REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 163/2021 OF 29TH DECEMBER 2021

BETWEEN

TUMAZ AND TUMAZ ENTERPRISES LIMITED ..... APPLICANT

AND

PONANGIPALLI VENKATA RAMANA RAO; RECEIVER MANAGER & ADMINISTRATOR MUMIAS SUGAR COMPANY LIMITED (IN RECEIVERSHIP) ..... RESPONDENT

SARRAI GROUP ..... INTERESTED PARTY

Review against the decision of Ponangipalli Venkata Ramana Rao dated 22nd December 2021 in the matter of leasing and operating of the assets belonging to Mumias Sugar Company Limited (In Receivership) (MSCL).

BOARD MEMBERS

1. Ms. Faith Waigwa - Chairperson
2. Mr. Steven Oundo, OGW - Member
3. Mr. Jackson Awele - Member
4. Mr. Alfred Keriolale - Member
5. Dr. Joseph Gitari - Member

IN ATTENDANCE

Mr. Philemon Kiprop - Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

Ponangipalli Venkata Ramana Rao the Receiving Manager of Mumias Sugar Company Limited (hereinafter referred to as the 'Respondent') invited sealed tenders in respect of leasing all or any of the six (6) facilities (assets) belonging to Mumias Sugar Company Limited (In Receivership) (hereinafter referred to as 'Mumias Sugar') for a mutually acceptable period at an agreed monthly lease rent (hereinafter referred to as the 'subject tender') from investors on 2nd August 2021.

The tender submission deadline was set for 31st August 2021 at 10.00 a.m. However, on 30th August 2021, Okwany J in High Court Civil Suit Number E697 of 2021 Gakwamba Farmers' Cooperative Society Limited v Ponangipalli Venkata Ramana Rao directed the Respondent to open tenders in a transparent manner in the presence of tenderers present at a date and time to be communicated to tenderers and for financial information contained in the tenders to be shared with tenderers and made available to the public. Further, Justice Okwany directed for an invite to be extended to the Senate Committee on Agriculture, Livestock and Fisheries to attend the tender opening.

The Respondent received eight (8) tenders by the tender submission deadline of 31st August 2021. The eight (8) tenders were opened on 10th September 2021 at 04:00p.m and on 6th October 2021 in the presence of tenderers' representatives present following the Respondent's interpretation of High Court Orders of Okwany J of 30th August 2021 and 23rd September 2021 and High Court Orders of Mabeya J of 30th September 2021. The following tenderers were noted to have submitted their respective tenders in good time as captured in the Bid Opening Report signed by the Respondent on 25th October 2021 (hereinafter referred to as the 'Tender Opening Report'):

1. Pandhal Industries Ltd;
2. Kruman Finances Ltd;
3. KE International (Tumaz & Tumaz Enterprises Limited)
4. Suicriere de Mascareigms Ltd;
5. New Mumias Sugar Company Ltd;
6. West Kenya Sugar Ltd;
7. Kibos Sugar & Allied Ltd;
8. Sarrai Group

On 22nd December 2021, the Respondent announced that the evaluation of tenders in the subject tender had been conducted and finalized in accordance with a Court ruling dated 19th November 2021 and that Sarrai Group, Uganda had been awarded the subject tender save that the award did not include leasing of the Ethanol and Cogen plants.

In an email of 24th December 2021, the Respondent notified tenderers that the subject tender has been finalized in favour of Sarrai Group.

REQUEST FOR REVIEW NO.163 OF 2021

Tumaz and Tumaz Enterprises Limited, the Applicant herein, lodged a Request for Review dated 29th December 2021 and filed on even date together with a Statement in Support of the Request for Review sworn by Julius Mwale on 29th December 2021 through the firm of Javier Georgiadis & Sylvester Law LLP, seeking the following orders:

a) **Annul in whole the decision of the Respondent communicated on 22nd December 2021 announcing Sarrai Group, the Interested Party herein as the successful bidder.**
b) **Award the tender to the Applicant or in the alternative Order for a review of the Bid.**
c) **The Respondent be condemned to pay Costs of this Request for Review to the Applicant.**
d) **Such other or further relief as the board shall deem fit, just and expedient.**

Vide a Notification of Appeal and a letter dated 29th December 2021, the Acting Board Secretary notified the Respondent of the existence of the Request for Review and suspension of procurement procedures for the subject tender while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March

2020 detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 29th December 2021.

