



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 173 OF 2014

RICH PRODUCTIONS LIMITEDPETITIONER

VERSUS

KENYA PIPELINE COMPANY1ST RESPONDENT

PUBLIC PROCUREMENT OVERSIGHT AUTHORITY (PPOA)2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner, a limited liability company incorporated in Kenya under the provisions of the Companies Act Cap 486, has filed this petition seeking orders to stop the 1st respondent from proceeding with the tendering process for the construction of a pipeline from Mombasa to Nairobi on the basis that the process has been carried out in violation of the Constitution and the law governing the public procurement process. In the affidavit sworn in support of the petition, the petitioner describes its core business as trading and sourcing for international partners, primarily in the energy sectors.
2. In the petition dated 12th April 2014, the petitioner seeks the following orders:
 - i. ***A declaration that the Procurement Proceedings undertaken by the 1st Respondent's in relation to the proposed construction of Mombasa Nairobi Petroleum Products Pipeline including but not limited to invitation and expression of interest, evaluation and outcome of the said expression of interest, subsequent requests for proposal/tender for technical and financial bids for the proposed construction of Mombasa Nairobi Petroleum Products Pipeline are unconstitutional, illegal and irregular.***
 - ii. ***An order of certiorari do issue to bring to this Honourable Court for the purposes of being quashed the procurement proceedings undertaken by the 1st respondent in relation to the proposed construction of Mombasa Nairobi Petroleum Products Pipeline including but not limited to invitation and expression of interest, evaluation and outcome of the said expression of interest subsequent requests for proposals/tender for technical and financial bids for the***

proposed construction of Mombasa Nairobi Petroleum Products Pipeline.

iii. ***An order that fresh procurement proceedings in relation to the proposed construction of Mombasa Nairobi Petroleum Products Pipeline be commenced afresh.***

iv. ***Such other orders as this honourable court shall deem just and fit to grant.***

v. ***Costs of this suit.***

3. The petition is opposed by both the 1st and 2nd respondents. The 1st respondent is a state corporation established under the Companies Act. Its main objective is described in its pleadings as being to provide efficient, reliable, safe and cost effective means of transporting petroleum products from Mombasa to the hinterland. It has to this end constructed a pipeline network, storage and loading facilities for transportation and distribution of petroleum products. It intends to construct a new pipeline from Mombasa to Nairobi as the lifespan of the existing pipeline, which was constructed and commissioned in 1978, ended in 2003. It is to this end that the 1st respondent invited expressions of interest and proposals for construction of a new pipeline.
4. The 2nd respondent is a statutory oversight body established under the provisions of the Public Procurement and Disposal Act, 2005. It has the statutory mandate to, among other things, ensure that procurement procedures under the Act are complied with.

The Petitioner's Case

5. The petitioner is aggrieved that the 1st respondent has invited separate financial and technical bids for the pipeline project. It contends that inviting such bids separately fundamentally deviates from the Expression of Interest (EOI) documents it had initially issued and is unlawful as it contravenes section 64 of the Act. It contends that the approach is unfair and discriminates against bidders or contractors who were either unsuccessful in the EO1 stage or were hindered from applying due to the onerous financial requirements.
6. It accuses the 1st respondent of discriminatory application of procurement procedures in a manner deliberately intended to exclude the petitioner and otherwise qualified contractors from participating in the tender, thus violating the provisions of Article 10, 27 and 227 of the Constitution which require entities, in contracting for goods and services, to ensure that they do so in a manner that is fair, equitable, transparent, competitive and cost-effective.
7. Learned Counsel, Mr. Sagana, presented the petitioner's case. He relied on the affidavit sworn in support of the petition by Ms. **Catherine N. Macharia** a Director of the petitioner, on 14th April 2014 and submissions dated 28th April 2014.
8. In the said affidavit, Ms. Macharia makes various depositions with regard to the factual situation leading to the present petition. She states that on or about 16th January 2013, the 1st respondent advertised for expression of interest (EO1) for prequalification of contractors for the proposed Mombasa – Nairobi Petroleum Products Pipeline Tender No SU/QT/032N/13; that desirous of participating in the EO1, the petitioner entered into a consortium with a company known as Stallion Gulf Limited.
9. According to the petitioner, the consortium was, however, unable to tender due to the onerous financial requirements imposed by the 1st respondent. Ms. Macharia deposes that among the mandatory requirements in the EO1 were, under clause 1.2 (b)(ii) on financial capability, a requirement for an undertaking to arrange for credible loan facility from reputable financial institution upto a maximum of 70% of the project cost without anticipating a sovereign guarantee. This financial capability requirement was assigned a score of 25% out of a minimum score of 70% in the evaluation criteria contained in the EO1 documents. The petitioner was therefore prohibited from submitting its bid as only prequalified contractors were invited to submit bids for

