review Board was not quashed; as long as the procurement process was unconstitutional and contra statute, the decision to award the said tender was void.
85. I now turn to consider whether there was non-compliance with ELAA and whether the said law was applied retrospectively. The 1<sup>st</sup> respondent argued that in awarding the aforesaid contract, IEBC acted unlawfully and in contravention of the ELAA by refusing to recognize the prescribed system of elections under the Act, and in particular the integrated electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.
86. It contended that the specification of result declaration form of tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre as envisaged under section 14 (1C) of the ELAA and the specification of the poll register as awarded are illegal and are not in conformity with the description of the Register of voters as stipulated under the ELAA; and will lack synergy and congruence with the use of technology for the preparation, publication and maintenance of the Register of voters; that the specifications of the ballot papers do not include security features and code bars consistent with the technology or devices to be used; and that the materials requisitioned by the IEBC cannot meet the conditions under sections 14(1)(C), 17(3) and (4) of the ELAA.
87. Further, the 1<sup>st</sup> respondent averred that there are no regulations in place for the establishment of an integrated electronic system, the use of technology and the procurement of technology necessary for the conduct of general election and for the examination, verification and deployment of technology required under section 17 of the ELAA; that political parties had not been consulted in making regulations under section 17(5) of the ELAA; and that the IEBC had not established a technical committee required under section 17(8) of an ELAA.
88. Responding to those allegations, the IEBC argued that *the Constitution* does not prescribe the use of a manual or electronic electoral system, that is left to the discretion of the Commission; that notwithstanding, it has a program for procurement of technology for the forthcoming general election in accordance with section 44 (7) (a) of the *Elections Act*, 2011 as amended as far as voter registration, identification of voters and results transmission is concerned.
89. But regarding applicability of the ELAA, the IEBC argued that the Act came into force on 4<sup>th</sup> October, 2016, a month after closing of the impugned tender for the supply and delivery of ballot papers, election results declaration forms and poll registers. The Act could not therefore be applied retrospectively.



90. Upon consideration of the views expressed by all the parties, the learned judge held that the award of the aforesaid tender ought to have taken into account the current legislative framework that had been put in place to ensure that the constitutional threshold is attained.
91. The judge's view was that "laws which are enacted with a view to facilitate an event such as the forthcoming elections, if they [are] to achieve their intended purpose ought to be interpreted as if their operationalisation was to have retrospective effect in so far as the preparations for the forthcoming elections are concerned".
92. The appellant faulted the learned judge for failing to cite specific violations of the ELAA and thereby falling short in his cardinal duty to pronounce himself on the specific provisions of the law (if any) that had been violated by the IEBC in its award of the contract.
93. As regards suitability of the materials that were to be supplied, while appreciate that they had to be in compliance with the dictates of *the Constitution* and the applicable law at the time of placing the tender, it must be borne in mind that the materials were to be supplied over the two (2) years contract period on an "as and when required" basis. That meant that the materials would be supplied only when the IEBC placed an order, stating the specifications and the standards of the materials to be supplied.
94. The IEBC would be required to ensure that the materials meet the applicable legal requirements, in particular, those of *the Constitution*, the applicable *Elections Act* and Regulations. If for example, within the contract period the election law required a different format of ballot papers from those supplied earlier, all that would be required of the procuring entity is to give the supplier the new specifications.
95. As to whether the ELAA was to be applied retrospectively, it is important to consider what the Supreme Court had to say in *Samuel Kamau Macharia & another V Kenya Commercial Bank Limited & 2 others* (supra), that:
- "As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."
96. The ELAA came into operation about a month after closure of the impugned tender. Consequently, the advertisement of the tender was based on the dictates of the old law, that is, the *Elections Act*, 2011. However, the award of the tender was on 30<sup>th</sup> November, 2016, more than a month from the commencement date of ELAA.
97. In my view, the learned judge cannot be faulted for his view that the award of the tender ought to have taken into account the current legislative framework. I do not understand the judge to have been saying that the ELAA should have been applied retrospectively; he merely stated that it was "unreasonable on the part of the IEBC to have proceeded with the contract in light of the new legal development." In other words, the award of the contract, which was post the amendments to the *Elections Act*, 2011, had to take into consideration the provisions of the ELAA, especially as regards the poll registers and use of technology.
98. Save for the aspect of unconstitutionality or illegality regarding the composition of the Commission at the time of award of the tender, all that was required of the IEBC was to ensure that the award of the tender and the specifications of the materials to be supplied was in accordance with the ELAA.
99. Finally, did public interest militate against the grant of the orders sought? I do not think so. I am in agreement with the learned judge that contravention of *the Constitution* or a statute cannot be



justified on the plea of public interest. Under Article 165(3) (d) of *the Constitution*, the determination of any question respecting the interpretation of *the Constitution*, including the determination whether any law is inconsistent with or in contravention of *the Constitution*; or whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of *the Constitution*, has to be undertaken with fidelity to the values, principles and the spirit of *the Constitution*. That includes any statutory amendment. Public interest can never override constitutionalism.

100. In conclusion, and for the reasons stated herein, I would uphold the learned judge's decision and dismiss this appeal. As Murgor, JA agrees, the final order of the Court is that this appeal is hereby dismissed. Each party shall bear its own costs of the appeal.

