UNIVERSITY OF NAIROBI

SCHOOL OF LAW

PUBLIC PROCUREMENT OF BANKING SERVICES IN KENYA: AN APPRAISSAL OF THE EXISTING LEGISLATIVE FRAMEWORK

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G62/68585/2013

This thesis is submitted in Partial Fulfilment of the Requirement for the Award of a Master of Laws Degree (LL.M) at the University of Nairobi.

2018

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I remain greatly indebted and dedicate this piece of work to my Dear Wife Zipronza Njeri and Daughter Sasha Ibrahim. Your love, support, understanding, encouragement and compromise on your valuable time with me no doubt enabled me to successfully undertake and successfully complete my *homework*, this thesis.

Importantly is the support of my Dear Mum Pauline Kitoo. You are such a gem of a woman. Your love for me never failed or faltered. Your loving spirit helped me find my own.

ACKNOWLEDGEMENT

I take this time and opportunity to thank the Lord Almighty for this far he has brought me. Honour and praise be unto Him.

My sincere gratitude and special thanks goes to my supervisor Dr. Jackson Bett. His invaluable guidance, critique, insights, patience and availability have no doubt been the much needed enabler to the finalisation of this work.

Gratitude also goes to Mr. Muthomi Thiankolu for his several and quite often engaging modules in Public Procurement and Accountability Law which unravelled the mystery in public procurement, gave me the drive and proved to be the needed shot in the arm for me to proceed with and finalise this thesis.

Further input, modules and comments by Professor Neil Paulsen and Honourable Paul Lucas during my stint at the University of Queensland, Brisbane, Australia and the University of Pretoria, South Africa for the Australia Awards Africa – Public Private Infrastructure Partnerships Program under the auspices of the Department of Foreign Affairs and Trade (DFAT) and are highly appreciated and acknowledged.

I am importantly and greatly indebted to the leadership and fellow staff of Kenya Electricity Generating Company PLC for the conducive work environment which has no doubt been an enabler for me to practice public procurement and academic advancement.

May God bless you all.

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9. The UNCITRAL Model Law on Procurement of Goods, Construction and Services, 2011.

ABBREVIATIONS & ACRONYMS

1. CTB - Central Tender Board
2. DTB - District Tender Boards
3. ESKOM – Electricity Supply Commission (South Africa)
4. GATT – General Agreement on Tariffs and Trade
5. GFOA - Government Finance Officers Association
6. GPA – The World Trade Organisation's Agreement on Government Procurement.
7. MTB - Ministerial Tender Boards
8. OECD - Organisation for Economic Co-Operation and Development
9. PFMA, 2012 - Public Finance Management Act, 2012
10. PPADA, 2015 - Public Procurement and Asset Disposal Act, 2015
11. PPOA - Public Procurement Oversight Authority
12. PPRA – Public Procurement Regulatory Authority
13. SAPO - South African Post Office
14. UNCITRAL – United Nations Commission on International Trade Law
15. UNGA - United Nations General Assembly
16. WTO – World Trade Organization

ABSTRACT

The study seeks to clarify and resolve the apparent incongruence between the Public Procurement and Asset Disposal Act, 2015[1] and the Public Finance Management Act[2]. The conclusion is that much as the two statutes derive their existence out of the Constitution and in particular Articles 201 and 227 hence are complementary on matters touching on public procurement, the PPADA 2015 nevertheless prevails over the PFMA 2012 on matters dealing with public procurement as it is the more specific law on procurement including banking. It is also the latest in enactment. The finding is that public procurement including that of banking services should be subject to the PPADA 2015 if at all the principles of procurement[3] are going to be realised and remain meaningful. The upshot of the study is that the PFMA 2012 merely sets the requirements for approvals of banking arrangements and banking facilities while the PPADA 2015 establishes the procedure for the sourcing of among others banking services which procedure must be complied with as a condition precedent for any approvals for banking arrangements as anticipated and referred to in the PFMA 2012.

[1] No. 33 of 2015, subsequently referred to as PPADA 2015.
[2] No. 18 of 2012, subsequently referred to as PFMA 2012.

[3] Refer to Notes 1 and 2 above.

CHAPTER ONE: INTRODUCTION

1.0 BACKGROUND

In 2007, the Public Procurement Oversight Authority[4] (PPOA) estimated that procuring entities in Kenya were paying around sixty percent (60%) more than prevailing market prices for goods and services.[5] This signals that there is a non-competitive procurement market in Kenya. It is estimated that twenty five percent (25%) of public expenditure can be saved by proper implementation of public procurement laws and regulations in Kenya[6]

Banks offer a wide range of services to public entities from deposits, payment to service providers, stakeholders, shareholders, staff, safekeeping, access to loan facilities among other things. In the process, the entities are offered significant opportunities to procure and evaluate financial services. In procuring these services it is incumbent upon public entities to realise value for money and also ensure that their specific and unique banking needs are met.

Regrettably, what we have however witnessed is what one would easily call a series of unstructured, noncompetitive and nontransparent banking of public monies by public entities exposing public monies to possible cases of pilferage, wastage, rent seeking and sadly loss of the deposited funds to collapsed banks[7]. This was recently witnessed in the cases of Chase Bank (Kenya) Limited (now acquired by the State Bank of Mauritius), Imperial Bank (now subject of acquisition by the Kenya

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[4] Referred to as the PPOA.

[5] Debra Gichio, *"Public procurement in Kenya; Cash cow for the corrupt or enabler for public service delivery?"*(2014)14 Transparency International Kenya <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwisisvc5N3dAhVKCxoKHQX5DLoQFjAAegQIARAC&url=https%3A%2F%2Ftikenya.org%2Fwpcontent%2Fuploads%2F2017%2F06%2Fadili-145-public-procurement-in-kenya-cash-cow-for-the-corrupt-or-enabler-for-public-service.pdf&usg=AOvVaw0Kzy2KsGwS17vSdY6hjF4e> accessed 3rd September, 2018.

[6] *Ibid.*

[7] Mutai E, "Ouko Doubts KPA will recover Sh. 3bn held in Chase Bank" *Daily Nation* (Nairobi, January 3, 2018) <https://www.nation.co.ke/business/ Ouko-doubts-KPA-will-recover-Sh3bn-held-in-Chase-Bank/996-4250420-132sv9d/index.html> accessed 13th June, 2018.

Commercial of Kenya) and Dubai Bank among others[8]. Just recently the National Treasury came out to confirm that it did not have records of the various accounts opened and operated by the various public entities.[9]

In essence, key and integral objectives and principles of public procurement and public finance have been missing if not overlooked. This includes value for money, transparency, accountability, economy and competition. Major concern has been that the public procurement of banking services has a "black hole"; and has often not been done in accordance with the provisions of Articles 201(a), (d) and (e)[10] and 227(1)[11] of the Constitution of Kenya, yet these articles remain the point of reference for any public procurement.

According to the Organisation for Economic Co-operation and Development[12], there at least exists an enabling legal framework which has been established in the last ten years and this has very much helped in the strengthening of the public procurement system in a number of countries Kenya included. There however still exists some weaknesses in terms of enforcement and interpretation of the legal framework.[13]

There is rampant corruption due to the huge sums of money and discretion involved in public procurement for both developed and developing countries corruption.[14]. Inserted into this mix is the cut throat competition between bidders that rely heavily on public contracts for their survival. In some contexts, this dependency, (or over-dependency) on public contracts leads to a desperation that is expressed through the willingness of the private sector to offer bribes or other inducements to ensure that they obtain government contracts[15].

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[8]Kitoo Ibrahim, "Stick Within Law When Banking For State Bodies" *Business Daily Africa* (Nairobi, September 5, 2016) <https://www.businessdailyafrica.com/analysis//539548-3370452-8o3ranz/index.html> accessed 13th June, 2018.

[9]Mutai E, "KPA Unable to Access Sh.3bn deposited in Chase Bank" Daily Nation (Nairobi, August 22, 2016) <https://www.nation.co.ke/business/996-3353046-132thau/index.html> (2018). Accessed 13th June, 2018.

[10] This Article seeks to ensure that financial decisions as regards public entities are made in an open and accountable manner and that there is public participation, prudence and responsibility in the spending of public money.

[11] This Article provides for fairness, transparency, competition and cost – effectiveness in a public procurement system.

[12] Organisation for Economic Co-Operation and Development (OECD) is an intergovernmental economic organisation with thirty six (36) member countries, founded in 1961 to stimulate economic progress and world trade.

[13] Organisation for Economic Co-Operation and Development, "Effective Development Cooperation", <https://www.oecd.org/dac/effectiveness / 41583965 .pdf> accessed 2nd June, 2018.

[14] Steven Kelman, *Procurement and Public Management: The fear of Discretion and the Quality of Government Performance* (Washington, DC AEI Press, 1990)

[15] Sope Williams – Elegbe, *Public Procurement and Multilateral Development Banks: Law, Practice and Problems*, p.173.

This study seeks to interrogate the extent to which the legal provisions governing the award of public tenders and especially as relates to banking services promote the objectives of transparency, competition and value for money as provided for under the Constitution of Kenya 2010 and the PPADA 2015. Banking services in this case will be in interrogated in the context of opening and running of bank accounts or what is otherwise called banking arrangements and sourcing of credit facilities.

Regulation of financial institutions is at the periphery of this thesis. As such it will be discussed in passing but not in detail.

1.1 Statement to the Problem

There currently are two legislations as regards the public procurement of banking services. These are the Public Finance Management Act, 2012 and the Public Procurement and Asset Disposal Act, 2015. The cause for concern is that there conflicting interpretations adopted by public officials as to what extend the two legislations govern the public procurement of banking services. A number of public officials opt to the application of the Public Finance Management Act, 2012 regime as opposed to the Public Procurement and Asset Disposal Act, 2015. The big question has been whether with the promulgation of the Constitution of Kenya 2010 which introduces a higher threshold for transparency in public sector procurement and finance management the Public Procurement and Asset Disposal Act, 2015 has no place in the public procurement of banking services. The findings in this study is that the constitutional standard is the minimum standard on which any law must be anchored. Adoption of this approach serves to strengthen the integrity and transparency of the process of awarding public tenders as envisaged under the Constitution, the PPADA 2015 and the international best practice.

1.2 Research Questions

This study seeks to answer the following research questions:

1. Are the Public Procurement and Asset Disposal Act, 2015 and the Public Finance Management Act, 2012 incongruent or in conflict with each other as relates to public procurement of banking services in Kenya? How can this conflict be addressed?
2. Is there any specific law and/or provisions in law in Kenya excluding banking services from public procurement regulatory regime in this case the Public Procurement and Asset Disposal Act, 2015?

3. What are the applicable rules of statutory interpretation towards reconciling the apparent statutory conflicts between the Public Finance Management Act, 2012 and the Public Procurement and Asset Disposal Act, 2015?
4. Is there need for legislative and/or policy interventions and/or clarifications?

1.3 Study Objectives

This thesis seeks to achieve the following objectives:-

1. Generally trace the public procurement history in Kenya;
2. Specifically trace the historical background of the public procurement of banking services in Kenya;
3. Specifically and critically appraise the existing laws on the public procurement of banking services. This is to identify the multiple or competing interpretations of the said laws. In this case objectives of the various legislations will be looked at and specific provisions of the said legislations will be compared. Key of them will be the public procurement guiding principles as laid out in Articles 10, 201(a), (c), (d) and (e), 227 and 232 of the Constitution and Section 3 of the PPADA 2015.
4. To specifically offer recommendations in the form of statutory interpretation methods and legislative interventions in the public procurement of banking services. The aim is to lay the debate to rest, by offering clarity to public entities on the way forward and importantly to achieve the identified public procurement and public finance management principles.