construction of the project.

10. The petitioner avers that it recently established that the outcome of the EO1 was the subject of various complaints to the 2nd respondent on the fairness and integrity of the procurement process applied by the 1st respondent; that the 1st respondent specifically conducted the tender to ensure specific candidates did not qualify for short listing, which resulted in the lodging of complaints with the 2nd respondent.
11. The petitioner relied in this regard on a letter dated 14th June 2013 in which the Director General of the 2nd respondent indicates that in his opinion, the procurement was not evaluated in strict adherence to the requirements set out in the bid document and procurement law and directed that the procurement be undertaken in accordance with the Public Procurement and Disposal Act and the Regulations made thereunder.
12. Ms. Macharia avers that it was anticipated that due to the concerns raised by the 2nd respondent, the 1st respondent would restart the process so that all bidders are treated equally and fairly in accordance with the Constitution and the said Act; that instead of addressing the 2nd respondent's concerns, and in a complete departure from the requirements of the EO1 documents, the 1st respondent invited Tenders for Financing of Line One (Mombasa – Nairobi) replacement project – SU/QT/132N/14 which were to be submitted on or before 11th March 2014; and that it also separately requested for Technical and Financial Proposals for the Construction of Mombasa – Nairobi Petroleum Pipeline to prequalified bidders only, due for submission by 17th April 2014.
13. The petitioner contends that it will suffer serious prejudice if the orders sought in this petition are not granted as it will be excluded from participating in the procurement process.
14. In his submissions on behalf of the petitioner, Mr Sagana reiterated the above averments. He pointed out that parties interested in the project had to submit audited accounts for the previous five years with a financial capability of not less than US\$500m and give an undertaking from a reputable financial company of not less than 70% of the cost and a tax compliance certificate.; that while only 13 companies were prequalified, the 1st respondent changed the requirements after pre-qualification.
15. Mr. Sagana submitted that the petitioner was happy with the requirements of the EO1 but is unhappy that they were changed after locking out the petitioner and others. He cited as evidence of the change two letters from the 2nd respondent dated 14th June and 23rd August 2013; a letter from the 1st respondent dated 30th August 2013; as well as the invitation to tender for the financing of the project by the 1st respondent. It was his submission that the fresh bid will give undue advantage to the 13 prequalified companies to the disadvantage of the petitioner; that the petitioner would have put in its bid if the financial qualifications were not so onerous; that it had the technical but not the financial capacity and should not have been excluded through the onerous requirements; and that the 1st respondent was obliged by Article 227 to stick to what it had initially tendered for.
16. To the respondent's contention that the petitioner is a briefcase company, it was the petitioner's submission that the Court was not required to determine whether the petitioner could have qualified or not, but whether there was material deviation to the exclusion of the petitioner and others.
17. With regard to jurisdiction, the petitioner submitted that it could not have made its claim before the 2nd respondent as it was not a candidate for pre-qualification since it did not tender due to the high financial requirements; and that it could only approach the Court by way of petition. This was in accordance with section 93 of the Act which deals with the jurisdiction of the Public

Procurement and Disposal Oversight Authority (PPOA) by providing that a candidate can go before the Authority and defines a candidate as one who submitted a bid. The petitioner therefore asked the Court to grant the orders sought in the petition so that the procurement process for the pipeline project could start afresh and be conducted in accordance with the procurement law and the Constitution.