### **Judgment of Gatembu, JA**

101. This is an appeal from the judgment of the High Court (Odunga, J .given on 13<sup>th</sup> February 2017 quashing, by an order of certiorari, the decision of Independent Electoral and Boundaries Commission (IEBC) to award the appellant, a tender for the supply and delivery of election materials and granting IEBC liberty to restart the tender process in that regard.
102. In preparation for the General Elections scheduled for 8<sup>th</sup> August 2017 the 1st respondent, Independent Electoral and Boundaries Commission (IEBC) published an invitation on 17<sup>th</sup> August 2016 inviting bids from eligible tenderers under Tender Ref No. IEBC/01/2016-2017 for the supply and delivery of Ballot Papers for Elections, Election Result Declaration Forms and Rolls register on an "as and when required" basis for a period of two years (2016-2018). The closing date was 7<sup>th</sup> September 2016. Nine bids were received.
103. of the nine tenderers who submitted bids, Al Ghurair Printing and Publishing Company LLC, the appellant, was awarded the tender. Paarl Media (PTY) Limited which was named as the 2<sup>nd</sup> interested party in the High Court and whose bid was not successful was aggrieved. It applied to the Public Procurement Administrative Review Board, the Interested Party, (the Review Board) for review under Section 167(1) of the *Public Procurement and Asset Disposal Act*, 2015 (the Act). That was in Review Board Application No. 93 of 7<sup>th</sup> November 2016 between Paarl Media (PTY) Limited and IEBC.
104. The Coalition For Reforms and Democracy, the 1st respondent, (the 1st respondent) was joined as an interested party in the proceedings before the Review Board. After hearing the request for review, the Review Board dismissed the request in a decision given on 28<sup>th</sup> November 2016. Thereafter IEBC says it proceeded to execute a contract with the appellant on 30<sup>th</sup> November 2016.
105. On 19<sup>th</sup> December 2016, the 1st respondent moved the Judicial Review Division of the High Court at Nairobi by Chamber Summons in Misc. Application No. 637 of 2016 citing Articles of *the Constitution*, the *Elections Act*, the Election Laws (Amendment) Act, 2016 and the *Public Procurement and Asset Disposal Act*. It sought leave to apply for orders of: certiorari to quash the decision of IEBC to award the tender to the appellant; mandamus to compel IEBC to restart the tender process; and prohibition to prohibit IEBC from executing a contract with the appellant. In the same application, the 1st respondent also sought leave to apply for an order of certiorari to quash the decision of the Review Board contained in its decision or judgment delivered on 28<sup>th</sup> November 2016 in Review Board Application No. 93 of 7<sup>th</sup> November 2016 between Paarl Media (PTY) Limited and IEBC. It also sought an order that the grant of leave should operate as a stay of the award or any subsequent contract. Leave having been granted, the 1st respondent then filed its substantive motion on 20<sup>th</sup> December 2016. IEBC was named as the 1st respondent while the Review Board was named as the 2<sup>nd</sup> respondent. The appellant and Paarl Media (PTY) Limited were named as the 1<sup>st</sup> and 2<sup>nd</sup> interested parties respectively.



106. The 1st respondent’s application for judicial review was based on grounds set out in the statutory statement and verifying affidavit of the Executive Director of 1st respondent and the submissions tendered before the High Court. In a nutshell, the 1st respondent complained that the award of the tender “didnot comply with the provisions of *the Constitution*, the *Public Procurement and Asset Disposal Act* and *the Constitution* and breached the principles of natural justice, the rule of law and legal imperatives of public participation, consultations, good governance, integrity, transparency and accountability.” The complaints and arguments advanced in support of the application as well as the responses to those complaints and the counterarguments in opposition are captured in detail in the judgment of Musinga, JA and I need not repeat them here.
107. In its ground of opposition, IEBC contended that the 1st respondent’s application was an abuse of the process of the court because: it offended Section 175(1) of the Act as it was filed outside the 14 days statutory period for filing an application for judicial review of the Review Board’s decision; the decision of the Review Board had become final and binding under Section 175(1) of the Act; the contract with the appellant had already been signed and no review of the Review Board’s decision could be undertaken by dint of Section 135 and 167(4)(c) of the Act; the 1st respondent did not have capacity to apply for review not having submitted any request for review before the Review Board; public policy militated against the grant of the application; and that the procurement had been undertaken in compliance with the law.
108. After considering the application and the material and submissions presented, the High Court, (Odunga, J), delivered the impugned judgment on 13<sup>th</sup> February 2017 quashing the decision of IEBC awarding the tender to the appellant and further ordered that IEBC was at liberty to restart the tender process. The Judge however declined to grant the 1st respondent’s request for a prohibitory order or to grant any relief against the Review Board.
109. The important findings on the basis of which the court reached that decision are that: Firstly, the 1st respondent was not an  
“aggrieved person” for purposes of Section 175 of the *Public Procurement and Asset Disposal Act* and therefore, the 14 day statutory period for applying for review prescribed thereunder is not applicable to this case. Secondly, at the time of notification of the award of tender and subsequent execution of the contract in favour of the appellant, IEBC was not properly constituted, as it did not have commissioners in office. Thirdly, there was non-compliance with the Election Laws (Amendment) Act, 2016; and fourthly, the tender could not be defended on grounds of public interest, as public interest cannot justify contravention of the law.
110. Aggrieved, the appellant lodged the present appeal. During the hearing of the appeal, learned counsel Mr. Waweru Gatonye appeared with Mr. Kamau for the appellant. Also supporting the appeal were learned counsel Mr. W. A. Mutubwa for IEBC, the 2<sup>nd</sup> respondent and Ms. Joy Maina for the Review Board. Learned Senior Counsel Mr. J. Orenge, SC appeared for the 1st respondent.
111. Although the appellant raised 9 grounds of appeal, there are essentially four issues in this appeal based on the findings of the High Court to which I have referred. The first is whether the 1st respondent was bound to file the judicial review application within 14 days prescribed under Section 175 of the Act. Learned counsel approached this issue from a jurisdictional perspective and framed the question in terms of whether the court had jurisdiction to deal with the 1st respondent’s judicial review application. Undoubtedly in my view, the High Court had jurisdiction by virtue of Article 165 of *the*