1.4 Hypothesis

This study is built up on the following hypothesis: -

(i) that the Public Finance Management Act, 2012 and the Public Procurement and Asset Disposal Act, 2015 are in conflict with each other. This state of affairs creates room for multiple interpretations;

(ii) that lack of clarity as to what extend these two laws remain applicable is incentive for public officials who motivated to pursue their own interests and ends prefer to exercise and abuse their discretion and utilise the provisions of the Public Finance Management Act, 2012 as the prevailing law on the procurement of banking services to the exclusion of the Public Procurement and Asset Disposal Act, 2015;

(iii) That there is insufficient if not lack of knowledge on the applicable laws as regards the public procurement of banking services among a large number of public officials

including those in procurement and finance departments and who are expected to know better such laws.

1.5 Study Justification

There currently exists an apparent conflict between the Public Finance Management Act, 2012 and the Public Procurement and Asset Disposal Act, 2015. This conflict creates room for multiple interpretations as relates to the procurement of banking services by public entities in Kenya. Lack of clarity exposes and lends the statutes to implementation and enforcement shortcomings which quite often undermines realization of the procurement principles as laid out in Articles 227(1) and 201 (a), (c), (d) and (e) of the Constitution. There is very little literature on this critical area of public procurement of banking services. This study is proposed in this context and is intended to plug this existing gap.

In addition, the findings and the recommendations of the study will help in:-

(i) ensuring that the government and public entities shall realise value for money a principle which has hitherto not been realised as expected in the procurement of banking services;

(ii) Enhancing transparency and competition in the procurement of banking services. This will create new procurement opportunities which most banks have before not been able to access owing to the non-competitive and opaque procurement practices;

(iii) Contributing to and advancing the academic discourse and debate on the applicable law on the procurement of banking services in Kenya whilst also helping shape the jurisprudence amongst judges and legal practitioners on the application and the interpretation of the public procurement law in light of Article 10, 201 and 227 of the Constitution.

1.6 Conceptual Framework

This study is underpinned by the following concepts:-

1. That improper and unchecked exercise of discretion by public officials especially those involved in public procurement has a potential to undermine public confidence, accountability, competition and value for money. One of the key areas of debate in the

literature of public procurement regulation is the extent to which discretion should be allowed in public procurement systems to achieve the most appropriate balance between those competing considerations. As far as the benefits of limiting discretion are concerned, the importance of limitations on discretion as a means of preventing corruption has been particularly prominent. Whereas my study progresses on this proposition, there is another school of thought that in fact discretion should be enhanced for public officials to effectively deliver. For instance Kuloba[16] in his thesis concludes that public procurement regime in Kenya is too detailed, too prescriptive with the result that public procurement officials are unable to effectively make decisions that are based on good business judgment. The need for increased public official discretion is further supported by Kelman[17]. He argues that procurement failures are often caused by the rules established to promote open competition and prudent utilisation of the often scarce public resources. In his view, much as the federal procurement system has greatly helped root out corruption and favouritism on the other end it has fallen short of helping the state agencies achieve as expected in delivery of their goals and mandate to the public and the purpose for which they do exist. A key consideration of transparency as a principle in public procurement is the amount of discretion granted to procuring entities. According to Arrowsmith, whilst limiting discretion can have benefits, limiting discretion too much can undermine value for money since public entities will not be able to freely respond in a manner most appropriate under given circumstances to achieve the best possible terms for the goods or services procured.[18]

2. That transparency and competition is a fundamental requirement in the public procurement processes. Transparency in this context postulates that things go better when processes are open and that value for money is often than not achieved when there is transparency.[19] For purposes of this study, conceptual clarification of the term transparency was necessary. Indeed transparency in the public tender process provides equal opportunities to bidders who participate in the public bidding process.

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[16] Kuloba, Isaac S (2011), *'Regulation of Discretion in Public Procurement in Kenya'* (LLM Thesis, University of Nairobi).

[17] Steven Kelman, Procurement and Public Management: *The Fear of Discretion and the Quality of Government Performance*, by Steven Kelman, Washington, D.C.; The AEI Press, 1990. Steven Kelman is the Weatherhead Professor of Public Management at the Harvard University's John F. Kennedy's School of Government.

[18] For further discussion and illustration, see S. Arrowsmith, 'The EC Procurement Directives, National Procurement Policies and Better Governance: The Case for a New Approach' (2002) 27 *European Law Review 3*.

[19]Hermalin B, and Weisbach M, "Transparency and Corporate Governance", (2015) <http://lsolum.typepad.com/legal_theory_lexicon/2003/12/legal_theory_le_1.html> accessed on 2nd September, 2018.

3. Value for money as a concept is in many jurisdictions taken and regarded as the key and underlying objective for the regulation of any public procurement.[20] In fact the reason for insisting on transparency and competition in bidding is to ultimately achieve value for money. Indeed transparency and competition in bidding ensures that certain deliberate conduct, notably corrupt behaviour do not undermine the aspect of value for money. As a concept, value for money is thus heavily contingent.

1.7 Theoretical framework

This study is premised on the following theoretical framework:-

1.7.1 Legal Positivism

The word "positivism" is derived from the Latin word *positus*, meaning to posit or postulate. Legal positivism therefore requires that all law must be written. By so requiring that all law must be written, legal positivism helps in checking administrative excesses and stemming discretion bestowed upon public and judicial officials. Legal positivism therefore requires judges to be guided by legal precepts as opposed to their personal predilections in deciding cases before them.

As relates to this study, the legal position is that there exists two legislations these being the Public Finance Management Act, 2012 and the Public Procurement and Asset Disposal Act, 2015 which all bear on the procurement of banking services. There unfortunately exists an apparent conflict between these two laws the outcome of which has been varied interpretations on which one prevails over the other going by the various provisions of the said laws. Continued application of these laws in their current state means that there will be continued confusion and selective application of the said laws the effect of which value for money and transparency in the procurement of banking services will continue to be undermined and elusive. This state of affairs calls for clarity in the form of legislative reform to ensure that the application of Public Procurement and Asset Disposal Act, 2015 is brought to fore as relates to the procurement of banking services.

[20]Arrowsmith S, *The Law of Public and Utilities Procurement,* Second edition, (London: Sweet & Maxwell, 2005), p.2 - 5;

1.7.2 Agency Theory

An Agency relationship comes into play when one person otherwise called the principal reaches out to another person otherwise called the agent and delegates to that person a decision making role on his or her behalf.[21]

The agency problem has long been recognised and has become a central challenge in the running and regulation of modern enterprise. The agents who typically are the managers of a company, have not been able to watch over the principal's money with the same probity, vigilance and fidelity with which they would be expected to watch over their own.[22] Whereas in a corporation (and in this case where stewardship holds sway), the shareholders are the principals and the managers are the agents supposed to work on behalf of and protect the interests of the principals, more often than not the managers have not acted in furtherance of the interests of the shareholders but rather to the chagrin of these interests.

One of the characteristics of the agency relationship is that the agent will have more information regarding the procurement process than the principal. He will have more information and by, necessity, more discretion to deal with procurement and suppliers. This raises a serious difficulty for the principal who will need to ensure that the agent complies with the principal's wishes. The lack of information in the hands of the principal will, in terms of procurement fashion the form of regulation to be applied.

An important, and often prominent, objective of public procurement regulation is to combat corruption associated with the agency problem. Curbing practices such as the payment of bribes or return of favours in exchange for the award of contracts has become a major aim of public procurement regulation.

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[21] Jensen M and Meckling W, "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure " (1976)3 Journal of Financial Economics, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwibg5KOn93dAhXD3KQKHbSgCiUQFjABegQICBAC&url=https%3A%2F%2Fwww2.bc.edu%2Fthomaschemmanur%2Fphdfincorp%2FMF891%2520papers%2FJensen%2520and%2520Meckling%25201976.pdf&usg=AOvVaw1HZ7_vSZeV_xRAPI5fudiV>accessed 4th June 2018.

[22] Smith, A. (1776), *An inquiry into the nature and causes of the wealth of nations*, Raleigh, N.C.: Alex Catalogue, <https://www.ibiblio.org/ml/libri/s/SmithA_WealthNations_p.pdf>accessed 4th June 2018.

Within the economic framework, the agency model of corruption appears to be the most dominant.[23] This model assumes that the public servant is the agent of a specific government agency and is employed to further that agency's (the principal's) interests. In addition to this public interest that the agent is supposed to further, the agent also has his own private interests. These interests may often conflict with those of the principal. Corruption occurs when the agent decides to pursue his private ends at the expense of the public interest, or subordinates the public interest to his private interests. The economic model assumes that the agent is a rational being and will weigh up the benefits of being corrupt against the costs and that where the net benefits of corruption exceed the net costs of the corrupt activity, the agent will act corruptly.[24]

The agency theory remains relevant in this study in that just like the procurement of any other services, procurement of banking services is also fraught with corruption with public officials overlooking the interest of public entities to enrich themselves by awarding banking services contracts in an opaque manner for their own benefits while value for money remains undermined.

1.7.3 The Stewardship Theory

The stewardship theory is the other extreme of agency theory. It looks at the manager as a selfless and disinterested person in advancing his welfare or private ends but rather as one motivated to advance the interests of the principal.[25] It looks at managers as very responsible and stewards of the assets of the principal. It looks at the manager as one who is motivated not by engagement in corruption but by things like executive compensation, levels of benefits and also managers' incentive schemes by rewarding them financially or offering shares that aligns financial interest of executives to motivate them for better performance.[26]

Under this theory, the executive manager in this case is interested in doing a great job and is not in any way an opportunistic shirker driven by greed and self-advancement. This is the case even in instances where he is left with a lot of discretion.

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[23] N. Groenendijk, 'A Principal-Agent Model of Corruption' (1997) 27 *Crime, Law and Social Change* 207 – 29; O.H. Fjeldstad, J. C. Andvig, I. Amundsen, T. Sissener and T. Soreide, *Corruption: A review of Contemporary Research* (Bergen: CMI, 2001).

[24] R. Klitgaard, *Controlling Corruption* (Berkeley, CA: University of California Press, 1988), pp. 69 – 74.

[25] Barney JB, and Hesterly WS, 'Strategic Management and Competitive Advantages'. (Pearson Prentice Hall, *(2008)* <*https://trove.nla.gov.au/work/32070121*>accessed 4th June 2018.

[26] *Ibid.*

1.8 Research Methodology

This study generally adopts a predominantly qualitative and analytical approach as opposed to quantitative approach.

Primary data was collected through oral interviews with government officials especially in finance and procurement departments of various public entities. Oral interviews were also contacted with the marketing teams and relationship managers especially in the public sector segment of the various banks in Kenya.

This study relied heavily on relevant secondary sources such as review and analysis of the relevant statutes, academic books, case law, published and unpublished academic papers, journal articles, published thesis, periodicals and relevant newspaper articles, parliamentary Hansards, internet sources bearing on the subject of public procurement of banking services among other sources;

1.9 Study Limitations

Much as interviews were conducted several interviewees who confirmed that the procurement of banking services still falls short of the principles of competition, transparency among others as stipulated under Articles 227(1) and 201 (a), (c), (d) and (e) of the Constitution and various provisions of the Public Procurement were not keen to give their responses through written questionnaires. This is majorly attributed to the confidentiality issues and fear of disclosure of identity of the institutions and the interviewees. A sample questionnaire intended for use is attached as Appendix 1 to my study

1.10 Literature Review

Arrowsmith[27] looks at transparency in the context of ensuring that public procurement is conducted with clarity as to the applicable rules and qualification criteria which are early enough also made available to the interested parties. This study to a great extend borrows from this thinking as regards the best practices in public procurement particularly on transparency requirements.

