



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 237 OF 2018**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLES 10, 19, 20, 22, 23, 47, 201(A), 227(A) AND 258 OF THE CONSTITUTION OF THE  
REPUBLIC OF KENYA**

**AND IN THE MATTER OF: CONTRAVENTION OF ARTICLE 201(A) AND 227(A) OF THE CONSTITUTION OF  
KENYA**

**BETWEEN**

**PHILIP NYANDIEKA (SUING ON HIS OWN BEHALF AND**

**ON BEHALF OF THE GENERAL PUBLIC).....PETITIONER**

**AND**

**NATIONAL GOVERNMENT**

**CDF-BOMACHOGE BORABU CONSTITUENCY.....RESPONDENT**

**JUDGMENT**

1. The petitioner herein, who describes himself as a male adult and a resident of Nairobi, moved this Honorable Court vide petition dated 2<sup>nd</sup> July 2018 seeking the following orders:

*i. That this Honorable Court be pleased to cancel the National Government CDF Bomachoge Borabu Tender Nos. NGCDF/BOMBOR/KYY/01/17-18 to NGCDF/BOMBOR/KYY/12/17-18.*

*ii. That this Honorable Court do direct the Respondent to retender in accordance with the Constitution of Kenya, 2010 and the law.*

*iii. Costs of this petition.*

**PETITIONER'S CASE**

2. The Petitioner's case is contained in the petition dated 2<sup>nd</sup> July 2018, the Petitioner's Verifying Affidavit dated 2<sup>nd</sup> July 2018, Supplementary affidavit and written submissions dated 27<sup>th</sup> July 2018. The petitioner's case was further highlighted through the oral submissions made by his counsel during the hearing of the petition.

3. The petitioner's case is that the said tender nos. NGCDF/BOMBOR/KYY/01/17-18 to NGCDF/BOMBOR/KYY/12/17-18 contravene the provisions of sections 53(3) of the Public Procurement and Asset Disposal Act (PPDA) No. 33 of 2015 (hereinafter "**the Act**") which requires that a minimum of 30% of tenders be reserved for women, youth, persons with disabilities and other disadvantaged groups. The Petitioner states that according to the Respondent's annexure marked **BOK1**, only 9% of the budgetary allocation for the 22 tenders tabled by the Respondent caters for the groups of women, persons with disabilities and youth.

4. The petitioner contends that tender nos. NGCDF/BOMBOR/KYY/01/17-18 to NGCDF/BOMBOR/KYY/12/17-18 contravene the provisions of Article 201(a) of the Constitution of Kenya 2010 and section 53(3) of the National Government Constituency Fund Act, 2015 on openness, accountability and public participation. It is averred that the documents annexed to the Respondent's replying affidavit and marked as **BOK2** do not show if any notice was ever given to the public for the meeting of 1<sup>st</sup> December 2017 which gave rise to the attached minutes and further, that the tender was advertised in contravention of Article 227 (a) of the Constitution of Kenya 2010 in that the projects are not fairly and equitably distributed amongst the four wards of Bomachoge Borabu Constituency.

### **The Respondent's Case**

5. The Respondent's case is contained in the Replying Affidavit of Benard Otieno Konya filed on 18<sup>th</sup> July 2018, the written submissions filed on 31<sup>st</sup> July 2018, and oral submissions made on their behalf by their Counsel.

6. The Respondent raised a preliminary objection on the jurisdiction of this court to entertain the matter and argued that the suit contravenes the provisions of section 175 of the Public Procurement and Asset Disposal Act which provides that a person aggrieved by a decision made by the Review Board should seek judicial review by the High Court within fourteen days from the date of the Review Board's decision. According to the respondent, the petitioner therefore ought to have filed a Judicial Review application as opposed to the instant petition which, it contends, is incompetent and ought to be dismissed.

7. Counsel for the Respondent also relied on the provisions of the Fair Administrative Actions Act, particularly section 9 thereof which stipulates that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to the High Court or a subordinate court to which original jurisdiction is conferred. Counsel cited subsections 2-5 of section 9 which requires an aggrieved person to exhaust available dispute resolution mechanisms including internal mechanisms for appeal or review and all other remedies available under any other written law before approaching the High Court or relevant subordinate Court.

8. Reliance was further placed on section 56 (particularly 56(3)) of the National Government Constituency Development Fund Act, 2015, which states that complaints and disputes by persons arising due to the administration of the Act shall be forwarded to the Constituency Development Fund Board in the first instance.