- Constitution. I think the question, most respectfully, is whether the 1<sup>st</sup> respondent's application before the High Court was competent and whether the learned Judge erred in entertaining it.
112. The second issue is whether the notification of the tender and subsequent award of the contract was a nullity on account of declared vacancies in the office of commissioners of IEBC. The third issue is whether the Election Laws (Amendment) Act, 2016 was applicable retrospectively. The fourth issue is whether public interest militated against the granting of the orders given by the High Court.
  113. I begin with the question whether the application by the 1<sup>st</sup> respondent was competent and whether the learned Judge erred in entertaining it having been filed outside 14 days prescribed under Section 175 of the Act.
  114. In support of the appeal, it was contended that the 1<sup>st</sup> respondent's application was filed outside the statutory timelines; that the 1<sup>st</sup> respondent was made a party in Review Board Application No. 93 of 7<sup>th</sup> November 2016 between Paarl Media (PTY) Limited and IEBC "with all attendant rights of a party in such proceedings"; that before the Review Board, the 1<sup>st</sup> respondent urged that the tender was awarded in contravention of the Constitution, the Election Laws (Amendment) Act, 2016 and the Act and that the procurement process could not proceed at a time when the offices of commissioners of IEBC had been declared vacant; that the Review Board found the tender was carried out procedurally and in compliance with the law and dismissed the request for review; that with respect to the question whether the Elections Act and the Election Laws (Amendment) Act, 2016, the Review Board determined that "only the High Court and the Supreme Court while exercising their original jurisdiction or the Court of Appeal while entertaining and appeal from the High Court are vested with jurisdiction to consider such matters" and that the Review Board "is only vested with powers to deal with procurement disputes although in doing so the Board is bound to consider the provisions of the Constitution and any other statute in so far as the same relates to procurement." The Review Board also made a decision, counsel argued, on the question whether the tender process could proceed in the absence of Commissioners of IEBC before dismissing the request for review on 28<sup>th</sup> November 2016.
  115. Under Section 175 of the Act, the argument went, any party to the proceedings before the Review Board who is aggrieved by its decision is entitled to file a request for judicial review within 14 days after the decision of the Review Board is rendered; that having been formally enjoined in the proceedings before the Review Board, the 1<sup>st</sup> respondent became a party to those proceedings and was entitled to remedies available to it under the Act; that the 1<sup>st</sup> respondent therefore had until 13<sup>th</sup> December 2016 to apply but did not do so until 19<sup>th</sup> December 2016, some 21 days after delivery of the decision, and therefore the court did not have jurisdiction to entertain an application that was statute barred. Citing *Kimani Wanyoike vs. Electoral Commission & another* [1995] eKLR, it was submitted that where there is a clear procedure for the redress of any particular grievance prescribed by law, that procedure should be strictly followed.<sup>6</sup>
  116. Counsel faulted the Judge for taking the view that the Review Board had not made a decision with respect to the 1<sup>st</sup> respondent's complaints that were founded on the Elections Act and the Election Laws (Amendment) Act, 2016 and for concluding that the 1<sup>st</sup> respondent could not therefore be considered an aggrieved person for purposes of Section 175 of the Act.
  117. Counsel argued that a person enjoined to Review proceedings before the Review Board "cannot be a person that can be said to be left remediless by the administrative review proceedings or subsequent proceedings under the Public Procurement and Asset Disposal Act, 2015 or even by the judicial review process." It was submitted that the court did not have jurisdiction to hear and determine a request for judicial review filed outside the timelines set under Section 175 of the Public Procurement and Asset Disposal Act.





118. Counsel supporting the appeal argued that the decision of the Review Board given on 28<sup>th</sup> November 2016 became final and binding in the absence of a challenge to that decision within the prescribed timelines; that having failed to challenge the decision of the Review Board within the set timelines, it was not open to 1st respondent to move to the High Court.
119. Citing the decision of the Supreme Court in *Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others* [2014] eKLR, counsel submitted that the 1st respondent was in effect seeking to “ingeniously” “relitigate [in the High Court] an issue already determined” by the Review Board; that the issues raised by the 1st respondent before the High Court “had been heard, considered and a decision rendered” by the Review Board; and that 1st respondent was, in effect, to use the words of the Supreme Court, “seeking a different result from a different forum, rather than through the designated appellate or judicial review route.”
120. Counsel also found support in the decision of this Court in *Ethics and Anti-Corruption Commission vs. Horsebridge Networks Systems (EA) Ltd and another Civil Appeal No. 69 of 2015* to the effect that a decision of the Review Board is “final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board’s decision.” Counsel also referred to the case of *Republic vs. PPARB, Centre for Mathematics, Science and Technology in Africa and 2 others* for the holding that,
- “the timelines in the PP&DA were set for a purpose. Proceedings touching on procurement matters ought to be heard and determined without undue delay.”
121. Counsel further argued that the decision of the court was inconsistent with an earlier decision of the same court in the case of *Public Procurement Administrative Review Board and another Ex-parte Avante International Technology Inc* [2013] eKLR where the court expressed the view that it would amount to gambling for a party who has opted to apply for review of a decision of a procuring entity to then invoke the supervisory jurisdiction of the court subsequent to the decision of the Review Board.
122. It was contended that to the extent that the decision of the Review Board remains binding, and was not quashed, an absurd situation of “incoherent competition between the Review Board and the High Court” has been created as there are effectively two conflicting orders that must be obeyed.
123. In opposition, learned counsel for the 1st respondent Mr. J. A. Orengo, SC, submitted that the attack or challenge of the competence of the proceedings before the High Court was and is misplaced because the 1st respondent was neither a “candidate” or a “tenderer” under Section 167(1) and (2) of the Act and cannot therefore be a “person aggrieved” for purposes of Section 175(1) and (2) of the Act. Furthermore, an aggrieved person under that provision can only be a person with a commercial or business interest in the tender and who is under a duty to pay a percentage of the contract value as security fee.
124. Senior counsel further submitted that the determination by the learned Judge that the 1st respondent cannot be considered as a “person aggrieved” in order to warrant it invoking the provisions of Section 175 of the Act is well founded because the Review Board did not make a decision with respect to the issues relating to the *Elections Act* and the *Election Laws (Amendment) Act, 2016* and neither could the 1st respondent move the Review Board for determination of those issues.
125. Citing *East African Railways Corp vs. Anthony Sefu* [1973] EA 227; *Habre International Co. Ltd vs. Kassam and others* (1999) 1 EA among other decisions, counsel urged that no statute should be construed as to oust or restrict the jurisdiction of the superior courts in the absence of clear and