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[27] Laguado G, 'A critic to the objectives of the global public procurement initiatives in the context of the WTO' (2002)5, International Law: Revista Colombiana de derechoInternacional, 217-241 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiJgc_7q93dAhWNx4UKHaikBnIQFjAAegQICRAC&url=https%3A%2F%2Fwww.nottingham.ac.uk%2Fpprg%2Fdocumentsarchive%2Fasialinkmaterials%2Fpublicprocurementregulationintroduction.pdf&usg=AOvVaw1IJ_F2RHviBu8pdkzGkjRD> accessed 10th June, 2018.

Trepte[28] identifies three essential parties to any procurement process and these include the public entity, the procuring agent (as the bureaucrat) and the bidders. Procurement regulation applies overlapping transparency conditions for the benefit of all three. He states that among the objectives of transparency is control over the bureaucracy. Trepte's contribution was relevant to this research to the extent that he emphasizes the need for checks on the main players in the procurement process. This will limit discretion and enhance transparency of the process.

Migai[29] identifies competition, publicity, use of commercial criteria and transparency as core principles for sound procurement.[30] He points out that law seeks to protect individuals and groups thereof against the exercise of power by insisting that power should be democratic.[31] In the context of the process leading to the award of public tenders, it is critical that procuring entities should not have unfettered discretion. Rather procuring entities should act fairly by minimizing discretion and ultimately ensuring transparency in the procurement processes. To this end, his work is relevant to the extent that he seeks to use law as the tool to protect individuals and groups among them those participating in the public tender process.

Thiankolu[32], does an appraisal of the policy objectives on public procurement as reflected in the Public Procurement and Disposal Act, 2005 (now repealed by the Public Procurement and Asset Disposal Act, 2015). He argues that the drafters of the said law made subtle but significant deviations from the United Nations Commission on International Trade Law Model Law on Procurement of Goods, Services and Construction ("the Model Procurement Law"). He posits that these deviations created serious conflicts within the Act and other Kenyan laws. He argues a case for a thorough review of the Act to address these inconsistencies.[33]

Kuloba[34], looks at discretion in decision making by procurement officials. He interrogates the agency problem, incentives, concepts of discretion and regulation while addressing the question

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[28] Trepte Peter, *Regulating Procurement*, Oxford University Press Inc.New York, (2004) *pg.* 393.

[29]Akech Migai, 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' (Global Administrative Law: National and International Accountability Mechanisms for Global Regulatory Governance" Conference, New York University Journal School of Law, Institute for International Law and Justice, April 22-23, 2005) *pg*21-22.

[30]*Ibid.*

[31]*Ibid,* pg 35.

[32] Muthomi Thiankolu (2011), 'Reconciling Incongruous Policy Objectives and Benchmarking Kenya's Public Procurement Law: A Review of the Selex Case" *Journal of Public Procurement, Volume 11, Issue 4,451-481.*

[33]Reference is made to the abstract to the article, *ibid.*

[34] Kuloba, Isaac S (2011), *'Regulation of Discretion in Public Procurement in Kenya'* (LLM Thesis, University of Nairobi).

of how much discretion should be given. His study concludes that public procurement regime in Kenya is too detailed, too prescriptive with the result that public procurement officials are unable to effectively make decisions that are based on good business judgment. This coupled with lack of incentive mechanisms for procurement officials, has increased the divergence between the interests of procurement officials (as agents of the government) and the goals of government (the principal). He posits that there is need to review and amend the Public Procurement Law and Regulations (in this case the Public Procurement and Asset Disposal Act, 2005 now repealed) to facilitate realisation of value for money, and to meet the other public procurement objectives.[35]

Kiawa[36], examines accountability in the public sector procurement. She argues that procurement of public goods works and services has been shrouded with conflict of interest, discretion and secrecy raising concerns on transparency of the procurement process. She concludes that the procurement process at the State law office falls short of the accountability threshold envisaged under the procurement laws. Her work is significant to this research to the extent that it emphasizes on promotion of accountability of officers participating in the public tender process. Kiawa's work provided useful literature on accountability which is closely linked to transparency; these are among the key principles of public procurement. Her findings were useful to my study in that transparency has been missing in the public procurement of banking services as well and my thesis seeks to call for the transparency in this sector of the economy as well. Indeed accountability in public tender process directly improves the desired transparency standards.

The OECD recognizes transparency as a key input to effective governance[37]. For the OECD public procurement creates an opportunity for the public and private sector to interact.[38] Indeed the OECD identifies transparency and accountability as critical in the promotion of integrity and prevention of corruption in public procurement systems. This is especially so when supported by other principles like efficient management of public resources otherwise known as administrative efficiency and fair competition.[39] The OECD has researched extensively on the on public

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[36] Kiawa Florence Mumbi (2012), *'Accountability in Public Sector Procurement: A case Study of the State Law Office'* (LLM Thesis University of Nairobi).

[37] Organisation for Economic Co-Operation and Development (OECD) (2003): Public Sector Transparency and the International Investor pg 1 available at http://www.oecd.org/dataoecd/36/42/18546790.pdf pg 14-17 accessed on 9/1/2013.

[38] OECD, '*Report on The Global Forum on Governance-Fighting Corruption and Promoting Integrity in Public Procurement*' pg 29-30, 2004 Paris <http://www.oecd.org/dataoecd/11/18/34340364.pdf> accessed on 25th August, 2018.

[39] *Ibid.*

procurement particularly across its member countries; as such its findings formed an invaluable source reference for the study.

Arising out of this literature review among others it's my conclusion that much as there is literature interrogating procurement principles there is dearth of literature clearly addressing the grey or otherwise contradicting area on public procurement of banking services especially in Kenya. If anything the existing statutes are in conflict with each other as relates to this critical yet often overlooked subject of procurement. This thesis seeks to fill this void.

1.11 Chapter Breakdown

Chapter One is essentially my introduction of the study. This Chapter seeks to cover the background against which the study is premised in this case the rampant corruption, bribery and discretion bestowed upon public officials. The Chapter looks at the problem of the opaque procurement of banking services by public entities the effect of which is undermined value for money and transparency in the public sector procurement of banking services. It states the various research questions like what are the prevailing legislations as relates to the public procurement of banking services in Kenya. What are the conflicts in place among others? The Chapter lists various study objectives among them the historical background of the public procurement in Kenya especially in the context of banking services and resolving of the apparent conflict between the Public Finance Management Act, 2012 and the Public Procurement and Asset Disposal Act, 2015. The Chapter identifies the study justification, conceptual framework, theoretical framework, research methodology, study limitations and literature review.

Chapter Two is on the historical perspective of the public procurement of banking services. It seeks to introduce this topic, traces the meaning of public procurement, generally traces the history of public procurement in Kenya, specifically traces the history of public procurement of banking services in Kenya while giving an overview of the regulation of the banking business in Kenya. A conclusion is lastly given on the Chapter.

Chapter Three looks at the procurement of banking services in the context of the Constitution of Kenya, Public Procurement and Asset Disposal Act, 2015 the emphasis being the addressing of the apparent incongruence between the PPADA, 2015 and the PFMA, 2012. An introduction to the Chapter is given, the provisions of the Constitution of Kenya are interrogated more so as relates to public procurement. The Chapter also analysis the various procurement principles these

being accountability, transparency, integrity, value for money, competition, economy and efficiency. It also looks into the various provisions of the PPADA, 2015 while also looking at the various rules of statutory interpretation and case law in attempting to resolve the statutory conflicts. A conclusion is given on the Chapter.

Chapter Four seeks to offer bench marks. It looks at the UNCITRAL Model Laws and the Republic of South Africa Public Procurement Laws. It has an introduction on the Chapter, takes a look the UNCITRAL Model Laws, does an analysis of the South African public procurement law including the South Africa Republic Constitution, Case Law touching on the public procurement of banking services and further reforms in the Republic of South Africa. A conclusion is ultimately given on the Chapter.

Chapter Five offers a conclusion on the whole study. This is based on the study problem and objectives. A recommendation for legislative reforms is given. The recommendation is that there is need to amend the PFMA, 2012 to expressly provide for the procurement of banking services in line with the provisions of the PPADA, 2015 and Articles 10, 210 and 227 of the Constitution.

CHAPTER TWO: HISTORICAL PERSPECTIVE OF THE PUBLIC PROCUREMENT OF BANKING SERVICES

2.0 INTRODUCTION

Whereas this study seeks to specifically interrogate the legal regime for the public procurement of banking services in Kenya, the same cannot be effectively interrogated without discussing and tracing the meaning and history of public procurement generally (albeit without much detail). This Chapter therefore seeks to generally define what public procurement is, trace its historical background and the historical background of public procurement of banking services in Kenya up to date. The Chapter covers public procurement from the times of the British firm crown agents, Central Tender Boards, Government Financial Regulations and Procedures issued by then Ministry of Finance, Ministerial Tender Boards, District Tender Boards, Exchequer and Audit (Public Procurement) Regulations, 2001, the Public Procurement and Disposal Act, 2005 (now repealed), the Public Finance Management Act, 2012 and the Public Procurement and Asset Disposal Act, 2015 and attendant regulations.

2.1 TRACING THE MEANING OF PUBLIC PROCUREMENT

Public Procurement can be defined as the process through which a public entity sources for goods, works and services necessary for it to discharge its functions. Broadly speaking, the process covers the whole cycle starting from the entity identifying needed goods or services, developing the tender document and specifications, the identification of a supplier through evaluation, issuing the letter of award, execution of the contract between the entity and the successful bidder, performance and administration of the contract as concluded between the public entity and the supplier[40].

The Public Procurement and Asset Disposal Act, 2015, defines public procurement in the context of procurement entities using public funds. The Act defines procurement entity to mean a public entity making a procurement or asset disposal to which the Act applies. It proceeds to define a public entity by listing to include among others the national government or any organ or department of the national government[41].

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[40] See generally S. Arrowsmith, *The Law of Public and Utilities Procurement* (2nd edn, London; Sweet & Maxwell, 2005), pg 1; S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (The Hague; London: Kluwer Law International, 2000), pp.1 – 2.

[41] Public Procurement and Asset Disposal Act, 2015, Section 2.

2.2 TRACING THE HISTORY OF PUBLIC PROCUREMENT IN KENYA

The Kenya public procurement has evolved from essentially what could be classified as a rudimentary one to what now a more organised and structured one anchored in law even though slightly falls short of international standards.

Migai[42] traces the background of public procurement in Kenya. According to him during the period about early 1970s, and during which time there existed no uniform legislation to guide the public procurement system at the time.[43] Kenya was then a colony state under Britain. Around the year 1974, a more uniform and elaborate system of procurement was put in place. This established and allowed the supplies offices within various ministries and departments to undertake procurement on behalf of the ministries and departments[44]. It's also during this time that the Central Tender Board was created. The board was tasked with the procurement of goods and services beyond a certain threshold.[45]

The overarching role of the regulation of the public procurement was however a reserve of the Ministry of Finance. One of the ways of regulation the Ministry adopted was the issuance of various procurement regulations and guidelines through circulars to the supplies officers in the various government departments and authorities.[46] A case in point were the Government Financial Regulations and Procedures. It was under these regulations that the Central Tender Board[47] was established. The CTB was an inter-ministerial body, and comprised of members appointed by the permanent secretaries of the ministries they represented. The Chairperson of the CTB was an appointee of the Permanent Secretary to the Ministry of Finance.[48] The CTB had the responsibility for the procurement of goods and services of Kenya shillings two million and above with the

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[42] Migai, 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' (Global Administrative Law: National and International Accountability Mechanisms for Global Regulatory Governance" Conference, New York University Journal School of Law, Institute for International Law and Justice, April 22-23, 2005).

[43] *Ibid.*

[44] W. Odhiambo and P. Kamau, *'Public Procurement: Lessons from Kenya, Tanzania and Uganda'*, OECD Working Paper 208 (2003), p.16.

[45] *Migai, Note 42 above.*

[46] *Ibid.*

[47] Referred to as CTB

[48] *Ibid*

Ministerial Tender Board dealing with a value below Kenya Shillings two million.[49] Some institutions like the Department of Defence, were privileged and were permitted to have their special tender boards but then were limited in that they had to operate within the same thresholds and powers as the MTBs.