The 1st Respondent's Case

18. The 1st respondent made four main arguments against the petition. The first was that the petitioner had not exhibited a resolution authorising the filing of the suit, and the petition was therefore incompetent. Counsel relied on the decision of the Court in **East African Portland Cement –vs- Capital Market Authority & 4 Others[2014]eKLR** for the proposition that a suit by a company must have the authority of the Board of directors and a resolution to that effect.
19. Secondly, it was the 1st respondent's case that the petitioner was guilty of material non-disclosure; that the petitioner had only presented such material before the Court as suited its purposes while withholding material information from the Court; that the 2nd respondent had been receiving anonymous complaints with regard to the tender leading to the exchange of correspondence between the respondents on the alleged irregularities in the process, none of which concerned the petitioner; that all the concerns of the 2nd respondent were addressed; and the 2nd respondent gave the green light for the 1st respondent to proceed with the project by its letter dated 7th October 2013, but that the petitioner had only presented to the Court such letters as showed the complaints with regard to the process but not the ones showing that the issues had been addressed and resolved.
20. It contended therefore that the petition, which oscillates between an action by a citizen seeking to safeguard the public interest and a bidder with a financial interest, was couched in a manner intended to deceive the Court into thinking that the 1st respondent had violated the Constitution and the law.
21. Thirdly, it was the 1st respondent's case that it had complied with both the Constitution and the law on public procurement and been allowed to proceed with the tender process by the 2nd respondent.
22. The fourth limb of the 1st respondent's case is that the petitioner which the 1st respondent refers to as a briefcase company, has no capacity to tender for the project and could not qualify even were the tender process to be stopped. Counsel contended that it was a company that specializes in film production; that it was incorporated in 1998 and has filed no returns since its incorporation; and has a share capital of Kshs 100,000 while the project is worth between Kshs50-60billion.
23. Further, that even had it entered into a consortium, as alleged, with a company known as Stallion Guilt Limited, the information available from Stallion Guilt Limited's website indicated that it belongs to a Winnie Mugweru and Martin Mugweru, and there was no indication that it ever constructed a pipeline. It was the 1st respondent's further contention that no consortium agreement had been produced in evidence.
24. The 1st respondent contended further that there was no evidence that the petitioner ever obtained the tender documents; that the intention behind the EOI was to weed out serious tenderers from those without the capacity to perform; and that the petitioner and its alleged partner could not have met the qualifications as they had never constructed a pipeline.
25. The 1st respondent submitted that the end of life of the current pipeline from Mombasa to Nairobi is mid-2014; that the petitioner had had time since 16th January 2013, when it was allegedly excluded from participation in the EOI due to the onerous conditions, yet it was approaching the Court over one and a half years later. It was the 1st respondent's contention that the petitioner

could not in any event have qualified for the contract when compared against the massive experience of the 13 pre-qualified companies.

26. Mr. Murgor submitted that Article 227 of the Constitution and the Public Procurement and Disposal Act provide a comprehensive procedure for challenging procurements by public entities; that the Public Procurement Oversight Authority has the jurisdiction to terminate a procedure; and there was time before the signing of the contract for the petitioner to challenge the process before the appropriate forum.

27. The respondent took the position that this matter was therefore improperly before the Court; that the petitioner had conceded that as it had not tendered, it had no right to file a matter before the PPOA; that filing this petition before this Court was an abuse of process and the petition should be dismissed.

The 2nd Respondent's Case

28. Like the 1st respondent, the 2nd respondent opposed the petition, observing that no orders were sought against it, and prayed that the petition be dismissed with costs.