- unambiguous language to that effect and that the law must be interpreted in a manner that upholds, as opposed to divesting courts of jurisdiction.
126. Distinguishing the Supreme Court decision in *Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others* (above) from the circumstances of this case, counsel submitted that in the present appeal, the decision of the Review Board was not final on matters brought to its attention by the 1st respondent as it pronounced its incompetence and lack of jurisdiction and urged the 1st respondent to litigate in the appropriate forum; that the constitutional and legal issues could not be raised before the Review Board.
  127. The decision of the High Court in *Public Procurement Administrative Review Board and another Ex-parte Avante International Technology Inc* (above), counsel submitted, is also distinguishable in that it dealt with a situation where a party who had opted to apply for review of a decision of a procuring entity sought to invoke the supervisory jurisdiction of the court.
  128. As regards the argument that the jurisdiction of the court to order judicial review is ousted where there exists an alternative remedy, counsel submitted that the learned Judge was right in holding that the court is under a duty to examine whether the alternative remedy is efficacious and whether it provides a satisfactory answer to the litigant's grievance. In this case, counsel argued, the 1st respondent invoked several jurisdiction of the High Court in relation to judicial review and
 

“the court cannot be held in a cellular and iron clad environment”. The Judge was therefore right to hold that the 1st respondent was entitled to “commence the case before the Tribunal with the jurisdiction to hear and determine all the questions in controversy and grant all the reliefs sought and if it turns out that that Tribunal is the High Court an objection as to the availability of alternative remedy ought not to be sustained.”
  129. Senior counsel referred the Court to the impugned judgment and to the decision in *Judicial Service Commission vs. Mbalu Mutava and another* [2015] eKLR and posited that the remedy of judicial review now reposes in *the Constitution* in addition to the Law Reform Act, the Fair Administration Action Act, the Civil Procedure Rules and common law and for the grant of remedies emphasizing that the “court cannot be held in a cellular and iron clad environment”
  130. In submissions in reply to the 1st respondent's submissions, counsel for the appellant argued that quite apart from the fact that Section 167 of the Act does not oust the applicability of Section 175, the words “both parties” in Section 175 of the Act cannot be construed to mean the two disputing parties as suggested by counsel for 1st respondent or that the decision of the Review Board would only bind two parties. Counsel maintained that the 1st respondent was a person aggrieved and the statute must be read and interpreted as a whole.
  131. Having considered the rival arguments on the issue under consideration, I take the following view of the matter. It is not in doubt that following the award of Tender Ref No. IEBC/01/2016-2017 for the supply and delivery of Ballot Papers for Elections, Election Result Declaration Forms and Rolls register by IEBC to the appellant, Paarl Media (PTY) Limited, an unsuccessful tenderer applied to the Review Board, for review under Section 167(1) of the Public Procurement Act. That was done in Review Board Application No. 93 of 7<sup>th</sup> November 2016 between Paarl Media (PTY) Limited and IEBC.
  132. The Act, which is *Act No. 33 of 2015*, was enacted to give effect to Article 227 of *the Constitution* with the object of providing efficient public procurement and for asset disposal by public entities. Article 227 of *the Constitution* enjoins state organs and public entities, when procuring goods and services, to do so “in accordance with a system that is fair, equitable, transparent, competitive and cost effective.”



133. The Review Board is established under Section 27 of the Act with the mandate, under Section 28 of the Act of “reviewing, hearing and determining tendering and asset disposal disputes” in addition to any other function conferred on it by the Act or other law.
34. As already indicated, the 1st respondent applied and was joined in Review Board Application No. 93 of 7<sup>th</sup> November 2016 between Paarl Media (PTY) Limited and IEBC. Section 170 of the Act provides that the parties to a review shall be: the person who requested the review; the accounting officer of a procuring entity; the tenderer notified as successful by the procuring entity; and such other persons as the Review Board may determine. By reason of that provision, the 1<sup>st</sup> respondent was therefore a party in the proceedings before the Review Board.
135. The Review Board completed its review Application No. 93 of 7<sup>th</sup> November 2016 and rendered its decision on 28<sup>th</sup> November 2016 rejecting the review. Section 175 of the Act on “Right to judicial review to procurement” provides under subsection (1) that:
- “A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.”
136. Section 175 of the Act as a whole provides for an elaborate time bound process for escalating the dispute from the Review Board (which must complete its review within 21 days after receiving the request), to seeking judicial review to the High Court (which must be done within 14 days from the date of the decision of the Review Board); to the High Court (which has 45 days after such application to make its decision). A person aggrieved by the decision of High Court may appeal to the Court of Appeal within 7 days of the High Court decision. The Court of appeal shall make a decision within 45 days which decision shall be final.
137. The importance of the timelines is buttressed by Section 175(5), which provides that the decision of the Review Board shall be final and binding to all the parties should the High Court or the Court of Appeal fail to make a decision within the prescribed timelines.
138. Not considering itself “a person aggrieved” within Section 175 (1) of the Act, the 1st respondent did not heed the procedure or the 14-day timeline stipulated under Section 175 (1) of the Act. Rather, it invoked the jurisdiction of the High Court under Order 53 of the Civil Procedure Rules and Section 8 of the *Law Reform Act* by its application for judicial review presented to court on 19<sup>th</sup> December 2016.
139. The 1st respondent argues that it did not request for a review before the Review Board and could not have done so not being a candidate or a tenderer under Section 167 of the Act; that considering that judicial review “reposes in *the Constitution* in addition to the *Law Reform Act*, the *Fair Administrative Action Act*, the Civil Procedure Rules and the Common law” the grant of remedies “cannot be held in a cellular and iron clad environment” and “one cannot distinguish judicial review under Article 23 of the Constitution from the same jurisdiction under the *Law Reform Act*, the *Fair Administrative Action Act* and Order 53 of the Civil Procedure Rules.” The 1st respondent also says that the Review Board did not in any event pronounce itself on the grievances based on the *Elections Act* and the Election Laws (Amendment) Act and referred the same to the High Court as the appropriate forum.
140. In my view, there is nothing in the elaborate provisions under Section 175 of the Act that goes against *the Constitution* or that is inimical or likely to lessen or adversely affect or undermine the constitutional underpinning of the remedy of judicial review. Nyamu, J (as he then was) in Republic vs. Public Procurement Administrative Review Board & another Ex-parte Selex Sistemi Integrati [2008] KLR