We also had the District Tender Boards[50]. The role of the DTB was to undertake procurement functions and needs at the lower levels of government administration.[51] They were composed of the representatives of government ministries in the district level.

The year 1997 was characterised by the famous Blue Books which served as the Procurement policy document at the time[52]. This was period of District focus for Rural Development Strategies. It's during this time that the World Bank was concerned and decided to carry out a nationwide survey on public procurement. The findings of this audit brought out various procurement challenges among them poor management of public finances, inefficiency in the delivery of public services, obscure and non-competitive and non-transparent procurement. In the eyes of World Bank all these factors exposed the procurement system susceptible to abuse and lack of legal framework to enforce procurement rules. In light of the foregoing a public procurement reform through enactment of a legal framework was a condition under the Economic Recovery Strategy Assistance.[53] Development partners and other stakeholders interpreted the commitment by Government to reform public procurement as commitment to good governance.[54]

In 2001, and relying on the provisions of the Exchequer and Audit Act[55], the Exchequer and Audit (Public Procurement) Regulations were passed. The regulations sought to harmonise all the national treasury circulars applicable at the time.[56] Key effects of these regulations was the abolishment of the CTB and the establishment of the Public Procurement Directorate and Public Procurement Appeals Board.[57] Important was that the chairmen of the Tender Committees were

[49] Referred to as MTBs.

[50] Referred to as DTBs

[51] *Ibid.*

[52] Often referred to as the Nyachae Book.

[53] *Ibid.*

[54] *Ibid.*

[55] Chapter 12, Laws of Kenya. Assented into law on 31st May, 1955 and commenced on 1st June, 1955.

[56] The regulations were published as Legal Notice No. 51 dated 30th March, 2001 and subsequent amendment of the same in 2002. The Regulations were based on the UNCITRAL Model Procurement Law.

[57] The Procurement Directorate and Public Procurement Appeals Board operated as a department in the Ministry of Finance.

tapped from the private sector. The Regulations governed Kenya's public procurement until 31st December, 2006.

After the 2002 elections the new government sought to address the public procurement challenges and the rampant corruption existing at the time. The drafting of a new public procurement legislation started in earnest. The drafters adopted the UNICITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment (1995). Subsequently the Public Procurement and Disposal Act[58] and the attendant Public Procurement and Disposal Regulations[59], were enacted. The Act and the Regulations became operational on 1st January, 2007 replacing the 2001 Regulations as the main procurement law in Kenya. It is noteworthy that the World Bank posted one of its top procurement officers, Robert Hunja, a Kenyan national, to serve as the pioneer head of the Public Procurement Oversight Authority.

The Public Procurement and Disposal Act, 2005 lasted for almost a decade but then and owing to the shortcomings identified with it, the Public Procurement and Asset Disposal Act, No. 33 of 2015 was on 18th December, 2015 assented to as law by His Excellency the President of the Republic of Kenya[60]. The Public Procurement and Asset Disposal Act, No. 33 of 2015 currently is yet to have the regulations in support in place. In this absence the Public Procurement and Disposal Regulations, 2006 apply but this application is only to the extent to which the regulations do not conflict or contradict the Public Procurement and Asset Disposal Act, No. 33 of 2015[61].

[58] Act No. 3 of 2005, Laws of Kenya.

[59] The Regulations were enacted in 2006.

[60] It commenced on 7th January, 2016.

[61] Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, Section 24.

2.3 TRACING THE HISTORY OF PUBLIC PROCUREMENT OF BANKING SERVICES IN KENYA

2.3.1 An Overview of the Regulation of the banking business in Kenya

The Constitution of Kenya, 2010[62] establishes the Central Bank of Kenya[63]. The primary function of the bank is to formulate monetary policies, promote price stability, issue currency and perform any other functions conferred on it by an Act of Parliament.[64]

Kenya has in place the Central Bank of Kenya Act.[65] Under this Act the bank is mandated to put in place rules and regulations as may be necessary and as concerns banking and financial matters.[66] It also has powers to conduct inspections and sanction any bank for noncompliance with banking laws and regulations.

The Central Bank of Kenya has been vested with wide powers to enable it discharge the functions of supervising and controlling banking institutions. These include the power to issue directions in respect of guidelines necessary for the maintenance of a stable and efficient banking and financial system.[67]

The transacting of banking or financial business or the business of a mortgage finance company is only restricted to those with a valid license and this restriction covers misrepresentation that may arise either from the use of the word "bank" without the consent of the Minister or making any representation that one transacts banking business.[68] The implication of the foregoing is that any institution intending to transact banking business, financial business or business of a mortgage

[62] Article 231(1).

[63] Popularly referred to as the CBK.

[64] Article 231(2).

[65] Chapter 491, Laws of Kenya.

[66] Victoria Mbithi, Donald Kipkorir and Rajab Mwachia, 'Key financial laws in Kenya' (IFLR1000, 9th October 2015 <https://www.iflr1000.com/NewsAndAnalysis/Key-financial-laws-in-Kenya/_Index/4082>accessed 28th August 2018.

[67] Banking Act, Cap 488, Laws of Kenya, Section 33(4).

[68] Gichuki N, *Law of Financial Institutions in Kenya,* 2nd edition) (Nairobi: Law Africa; 2013).

finance company in Kenya must before commencing such business apply and obtain a license from the Minister of Finance in consultation with the Central Bank of Kenya.[69]

Regulation of banks in Kenya is generally done under the Banking Act[70]. The purview of the Act is the regulation of banking business.

The Microfinance Act[71], deals with the issuance of licences, regulating and supervising of the microfinance business. Microfinance in the context of this Act entails the provision of financial services to small and micro-enterprises or low income households in addition to providing them with organized systems of saving their incomes[72]. Going by the Act microfinance business entails receipt of money, by way of deposits or interest on deposits, and lending the same to others to finance business; or providing loans or other facilities to micro or small enterprises and low income households.

The Sacco Societies Act[73], is not a subject of this thesis as public entities rarely interact or transact with the institutions regulated under this Act.

2.3.2 The Era of the Exchequer and Audit Act, the National Treasury Circulars and the Government Financial Management Act

The Exchequer and Audit Act[74] was assented into law on 31st May 1955 and commenced on the 1st of June year 1955. Its key purpose was to ensure sound management and control in the utilization of public finances in Kenya. It has since been repealed.

[69] *Ibid.*

[70] Cap. 488, Laws of Kenya.

[71] Act No. 19 of 2006, Laws of Kenya.

[72] *Supra, Note 85.*

[73] Act No. 14 of 2008, Laws of Kenya.

[74] Chapter 12, Laws of Kenya.

Before the year 2005, the Treasury Circulars No. 2 of 11th February 1988, No. 7 of 27th October 1989, No. 4 of 8th April 1992, No. 10 of 15th July 1992[75], No. 14 of 22nd September 1998 and No. 12 of 29th November 2002 called for approval from state corporation's boards of directors and the National Treasury before investment of any surplus funds. The circulars called for the prioritization in the investment of any surplus funds in Treasury Bills and bonds. The circulars also required state corporations to ensure that any money held in deposit accounts with banks are upon maturity transferred to the National Treasury.[76]

The Government Financial Management Act[77], was assented into law on 31st December 2004 and commenced on 1st November, 2005. As relates to banking, the Act outlawed any opening of bank account for government purposes without the written authority of the Treasury.[78]

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[75] Reference is given to the Kenya National Assembly Official Record (Hansard) 6th March, 2003 on Kenyatta National Hospital deposits with the collapsed Euro Bank. Kenya Shillings 310 Million had been deposited for a period of four (4) years beginning 1997 with the bank contrary to the Exchequer and Audit Act, Cap. 412, Laws of Kenya and the No. 10 of 15th July 1992. https://books.google.co.ke/books?id=onXjhRsFqnwC&pg=PT6&lpg=PT6&dq=Treasury+Circulars+No.+10+of+July+1992&source=bl&ots=sol5S29bkM&sig=7TkJcWcmFpfVXnXUoYB8a37vOD4&hl=en&sa=X&ved=2ahUKEwjFl_ythpPdAhUNz4UKHfv_AR0Q6AEwCHoECAIQAQ#v=onepage&q=Treasury%20Circulars%20No.%2010%20of%20July%201992&f=falseaccessed 28th August 2018.

[76] Reference is given to Kenya National Assembly Official Record (Hansard) 10th April, 2003.https://books.google.co.ke/books?id=Kt2wGrQzmIQC&pg=PT2&lpg=PT2&dq=Treasury+Circulars+No.+10+of+July+1992&source=bl&ots=fiHYJP-42&sig=MWzti2PJYOutPnEMbzeYwNXRVVw&hl=en&sa=X&ved=2ahUKEwjFl_ythpPdAhUNz4UKHfv_AR0Q6AEwCXoECAEQAQ#v=onepage&q=Treasury%20Circulars%20No.%2010%20of%20July%201992&f=false. Accessed 28th August 2018.

Reference is also given to the Kenya National Assembly Official Record (Hansard) 12th November, 20003 on the adoption of the Public Investment Committee Report touching on irregular investment of public funds by among other state corporations the Kenya Ports Authority, National Hospital Insurance Fund and Kenyatta National Hospital. The funds had been invested in among other institutions the Nairobi Finance, Pioneer Building Society, Middle Africa Finance, International Finance, Thabiti Finance, Ali Credit and Finance. https://books.google.co.ke/books?id=i74QzbKpI60C&pg=PT28&lpg=PT28&dq=Treasury+Circulars+No.+10+of+July+1992&source=bl&ots=211NSg6Pul&sig=gnv7e2HVqGfrBmq_Af2RID3tcpw&hl=en&sa=X&ved=2ahUKEwjFl_ythpPdAhUNz4UKHfv_AR0Q6AEwB3oECAMQAQ#v=onepage&q=Treasury%20Circulars%20No.%2010%20of%20July%201992&f=false. Also:https://tikenya.org/wp-content/uploads/2017/06/adili-145-public-procurement-in-kenya-cash-cow-for-the-corrupt-or-enabler-for-public-service.pdfaccessed 28th August 2018.

[77] Chapter 412B, Laws of Kenya.

[78] Government Financial Management Act, Chapter 412B, Laws of Kenya, Section 30(1) and (2).

2.3.4 The Era of the Public Finance Management Act, 2012 and attendant National and County Government Regulations

With the coming into force of the Public Finance Management Act, 2012 the government circulars are only applicable to the extent that they do not contradict this Act.

2.3.4.1. The Public Finance Management Act, 2012 & Regulations

The Public Finance Management Act, 2012 was assented to law on the 24th July, 2012. It is the most recent and applicable law on public finance management in Kenya. The principal objective of this Act is to ensure that the management of public funds is done in line with the constitutional principles and to ensure accountability on officials entrusted with the management of public finances.[79]

The Act requires prior written national treasury authorisation for any opening, operation and closing of bank accounts by all national government entities.[80]

The National Treasury is also under the Act required to keep a complete and up to date inventory of bank accounts held by public entities.[81]

The Public Finance Management (National Government) Regulations, 2015[82] apply to among others the state departments, national government entities and public funds[83]. As relates to the cash and banking arrangements, Regulation 82 comes into play. The regulation sets the criteria to be considered by the National Treasury before granting an approval to national government entity to open and operate a national government bank account.

The Regulations[84] further provide for openness and accountability by providing that the public is entitled to full access to financial information except in cases where national security is concerned and a relevant consideration.

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79 Section 3 (1) and (2).

80 Section 28 (1).

81 Section 28(6) and (7).

82 These Regulations were made by the Cabinet Secretary in charge of finance in the exercise of the powers conferred upon him under Section 205 of the PFMA 2012.