29. In the affidavit sworn by Mr. Maurice Juma, the Director General of the 2nd respondent, it states that it is an oversight authority established under the Public Procurement and Disposal Act, 2005 with the mandate to, among other things, ensure that procurement procedures established under the Act are complied with; and that it has the power, through the office of the Director General, to call for and inspect the records or accounts of any procuring entity in order to ensure compliance with the provisions of the Act.

30. According to the 2nd respondent, it received an anonymous complaint regarding the procurement the subject of this petition; that it commenced an assessment of the procurement process and raised with the 1st respondent several queries which the 1st respondent responded to; and that it advised the 1st respondent to ensure compliance. Consequently, there are no pending queries between the respondents over the procurement.

31. Counsel for the 2nd respondent, Mr. Moimbo, submitted that all the queries raised over the subject of this petition were satisfactorily answered by the 1st respondent, culminating in a consensus that the tendering should proceed; that the allegation that the 2nd respondent had not sanctioned the tendering process was not true, and the petition should not have been filed at all and ought to be dismissed. He submitted further that even if the tendering process was to restart, the petitioner would not meet the financial requirements.

Issues for Determination

32. The petitioner complains about various aspects of the tendering process for the Mombasa-Nairobi pipeline by the 1st respondent. It acknowledges that it did not submit an expression of interest and therefore did not tender for the construction of the pipeline as it did not meet the financial requirements of the tender.

33. The core of its claim, as I understand it, is that because the 1st respondent has, subsequent to the EO1, invited separate financial and technical bids for the pipeline, it has deviated from the EO1 documents. It is the petitioner's contention that because of this deviation, the actions of the 1st respondent are unlawful as they contravene section 64 of the Public Procurement and Disposal Act; are unfair and discriminatory and in violation of Article 27 of the Constitution, as well as Articles 10 and 227. This is because bidders or contractors who were unsuccessful at the EO1 stage or did not apply due to the onerous financial requirements cannot now participate in the separate technical and financial bids; and that therefore the acts of the 1st respondent favour the 13

pre-qualified bidders.

34. The response from the 1st and 2nd respondent is that the petition is incompetent for having been filed without authority; that there was material non-disclosure by the petitioner; that there was no violation of the right to non-discrimination as alleged; and that the procurement process was in accordance with the requirements of the Public Procurement and Disposal Act.
35. In considering the petitioner's claims in this matter, I shall do so by evaluating the material presented before me against the above provisions of law in order to respond to following two main issues:
- i. *Whether a violation of the provisions of Articles 10, 27 and 227 of the Constitution has been disclosed.*
 - ii. *Whether this Court has the jurisdiction to deal with the issues raised in the present petition;*

Undisputed Facts

36. Before addressing my mind to the above issues, I believe it is necessary to set out what is common ground between the parties in view of the undisputed facts in the pleadings before me. These undisputed facts emerge from the averments of the parties, particularly the affidavit of **Gloria Robai Khalifa** sworn on 19th April 2014. The contents of Ms. Khalifa's affidavit were not controverted by the petitioner. Indeed, during the hearing of this matter, Counsel for the petitioner relied substantially on the 1st respondent's documentation contained in the said affidavit in presenting the petitioner's case.
37. First, it is undisputed that the 1st respondent advertised the tender as an expression of interest (EOI) for construction of the proposed Mombasa-Nairobi Petroleum Products Pipeline project in local dailies on Wednesday, 16th January 2013. The EOI closed on 28th February 2013. Forty EOI were received and evaluated, and thirteen firms were shortlisted to proceed to the next stage.
38. However, on 25th April 2013, the 1st respondent received a letter dated 24th April 2013 from the 2nd respondent regarding allegations of irregularities in the processing of the tender. The 2nd respondent sought a detailed account and documents relating to the procurement process.
39. From the documents annexed to the 1st respondent's affidavit, it appears that the 1st respondent stopped the procurement process to enable the 2nd respondent carry out its review; that it received a letter from the 2nd respondent dated 14th June 2013 and 23rd August 2013, highlighting the areas that required clarification; that it responded by letters dated 24th June and 30th August 2013 on the issues raised by the 2nd respondent; that it further wrote to the 2nd respondent on 3rd October 2013 requesting for authority to proceed with the tender process; and that the 2nd respondent, in its letter dated 9th October 2013, raised no further queries with regard to the tender process but gave the 1st respondent the go ahead to proceed.
40. The 1st respondent has also set out in some detail the history behind the present dispute and the necessity for a tender for the construction of the pipeline. According to Ms. Khalifa, the existing Nairobi Mombasa pipeline was constructed and commissioned in 1978, with a design lifespan of 25 years, which ended in 2003. As a result, the cost of maintaining the pipeline has become extremely high; and there have been numerous pipe bursts with the latest reported on Wednesday, 10th July 2013. The 1st respondent therefore intends to construct and commission a new multi-product pipeline alongside the existing pipeline from Mombasa to Nairobi, to cover a distance of 450 kilometres.
41. The 1st respondent also sets out in the said affidavit the tasks which the successful contractor is expected to undertake with regard to the construction of the new pipeline. It has also elaborated