728 opined that the elaborate provisions and ouster clauses in the then Public Procurement and Disposal Act, 2005 “were tailored to accelerate finality of public projects.”<sup>1</sup>

2. There are many decisions that recognize that tribunals and quasi-judicial organs are an integral part of our judicial system. And indeed they are.<sup>2</sup> In *Kimani Wanyoike vs. Electoral Commission & another* [1995] eKLR, this Court upheld the proposition advanced in *Speaker of the National Assembly vs. Hon. James Njenga Karume*, Civil Application No. 92 of 1992 (2008) 1KLR 425 that “wherethere is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.” Although those decisions are pre-2010 Constitution, the position has been upheld by the Supreme Court in *Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others* [2014] eKLR where the Supreme Court asserted the importance of following “the prescribed route of judicial review”.

The Supreme Court put it thus:

“We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents

141. It has been suggested that the timelines are far too ambitious. See for instance *Republic vs. Public Procurement Administrative Review Board & another Ex-parte Kleen Homes Security Services Limited* [2017] eKLR. 2. See Article 1(3)(c) and 159 of *the Constitution* for example.<sup>14</sup> instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of “issue estoppel” is meant to forestall. Issue estoppel “prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route.” [Emphasis]
142. The learned Judge (Odunga, J) had in an earlier decision taken a similar approach in *Public Procurement Administrative Review Board & another Ex-parte Avante International Technology Inc* [2013] eKLR where he stated:

“The first issue for determination is whether despite the application for review made pursuant to the provisions of section 93 of the Act it would still be open to the applicant to challenge the decision of the Commission by way of judicial review. Whereas under section 99 of the Act it is provided that the right to request a review under this part is in addition to any other legal remedy a person may have, it is my view that for a party who has opted to apply for review of a decision of a Procuring Entity to invoke the supervisory jurisdiction of the Court challenging the decision of the said Entity subsequent to the delivery of the Board's decision, would amount to gambling with the Court process and ought not to be entertained by the Court. As the decision whether or not to grant judicial review orders is an exercise of discretion, the Court ought not to grant orders where its process is being abused.” [Emphasis]

In my view, once a person is made a party to the review proceedings under Section 170 of the Act, the provisions on review in the Act apply mutatis mutandis to such person.

143. Consistently with the approach taken by the courts<sup>3</sup> in those decisions, the *Fair Administrative Action Act, Act No. 4 of 2015* that gives effect to Article 47 of *the Constitution* provides that any person who is



aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court or a subordinate court to which jurisdiction is conferred.

144. Section 9 of that Act deals with the procedure for judicial review. Section 9(1) provides that subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*. Subsections 2-5 of section 9 instructively provide:

“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court 3. See also *Mutanga Tea & Coffee Company Ltd vs. Shikara Ltd* [2015] eKLR; *Samson Chembe Vuko vs. Nelson Kilumo* [2016] eKLR; *Republic vs. Judicial Service Commission Ex parte Pareno* [2004] 1KLR203 shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.” [Emphasis]

145. Section 12 of the same statute states that the *Fair Administrative Action Act* “is in addition to and not in derogation of the general principles of common law and rules of natural justice.”

146. In my view, the 1st respondent was therefore obliged, if it was “a person aggrieved” under Section 175 of the Act to exhaust the mechanism and remedies available under the Act before invoking the jurisdiction of High Court under Article 165 of *the Constitution*, the *Law Reform Act* or under common law.

147. But was the 1st respondent “a person aggrieved” for purposes of Section 175 of the Act? The learned Judge did not think so. In his view:

“Since the Board did not make a decision with respect to the issues raised before me in these proceedings and could not do so, it is my view that the ex parte applicant cannot be termed as a “person aggrieved” in order to warrant it invoking the provisions of section 175 aforesaid. It follows that the fourteen days period stipulated under the said section could not apply to it.”

148. The learned Judge found support for that view from the pronouncement by the Review Board in its decision given on 28<sup>th</sup> November 2016 that:

“The Board additionally wishes to observe that in matters of election and whether the provisions of the *Elections Act* and the Elections laws (Amendment) Act 2016, it is only the High Court and the Supreme Court while exercising their original jurisdiction or the Court of Appeal while entertaining an appeal from the High Court that are vested with



jurisdiction to consider such matters. The Board on the other hand is only vested with the powers to deal with procurement disputes although in doing so the Board is bound to consider the provisions of *the Constitution* and any other statute in so far as the same relates to procurement."