83 Public Finance Management (National Government) Regulations, 2015, Regulation 3.

84 *Ibid* Regulation 6.

As relates to borrowing or refinancing needs, the Act makes it mandatory for the national government entity to seek and obtain a written approval from the National Treasury Cabinet Secretary[85].

The PFMA[86], makes it mandatory to obtain a prior written County Treasury's authorisation for the opening, operation and closing of all bank accounts for the county government and its entities. The county treasury is also required to ensure that a complete and updated inventory is kept in respect of all the loans made to the county government.[87] Section 82 (1) sets the detailed criteria to guide the County Treasury in granting any such approval for the opening and operation of a county government bank account[88].

Under Section 140[89] the only person authorised to raise a loan on behalf of a county government is the County Executive Committee but the same is subject to ensuring that the loan and it's terms and conditions are clearly reduced into writing and that the said loan is among others guaranteed by the national government and approved by the county assembly as per Article 212 of the Constitution and in accord with Sections 58 and 142 of the Act.[90]

2.4 CONCLUSION

This Chapter has traced the general meaning and history of the public procurement in Kenya. There was the era of the Exchequer and Audit Act, the National Treasury Circulars, Government Financial Management Act, Exchequer and Audit (Public Procurement Regulations), 2001, the Public Procurement Disposal Act, 2005 (now repealed), The Public Finance Management Act, 2012 and the Public Procurement and Asset Disposal Act, 2015. The Chapter has also sought to look at the regulatory framework of the banking services in Kenya and to this extend the provisions of the Central Bank of Kenya Act and Banking Act were looked into.

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[85] Public Finance Management Act, 2012, Section 51 (1), (2) and (3).

[86] Public Finance Management Act, 2012, Section 119(1).

[87] *Ibid,* Section 122(1), (2), (3), (4) and (5).

[88] *Ibid* Regulations 177 and 178.

[89] Captioned Authority for borrowing by County Governments.

[90] Section 58 requires an approval of such a guaranteed loan by the Parliament. Section 142 provides that the county assembly may authorise short term borrowings by county government entities for cash management purposes only.

An important finding in the foregoing analysis of the PFMA 2012, the National Government and the County Government Regulations is that although they all make it mandatory for any opening and operation of bank accounts and borrowing at all the levels of government and by any public entity to seek a prior approval of the same from the respective treasury and assembly, the Act and the Regulations do no expressly make it a requirement for the procurement of the said banking services to have been done within the tender process as per the Public Procurement and Asset Disposal Act, 2015. This is the lacunae or "black hole" the public entities have exploited to circumvent the provisions of the Public Procurement and Asset Disposal Act, 2015.

Having reviewed the Kenyan procurement system from Kenyan independence to the present, it can be concluded that substantial progress has been made towards aligning the system with international standard practices. Indeed, Kenya's regulatory development from mere issuance of unenforceable government circulars to the current regime founded on an Act of Parliament, with enforceable provisions that are largely modelled after international regulatory standards, is remarkable. Also the procurement oversight and review institutions have become properly structured and strengthened by the enabling provisions of the Act. In turn, these institutions have contributed to the development of procurement regulations in Kenya. Indeed, the Public Procurement Review Board, the High Court and the Court of Appeal's interpretations of the procurement rules in the course of adjudicating over procurement complaints have enhanced the understanding and application of the procurement rules. Further changes are bound to occur in the near future.

CHAPTER THREE: PROCUREMENT OF BANKING SERVICES IN THE CONTEXT OF CONSTITUTION OF KENYA, PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015: ADDRESSING THE APPARENT INCONGRUENCE

3.0 INTRODUCTION

This Chapter will analyse the procurement of banking services in the context of the Constitution of Kenya, 2010 and the Public Procurement and Asset Disposal Act, 2015. It will begin by giving the Constitutional perspective and proceed to analyse the various procurement principles and provisions of public procurement in light of the Public Procurement and Asset Disposal Act, 2015 and the attendant regulations under the Act. In addressing the apparent conflict between the Public Finance Management Act, 2012 and the Public Procurement and Asset Disposal Act, 2015, the Chapter delves into the various ways of statutory interpretation which all yield to a conclusion that banking services need to be procured in accordance with the provisions of the Public Procurement and Asset Disposal Act, 2015 and any approval by the National Treasury (as anticipated under the provisions of the Public Finance Management Act, 2012) on the specific bank to offer the services should only be done upon satisfaction that the provisions of the Public Procurement and Asset Disposal Act, 2015 especially on competition, transparency and value for money have been met. This is especially so if at all the procurement is to accord to the provisions of Articles 10, 201 and 227(1) of the Constitution emphasising on fairness, transparency, competition, cost-effectiveness, accountability, prudent utilisation of public resources among others.

3.1 THE CONSTITUTION OF KENYA, 2010.

The Public Procurement and Asset Disposal Act,[91] was enacted pursuant to and to give effect to Article 227 of the Constitution. In essence, public procurement is required to be done in accordance with a system that is fair, equitable, transparent, competitive and cost effective.[92] Other provisions in the Constitution touching on transparency relate to national values and principles of governance.[93] These bind all State Organs, State Officers, Public Officers and all persons in the interpretation and application of the Constitution, enactment, application or interpretation of any law, making or implementation of any public policy decisions. The principles include among others: the participation of the people, good governance, integrity, transparency and

[91] Act No. 33 of 2015, Laws of Kenya.

[92] Constitution of Kenya, 2010, Article 227 (1).

[93] *Ibid,* Article 10.

accountability.[94] The Constitution entrenches further provisions on leadership and integrity[95]. In this regard, the Constitution provides checks and balances that will ensure public officials involved in all processes including public procurement uphold the constitutional standard on matters of integrity.

The Constitution provides that in all aspects of public finance in the Republic there shall among other things be openness and accountability, including public participation in financial matters, that public money shall be used in a prudent and responsible way; and that financial management shall be responsible[96]. The Public Finance Management Act,[97] was enacted pursuant to and to give effect to this Article.

To this extend, therefore, the promulgation of the 2010 Constitution has far reaching implications on the legal framework on public procurement regulation in Kenya. I seek to discuss the various procurement principles as hereunder.

3.2 PRINCIPLES OF PUBLIC PROCUREMENT

3.2.1 Accountability

Accountability refers to the obligation on the part of public officials to report on the usage of public resources and being answerable for any failure to meet stated performance objectives.[98] It is a standard of public life, where "holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their offices."[99] Indeed, accountability, is a very critical principle and essential building block of public administration. Accountability is one of the principles of public procurement and public services

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[94] *Ibid,* Article 10(2).

[95] *Ibid,* Chapter Six on Leadership and Integrity.

[96] *Ibid,* Article 201.

[97] Act No. 18 of 2012, Laws of Kenya.

[98] Elia Armstrong, *'Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues'* (2005) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiDgvuoyN3dAhVJrxoKHTUTCMcQFjAAegQICRAC&url=http%3A%2F%2Funpan1.un.org%2Fintradoc%2Fgroups%2Fpublic%2Fdocuments%2Fun%2Funpan020955.pdf&usg=AOvVaw22M1vu24NPCF0cF6hB9eGB> accessed 18th August, 2018.

[99] Pope J, *'IT source book 2000, confronting corruption: the elements of national integrity system'*, <http://info.worldbank.org/etools/docs/library/18416/00.pdf> accessed on 18thAugust, 2018.

under Articles 227(1) and 232(1) (e) respectively of the Constitution. Among the principles of public service in the new constitution is accountability for administrative acts.

3.2.2 Transparency

The Black's law dictionary defines transparency to mean openness; clarity; lack of guile and attempts to hide damaging information. Indeed transparency has common usage when dealing with issues of public finance disclosures, organisational and institutional policy making, legislation making among other activities where members of the public are likely to be affected.[100]

In the context of public procurement, transparency may be taken and understood in the context of four elements: - publicity for the available tender opportunities; disclosure on the rules to govern the specific procurement opportunity; a principle of rule-based decision making that limits the discretion of procuring entities; and having in place the mechanisms for the verification of the fact that the rules have been followed and for the enforcement where they have not.[101]

The Constitution of Kenya underscores the importance of transparency in public service delivery. It takes cognizance of transparency as one of the binding values on all state officers and institutions.[102] The Constitution has specific provisions on public procurement. It requires State organs or any other public entities to ensure that systems creating contracts for goods, services and works are transparent among other principles[103].

It cannot be overemphasized that an effective and transparent public procurement system, supported by sound legislation, institutional structure and organizational capacity, is the foundation for any public expenditure management framework.[104]. In principle, the availability of, and easy access to, public procurement information is key to conducting successful tenders and developing and strengthening sound economies that maximize the use of public resources. Availability and access to information also reduce the opportunity for discretionary action by government officials and therefore the potential for corruption.[105] High levels of transparency

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[100] Garner B.A, *Black's Law Dictionary*, Ninth edition, (West Publishing Co. USA, 2009) pg.1537.

[101] As outlined in Arrowsmith, Linarelli and Wallace, note 49 above, pg. 72-3.

[102] The Constitution of Kenya, 2010, Article 10.

[103] *ibid*, Article 227(1).

[104] http://www.crownagents.com/procurement-reform.aspx> accessed 15th August, 2018.

[105] Proética, Transparency International-USA (TI-USA) and the Center for International Private Enterprise (CIPE): APEC Procurement Transparency Standards in Peru- Strengthening the Culture of Integrity, Transparency

encourage more bidders to participate in public procurement and this often leads to increased competition.

3.2.3 Integrity

Lack of transparency and accountability were recognized as a major threat to integrity in public procurement at the 2004 OECD Global Forum on Governance: Fighting Corruption and Promoting Integrity in Public Procurement.[106]

A big concern as relates to public procurement in most of the world economies, Kenya included is integrity. It is for this reason that many studies and reports carried out by a number of institutions including the World Bank Group identify integrity as an overarching concern and pick it out as of primary importance towards the reform of the African procurement systems.[107] Dekel, considers that integrity rather than value for money is the overriding goal of competitive bidding in public procurement, and also that the principle of equal treatment as an independent objective of the procurement process should be equal in status to value for money.[108] Integrity seeks to prevent if not completely eliminate corruption, conflicts of interests, favouritism and other unethical conduct.

3.2.4 Value for Money

The rationale for value for money as an objective of procurement regulation seems fairly obvious: the government (or its agencies) in spending tax- payers' money are under an obligation to ensure the judicious use of these funds.[109] Competition thus remains a crucial means and an enabler for the realisation of value for money (but not, however, an end in itself). It's for this reason that most of the public procurement legislative regimes in the world make it a requirement that competitive methods of procurement be utilised by public institutions by allowing as many interested suppliers to participate in competing for the available publicised procurement opportunities and contracts.

International-USA and Center for International Private Enterprise (2011) pg 11 available at http://www.cipe.org/sites/default/files/publication-docs/TI-Report-Peru.pdf accessed on 3rd September, 2018.

[106] Organization for Economic Co-Operation and Development, Integrity in Public Procurement Good Practice from A to Z, Organization for Economic Co-Operation and Development, 2007,pg 324 <http://www.oecd.org/gov/ethics/integrityinpublicprocurementgoodpracticefromatoz.htm>accessed 21st August 2018.

[107] See the World Bank Institute's Contract Monitoring Initiative at http://wbi.worldbank.org/wbi/content/transparent-contracting-and -procurement (accessed on 14th October, 2018)

[108] O. Dekel, *The Legal Theory of Competitive Bidding for Government Contracts'* (2008) 37(2) Public Law Contract Journal, pg. 237.

[109] *Ibid,* pg. 246.

Another way of realising value for money is by ensuring strict enforcement of the procurement rules especially where they touch on competition and transparency. This ensures that public entities remain fair and treat all bidders equally in procurement hence ensuring that any interested member of the public is able to identify and take part in the procurement and have a share of the available government business opportunities. Through this the government gets the benefit of obtaining the goods and services it needs at the available best terms, cost and quality whilst also maintaining or creating the public confidence on its procurement process.

