



THE SUPREME COURT OF KENYA

OKIYA OMTATAH OKOITI VS. PORTSIDE FREIGHT TERMINALS & 13 OTHERS

SC PETITION NO. E011 OF 2024

DATE OF JUDGMENT: 30th June, 2025

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court allows the appeal.

Background

The appeal concerns the award of a tender by Kenya Ports Authority (KPA) to Portside Freight Terminal Limited for the construction and development of a second grain bulk handling facility at the Port of Mombasa. In 2019, following engagement with various stakeholders, KPA unveiled its 30-year master plan, which spans from 2017 to 2047. Since the first bulk grain handling facility is located at the Port of Mombasa, the master plan contemplated the construction and operationalization of a second bulk grain facility to be located either at Dongo Kundu or Lamu Port. KPA did not, however, tender for the construction and development of the facility proposed in its master plan. Instead, several companies, including Portside Freight Terminals Limited, expressed interest by submitting unsolicited applications and proposals for consideration by KPA. Upon consideration of Portside's proposal by KPA's technical team, the Ag. Managing Director of KPA sought approval from the National Treasury to utilize the Specially Permitted Procurement Procedure (SPPP) method of procurement under the Public Procurement and Asset Disposal Act (PPAD Act) for the said project. Upon approval by the Cabinet Secretary, National Treasury, the tender was awarded to Portside Freight Terminals Limited.

The appellant challenged the award of the tender, arguing that it violated the Port master plan by locating the project outside the designated zones of Lamu or Dongo Kundu. He claimed that KPA's own technical team had flagged this non-conformity and that, unlike the proposals submitted by the 6th to 11th respondents, which were aligned with the plan, Portside's proposal changed the location without public participation. He further contended that the procurement process was improperly initiated by KPA's Board instead of its accounting officer, as required in law. The appellant also argued that the invocation of the SPPP method of procurement was illegal and unconstitutional, bypassing proper procurement procedures, granting Portside an unfair advantage, and lacking transparency, fairness, and accountability contrary to Articles 10, 201, and 227 of the Constitution.

The High Court ruled in the appellant's favour, finding that the award of contract and license to Portside Freight Terminals Limited for the development of the second bulk grain handling facility indeed violated Articles 10, 201 and 227 of the Constitution.

On a first appeal, the Court of Appeal overturned the High Court's decision and held that the invocation of the SPPP under the PPAD Act did not violate the Constitution, relying on the

provisions of Article 227(2) that require Parliament to enact legislation to prescribe a framework within which policies relating to procurement and asset disposal, which would include “categories of preference in the allocation of contracts”; and that the SPPP was in that category.

The appellant, aggrieved by that decision, appealed to the Supreme Court.

The Supreme Court delineated the following issues for determination:

- i. *Whether this Court has jurisdiction to determine the appeal under Article 163(4)(a) of the Constitution;*
- ii. *Whether the appellant had locus standi to institute the action;*
- iii. *Whether KPA’s Board of Directors usurped the role of the accounting officer in proposing the use of SPPP and the subsequent grant of license wayleave to Portside Freight Terminals Limited;*
- iv. *Whether KPA’s decision to vary the project sites was ultra vires the Port Master Plan and in violation of Articles 10 and 227 of the Constitution; and*
- v. *Whether the decision to grant Portside Freight Terminals Limited the license and wayleave to establish a second grain bulk facility through the Specially Permitted Procurement Procedure under Section 114A of the PPAD Act violated Articles 10, 201 and 227 of the Constitution.*

Upon consideration, the Supreme Court has allowed the appeal for the following reasons:

Issue 1: The Court finds that it has jurisdiction under Article 163(4)(a) to determine the appeal. From the High Court to the Court of Appeal and before the Supreme Court, the appellant raised claims that the procurement process by KPA, resorting to the SPPP, breached Articles 10, 201 and 227 of the Constitution.

Issue 2: The Court upholds the findings of the Court of Appeal that the appellant could not petition the High Court and argue discrimination on behalf of the 6th to 11th respondents, who have all along been parties in the proceedings, and who elected not to participate.

Issue 3: The Court upholds the Court of Appeal’s conclusion that it was the Ag. Managing Director and not the Board that initiated the SPPP process.

Issue 4: The Court holds that KPA has a duty to endeavor to implement every aspect of its plans. However, deviations from any of the terms of its master plan cannot constitute constitutional or legal violations unless they infringe upon constitutional and statutory obligations or contractual commitments. Consequently, Article 10(2)(a) of the Constitution was not breached as KPA could vary its project sites without requiring a second round of public participation.

Issue 5: The Court finds that;

(a) In awarding a license and wayleave to Portside, KPA did not meet the minimum threshold of a procurement as contemplated under the Constitution. The entire procedure, from conception, application, evaluation, submission for approval, approval up to award violated: (i) Article 10(2)(c), as there was no transparency, and accountability in the process leading to the award and in the award itself; (ii) Article 201(a) for lack of openness and accountability, and (iii) Article 227(1) for resorting to use a system of procurement that was not, in the circumstances, fair, equitable, transparent, competitive or cost-effective.

(b) KPA failed to demonstrate, in terms of Section 114A of the PPAD Act, that it chose the SPPP over other competitive methods of procurement due to exceptional requirements that would have made it impossible, impracticable or uneconomical to adopt a competitive

system as envisaged by the Constitution. The Court of Appeal, therefore, erroneously reversed the determination of the High Court to the effect that the procurement did not pass constitutional muster.

(c) KPA failed to conduct a pre-qualification procedure as a basic procedure prior to adopting an alternative procurement method other than open tender in order to identify the best few qualified firms for the subject procurement. In this regard, KPA was required to publish an invitation notice for candidates to submit applications to be pre-qualified.

(d) The appellate court also erred and misapplied the Constitution in equating the SPPP with categories of procurement methods envisaged by Article 227(2) of the Constitution that give preference to certain persons or a class of persons in the society in the allocation of public contracts for services or goods.

The Judgment of the Court of Appeal is therefore set aside, to the extent that the use of the Specially Permitted Procurement under Section 144A of the Public Procurement and Asset Disposal Act, to award the licence and wayleave to Portside Freight Terminals Limited (the 1st respondent) was in violation of the Constitution.