149. I do not understand the Review Board to have been saying that it was outside its mandate to determine whether the procurement process in respect to the tender was compliant with the Election Act and the Election Laws (Amendment) Act, 2016. Neither do I understand, as was urged, that the Review Board was thereby declaring its incompetence to adjudicate on the dispute and that it thereby referred the 1st respondent to the High Court as the right forum.
150. In my view, it was within the mandate of the Review Board to determine whether the tender process was compliant with the law. The Review Board, like the Judiciary is, under Article 1(3) of *the Constitution*, duty bound to perform its functions in accordance with *the Constitution* and has a duty under Article 3 of *the Constitution* to respect, uphold and defend *the Constitution*. The Supreme Court noted as much in *Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others* (above) where the Court stated that the Review Board is bound by *the Constitution* and has powers to deal with complaints of a procurement nature relating to *the Constitution*.
151. The learned Judge did not himself have any doubt that the dispute before the Review Board and indeed before him was a procurement dispute. He framed the issue in paragraph 134 of his judgment this way:
- “ 134. I have considered the issues raised in this application. Although the parties in their submissions raised several issues, it is my view that the matter before this Court is whether the award Tender Number IEBC/01/2016 - 2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers by the IEBC to Al Ghurair Print and Publishing Company Limited of Dubai was proper.” [Emphasis]
152. The question of compliance or none compliance with the Election Act and the Election Laws (Amendment) Act, 2016 could in the circumstance of the case only have arisen in the context of that procurement dispute that the learned Judge articulately framed. I think, with respect, the Judge erred in taking the view that the 1<sup>st</sup> respondent’s application was properly before him. The difficulty with the approach taken by Judge that he was dealing with an application for judicial review outside of the framework of the Act is only too clear. He could not, given that approach, quash the decision of the Review Board. The result is an incongruous and untenable situation where the decision of the Review Board upholding the procurement process remains in place whilst the award of the tender to the appellant has been quashed.
153. For the foregoing reasons, I take the view that the proceedings initiated by the 1st respondent before the High Court were incompetent and should have been struck out. Being of that persuasion, I need not consider the other issues arising in this appeal. However, I will for purposes of completeness, make brief comments on the same as follows: On the question whether the notification of the tender and subsequent award of the contract was a nullity on account of declared vacancies in the office of commissioners of IEBC, I take the view that the Secretariat derives its mandate from the *Independent Electoral and Boundaries Commission Act*<sup>4</sup>. By the time the invitations for the tender were published on 17<sup>th</sup> August 2016, the Commissioners were in office. It has not been suggested that there was no mandate to invite the tenders. What is not clear from the material placed before the lower court is the extent of that mandate. Did such mandate extend to empowering the Secretariat to award the tender





and execute the contract? That would be a matter of evidence that was not placed before the lower court.

- a. As to whether the Election Laws (Amendment) Act, 2016 was applicable retrospectively, this is what the learned Judge said:

“In my view laws which are enacted with a view to facilitate an event such as the forthcoming elections, if they [are] to achieve their intended purpose ought to be interpreted as if their operationalization was to have retrospective effect in so far as the preparations for the forthcoming elections are concerned. This interpretation must be so due to the appreciation of

154. Under Section 10(7)(e)(i) of the *Independent Electoral and Boundaries Commission Act*, No. 9 of 2011 the Secretary is responsible for executing decisions of the Commission the fact general elections are a process as opposed to a one off event.”

155. By the time tenders were invited by IEBC on 17<sup>th</sup> August 2016 the Election Laws (Amendment) Act, 2016 was not in place. I would agree with the learned Judge to the extent that anything done by IEBC subsequent to that enactment in connection with the preparation for the forthcoming elections should be done in accordance with that statute. In that regard it is noteworthy that the tender was for the supply of the specified electoral materials

“as and when required” so that it would be incumbent upon IEBC when placing orders for materials to ensure the specifications and standards of such materials are compliant with the legal requirements in place as at the time of making such orders. Lastly, I am in agreement with the principle that public interest is served by enforcing *the Constitution*

156. The result of the foregoing is that I would allow the appeal on the ground that the 1<sup>st</sup> respondent’s application before the High Court was incompetent. I would order that each party bears its own costs of the appeal and of the lower court. As I am alone in the view I have taken, the final orders are as set out in the judgment of Musinga, JA.

### **Judgment of A. K. Murgor, JA**

157. Having had the benefit reading the comprehensive opinions of Musinga and Gatembu JJ,A, I would wish to express a further opinion on the issue of whether the High Court had jurisdiction to hear and determine the 1<sup>st</sup> respondent’s Judicial review application dated 19<sup>th</sup> December 2016, that was before it.

158. In this regard, the appellant’s argument was that, the Coalition for Reforms and Democracy, the 1<sup>st</sup> respondent, a political party, filed its Judicial review application from the decision of the Review Board on 19<sup>th</sup> December 2016, which was after the lapse of the fourteen days period specified by section 175 of the Public Procurement and Asset Disposal Act, 2015, (the PPAD Act), and for this reason, the High Court had no jurisdiction to hear it.

159. The 1<sup>st</sup> respondent’s response was that, it was not a candidate or a tenderer as defined by section 167 (1) and (2) of the PPAD Act, and so was not compelled to comply with the provisions of the Act; that notwithstanding its joinder as an interested party in the proceedings before the Review Board, did not mean that it became a person aggrieved within the meaning of the Act.

160. So as to contextualize the issue under discussion, a brief background on the genesis of the appeal which stemmed from the award of a tender to the appellant by the IEBC will be worthwhile.