The ensuring of fair treatment of potential suppliers helps in ensuring value for money in several ways. For instance, it limits the possibility of the public entities to abuse the discretion by favouring specific firms the public officials may have interest in or where bribes may have been or may be given. It also encourages as many suppliers as possible and in this case best firms to also participate in the procurement process.

It must be stated however that there is no universal formula for assessing value for money in the public sector procurement.

3.2.5 Competition

In public procurement regulation, competition translates to rules insisting that contracts be awarded through some procedure involving multiple would-be suppliers competing for the contract. It is said to be one of the overarching principles of a procurement system. Schooner describes it as a 'pillar' of a procurement system.[110] He argues that it is through competition that the government is able to receive its best value in terms of price, quality and contract terms and conditions'.[111] In a practical sense, competition means inviting or encouraging the participation of a wide pool of potential bidders, the idea being that private companies, who are driven by profit, will compete to obtain government contracts, [112] thereby driving down prices and promoting innovation and excellence. There is a general presumption that the existence of competition amongst different bidders naturally induces them to give their best offer which is

[110] Schooner S, *'Desiderata Objectives for a System of Government Contract Law',* 2011 Public Procurement Law Review 103 (2002) pg 28.

[111] *Ibid*, pg. 54.

[112] *Ibid,* pg. 72.

to the benefit of the government and taxpayers. At a simplistic level, it is generally understood that competition in procurement means the participation of more than one supplier in a public procurement process.[113] The goal of (fair) competition requires procuring entities to allow all willing and eligible bidders to participate in a tender and to treat similar bids similarly and impartially and in accordance with prior communicated, objective and quantifiable criteria. In Trepte's words, competition operates as a discovery procedure by allowing different suppliers to communicate the prices and terms on which products are available and which may be produced using different quantitative combinations of various factors of production.[114] Competition is thus not only important for achieving value for money, but also helps in preserving integrity in the procurement system by creating incentives for the bidders to monitor compliance with the rules in a given procurement.

3.2.6 Economy and Efficiency

A procurement system is efficient (and economical) when procuring entities spend the least amount of resources in purchasing what they need.[115] The reason is that resources are often scarce and unless prudently utilised will get finished. It is for this reason that the resources ought to be utilised in a prudent, responsible and optimal manner to ensure that they meet the needs of public entities. In the context of public procurement, the goals of economy and efficiency call upon the public entities to spend taxpayer's money prudently.[116] This becomes even more critical if the Constitution places an obligation on the government to provide essential amenities and services as in the case with Kenya.[117]

In the recent case of *RentCo East Africa Limited, Lantech Africa Limited and Toshiba Corporation Consortium – v - Public Procurement Administrative Review Board & Kenya Electricity Generating Company Limited*[118] and in what appears like a classic case of how integrated in nature the various public procurement principles are in terms of application and importance in meeting the general object of public procurement, the Learned Justices stated thus:-

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[113] Racca, Perin and Albano, *'Competition in the Execution Phase'*, (2016), Public Procurement Law Review, pg. 89, 92-95.

[114] Trepte Peter, *Regulating Procurement*, (Oxford University Press Inc. New York 2004), pg 394.

[115] Schooner, 2002, pg. 45.

[116] Muthomi Thiankolu, *Reconciling Incongruous Policy Objectives and benchmarking Kenya's Public Procurement Law*: A review of the Selex Case, P.459, Journal of Public Procurement, Volume 11, Issue, 4, 451 – 481, Winter 2011.

[117] Refer to Article 43 of the Constitution of Kenya, 2010 on the Economic and Social Rights.

[118] Civil Appeal No. 24 of 2017.

"The object of procurement laws enacted in the recent past in Kenya is to improve public financial management, promote efficient use of state resources in order to foster national development; …; foster competition, efficiency, transparency, integrity and accountability, facilitate and ease procurement administration; and ensure value for money. Article 227 of the Constitution enjoins State organs and other public entities that contract for the supply of goods and services, to do so in accordance with a system that is fair, equitable, and transparent, competitive and cost-effective. Similar values of maximisation of economy and efficiency, promotion of integrity, competition, fairness, transparency, accountability, public confidence in the procurement procedures run through the Public Procurement and Asset Disposal Act, 2015… But these values and principles will mean little if the persons and institutions responsible for ensuring compliance are themselves in violation of the law".

3.3 THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015.

3.3.1. Commencement and Applicable Principles

The PPADA 2015 commended on 7th January, 2016. The key objective of the Act is to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes. The Act provides that State organs and public entities shall be guided by among others the following values and principles of the Constitution and relevant legislation—

(a) the national values and principles provided for under Article 10 of the Constitution;
(b) the principles of public finance under Article 201 of the Constitution;
(c) the values and principles of public service as provided for under Article 232 of the Constitution;
(d) maximization of value for money[119];

3.3.2. The Application of the Act

In terms of application, the PPADA, 2015 applies to all State organs and public entities.[120] For greater certainty, the Act provides that all public procurement are procurements with respect to

[119] Public Procurement and Asset Disposal Act, 2015, Section 3.

[120] *Ibid*, Section 4(1).

which it applies[121] and that all procurement by State organs and public entities are subject to the rules and principles of the Act.[122]

3.3.3. The Permitted Exceptions to the Application of the Act

There are some limited exceptions to the application of the PPADA, 2015. These are only in respect to (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 of 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 Partnerships Act, 2013; and 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.[123] The only other exception is for classified procurement under Section 90 of the Act.

It's important to note that in all these exceptions banking services doesn't feature.

3.3.4. The Various Procurement Methods

The Act provides for the various methods of procurement[124] with clear conditions for the application of each method. It provides for open tendering as the default and recommended method of public procurement[125]. The rationale for this is to foster transparency, fairness, competition and value for money in the Kenyan public procurement system and ensure that discretion is limited when the alternative methods of procurement are utilised.

[121] *Ibid*, Section 4(3).

[122] *Ibid*, Section 53(1).

[123] *Ibid*, Section 4(2).

[124] *Ibid*, Section 92.

[125] *Ibid*, Section 91(1).

3.3.4.1. Open Tendering

This is the default method to be used for all procurement of goods and services as specified in the PPADA, 2015.[126] Under this method, the procuring entity is required to ensure that reasonable steps are taken to bring the invitation to tender to the attention of those who may wish to submit tenders.[127] If the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for county, national and international advertising, the procuring entity is required to advertise in the dedicated Government tender's portals or in its own website, or a notice in at least two daily newspapers of nationwide circulation.[128] In addition to this the entity is required to use Kenya's dedicated tenders portal or any other electronic advertisements; and post advertisements at any conspicuous place reserved for this purpose in the premises of the procuring entity.[129] In the case of county-specific procurement pursuant to Section 33, the procuring entity is required to advertise the notice inviting the expressions of interest in the dedicated Government tenders portal; in its own website, or in at least one daily newspaper of county-wide circulation.

This method is considered as the appropriate one to use by default to support the key goals of public procurement systems, most notably value for money and integrity, since it provides for the greatest degree of transparency and competition of all procurement procedures; and it also supports the goal of equal treatment. In particular, the possibility for any person to have a tender considered makes for the maximum possible number of participants, which can increase the chances of the procuring entity benefitting from the best supplier available, and also induces suppliers to put the best offer they can make because of the level of competition; wide participation reduces the risk of collusion; the absence of any discretion to select which suppliers will be permitted to submit tenders reduces the possibility of abuse of discretion to favour particular suppliers; and the formal nature of open tendering also reduces the possibility for abuse of discretion.

However, situations may arise (typically owing to urgency, the type of goods or services sought to be procured or the supplier's circumstances) which warrant the use of alternative procurement methods and procedures. In this study, I look at the following alternative procurement methods:

[126] *Ibid,* Section 91.
[127] *Ibid*, Section 96.
[128] *Ibid*, Section 96(2).
[129] *Ibid,* Section 96(3).

two-stage tendering, restricted tendering, direct procurement and specially permitted procurement procedures.

3.3.4.2. Two-Stage Tendering

This method is utilised when the goods or services subject of procurement are complex in nature and there is evidence that on the part of the public entity there is inadequate knowledge and technical expertise which make it not feasible for the public entity to derive detailed technical specifications for the goods or services being sought to be procured.[130] The process is that the public entity then invites the bidders for the initial submission of tenders but only the proposals for the technical specifications with no accompanying financial bids. After this the procuring entity then conducts an evaluation on the technical proposal and thereafter invites the successful bidders whose tenders are retained to then place financial bids for consideration. It is from this second round of tenders that the entity selects a supplier.[131]

3.3.4.3. Restricted Tendering

In this case the tendering is limited to certain potential suppliers and may be used only where (i) the complexity or specialized nature of the goods or services requires that tendering be limited to pre-qualified suppliers, (ii) the time required to conduct open tendering would be disproportionate to the value obtained in the long run, or (iii) there is evidence that there are only a few known suppliers of the relevant goods or services.[132]

3.3.4.4. Direct Procurement

As the words states direct procurement involves engagement of a particular supplier without opening the tender to other interested bidders. The process is that the procuring entity issues a tender document directly to a particular supplier and invites the supplier to make a proposal to the procuring entity as a basis for negotiation[133]. This method of procurement is only allowed as long as the purpose is not to avoid competition[134] and only permitted where (i) the goods or services are available only from a particular supplier and the public entity is able to demonstrate that there exists no reasonable alternative or substitute, (ii) there is an urgent need for the goods or services due to an unforeseeable event beyond the control of the procuring entity the effect of which is

[130] *Ibid,* Section 99(1).
[131] *Ibid,* Section 99(2) and (3).
[132] *Ibid,* Section 102 (1) (a) (b) and (c).
[133] *Ibid,* Section 104(a).
[134] *Ibid,* Section 103(1).

that it makes it impractical to use the other procurement methods, (iii) it is necessary to purchase from a particular supplier to ensure that there is standardization or because of the need for compatibility with existing goods, technology or services, (iv) the supplier is a public entity supplying on terms that are fair and comparable to those obtainable in the open market[135].

An important finding is that banking services are not directly provided for as a subject of direct procurement in the foregoing provisions for direct procurement. As such any direct procurement of banking services outside the permitted justifications under Sections 103 and 104 of the PPADA, 2015 remains a violation of the same Act.

3.3.4.5. Specially Permitted Procurement

The National Treasury has the powers to allow a public entity to use the procedure (essentially allowing that body to not comply with the Act) where (i) exceptional requirements make it impossible, impracticable or uneconomical to comply with the Act, (ii) market conditions or behaviour do not allow the effective application of the Act, (iii) procurement of the goods or services is regulated or governed by harmonized international standards or practices, (iv) strategic partnership with the supplier is applied, or (v) credit financing procurement is applied.[136]

3.4 RESOLVING THE STATUTORY CONFLICT BETWEEN THE PUBLIC FINANCE MANAGEMENT ACT, 2012 AND THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015: STATUTORY INTERPRETATION

A review of the provisions of the PFMA 2012, its regulations and the PPADA 2015, no doubt points out to an existing contradiction within the PFMA 2015, its national and county government regulations and an interpretation conflict the PPADA, 2015.

The PFMA 2012 provides that it shall prevail in case of any inconsistency between it and any other legislation on among other matters, borrowing, lending, loan guarantees, banking arrangements, including opening of bank accounts and investments of moneys.[137] It however proceeds to provide that for the purposes of the Act, all procurement of goods and services and disposal of assets,

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[135] *Ibid,* Section 103(2).

[136] This particular procurement procedure is provided for under Section 114A of the Public Procurement and Asset Disposal Act, 2015. It was introduced through the Finance Act, 2017.