The Respondent filed a Notice of Preliminary Objection dated 3rd January 2022 on even date and a Respondent's Response to Request for Review dated 6th January 2021 on 7th January 2021 through the firm of Munyao Muthama & Kashindi Advocates.

The Interested Party filed a Notice of Preliminary Objection dated 6th January 2022 on 7th January 2022 through Namasaka & Kariuki Advocates

According to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

The Interested Party filed their Written Submissions in Support of Notice of Preliminary Objection dated 6th January 2022 on 7th January 2022 together with a bundle of authorities.

APPLICANT'S CASE

The Applicant avers that Mumias Sugar, was placed under receivership on 20th September 2019 and that by an advertisement published in the local dailies on 2nd August 2021, the Respondent invited investors to submit sealed tenders in the subject tender.

According to the Applicant, it submitted its tender in good time on 30th August 2021 because the tender submission deadline was set for 31st August 2021. The Applicant avers that on 30th August 2021, Justice Okwany in High Court Civil Suit Number E697 of 2021 Gakwamba Farmers' Cooperative Society Limited v Ponangipalli Venkata Ramana Rao, directed tenders to be opened in a transparent manner; in the presence of all tenderers present, at an event and at a date and time communicated to all tenderers; for financial information contained in the tenders to be made available to all the tenderers and the public at large; and an invite be extended to the Senate Committee on Agriculture, Livestock and Fisheries to attend the opening committee.

The Applicant avers that on 10th September 2021, the Respondent opened eight (8) tenders at 16:00hrs but did not share any contents of the tenders but instead requested all the tenderers representatives present to sign on the financial pages of the eight (8) tenders submitted and opened. According to the Applicant, the Respondent convened another meeting to announce the particulars of the tenders received on 5th October 2021 but later re-scheduled to 6th October 2021.

The Applicant alleges there was lack of transparency in the opening of tenders because the opening was done in secrecy without disclosing the contents of tenders other than the financial aspect thereof to those present thus, there was no way of one knowing whether tenderers submitted all the required documents or not.

The Applicant alleges the Respondent's decision to award the subject tender to the Interested Party was illegal, procedurally unfair, violated the Applicant's legitimate expectation and the principles of natural justice because the Respondent failed to open tenders in the presence of all the tenderers and as a result, it was not possible to ascertain whether or not documents submitted by tenderers were responsive or not. According to the Applicant, tenders are usually opened in the presence of all tenderers for transparency which, among other things, would involve ascertainment of documents submitted by respective tenderers.

The Applicant avers that Justice Mabeya in a ruling dated 19th November 2021 ordered that the Respondent was at liberty to proceed with the subject tender subject to strict observance of the Competition Act, 2010 (hereinafter referred to as the 'Competition Act'). According to the Applicant, in view of the ruling by Justice Mabeya of 19th November 2021, it inquired from the Respondent on the way forward in respect of evaluation of tenders vide a letter dated 23rd November 2021. The Applicant received a response that the

Respondent was in the process of evaluating tenders and that the Respondent will communicate to all tenderers who participated in the subject tender.

Thereafter, the Applicant alleges the Respondent never communicated with it within the stipulated timelines and it is only on or about 22nd December 2021 that the Applicant learned through media reports and social media circulations that the subject tender had been awarded to the Interested Party. The Applicant alleges that the Respondent informed it that the subject tender was finalized in favour of the Interested Party on 24th December 2021 without giving any reasons for reaching the said decision and without disclosing to the Applicant the outcome of the Applicant's tender in violation of the right to information under Article 35(1) of the Constitution. According to the Applicant, the Respondent has to date not notified it that its tender was unsuccessful or incomplete or non-responsive contrary to Section 87(3) and 126(4) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and that such notification ought to have simultaneously been issued with the notification of award issued to the Interested Party.

The Applicant alleges that (a) it had the most competitive tender in the amount of Kshs.27.6 Billion while the Interested Party was the third-highest at Kshs.11.5 Billion (b) there was lack of transparency in the manner the tendering process was conducted (c) the tendering process was tainted with

fraud, mistakes, and illegalities (d) it received communication from the Respondent that the Interested Party was the successful tenderer on 24th December 2021 at 15:00hrs yet the Interested Party was announced as the successful tenderer on 22nd December 2021 and (e) the mode of communication of the outcome of the tender varied from one tenderer to another, contrary to the stipulated law.