161. On 18<sup>th</sup> October 2016, the Independent Electoral and Boundaries Commission (the IEBC) awarded Tender Number IEBC/01/2016-2017 for the supply and delivery of ballot Papers for Elections, Election Result Declaration Forms and Poll Registers to the appellant. Paarl (Pty) Ltd (Paarl), a tenderer, was dissatisfied with the IEBC's decision, and on 7<sup>th</sup> November 2016, sought to have it reviewed by the Public Procurement Review Board (the Review Board). Paarl cited various failings, breaches and shortcomings of the procurement process by the IEBC in awarding the tender to the appellant, as the reasons for the review, that it contended were contrary to the provisions of the PPAD Act.
162. In the course of the review proceedings, on 24<sup>th</sup> November, 2016 the Review Board invited the 1<sup>st</sup> and 2<sup>nd</sup> respondents, to participate in the proceedings as interested parties.
163. After hearing all the parties' submissions, the Review Board framed the issues for determination thus;
- i. Whether the Applicant's Request for Review is incompetent and should be struck out on the ground that the Applicant failed to deposit a refundable deposit of and not less than 10% of the contract value as provided for under the provisions of Section 167 (2) of the public Procurement and Assets Disposal Act 2015.
  - ii. Whether the Applicant's request for a review was filed out of time contrary to the provisions of Section 167 (1) Public Procurement and Assets Disposal Act 2015.
  - iii. Whether the Applicant's Request for Review offends the provisions of Section 170 of the Public Procurement Assets and Disposal Act on the ground that the Applicant failed to cite the successful bidder M/s Al Ghurair Print and Publishing Company Limited as a party to the Request for Review at the point of filing the request for Review.
  - iv. ...(missing from record)
  - v. Whether the Applicant's Request for Review was filed by a stranger and a person who lacked locus standi.
  - vi. Whether the Applicant's Request for Review is incompetent owing to the Applicant's failure to lodge a statutory statement in support of the Request for Review.
164. In its decision, the Review Board concluded that, the IEBC awarded the tender procedurally and in accordance with the law. However, on 1<sup>st</sup> respondent's concerns regarding the tender award, the Review Board observed that its powers were limited to determining procurement disputes, and therefore, the complaints concerning the *Elections Act* and the Election Laws (Amendment) Act 2016, were not within its ambit for consideration. It further stated that, these were matters for determination of the Supreme Court, and the High Court upon the invocation of their original jurisdiction, or by the Court of Appeal on a matter on appeal from the High Court.
165. The Review Board was categorical that it would restrict its decision to resolution of the dispute between Paarl and the IEBC, and expressly stated thus;
166. It is clear from the above [Section 167 (1)] provisions of the Act and the case law that the Board's mandate is to consider and resolve procurement disputes and as such, the Board can only confine itself to the resolution of procurement disputes between the candidate or a tenderer on the one hand and the procuring entity. Under the provisions of Section 170(d) of the Act, the Board can however allow the participation of third parties in the proceedings pending before it, but that participation can only be limited to making observations within the context of the grounds for Review and the reliefs sought by the Applicant who is in law the "owner" of the Request for review. The Board cannot therefore be



reasonably expected to go outside the Applicant's case as pleaded or grant any relief not sought by the Applicant or grant relief to a party other than the Applicant."

167. Section 167 (1) stipulates that administrative review under the PPAD Act is specifically limited to 'candidates' and 'tenderers. Therefore under the subject review, Paarl was the tenderer and the applicant, while the IEBC was the procuring entity. When the provision is considered in terms of the 1<sup>st</sup> respondent's case, it is evident that though admitted as an interested party to the Review Board proceedings, the 1<sup>st</sup> respondent was neither a tenderer nor a procuring entity. It could not therefore be described as an applicant for purposes of instituting or participating in the Review Board proceedings.
168. Section 175 of the PPAD Act further provides for Judicial review from a decision made by the Review Board. It stipulates that;
- (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision failure to which the decision of the Review board shall be final and binding on both parties.
  2. The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fees as shall be prescribed by the regulations."
169. It therefore follows that to be an aggrieved person, one would require to have had the status of either an applicant or a procuring entity. In this case, without the status of an applicant, I consider that the 1<sup>st</sup> respondent could not have been a party aggrieved by the decision of the Review Board, with the result that, it had no capacity within which to institute Judicial review proceedings as contemplated within the meaning of section 175 of the PPAD Act.
170. Furthermore, when the framed issues are analysed, it is apparent that they were mainly procedural in nature, and strictly confined to the dispute between Paarl and the IEBC. The issues included, inter alia, the consequences of Paarl's failure to deposit a refundable deposit of and not less than 10%; whether the request for a review was filed out of time; the failure to cite the successful bidder M/s Al Ghurair Printing and Publishing Company Limited as a party; whether the Request for Review was filed by a stranger and a person who lacked locus standi; and the competence of Paarl's Request for Review owing to the Paarl's failure to lodge a statutory statement in support of the Request for Review. Clearly, these were not issues within which the 1<sup>st</sup> respondent had the liberty to participate.
171. On the other hand, the 1<sup>st</sup> respondent's case concerned the Elections Act, the Elections Laws (Amendment) Act in as far as they concerned the tender award for the supply and delivery of election materials comprising, ballot papers for elections, election result declaration forms and poll registers to the appellant.
172. When the framed issues, and the Review Board's decision are taken into account, it is clear that they were not concerned with, and did not in any way address the 1<sup>st</sup> respondent's complaints in respect of the specifications for ballot papers for elections, election result declaration forms or the poll registers.
173. The foregoing circumstances led me to hold the respectful view that, the 1<sup>st</sup> respondent's foray into the Review Board's proceedings amounted to an unfortunate misadventure into a forum that had no mandate or jurisdiction to determine matters concerning its grievances on the application of the Constitution, the Election Act, and the Election Laws (Amendment) Act to the election material tender award. In this regard, I agree with the learned Judge when he stated thus;

Strictly speaking therefore, it was not in the spirit or text of that law that parties other than candidates or tenderers should be permitted to challenge procurement processes through the procedure provided for under the Act. To that extent I agree that persons who fall within



the category of the Applicant herein have no locus to commence proceedings before the Review Board”.