9. It is contended that the instant Petition is premature and does not raise any violations of the Constitution by the Respondent. The respondent further contends that the applicant's averments are not supported by any documents and that the petition is therefore based on mere allegations intended to frustrate the Respondent in executing its mandate to the people of Bomachoge Borabu Constituency.

10. On public participation, Counsel for the Respondent submitted that public participation was conducted within the Constituency. Towards this end, the Respondent attached annexure **BOK-2**, which constitutes a notice inviting the public to the consultative meeting and the minutes emanating from the said meeting. It was submitted that the averment by the petitioner that public participation did not take place is not supported by any evidence and further that the evidence in the supplementary affidavit filed by the petitioner lacks probative value. Counsel cited the decision of the East African Court of Appeal in **Life Insurance Corporation of India v Panesar [1967] EA 614** wherein the Court discussed the use of affidavits in application and simple matters.

11. On the question of equitable distribution of resources and reservation of slots for women, youth, persons with disabilities and other disadvantaged groups, it was submitted that the Respondent complied with the provisions of the Constitution and the Act.

Counsel cited Articles 201, 227 (1) and 227(2) of the Constitution and section 53 of the Act. It is contended that the petitioner has not demonstrated how the Respondent failed to adhere to the equitable distribution of resources among the four wards. It was averred that the wards and the population vary in size and it was therefore unreasonable to argue that a certain ward is marginalized because it has a bigger population, compared to the other that cover a vast area. Counsel submitted that the alleged inequality raised by the petitioner was not raised during the public participation.

12. Respondent countered the Petitioner's allegations through annexure **BOK-1**, which was defined as a copy of the Respondent's Annual Procurement Plan for the 2017/2018 financial year. The Respondent stated that the said annual plan showed that there was compliance with Section 53(6) of the Act, which provides that all procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.

## **DETERMINATION**

13. I have considered the pleadings filed herein, the parties' respective submissions together with the law and the authorities that they cited. I note that the following issues arise for determination:

- a) Whether this court has the jurisdiction to hear and determine the petition.
- b) Whether the respondent's actions violated the petitioner's constitutional rights.
- c) Whether there was equitable distribution of resources and reservation for women, youth, persons with disabilities and other disadvantaged groups

### **Jurisdiction**

14. The Respondent raised a preliminary objection touching on the jurisdiction of this Court in the context of the instant petition and the doctrine of exhaustion of remedies.

In the oft cited case of **The Owners of Motor Vessel "Lillian "s" Vs. Caltex Oil Kenya Ltd [1978] KLR 1**, at page 14 the Court of Appeal opined as follows:-

***"Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."***

15. The first point of law in support of the preliminary objection is Section 175 of the Public Procurement and Asset Disposal Act ("the Act") which provides that a person aggrieved by a decision made by the Review Board should seek judicial review by the High Court within fourteen days from the date of the Review Board's decision. It was argued that the petitioner ought to have filed a Judicial Review application as opposed to the instant petition, which in the circumstances, renders the petition incompetent thus fit for dismissal.

16. The documentation availed before this court shows that petitioner lodged an application for review before the Public procurement Administrative Review Board being application No. 78/2018 challenging the decision of the National Government CDF Bomachoge Borabu Constituency in the matter of Tenders Nos. NGCDF/BOMBOR/KYY/01/17-18 to NGCDF/BOMBOR/KYY/12/17-18. The said Board, in its decision dated 29<sup>th</sup> June 2018, struck out the application on the basis of a preliminary objection to the effect that whereas the application raises constitutional questions, the Board has no jurisdiction to interpret the Constitution. The Board further stated that the applicant/petitioner had no *locus standi* in the matter since he was neither a candidate nor a tenderer in the said procurement process.

17. Section 175(1) of the Public Procurement and Asset Disposal Act states as follows:

### **Right to judicial review to procurement**

*(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.*

18. Section 165(1) of the Act provides that the persons who may seek administrative review are a candidate or a tenderer, who claims to have suffered or risks suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations.

19. Section 2 of the Act defines a “candidate” as “**a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity**”. The said section defines a “tenderer” to mean “**a person who submitted a tender pursuant to an invitation by a public entity**”.