- what it required from those submitting their EOI. The requirements included proof of relevant experience in similar assignments in the last ten years; audited accounts for the last five years to demonstrate financial capability for undertaking such projects; demonstration of necessary qualifications, capability, experience, resources, equipment and facilities necessary to render the services; as well as the legal capacity to enter into a contract for the provision of the services.
42. In addition, they were required to provide proof that they had relevant experience in the construction of petroleum products cross country pipelines, pump stations, and related ancillary works in the last ten years; and had satisfactorily constructed and commissioned at least two petroleum products cross country pipelines and related engineering works. The purpose of the EOI was to weed out what the 1st respondent refers to as briefcase contractors and middlemen who did not have the capacity to carry out the works required but whose participation in the process was likely to lead to wastage of public resources.
43. The petitioner has not disputed that it did not have the requisite experience or financial capability to tender for construction of the pipeline. Indeed, it has not disputed the contentions by the 1st respondent that it is guilty of non-disclosure of material facts in its pleadings.
44. Among the matters that it is accused of failing to disclose are that it is a dormant or briefcase company which has never filed annual returns from the date of its incorporation, and was thus in violation of the provisions of the Companies Act; that it was therefore incapable of meeting basic requirements under the EO1; that it is not a construction contractor nor is it specialised in building cross country petroleum products pipelines, its core business being, inter alia, according to its memorandum of association, to carry on the business of production of television and radio programmes, educating and entertaining the public through television programmes, photography, motion picture renters and activities related to the film industry.
45. Further, it did not disclose that Stallion Gulf Limited, the company which the petitioner alleges it had entered into a consortium with for the purpose of tendering for the construction of the pipeline, is a local company initially registered as a partnership on 3rd June 2008 and incorporated in January 2010. It did not, also, disclose that the core business of Stallion Gulf Limited, according to information on its website, is **“distribution of petroleum products within the markets...”** Consequently, the 1st respondent’s contention that the petitioner and its alleged partner in the consortium are completely incapable of fulfilling the requirements under the EO1 with regard to relevant experience, financial capability availability of resources and legal requirements has not been challenged.
46. It is also undisputed that the petitioner did not raise any issue after the evaluation of the EOI and notification of the prequalified parties by the 1st respondent. It appears, however, to have subsequently obtained access to correspondence between the respondents- according to the 1st respondent, through some unlawful means-relating to allegations made against the tender process. It is these documents which form the basis of the petitioner’s claim.
47. According to the 1st respondent, the petitioner “plucked out selective correspondence” to create the false impression that the 1st respondent was acting contrary to the Constitution and the Public Procurement and Disposal Act; and that it has deliberately withheld the correspondence that proves that the concerns of the 2nd respondent were addressed after which it cleared the 1st respondent to proceed with the procurement process. The 1st respondent denies contravention of section 64 of the Public Procurement and Disposals Act.