The Applicant alleges the Respondent failed to give all tenderers an open and a transparent opportunity at winning the tender thus compromising the integrity, fairness, transparency and accountability of the process in violation of Section 3 of the Act and Article 10 and 227 (1) of the Constitution by awarding the subject tender to the Interested Party . Further, by the Respondent rejecting the Applicant's tender at the preliminary stage yet the Applicant's tender was substantially responsive and awarding the tender to the Interested Party yet the Interested Party did not submit the most competitive tender, the Respondent violated Section 66 of the Act, the Competition Act and the Constitution thus, the award to the Interested Party is invalid, null and void.

Lastly, the Applicant alleges the subject tender's advertising documents were not clear as to the format and nature of the documents that were to be submitted hence clarity was sought from the Respondent but such requests were ignored by the Respondent.

Consequently, it is the Applicant's prayers that the decision of the Respondent awarding the subject tender to the Interested Party be annulled, the subject tender be awarded to the Applicant or in the alternative the Board orders a review of the subject tender and the Respondent be condemned to pay costs of this review to the Applicant.

RESPONDENT'S RESPONSE

In response, the Respondent has objected to the jurisdiction of the Board to hear and determine the Request for Review on grounds that; (a) the subject tender does not fall within the meaning of public procurement and neither is Mumias Sugar a public body or procuring entity within the meaning of Section 2 of the Act as the tender was for leasing of Mumias Sugar's assets by the Respondent in his capacity as Receiver and Manager of Mumias Sugar; (b) the Request for Review is fatally defective for being instituted against the Respondent who is not an Accounting Officer within the meaning of Section 2 of the Act but a private citizen not governed by the Act; (c) the Request for Review is fatally defective for failure to comply with mandatory provisions of the Act (including Section 170 of the Act) as no proceedings have been brought against the alleged procuring entity; (d) no leave of the insolvency court has been sought before filing of the Request for Review as required by Section 560(4)(d) of the Insolvency Act, 2015 (hereinafter referred to as the 'Insolvency Act') considering Mumias Sugar's affairs are being supervised by the High Court (Insolvency Court) within the ambit of administration following issuance of an Administration Order by Justice

Mabeya in IP E004 of 2019 and; (e) the hearing of the Request for Review is barred by the doctrine of sub-judice because there are similar proceedings instituted by the Applicant (on the same day the Request for Review was filed) in High Court HCRJ E178 of 2021 Republic v PVR Rao and Another ex parte Tumaz and Tumaz over the same subject matter and based on the same facts (almost word for word).

The Respondent alleges that even if the Board had jurisdiction on the foregoing grounds, which jurisdiction is objected, it further objects to the jurisdiction of the Board to hear and determine the Request for Review on grounds that the same raises matters that are time barred including and that no breach of duty imposed by the Act and or the Public Procurement and Assets Disposal Regulations, 2020 (hereinafter referred to as Regulations 2020) has been disclosed by the Applicant.

Further, it is the Respondents allegation that the jurisdiction of the Board is ousted by virtue of a contract in the subject matter having been signed with the Interested Party and possession of the assets of Mumias Sugar having been taken over by the Interested Party.

In response to the substantive issues raised in the Request for Review, the Respondent contends that the fact that the Applicant admits the existence of other pending proceedings before Justice Mabeya clearly shows that the subject tender was and is indeed under the supervision of the High Court

pursuant to the provisions of the Insolvency Act thus, it would lead to a miscarriage of justice if the Board were to give other orders and the same would be an affront to the sub judice rule.

The Respondent contends that the Applicant did not submit a tender that was in conformity with the requirements of the tender resulting to the Applicant's tender being non-responsive.

The Respondent contends that the nature and manner of opening of tenders was guided by the interpretation of Justice Okwany's court orders of 30th August 2021 and 23rd September 2021 and Justice Mabeya's court orders of 30th September 2021. Further, that tenders were opened in a transparent manner, in broad daylight and in the presence of all the tenderers who were in attendance.

The Respondent denies the allegations that his actions were illegal, procedurally unfair and in violation of the principles of natural justice but instead contends that he conducted the subject tender's process in strict adherence with the ruling and orders of 19th November 2021 without breaching any law as alleged or at all and that the Applicant was duly notified of the outcome of the subject tender and award of the subject tender to the Interested Party within a reasonable time and provided reasons and explanations for the Applicant's unsuccessfulness despite the Act not being applicable to the subject tender.