20. This Court notes that the above provisions of the Act are restrictive on the persons who may approach the Board in the event of dissatisfaction with the tendering process and cannot overlook disadvantage faced by the petitioner in as far as seeking a remedy before the said Board is concerned considering the fact that Section 165(1) of the Act more or less closes the door to persons who do not fall within the meaning of a candidate and/or tenderer. I am guided by the decision of the Court of Appeal while upholding the findings of Odunga J. in **Civil Appeal 63 of 2017, Al Ghurair Printing and Publishing LLC vs Coalition for Reforms and Democracy & Others** wherein it was held:

*“It is common sense that once a person is locked out of accessing the Review Board to as provided under the provisions of the Public Procurement and Asset Disposal Act; they can only proceed by way of an alternative remedy or remedies.”*

21. In the instant case, I find that the remedy chosen by the petitioner to institute this constitutional petition pursuant to the jurisdiction granted to this Court under Article 165(3) (b), (d) and 165(6) of the Constitution was quite in order.

22. The respondent raised an objection based on the provisions of Section 56(3) of the National Government Constituency Development Fund Act 2015 which stipulates that:

*Disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by the consensus of the parties to consider and determine the matter before the same is referred to court.*

23. Section 14 of the Act, on the other hand, establishes the National Government Constituency Development Fund Board. It was not disputed that the Petitioner herein did not approach the National Government Constituency Development Fund Board as envisaged under section 56(3) of the National Government Constituency Development Fund Act. It is however clear, from the record, Court that the petitioner raises allegations of inequality in distribution of projects in the Constituency vis-à-vis the size of the wards, which fall within the ambit of Section 56(3) of the Act. Be that as it may, and while *appreciating the fact that the National Constituency Development Fund Board is/was an alternative forum for the Applicant/Petitioner to ventilate his grievances, I find that* it is in the interest of justice that this Court examines the available alternative remedies to determine their efficacy and effectiveness in answering to the Petitioner’s grievance.

24. My finding is that the instant petition raises allegations and/or questions touching on violations of constitutional rights, which this Court properly has jurisdiction over. In any case the Public Procurement Administrative Review Board acknowledged, in its own determination of the application filed by the petitioner, that some of the issues raised by the applicant/petitioner were outside the jurisdiction of the Review Board. I therefore find that this Court is properly seized of this matter. [See the holding of Mativo J. in **Council of County Governors v Lake Basin Development Authority & 6 others [2017] eKLR, paras 48-51**]

#### **Alleged violation of rights**

#### **B). Public Participation**

25. The petitioner’s case was that there was no public participation while the respondent held the contrary opinion. Counsel for the Respondent submitted that public participation was conducted within the Constituency as shown in in annexure **BOK-2**. It was the Respondent’s position that the annexure **BOK-2** constitutes the notice inviting the public to the consultative meeting and the

minutes emanating therefrom. The Petitioner on the other hand argued that the said annexure does not show if any notice was ever given to the public for the meeting of 1<sup>st</sup> December 2017 which gave rise to the minutes attached.

26. I have perused annexure **BOK-2** and my first observation is that the notice for the meeting is dated 8<sup>th</sup> January 2018 and has the heading; “**Notice of Consultative Head Teachers Meeting**”. I further note that the said notice reads, in part, as follows:

*“The Constituencies Development Fund (CDF) is established under the CDF Act 2013 with a primary objective of addressing poverty at grassroots level by dedicating a minimum of 2.5% of the ordinary government revenue to grassroots development at the constituency level.*

*Bomachoge Borabu Constituency Development Fund Committee seeks to engage head teachers with the view to build consensus on priority projects for implementation in the year 2018. I am therefore pleased to invite you to the consultative meeting to be held at the Constituency Offices on 15<sup>th</sup> January 2018.*

*Agendas*

- *Briefings*
- *Observation by KEPSHA and KNUT Leadership*
- *Discussions on issues*
- *Selected actions from each Ward*

*Yours sincerely*

.....”

27. A reading of the said “notice” also shows that the intended meeting was specifically for the purpose of engaging head teachers in the manner stated therein. I therefore find that there is nothing in the said notice to show that it was directed to the general public for the purposes of getting their input on the tenders that are the subject of this petition.

28. I further note that the said annexure BOK-2 contains the of minutes of a meeting held on 18<sup>th</sup> December 2017 (see page 18 of BOK-2) notwithstanding the fact that the ‘notice’ above calling for the meeting indicated that the meeting was slated for 15<sup>th</sup> January 2018 (see page 17 of BOK-2). The attached programme for the said meeting is however dated 18<sup>th</sup> December 2017 (see page 18 of BOK-2). The said minutes lists some names of officials present for the said meeting and also contains an attendance register with a long list of names and national identity card numbers which this Court understands to be for the members of the public who were present at the meeting. I however note that the list does not indicate the respective Wards of each of the said members of the Public given that Constituency development projects under discussion were to be distributed to the respective wards.