[137] Public Finance Management Act, 2012, Section 6(c), (d) and (e).

required for the purposes of the national government or a national government entity are to be carried out in accordance with Article 227 of the Constitution and the Public Procurement and Disposal Act.[138] In addition Regulation 115(1)[139] provides that all purchases of goods, works and services from suppliers, shall comply with the provisions prescribed in the Public Procurement and Disposal Act, 2005.[140]

Section 121[141] provides that for the purposes of the Act, all procurement of goods and services and disposal of assets, required for the purposes of the county government or a county government entity are to be carried out in accordance with Article 227 of the Constitution and the Public Procurement and Disposal Act (Cap. 412C). In addition, Regulation 114 (1)[142] provides that all purchases of goods, works and services from suppliers, including capital investments, shall comply with the provisions prescribed in the Public Procurement and Disposal Act, 2005.

On the other hand the PPADA, 2015 also anticipates conflicts with other Kenyan Laws. The Act provides that it shall prevail in the instance of any inconsistency between it and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal.[143]

I will be looking at the various ways of resolving the conflict between the PFMA 2012 and the PPADA, 2015 in light of the following aids to statutory interpretation.

3.4.1 The maxim *generalia specialibus non derogant.*

The meaning of this maxim is that where there is an apparent conflict between the provisions of two legislations, the provisions of the legislation which is general in nature will prevail over those of the more specific legislation. The maxim has been interpreted as thus[144]:-

> *'When two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. In other words the specific prevails over the general.....'*

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[138] *Ibid*, Section 30.

[139] Public Finance Management (National Government) Regulations, 2015.

[140] Now repealed hence to read Public Procurement and Asset Disposal Act, 2015.

[141] Public Finance Management Act, 2012.

[142] Public Finance Management (County Government) Regulations, 2015.

[143] Section 5(1) of the Public Procurement and Asset Disposal Act, 2015.

[144] Sullivan R., & Driedger, *Driedger on the construction of statutes,* 18th edition, (Toronto, Butterworths, 1994).

In the context of this study therefore the provisions of the PPADA, 2015 being more specific on matters to do with public procurement of goods and services prevail over those of the PFMA, 2012 which is more of general application and nature. In line with this maxim, the Public Procurement Administrative Review Board (PPARB) has held that the PPADA, 2015 prevails over other laws even where the conflict has nothing to do with procurement rules. The Review Board, for instance, upheld a decision by the Privatisation Commission to impose value added tax on a foreign bidder's financial proposal. This was in spite of the Value Added Tax Act providing that the procuring entity was liable to pay the tax.[145]

3.4.2 A Statute has to be read as an integral whole

In essence any statute must be read as an integral whole and construction made of all its parts together and not in isolation. In *Canada Sugar Refining Co – v - R., Lord Davey* said:[146]

> *"Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statute relation to the subject matter."*

For the above reasons, it follows that the PFMA 2012 and its regulations cannot provide that procurement of goods and services by the national government, national government entities, county government and county government entities be procured within the statutory dictates of the PPDA 2015 and then curiously anticipate to have banking services exempted from the PPADA 2015. Indeed if this was the intention of the PFMA 2012 then nothing would have been easier than to so clearly state.

Justice G.V. Odunga in the Case of *The Republic – v – Public Procurement Administrative Review Board, Roben Aberdare (K) Limited & Kenya Rural Roads Authority*[147] held as follows:

> *"It is however my view that in public procurement and disposal, the starting point is the Constitution. A procurement must therefore, before any other consideration is taken into account whether in the parent legislation or the rules and regulations made thereunder, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness.*

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[145] This happened in Public Procurement Administrative Review Board, Application No. 48 of 2009: *Maritime and Transport Business Solutions BV – v – the Privatisation Commission.*

[146] [1898] A.C 735 at 741.*See also; Brett – v - Brett* [1826]3 Add. 310-.316.

[147] Miscellaneous Civil Application No. 1000 of 2017 [2017] eKLR.

In other words, any legislative consideration which does not espouse these ingredients can only be secondary to the said Constitutional dictates."

The same Justice Odunga in the case of *Republic – v – Public Procurement Administrative Review Board & M/s Lex Oilfield Solutions Limited Ex Parte Geothermal Development Company Limited & M/s Netfast Communications Limited*[148] stated thus:-

"*For a public entity to procure a financial facility whose repayment is shrouded in mystery and bind the public with its repayment when the process did not comply with the principles under Article 227 of the Constitution would be clearly contrary to the spirit of the Constitution. It is therefore my view that only in exceptional circumstances should a provision of an enactment be interpreted in a manner that excludes public scrutiny since Article 227 embraces all the instances where a State organ or any other public entity is contracting for goods or services. To hold that Parliament can through its delegated power enact a law whose effect would be to divide which entities are subject to Article 227 of the Constitution without justification from the Constitution would amount to scuttling the letter and spirit of the said Article".*

Closely related to the above were the words of Nyamu, J (as he was then) in the case of *Republic – v – Public Procurement Administrative Review Board & Kenya Revenue Authority*[149] where he held that:

"Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be a greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice…In many cases it is the procedural propriety which is the stamp of fairness."

To paraphrase *Chelasaw – Vs – Attorney – General & Another*[150], rules and laws made under constitutional powers are superior and stand above those made under say a statute or regulations and they should be given more regard and force.

3.4.3 Clear words of a statute are to be interpreted as bearing their natural meaning

In the case of the PPADA 2015, it is very clear that the Act shall prevail in case of any inconsistency between it and any other legislation or government notices or circulars, in matters relating to

[148] HC, Nbi, Judicial Review Division, Misc. Application Nos. 71 and 72 of 2017 [2017] eKLR.

[149] Nairobi HC, Misc. Civil Appeal No. 540 of 2008, [2009] eKLR.

[150] [2005] 1 EA 33.

procurement and asset disposal.[151] The PPADA 2015 is also clear that it applies to all State organs and public entities[152]; for greater certainty, the Act provides that all public procurement are procurements with respect to which the Act applies[153] and that all procurement by State organs and public entities are subject to the rules and principles of the Act.[154] Clearly banking services never feature as one of the exceptions to the application of the Act.

In the case of *Republic – v – Public Procurement Administrative Review Board & 2 Others Team Engineering Spa*[155] expressed itself as hereunder:-

> *"The general law of interpretation is that where the words of a statute are plain there can be no more than once construction. With respect to past enactments it has always been a principle of interpretation that considerations stemming from legislative history must not override the plain words of a statute. Therefore when it is evident that a different and wider intention inspired a later Act, the intention of the Legislature as manifested in an earlier one will be of little assistance…..The law in my view is that a law must not be interpreted in a manner that would render it meaningless or scandalous and that it must be interpreted to give meaning to the intention of the legislature. However, where the words clearly express the intention of the legislature there is no room for any other interpretation."*

3.4.4 Intention of the legislature dominates

As in the case of documents, a statute should be construed in a manner to carry out the intention of the legislature. As Lord Blackburn said in *Edinburgh Street Tramways – v – Torbain*[156].

> *"I quite agree that in construing an Act of Parliament we are to see what is the intention which the legislature has expressed by the words, but then the words again are to be understood by looking at the subject matter they are speaking of and the object of the legislature."*

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[151] Public Procurement and Asset Disposal Act, 2015, Section 5(1).

[152] *Ibid,* Section 4(1).

[153] *Ibid,* Section 4(3).

[154] *Ibid,* Section 53(1).

[155] [2014] eKLR.

[156] [1877]3 App.Cas.58 at p.68. Cf. the same learned Lord in *River Wear Commissioners – v - Adamson* [1877] 2 App.Cas.743 at 763; Viscount Maugham speaking of an Order in Council in *Liversidge – v - Anderson* [1942] A.C .206 at p.219, and Denning L.J. in *Jackson(Francis) Developments Ltd – v - Hall* [1951]2 K.B. 488 at pp. 494,495.

It's clear from the purposive reading of the preamble to the PPADA, 2015 that the intention of the legislature in having in place this Act was to facilitate competitive, transparent and value for money driven public procurement of goods and services in the public sector. As such any interpretation and application of the PPADA, 2015 or any other law which seeks to undermine this objective should be avoided.

3.4.5 Upholding the policy and object of the statute

Next, if possible, the construction adopted should be in accordance with the policy and object of the statute in question. In the case of *Republic - v – Public Procurement Administrative Review Board ex parte Kleen Homes Security Services Limited*[157] it was held that the court must examine Section 3 of the PPADA 2015 on the purposes and objectives of the Act in line with Article 227 of the Constitution and that these objectives are key and a noble intention of the legislature which must be appreciated and embraced.

In the case of *Republic – v – Public Procurement Administrative Review Board &Another Ex parte Selex Sistemi Integrati*[158], Nyamu, J (as he then was) expressed himself as follows:

> *"Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximise economy and efficiency as well as increase public confidence in those procedures….The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya."*

3.4.76 The Rule of construction against absurdity - *ut res magis valeat quam pereat.*

Under this rule statutes are as far as possible supposed to be interpreted in a way to avoid absurdity. This is the legal maxim of *ut res magis valeat quam pereat.*[159] Translated in English, the maxim means to give effect to the matter rather than having it fail. This is the maxim of construction applied when alternative readings are possible, one of which (usually the broader reading) would achieve the manifest purpose of the document or statute and one of which (usually the narrower) would

[157] [2017] eKLR at page 76.

[158] Nairobi HCMA No. 1260 of 2007 [2008] eKLR 728.

[159] See *Pye – v - Minister for Lands for New South Wales* (1954) 1 W.L.R. 1410 at p.1423.

reduce it to futility or absurdity, whereby the interpreter chooses the one that gives effect to the purpose of the statute.

3.5 CONCLUSION

This Chapter has looked into the various articles of the Constitution the most important being Articles 10, 227(1) and 201. These Articles lay emphasis on the principles of transparency, competition, accountability, integrity, value for money and prudent fiscal expenditure among others. The chapter has discussed these principles in detail and the way the same have been mainstreamed in the Public Procurement and Asset Disposal Act, 2015 and even in some court decisions. The provisions of the Public Procurement and Asset Disposal Act, 2015 granting exceptions to the Act have been looked into to confirm whether public procurement of banking services falls within these exceptions. Various approaches to statutory interpretation have also been interrogated towards resolving the apparent conflict between the various provisions of the Public Procurement and Asset Disposal Act, 2015 and the Public Finance Management Act, 2012. The net effect of this analysis is that banking services are not exempted from the Public Procurement and Asset Disposal Act legislative framework and that that any apparent conflict should be resolved in favour of the Public Procurement and Asset Disposal Act, 2015 and Articles 10, 227(1) and 201 of the Constitution provided however that the Public Finance Management Act, 2012 remains relevant in the obtaining of the relevant treasury approvals for any banking services by public entities in Kenya.

CHAPTER 4: BENCHMARKING: THE UNCITRAL MODEL LAW & THE SOUTH AFRICAN PUBLIC PROCUREMENT LAW

4.0 INTRODUCTION

This Chapter seeks to benchmark the Kenya public procurement law on banking services with the UNCITRAL Model Law and the South African public procurement law as it relates to the specific aspect of banking services. An important finding is that unlike the Kenyan Public Finance Management Act, 2012, the South African Public Finance Management Act, 1999 made makes specific and unequivocal references to the need to ensure that banking services are procured competitively and transparently within the framework of the South African public procurement law and that any treasury approvals for banking arrangements are to be done only after confirmation that the prescribed tendering procedures have been complied with. An exciting finding is that banking services for public entities are also competitively negotiated and contracts made of the procurement process.