Analysis and Determination

48. While conceding that it had not submitted an EOI, and that it is not dissatisfied with the conditions imposed in the EOI, the petitioner now complains that the process followed by the 1st respondent

is discriminatory and a violation of Articles 10, 27 and 227 of the Constitution.

49. Article 10 contains the national values and principles of governance. It states as follows:

“(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

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

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

b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

c. good governance, integrity, transparency and accountability; and

(d) sustainable development.”

50. Article 27 contains the non-discrimination provisions of the Bill of Rights. Sub-article 1, 2, and 4, which I believe are relevant to the present proceedings, are in the following terms:

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3)....

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

51. The question is whether the facts before the Court as set out above demonstrate violation of either Article 10 or 27. It is not disputed that the petitioner could not meet the requirements of the EOI. Consequently, it did not submit an EOI for consideration. It claims that it could have qualified if the 1st respondent had issued separate financial and technical bids as it has now done, as the petitioner could have tendered with Stallion Gulf Limited with which it had entered into a consortium.

52. I must remind myself at this stage that it is not the mandate of this Court to delve into an inquiry into whether or not any of the parties who submitted their EOI to the 1st respondent had the requisite technical or financial capacity to do so. That, as I will demonstrate later in this judgment, falls within the mandate of the 1st respondent in evaluating the tender; and of the 2nd respondent in the event that a tenderer is dissatisfied with the outcome of the process. I must, however, in determining whether there was a violation of the rights of the petitioner, or of the Constitution and the law as alleged, address my mind to the facts placed before me.

53. From the evidence, it is apparent that it would not have been possible, either for the petitioner alone or with its consortium partner, to qualify even had the separate financial and technical requirements been included in the EOI. That neither the petitioner nor Stallion Gulf Limited had any experience in construction of pipelines was not disputed, nor is it disputed that their core business did not include construction of pipelines.
54. Indeed, the petitioner tacitly acknowledged this. In his submissions before the Court, Counsel for the petitioner took the view that what the Court should consider is not whether the petitioner had qualified or not; rather, the Court should consider whether the 1st respondent, by requesting for separate financial and technical bids, was being unfair to other tenderers and giving an advantage to the thirteen pre-qualified tenderers.
55. This is a submission that I must respectfully dismiss. As this is a constitutional petition, the petitioner has an obligation, as is now well established, to show what provisions of the Constitution have been violated, and how these provisions have been violated, with regard to it. See **Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012.**
56. The petitioner did not submit an EOI. It is not a company that would have qualified under the EOI, nor could it have done so, from the evidence, even had it been able to show that it had entered into a consortium with the said Stallion Gulf Limited. Like the petitioner, this company, incorporated in 2010, did not have the requisite experience or financial capability to undertake the task at hand. Thus, as earlier stated, the invitation for separate financial and technical bids could not have made any difference to the petitioner. I can therefore find no violation of Articles 10 and 27 with respect to the petitioner.
57. The petitioner has argued that it has the locus to bring this petition, and that the Court has jurisdiction to entertain it, on the basis of Articles 23, 258 and 259 of the Constitution as read with Article 165 of the Constitution. It may indeed be argued that the petitioner was entitled to bring this petition under Article 22 on behalf of others who may well have qualified for the tender. However, Article 22 (2) provides that

“In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- a. ***a person acting on behalf of another person who cannot act in their own name***; (Emphasis added)
58. Assuming that there were tenderers or companies which had submitted expressions of interest, who were disqualified at that stage, and who may be aggrieved by the subsequent call for separate financial and technical tenders, it has not been shown why they have not lodged a claim against the 1st respondent in their own name, or applied to be enjoined in these proceedings as interested parties.

Jurisdiction

59. The answer to that, perhaps, goes to the question of the Court’s jurisdiction to entertain the present petition. The petitioner has alleged violation of the provisions of Article 227, the relevant provisions of which state that:

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

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the

following—

(a) categories of preference in the allocation of contracts;

(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;

(c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; ...”