29. I have also perused the agenda of the said meeting and I note that whereas it is indicated that there were discussions on some projects, it is not clear if the members of the public said to be present at the said meeting gave any input or views on the matters under discussion. What is presented before Court is a general report on what the ‘members’ deliberated upon. It is also worthy to note that Section 3 of the Act provides that public procurement and asset disposal by State organs and public entities shall be guided by the values and principles of the Constitution and relevant legislation and proceeds to expressly identify the national values and principles provided for under Article 10.

30. I therefore find that to the extent that the notice and minutes shown in annexure BOK-2 are not conclusive and that the claim that there was public participation was not proved. In the South African case of **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**, wherein **Ngcobo J.** who delivered the leading majority judgement expressed himself as follows:

*“At the outset, it is necessary to comment on the evidence presented by the respondents. The respondents’ evidence includes several broad and sweeping claims, amongst other things, that the NCOP Select Committee and the respective provincial portfolio committees ‘have conformed with the requirements of sections 59, 72 and 118 of the Constitution by holding public hearings . . . [,] by inviting members of the public to participate either by making oral or written submissions, and by extensively advertising and publicizing the fact that the relevant committees would be meeting in relation to one or more of the contested Bills.’ These allegations are largely unsupported by any documentary evidence. In addition, some of the allegations are inconsistent with the documents furnished by the respondents and with what this Court was told in the course of oral argument was common cause between the parties. There is no suggestion on the record that the NCOP held public hearings or invited written representations on any of the Bills. Insofar as the provincial legislatures are concerned, some but not all of the provinces held hearings in respect of some but not all of the Bills. Some provincial legislatures considered written representations that had been submitted to the National Assembly but it is not clear on the record whether any of them invited new or supplementary representations from the public. In the result, this Court has had to work with evidence that leaves a great deal to be desired and to speculate on what may have happened. It is not desirable that this should have happened in a case such as this, where the facts are crucial to determining whether the NCOP complied with its constitutional obligations.....It is not reasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made. Interested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions. The requirement that participation must be facilitated where it is most meaningful has both symbolic and practical objectives: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.....”*

In Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR Odunga J. held as follows:

“Article 201 of the Constitution provides for the *principles that shall guide all aspects of public finance in the Republic*. Article 201(a) specifically provides: *“there shall be openness and accountability, including public participation in financial matters”*.”

In Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex Parte Council of County Governors & another [2017], Odunga, J. as follows on stakeholder participation:

*“As was appreciated by Sachs, J. in the South African case of the Minister of Health vs. New Clicks South Africa (Pty) Ltd [2005] ZACC:*

*“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.” [Emphasis supplied]*

*The essence of public participation was captured in the case of Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others CCT 86/08 [2010] ZACC 5, in the following terms:-*

*“...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.”*

The Honorable Judge further went on to consider the value of stakeholder participation in the process and he surmised thus:

*“It is important to determine the impact of the views received from the public on the eventual determination. Having noted grievous anomalies in the foresaid report, the Association protested to the Task Force demanding that they go back to the drawing table and amend the report and include all the left out critical issues raised by farmers as presented to them during public hearing but these protests were ignored and it went ahead and presented a report to the President which was gazetted being Notice No. 105, Legal Notice No. 120 and is due for implementation any time from now.....In other words public participation is not just a formality and the views gathered in the process ought not to be considered as irrelevant. Whereas the authority is not bound by them, serious considerations must be given to them and must not just be disregarded as being inconsequential. In other words the authority ought not to make a decision and then conduct public participation simply for the purposes of meeting the constitutional mandate.”*

31. Public participation forms an integral part of the National Values and Principles that are enumerated under Article 10 of the Constitution. In the case of **Republic v Cabinet Secretary Ministry of Transport and Infrastructure & 4 Others Ex parte Ali Golle & Another [2018] eKLR** Aburili J. held as follows on the importance of public participation.

*“73. It follows that before decisions of such magnitude as would affect the livelihoods and rights of people are reached, those people must be accorded reasonable opportunity to know about the issues at hand and make known “their contributions and say on such issues, for public participation to be seen to have taken place.” Anything short of that is a violation of the principle and value of public participation.”*

32. In the circumstances of the present case, as I have already found in this judgment, the requisite threshold for public participation was not attained.