The Respondent contends the Board has no jurisdiction to review disputes touching on competition matters under the Competition Act, 2010.

It is the Respondent's contention that the Interested Party was awarded the subject tender as the most competitive tenderer who presented the highest evaluated tender taking into account the directions contained in the ruling of 19th November 2021 regarding adherence to competition principles as well as pursuant to the Receivers powers contained in the loan documentation and debentures.

In light of the foregoing, it is the Respondent's prayer that the Request for Review be dismissed with costs to the Respondent who has been undeservingly dragged into this review because the proceedings herein are frivolous, vexatious and an abuse of the Board's process.

INTERESTED PARTY'S CASE

The Interested Party objected to the jurisdiction of the Board to hear and determine the Request for Review on grounds that (i) the same was instituted contrary to the provisions of Section 167 read with 135 of the Act because a contract in the subject matter has already been signed between the Respondent and the Interested Party in line with Section 135 of the Act and (ii) the Respondent is neither a procuring entity nor a public entity as

described under Section 2 of the Act thus the Respondent cannot be a party to the Request for Review within the meaning of Section 170 of the Act.

According to the Interested Party, the Request for Review is an abuse of the process and ought to be dismissed with costs.

BOARD'S DECISION

The Board has considered each of the parties' pleadings, written submissions and bundle of authorities and finds the following issues call for determination: -

1. **Whether the Board has jurisdiction to hear and determine the issues raised in the Request for Review.**

   In determining the first issue, the Board will make a determination on the following limbs to the first issue;

   a. **Whether the subject tender is a public procurement or asset disposal within the meaning of Section 2 of the Act for which the Act applies;**

   Depending on the determination of the first limb of the first issue;

b. Whether the Respondent is an Accounting Officer within the meaning of Section 2 of the Act for whom a Request for Review can be instituted against as a party under Section 170 of the Act;

Depending on the determination of the second limb of the first issue;

c. Whether the Request for Review is fatally defective for being instituted against the Respondent;

Depending on the determination of the third limb of the first issue;

d. Whether leave of the insolvency court ought to have been sought under Section 560(4)(d) of the Insolvency Act before the Request for Review was filed.

Depending on the determination of the fourth limb of the first issue;

e. Whether the review proceedings herein are barred by the doctrine of sub-judice.

Depending on the determination of the fifth limb of the first issue;

f. Whether a contract in the subject tender has been signed between the Interested Party and the Respondent in accordance with Section 135 of the Act divesting the Board of its jurisdiction by dint of Section 167 (4)(c) of the Act.

Depending on the determination of the sixth limb of the first issue;

g. Whether the allegations raised in the Request for Review with respect to contents of the tender document advertised on 1st August 2021 and tender opening exercise conducted in September and October 2021 are time barred.

Depending on the determination of the seventh limb of the first issue;

h. Whether the Applicant has disclosed any breach of duty imposed by the Act and or the Regulations 2020 as required by Section 167 of the Act.

Depending on the determination of the eighth limb of the first issue;

2. **Whether the evaluation of the subject tender and award of the subject tender to the Interested Party was conducted and made in accordance with Article 227 of the Constitution, Section 3, 80, 87(3), 126(4) of the Act and Regulations 2020.**

The Board will now proceed to determine the issues framed as follows.

Whether the subject tender is a public procurement or asset disposal within the meaning of Section 2 of the Act for which the Act applies.

On this first limb of the first issue, the Respondent objects to the jurisdiction of the Board to hear and determine the Request for Review on ground that the subject tender does not fall within the meaning of public procurement and neither is Mumias Sugar, the entity that floated the subject tender, a public body or procuring entity within the meaning of Section 2 of the Act. The Respondent contends that the subject tender is for leasing of Mumias Sugar's assets by the Respondent in his capacity as Receiver and Manager of Mumias Sugar. In the circumstances, the Respondent contends the procurement process of the subject tender is not a public procurement by a public body and there is no use of public funds.

We note the Applicant has not opposed this objection. In the circumstances, we hold that the facts as pleaded with respect to this objection are uncontroverted.

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) eKLR,** Nyarangi, JA held that:

"..... I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..... "

Similarly, in the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

> ***".....So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question***

and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

The Supreme Court in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR** pronounced itself with respect to where the jurisdiction of a court or any other decision making body flows from, when it held as follows at paragraph 68 of its Ruling:

"(68) 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...."

The decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows.

This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides for:

> ***27. Establishment of the Public Procurement Administrative Review Board***
>
> ***(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.***

Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

> ***28. Functions and powers of the Review Board***
>
> ***(1) The functions of the Review Board shall be—***
>
> ***(a) reviewing, hearing and determining tendering and asset disposal disputes; and***
>
> ***(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

The above provisions of the Act demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific in Section 167 (1) of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 173 which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

(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.

(2) .....

(3) .....

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act.

168. .....

169. .....

170. .....

171. .....

172. .....

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 173 of the Act which donates powers to the Board with respect to administrative review of public procurement and asset disposal proceedings before the Board.

It therefore follows that the Board can only exercise its jurisdiction with respect to public procurement and asset disposal proceedings for which the Act applies. Simply put, if a procurement or asset disposal proceedings is one for which the Act does not apply, the Board will have no jurisdiction with respect to hearing and determining such procurement and asset disposal proceedings disputes.

Section 4 of the Act provides for the application of the Act as follows:

4. Application of the Act

(1) This Act applies to all State organs and public entities with respect to—

(a) procurement planning;

(b) procurement processing;

(c) inventory and asset management;

(d) disposal of assets; and

(e) contract management.

(2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies—

(a) the retaining of the services of an individual for a limited term if, in providing those services, the individual works primarily as though he or she were an employee, but this shall not apply to persons who are under a contract of service;

(b) the transfer of assets being disposed off by one state organ or public entity to another state organ or public entity without financial consideration;

(c) acquiring of services provided by government or government department;

(d) acquisition and sale of shares or securities, fiscal agency by a public entity, investments such as shares purchased by cooperative societies, state corporations or other public entities;

(e) procurement and disposal of assets under Public Private Partnership Act, 2013; and

(f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations.

(3) For greater certainty, all public procurement are procurements with respect to the application of this Act. *[Emphasis by the Board]*

Our interpretation of Section 4 of the Act is that all public procurement are procurements for which the Act applies and the Act applies to all State Organs and Public Entities with respect to procurement planning, procurement processing and disposal of assets, *inter alia,* save in cases where procurements or asset disposals are expressly ousted under Section 4(2) of the Act.

It therefore behooves upon us to establish what is public procurement, what is asset disposal, what is a State Organ and what is a Public Entity against the circumstances of the subject tender.

Section 2 of the Act assigns the meaning of public procurement and procurement as follows:

'public procurement' means procurement by procuring entities using public funds;

'procurement' means the acquisition by purchase, rental, lease, hire, purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system;

Section 2 of the Act assigns the meaning of a public entity as follows:

'procuring entity' means a public entity making a procurement or asset disposal to which this Act applies;

Section 2 of the Act then lists down 20 bodies that are considererd public entities as follows:

'public entity' includes—

(a) the national government or any organ or department of the national government;

(b) a county government or any organ or department of a county government;

(c) the Judiciary and the courts;

(d) the Commissions established under the Constitution;

(e) the Independent Offices established under the Constitution;

(f) a state corporation within the meaning of the State Corporations Act (Cap. 446);

(g) the Central Bank of Kenya established under the Constitution;

(h) a public school within the meaning of the Basic Education Act, 2013 (No. 14 of 2013);

(i) a public university within the meaning of the Universities Act, 2012 (No. 42 of 2012);

(j) a city or urban area established under the Urban Areas and Cities Act, 2011 (No. 13 of 2011);

(k) a company owned by a public entity;

(l) a county service delivery coordination unit under the National Government Co-ordination Act, 2013 (No. 1 of 2013);

(m) a constituency established under the Constitution;

(n) a Kenyan diplomatic mission under the state department responsible for foreign affairs;

(o) a pension fund for a public entity;

(p) a body that uses public assets in any form of contractual undertaking including public private partnership;

(q) a body in which the national or county government has controlling interest;

(r) a college or other educational institution maintained or assisted out of public funds;

(s) an entity prescribed as a public entity for the purpose of this paragraph; or

(t) any other entity or a prescribed class of public entities or particular public entities that uses public money for purposes of procurement or any other entity as declared under sections 4 and 5 of the Public Finance Management Act, 2012 (No. 18 of 2012);

Section 2 of the Act also assigns the meaning of public money as follows:

'public money' includes monetary resources appropriated to procuring entities through the budgetary process, as well as extra budgetary funds, including aid, grants and loans, put at the disposal of procuring entities by donors;

Section 2 also assigns the meaning of assets and disposal as follows:

'assets' means movable and immovable property, tangible and intangible, including immovable property, stores, equipment, land, buildings, animals, inventory, stock, natural resources like wildlife, intellectual rights vested in the state or proprietary rights;

'disposal' means the divestiture of public assets, including intellectual and proprietary rights and goodwill and other rights of a procuring entity by any means including sale, rental, lease, franchise, auction or any combination however classified;

The Act does not define a Stage organ, however, Article 260 of the Constitution assigns the meaning of a State organ as follows:

'State organ' means a commission, office, agency or other body established under this Constitution

Given the foregoing definitions, we understand public procurement for which the Act applies (i) is a form of acquisition of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system by way of lease among many other ways (ii) and which acquisition is by a public entity such like a company owned by a public entity or a body in which the national or county government has controlling interest among others recognized under Section 2 of the Act (iii) by use of public money (iv) and finally such acquisition must not have expressly been ousted as a public procurement for which the Act does not Apply under Section 4(2) of the Act.

Our understanding of a company owned by a public entity means a company fully owned by a public entity while a body in which the national or county government has controlling interest means a body in which the national or county government owns more than 50% of such body's voting shares, giving the national or county government the deciding voice in meetings and control such a body's direction.

On the other hand, we understand asset disposal for which the Act applies (i) is the act of divesting public assets by way of letting among many other ways (ii) by a public entity such like a company owned by a public entity or

a body in which the national or county government has controlling interest among others recognized under Section 2 of the Act (iii) and finally such divestiture must not have expressly been ousted as an asset disposal for which the Act does not Apply under Section 4(2) of the Act.

Turning to the circumstances of this review, it is common ground that the subject tender is for leasing of all or any of six (6) assets of Mumias Sugar for a mutually acceptable period and at an agreed monthly lease rent. The subject tender in our view is not a procurement but more of an asset disposal in the technical sense. We say so because it does not seek to acquire assets by way of lease or any other way but instead seeks to let out the assets of Mumias Sugar. Be as it may, we still need to establish whether the Act would apply to such asset disposal.

The Respondent has furnished the Board with a certified copy of a Certificate of Incorporation No.10,076 dated 29th June 1971 evidencing Mumias Sugar was registered as a limited company under the repealed Companies Act, Chapter 486 of the Laws of Kenya. Further, the Respondent furnished the Board with a letter dated 14th January 2021 from Central Depository & Settlement Corporation addressed to the Respondent confirming that the National Treasury holds 20.04% shareholding in Mumias Sugar. We have hereinbefore established that any asset disposal for which the Act shall apply must be one that is carried out by a public entity such like a company fully

owned by a public entity or a body in which the national or county government has controlling interest.

We find Mumias Sugar does not fit in any of the description of a public entity assigned under Section 2 of the Act and more so under Section 2(k) and 2(q) of the Act because the national government through the National Treasury neither fully owns nor has a controlling interest in Mumias Sugar because it only holds 20.04% of the shareholding in Mumias Sugar. We thus find that Mumias Sugar is not a public entity within the meaning of Section 2(a) to (t) of the Act for which the Act applies.

Having found Mumias Sugar is not a public entity, it is a no brainer that it is then not a procuring entity for which the Act will apply and consequently any procurement and asset disposal proceedings conducted by Mumias Sugar would not be subject to the application of the Act. We therefore find that the subject tender's asset disposal proceedings do not fall under the asset disposal proceedings for which the Act applies.

Given the foregoing and having established the jurisdiction of the Board flows from the Act, we find we have no jurisdiction to hear and determine the Request for Review with respect to the subject tender because we have held that the subject tender's asset disposal proceedings are not subject to the Act or put otherwise, the subject tender's asset disposal proceedings are not asset disposals for which the Act applies.

The effect of our finding is that the Respondent's Preliminary Objection with respect to the first limb of the first issue framed for determination succeeds and it is inconsequential to proceed to address the other limbs of the first issue framed for determination.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act 2015, the Board makes the following orders in the Request for Review dated 29th December 2021:

1. **The Request for Review dated 29th December 2021 be and is hereby struck out for want of jurisdiction.**

2. **Each party will bear its own costs in this matter.**

Dated at Nairobi this 19th day of January 2022.

.....	.....
CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**