60. It is, I believe, common ground that the legislation that meets the requirements of this constitutional provision is the Public Procurement and Disposal Act, 2005. It is also common ground that the 2nd respondent has the mandate, under the Act, to adjudicate over disputes pertaining to procurement by public entities. The question is whether a party, who has not participated in the tendering process and is therefore disqualified from lodging a claim under the Act, can bypass the provisions of the Act with regard to disputes and approach this Court by way of a constitutional petition such as is presently before me.

61. It is now well settled that where the Constitution or an Act of Parliament establishes a mechanism for resolution of disputes, that mechanism ought to be strictly followed, a principle that has been re-emphasised in a long line of cases including, to name but a few, **The Speaker of The National Assembly -vs- The Hon James Njenga Karume, Civil Application No 92 of 1992 (Unreported), Kipkalya Kiprono Kones -vs- Republic & Another ex-parte Kimani Wanyoike & 4 Others, (2008) 3 KLR (EP) 291, -vs- Electoral Commission of Kenya (No. 2) (2008) 2 KLR (EP) 43, Francis Gitau Parsimei -vs- National Alliance Party and Another Nairobi Petition No. 356 of 2012 [2012]eKLR.**

62. With regard to the dispute now before me, the Public Procurement and Disposal Act has set out the process for resolution of disputes arising out of public procurement processes. Section 93 thereof provides that:

“Subject to the provisions of this Part, any candidate 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 in such manner as may be prescribed.”

63. The term “*candidate*” is defined in the definitions section contained in section 3 of the Act to mean “*a person who has submitted a tender to a procuring entity*”.

64. The petitioner concedes that it did not submit an EOI as it did not qualify. It was not, therefore, a “*candidate*” which could lodge a complaint with the 2nd respondent; and it is for this reason that it has lodged the present constitutional petition. The question is whether a party which has not participated in a procurement process should be permitted to then come to Court alleging anomalies in a procurement process which the Public Procurement Oversight Authority, the body in which the law has vested jurisdiction in such matters, has given a clean bill of health. In my view, the answer must be in the negative.

65. The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects which I need not go into here. Suffice to say that it cannot exercise such jurisdiction in circumstances where the parties before it seek to avoid the mechanisms and processes provided by law, and convert the issue in dispute into a constitutional issue when it is not.

66. The petitioner has also premised its case on the jurisdiction of the Court under Articles 165(3)(d) (ii) and 258 of the Constitution, arguing that the Court has jurisdiction to determine ***“the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.”***
67. It is indeed true that the Constitution gives the High Court wide jurisdiction to determine whether any acts said to be done under the authority of the Constitution have been done in violation of the Constitution. However, it is not enough for the petitioner to allege violation of the Constitution. It must go further and demonstrate in what respect there has been a violation of the Constitution.
68. I have not heard any demonstration of the unconstitutionality of the acts of the 1st respondent. It appears to have complied with the requirements of the Public Procurement and Disposal Act, and to have answered satisfactorily the concerns of the institution charged with the mandate to oversee public procurement. More importantly, it cannot be open to a party which has not participated in a procurement process to then lodge a constitutional reference that in effect asks the Court to enter into the mandate of the 2nd respondent at the behest of a party that has not qualified under the provisions of the relevant statute.
69. This would result in undermining institutions such as the 2nd respondent which are established by law, and it would be contrary to the express provisions of the Constitution at Article 159 which enjoin the Court, in the exercise of judicial authority, to promote alternative forms of dispute resolution.
70. For the above reasons, I am unable to find any merit in the present petition. It is therefore dismissed with costs to the respondents.

Dated, Signed and Delivered at Nairobi this 19th day of June 2014

MUMBI NGUGI

JUDGE

Mr. Sagana instructed by the firm of Sagana, Biriq & Co. Advocates for the Petitioner

Mr. Murgor instructed by the firm of Murgor & Murgor & C. Advocates for the 1st Respondent

Mr. Moimbo instructed by the State Law Office for the 2nd Respondent