### **C). Equitable distribution of resources and reservation for women, youth, persons with disabilities and other disadvantaged groups**

33. The Petitioner argued that according to the Respondent’s annexure marked BOK1, only 9% of the budgetary allocation for the 22 tenders tabled by the Respondent caters for the disadvantaged groups such as women, youth and persons with disabilities. He further contended that the tender was advertised in contravention of Article 227 (a) of the Constitution of Kenya 2010 as the projects are not fairly and equitably distributed amongst the four wards of Bomachoge Borabu Constituency. On their part, the Respondent contended that it complied with the provisions of the Constitution and the Act. Counsel cited Article 201, 227 (1) and 227(2) of the Constitution and Section 53 of the PPAD. It is contended that the petitioner has not demonstrated how the Respondent failed to adhere to the equitable distribution of resources among the four wards in view of the variation that exists in the size and the population within the different wards forming the constituency. Counsel argued that the alleged inequality raised by the petitioner was not raised during the public participation.

34. On the argument that the Petitioner did not raise the issue of inequality during the public participation forum referred to herein I find that having found that the threshold for public participation was not met during the meeting that the respondent claimed it held for the said purpose, this argument is not sustainable.

35. Article 201 of the Constitution provides:

*The following principles shall guide all aspects of public finance in the Republic—*

*a. there shall be openness and accountability, including public participation in financial matters;*

*b. the public finance system shall promote an equitable society, and in particular—*

*(i) the burden of taxation shall be shared fairly;*

*(ii) revenue raised nationally shall be shared equitably among national and county governments; and*

*(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas;*

*(c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;*

*(d) public money shall be used in a prudent and responsible way; and*

*(e) financial management shall be responsible, and fiscal reporting shall be clear.*

36. Article 227 (1) of the Constitution of Kenya provides: *“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.”*

37. Article 227 (2) provides:

***(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; and***

***(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.***

38. Going by the above highlighted provisions of the Constitution, it is clear that equitable distribution of resources and protection of persons or groups disadvantaged by unfair competition or discrimination are well founded and provided for in the Constitution.

39. The petitioner's claim that the disadvantaged groups were not given their due share of the allocation of the tenders was countered by the respondent through its Annual Procurement Plan for the 2017/2018 (annexure **BOK-1**). The Respondent stated that the said annual plan demonstrated that there was compliance with Section 53(6) of the Act, which provides that all procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups. The said plan, it was argued, reflects a timeframe of events, and the schedule of events indicates when particular works, services or contracts are to be advertised. The Respondent faulted the petitioner for relying only on the advertisement/invitation to tender published on the Daily Nation newspaper on 7<sup>th</sup> May 2018 and argued that this was only a fraction of the tenders scheduled for procurement in 2017/2018 financial year. It was therefore the respondent's case that this was a wrong basis to argue that it had not complied with the requirements of Section 53(6) of the PPDA.

40. To the extent that the Petitioner merely relied on the said advertisement/invitation to tender on the Daily Nation newspaper to make the allegations on non-compliance with Article 227(2), I agree with the Respondent that the Petitioner would have done more. **Article 35** of the Constitution provides that every citizen, including the Petitioner, has a right to obtain information held by the State. The said Article places an obligation on the Petitioner to request for that information and further states that the State also has an obligation to disclose the information sought unless there sufficient reasons are advanced for non-disclosure. See **Nairobi Law Monthly & Another vs Kengen [2013] eKLR**.

41. In the instant case, I find that the Petitioner has neither demonstrated that it attempted to acquire the relevant information nor furnished this Court with any explanation justifying their failure to access that information. This is not however a barrier to the petitioner to pursue his claim as Article 22 of the Constitution provides for the right to approach the court if a right is **threatened** with violation.

42. The Respondent supplied this Court with annexure BOK-1, the said Annual Procurement Plan, and submitted that they had complied with Article 227. The next question for determination is whether there was compliance as argued by the Respondent.

43. Section 53(2) of the PPDA provides: **“An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process”**

44. Section 53(6) of the PPDA Act reads: **“All procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups”**.

45. It is also important to interrogate the provisions of Sections 155 and 157 of the PPAD which are a direct derivative of Article 227(2) of the Constitution of Kenya. The relevant provisions are highlighted below.