174. In effect, the 1<sup>st</sup> respondent was shut out of the Review Board proceedings, leaving it with no ability to participate in or to challenge the IEBC’s tender award under the PPAD Act. What then would be the remedy afforded to a party seeking to challenge a decision made by a public body such as the IEBC in the award of a tender?
175. After the unsuccessful attempt before the Review Board, the 1<sup>st</sup> respondent instituted judicial review proceedings against the IEBC, amongst others, pursuant to order 53 of the Civil Procedure Rules and Section 8 of the *Law Reform Act* the purpose of which was to review the IEBC’s tender award by the High Court. The application was brought under Articles 1, 38, 81, 86,88, 227, 232, and 249 of *the Constitution*, the *Elections Act*, and the Election Laws (Amendment) Act, 2016. The orders sought were;
- a. That an order of certiorari do issue quashing the decision of the first respondent to award Tender Number IEBC/01/2016-2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers to Al Ghurair Print and Publishing Company Limited;
  - b. That an order of mandamus do issue compelling the first respondent to restart the tender process in respect of Tender Number IEBC/01/2016-2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers to Al Ghurair Print and Publishing Company Limited and the same to be done in compliance with the provisions of the Public Procurement and Disposal Act and Election Laws (Amendment ) Act;
  - c. That a prohibition do issue prohibiting the first respondent from executing a contract or any transaction in respect of Tender Number IEBC/01/2016-2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers to Al Ghurair Print and Publishing Company Limited or any other company or body;
  - d. That an order of certiorari do issue quashing the decision of the second respondent contained in the decision or judgment delivered and issued by the second respondent in Application Number 93 of 7<sup>th</sup> November 2016 Paarl Media (Pty) Limited vs Independent Electoral and Boundaries commission on 28<sup>th</sup> November 2016.
176. In summary, the grounds upon which the application was made were that; the IEBC had acted unlawfully and illegally and in contravention of the Elections Laws (Amendment) Act, 2016 by refusing to recognize the electronic electoral of elections under the Act, and the integrated system that enables biometric voter registration, electronic voter identification and electronic transmission of results; had failed to ensure that the specification of result declaration forms as awarded conformed to the prescribed form of tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre; that the specification of the poll registers did not conform with the description of the Register of Voters; that the specifications of the ballot papers did not include security features and code bars consistent with the technology or devices to be used thus contravening the statutory requirements of accuracy, verifiability, accountability and transparency; had contravened the general principles for the electoral system electoral provisions of *the Constitution* of Kenya including the principles of free and fair elections that promote and achieve transparency, impartiality, neutrality, efficiency, accuracy and accountability.



177. In determining whether the 1<sup>st</sup> respondent was entitled to institute such proceedings, the learned judge observed;
- "In my view a person who would otherwise be locked out from invoking the provisions of the *Public Procurement and Asset Disposal Act* is not barred from seeking alternative remedy under other provisions of the law."
178. As stated earlier, the 1<sup>st</sup> respondent's preference was to institute Judicial review proceedings against the IEBC under order 53 of the Civil Procedure Rules. Being a coalition of political parties, and entity with a special interest in elections and their conduct, my view is that it was entitled so to do. -See *R vs Secretary for State for Foreign and Commonwealth Affairs ex p Rees-Moggs*[1994] QB 552.
179. Under Judicial review the High Court is empowered to interrogate the legality of decisions of public bodies (such as the IEBC), tribunals and subordinate courts, including bodies that exercise judicial, and quasi judicial decisions. The purpose of such a review is to correct errors of law or decisions that have been made without due regard for the procedural provisions of common law or statute.
180. In so doing, the 1<sup>st</sup> respondent sought to invoke the High Court's supervisory jurisdiction "over subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function..." as granted under Article 165 (6) of the Constitution, where the court was being called upon to determine whether the tender awarded by the IEBC to the appellant on 18<sup>th</sup> October 2016 conformed to the provisions of *the Constitution*, the *Elections Act*, and more particularly the Elections Laws (Amendment) Act. As rightly observed by the lower court, the application was concerned with IEBC's decision, and not the Review Board's decision, since the 1<sup>st</sup> respondent had clearly expressed its agreement with the Review Board's findings.
181. When the circumstances that led to the 1<sup>st</sup> respondent's application for Judicial review under order 53, particularly that, the 1<sup>st</sup> respondent was closed out of the procurement review proceedings, and was further estopped from instituting a judicial review under section 175 since it was not an aggrieved party within the meaning of the PPAD Act, are considered, I am of the view that, it's only recourse was to seek an alternative forum under another law to ventilate its grievances. As such, it was at liberty to institute Judicial review proceedings under order 53, which proceedings differed in every respect from the Judicial review contemplated under section 175 of the PPAD Act.
182. A distinction must therefore be drawn between judicial review as contemplated under section 175, which would be akin to an appeal by an applicant from the decision of the Review Board, and the Judicial review instituted by the 1<sup>st</sup> respondent as an alternative remedy under order 53. This being the case, the need to comply with the 14 days period for filing of the judicial review under section 175 of the PPAD Act did not arise, as the requirement did not apply to the 1<sup>st</sup> respondent's judicial review application instituted under order 53.
183. Accordingly, I find and hold that the 1<sup>st</sup> respondent was entitled to institute the Judicial review proceedings for the review the IEBC's tender award under order 53 of the Civil Procedure Rules, which proceedings were competent, and vested the High Court with jurisdiction to determine it.
184. That said, I am in agreement with the conclusions reached by Musinga, JA on the other issues, and having nothing further to add, I would therefore dismiss the appeal. I would order that each party bear its costs in view of the public interest element of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF APRIL, 2017.**

**D. K. MUSINGA**



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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