Section 155(1) provides: Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.

46. Whereas section 157 provides:

*157. Participation of candidates in preference and reservations*

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

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

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

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

b. allow competition amongst the eligible persons; and

c. be monitored and evaluated by the Authority.

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

a. candidates such as disadvantaged groups;

b. micro, small and medium enterprises;

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

d. identified regions; and

e. such other categories as may be prescribed.

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

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

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

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

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

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

ii. the amounts are below the prescribed threshold'

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

*b. a prescribed margin of preference shall be given-*

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

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

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

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

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

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

*13. A report under subsection (12) shall-*

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

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

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

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

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

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

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

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

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

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

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

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

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

47. My understanding of the provisions highlighted hereinabove is that the procuring entity is required to reserve a prescribed percentage of its procurement budget, which shall not be less than thirty per cent, to the disadvantaged group(s) and comply with the provisions of the Constitution, the Act and the regulations in respect of preferences and reservations. I therefore find that it is not enough for the Respondent to merely state that the procuring entity reserved 10 out of 22 projects for youth, women and persons with disabilities.

48. I have perused and analyzed annexure BOK-1 and I note the total value of tenders for the 2017/2018 financial year is indicated to be Kshs. 124,100,000.00. This varies slightly from the total reflected on annexure BOK-1, which is Kshs. 134,600,000.00. Further calculation shows that thirty percent of Kshs. 124, 100,000.00 is Kshs. 37,230,000.00. In the event that the proper figure was Kshs. 134,600,000.00 as reflected in annexure BOK-1, then thirty per cent of the same would amount to Kshs. 40,380,000.00.

49. I note that the Respondent's annual procurement plan (BOK-1) makes reservations in the style of the following tenders for purposes of Article 227(2) as read with all other relevant provisions as follows:

*i. Construction of pit latrine at Iyenga Primary School- Kshs. 200,000.00*

*ii. Construction of pit latrine at Nyambunwa Primary School- Kshs. 500,000.00*

*iii. Construction of pit latrine at Nyamisaro Primary School-Kshs. 500,000.00*

*iv. Construction of classroom at Nyaibate Secondary School-Kshs. 800,000.00*

*v. Completion of dormitory at Nyamecheo Primary School-Kshs. 3,000,000.00*

*vi. Construction of two classrooms at Magenche Primary School- Kshs. 1,000,000.00*

*vii. Completion of 3 classrooms at Ndereti primary-Kshs. 1,000,000.00*

*viii. Completion of dormitory at Magena Special School- Kshs. 1,700,000.00*

*ix. Construction of 8 door pit latrines at Kebabe Secondary- Kshs. 800,000.00*

*x. Completion of dormitory at Sengera SDA Secondary-Kshs. 1,000,000.00*

50. Going by the above list extracted from annexure BOK-1, the total amount in tenders reserved for youth, women and persons with disabilities is Kshs.10, 500,000.00 Needless to say, this amount is nowhere near the thirty per cent (30%) minimum prescribed by the Act pursuant to Article 227(2) of the Constitution. In the circumstances, the only logical finding that this Court can make is that the Respondent did not comply with Article 227(2) of the Constitution as well as all other relevant provisions in this context.

51. Regarding the Respondent's annexure marked BOK-3, which is defined as a copy of project distribution in Bomachoge Borabu Constituencies, which is intended to counter the Petitioner's allegations of unequal distribution of projects amongst the four wards, I note that the same is tied to the issue of public participation, equitable distribution of resources and inclusion of disadvantaged and/or marginalized groups. Since the Respondent has not satisfied this Court on the two key issues in the instant Petition, I find it difficult to draw a conclusion, based on annexure BOK-3, that there is/was equitable distribution of projects amongst the four wards.

## **Conclusion**

**52. Having regard to the findings and observations that I have made in this judgment, I find that the instant petition is merited and I therefore allow it in following terms:**

*i. The National Government CDF Bomachoge Borabu Tender Nos. NGCDF/BOMBOR/KYY/01/17-18 to NGCDF/BOMBOR/KYY/12/17-18 are hereby cancelled and the respondent is hereby directed to retender in accordance with the Constitution of Kenya, 2010 and the laws governing such tenders.*

*ii. Each party shall bear his/its costs of this petition.*

**Dated, signed and delivered in open court at Nairobi this 5th day of March 2019**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

No appearance for the petitioner

Mr Omiti for Mugisha for the respondent

Court Assistant - Ali



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