4.1 THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) MODEL LAW ON PUBLIC PROCUREMENT[160]

Model laws on procurement have been developed by UNCITRAL as part of its objective of promoting international trade by ensuring that there is standardisation of commercial laws. Towards this end they develop and develop templates for adoption by developing countries seeking to reform their public procurement laws and regulations by drawing on the wide experiences of procurement regulation around the world. This serves two important functions: they avoid the need to reinvent the wheel by designing or reforming procurement regimes 'from scratch'; and also help states to improve the quality of their procurement legislation by drawing on the collective global experience of regulation. The first Model Law on procurement was adopted in 1993[161], but covered only goods and works, to allow for rapid conclusion of an initial text without the complexity of considering services. A second Model Law was adopted soon

[160] UNGA RESOLUTION NO.66/95, 2011. The Model Law was adopted on 1st July 2011, available at www.uncitral .org/uncitral/uncitral_texts/procurement_infrastructure/2011Model.html.

[161] Model Law on the Procurement of Goods and Construction (1993), available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastrucute/1993Model.html.

afterwards, however, in 1994 [162] that also included rules on the procurement of services. It is this 1994 version that is mainly reflected in the in the current laws in many African countries Kenya included. The UNCITRAL initiated reforms on the 1994 UNCITRAL Model Law on Public Procurement; however the reform was not intended to be a wholesale review.[163] The intention was to harmonise the model law to be consistent with the United Nations Convention against Corruption (UNCAC) and the GPA. The emphasis was given on transparency, competition and objectivity.[164] The reform resulted in the 2011 UNCITRAL Model Law on Public Procurement, which was adopted on 1st July 2011.[165]

The Model Law embodies various provisions aimed at enhancing transparency in public procurement. The provisions comprise for instance rules concerning description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement.[166] Public procurement systems generally provide for a variety of different methods – or award procedures for awarding procurement contracts. These generally range from open tendering under which all interested and qualified firms may tender, to single source (or direct) contracting, whereby the procuring entity is permitted to approach a single supplier and award a contract without competition. Similar to the UNCITRAL Model Law, Kenya's Public Procurement and Asset Disposal Act, 2015 provides for 'open tendering' as the default procurement method.[167] The alternative procurement methods only apply under prescribed circumstances.[168] A limitation to the enforcement of the Act's stipulation on appropriate use of procurement methods is that procuring entities' choice of procurement method is exempted from challenge. This follows the rule in the 1994 version of the UNCITRAL Model Law, which commentators had criticised and advised that national government procurement laws should not follow and which has now been changed under the 2011 Model Law so that the decision on which

[162] UNCITRAL Model Law Model Law on the Procurement of Goods, Construction and Services (1994), available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastrucute/1994Model.html ('1994 Model Law')

[163] Caroline Nicholas, "Recent developments in the context of the UNCITRAL Model Law on Public Procurement" (OECD Conference, Paris July, 2013) http://www.oecd.org/gov/ethics/Session%206_%20Caroline%20Nicholas_UNCITRAL%20OECD%202013%20%282%29.pdf accessed 17th July 2013.

[164] *Ibid.*

[165] European Bank for Reconstruction and Development (2011): Public Procurement, available at http://www.ppi-ebrd-uncitral.com/index.php/en/uncitral-model-law accessed on 29/3/201.

[166] UNCTRAL Model Law on Public Procurement, 2011, Article 10(1).

[167] Section 91(1) of the Public Procurement and Asset Disposal Act, 2015.

[168] *Ibid,* Section 91(2).

procurement method to use is not excluded from being challenged.[169] Nonetheless, an aggrieved person may petition the Public Procurement Regulatory Authority to investigate and review a choice of procurement by a procuring entity, where there is evidence that the procurement method used is inappropriate for the circumstances.[170]

The Model Law requires the pre-qualification or pre-selection documents to set out a description of the subject matter of the procurement.[171] It requires the procuring entity to set out in the solicitation documents the detailed description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied.[172] Rules concerning evaluation criteria and procedures demonstrate the high transparency standards in the model law. It is a requirement that evaluation criteria shall relate to the subject matter of the procurement.[173] To the extent practicable, all non-price evaluation criteria shall be objective, quantifiable and expressed in monetary terms. [174]

In evaluating submissions and determining the successful submission, the procuring entity shall use only those criteria and procedures that have been set out in the solicitation documents and shall apply those criteria and procedures in the manner that has been disclosed in those solicitation documents.[175] The effect of the foregoing provision is that no criterion or procedure can be used if it has not been disclosed in the tender document.

Further, transparency provisions are on the rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions.[176] Others relate to exclusions of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest.[177] In addition, there are rules on the methods of procurement.[178].

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[169] J. Myers, Commentary on the UNCITRAL Model Law on Procurement' (1994) 22 *International Business Lawyer* 253, 255.

[170] Section 9(1) (h) of the Public Procurement and Asset Disposal Act, 2015.

[171] UNCTRAL Model Law on Public Procurement, 2011, Article 10(1) (a).

[172] *Ibid,* Article 10(1) (b).

[173] *Ibid,* Article 11 (1).

[174] *Ibid,* Article 11 (4).

[175] *Ibid,* Article 10 (6).

[176] *Ibid*, Article 14.

[177] *Ibid,* Article 21.

[178] *Ibid*, Article 27.

The methods include open tendering,[179] restricted tendering request for quotations, request for proposals without negotiation, two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations, electronic reverse auction and single-source procurement.

There can be little doubt that the 1994 *Model Law* has already had a marked influence on public procurement regulation in Africa and that the 2011 *Model Law* will in future continue to do so. The drafters of the PPADA, 2015 heavily borrowed from the text and structure of the Model Procurement Law. The Act is therefore in a big way similar to the Model Procurement Law. Any deviations are subtle. Achieving transparency in the procedures relating to public procurement is one of the key objectives of the UNCITRAL Model Law.[180] Kenya's public procurement policy is mainly discoverable from and founded upon the Kenya Public Procurement and Asset Disposal Act, 2015. The procurement objectives under the Act correspond with those stipulated under the UNICITRAL Model Law which are: value for money, integrity, accountability to the public, ensuring that markets are open to competition, support of economic and social objectives and efficiency.

In Kenya one of the major concerns in public procurement (including procurement of banking services) is the combatting of corruption. Although Kenya has to date not acceded to the plurilateral World Trade Organisation Government Procurement Agreement.[181] This agreement specifically deals with the combatting of corruption in public procurement in Article IV requiring the Parties to conduct procurement in a transparent and impartial manner that prevents corruption. This places a positive duty on the Parties to prevent corruption, and not only the duty

[179] It is worth noting however that except as otherwise provided for in Articles 29 to 31 of the Model Law, a procuring entity shall conduct procurement by means of open tendering.

[180] See the preamble to the 2011 UNCITRAL Model Law on Procurement of Goods, Construction and Services.

[181] Hereafter WTO GPA. During the discussions which led to GATT in 1946, the United States proposed that government purchases and contracts should also be subject to the general principles on which the GATT was based, including that of non-discrimination. The discussions culminated in the first Government Procurement Agreement, which was signed during 1979 and entered into force in 1981. This agreement formed the basis of the present GPA. Although the GPA resorts under the umbrella of the WTO, it does not form part of the single undertaking which constituted the WTO, and is a separate plurilateral agreement binding only the signatories thereto. The Agreement on Government Procurement (GPA) consists of 19 parties covering 47 WTO members (counting the European Union and its 28 member states, all of which are covered by the Agreement, as one party). Another 32 WTO members/observers and four international organizations participate in the GPA Committee as observers. 10 of these members with observer status are in the process of acceding to the Agreement.

to avoid corruption. Although the principles on which both the 1994 and 2011 *Model Laws,* the Kenya Public Finance Management Act 2012 and the Public Procurement and Asset Disposal Act 2015 are based, like competition, transparency, challenge procedures and such will assist to combat corruption, a positive duty to prevent corruption is not specifically imposed. The provisions of the *Model Law* are such however, that the *United Nations Convention against Corruption can* be complied with within the framework of the *Model Law*[182]*,* the approach by the GPA, which imposes a positive duty is preferable, however.[183]

4.2. The Republic of South Africa Public Procurement Law

The Republic of South Africa is regarded and referred to as a developed country, compared to other African countries. It however, and in many respects is a developing country.[184] The Republic of South Africa is founded and governed upon constitutional ideals. It is a democracy with a three-tier system of government. It consists of the national, provincial and local levels of government. In terms of dispute resolution the Republic has an independent judiciary which functions based on Roman-Dutch law and English common law legal system. The below is an outline of South Africa's public procurement system.[185]

4.2.1 An Analysis of the Law

The objectives of public procurement in South Africa are largely the same as they are for most national procurement systems including Kenya. The South African Constitution,[186] in section 217(1), stipulates that organs of state (referred to broadly here) must contract goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

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[182] The *UNCITRAL Model Law* has been designed to fulfil those requirements. See Nicholas Date Unknown http://www.ebrd.com/downloads/research/law/lit113c.pdf.

[183] For further reading on procurement under UNICITRAL Law please refer to http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812015000500012

[184] South Africa is, for example, a founding member of the World Trade Organisation (WTO) and is classified as a developed country in the WTO. It is, however, also on the list of emerging and developing economies of the International Monetary Fund's World Economic Outlook Report (October 2009). www.imf.org/external/pubs/ft/weo/2009/02/weodata/groups.htm#oem (accessed on 13th October, 2018.

[185] For more detailed discussion and analysis refer to the work of P. Bolton, The Law of Government Procurement in South Africa (Durban: LexisNexis Butterworths South Africa, 2007).

[186] Constitution of the Republic of South Africa, 1996 ('the Constitution').

The constitutional requirement is echoed in section 51(1)(a) of the Public Finance Management Act[187], which states that an accounting authority for, among others, a national or provincial department or public entity must ensure that the particular department or entity has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. In recognition of South Africa's history of discriminatory policies and practices, however, Section 217(2) stipulates that organs of states are not prevented from implementing a procurement policy that provides for categories of preference in the allocation of contracts and the protection or advancement or persons or categories of persons disadvantages by unfair discrimination. Such use of procedure must, in terms of section 217(3), however, take place in accordance with national legislation.

The Preferential Procurement Policy Framework Act (the 'Procurement Act')[188] was enacted in 2000, and provides a framework for the implementation of preferential procurement policies Regulations to the Act further bring out the use of procurement as an empowerment tool.[189] In June 2011, new Regulations were enacted and became effective on 7th December 2011.[190] The Regulations were redrafted to bring them more in line with South Africa's Broad-Based Black Economic Empowerment Act, enacted in 2003.[191] The aim of the latter Act is, inter alia, to establish a legislative framework for the promotion of black economic empowerment (BEE) in South Africa. The Act is aimed at the adoption of a uniform approach to BEE in South Africa and this includes procurement practices by organs of state.

The Public Finance and Management Act[192]regulates the management of finances in national and provincial government. It sets out the procedures for efficient and effective management of all

[187] Act No. 1 of 1999, South Africa.

[188] Act No. 5 of 2000.

[189] Preferential Procurement Regulations, Gazette Notice, No.22549 of 10th August 2001('2001 Procurement Regulations').

[190] Preferential Procurement Regulations, Government Gazette, No.34350 of 8th June 2011 (2011 Procurement Regulations').

[191] Act 53 of 2003. 9 See the preamble to the Act.

[192] No. 1 of 1999. It was assented into law on 2nd March, 1999 and commenced on 1st April, 2000 (with amendments by the following: Public Finance Management Amendment Act, No. 29 of 1999 Local Government: Municipal Systems Act, No. 32 of 2000, Judicial Officers (Amendment of Conditions of Service) Act, No. 28 of 2003[with effect from 1 November, 2003], Public Audit Act, No. 25 of 2004, Broadband Infraco Act, No. 33 of 2007, South African Express Act, No. 34 of 2007, Public Service Amendment Act, No. 30 of 2007 [with effect from 1 April, 2008], South

revenue, expenditure, assets and liabilities. It establishes the duties and responsibilities of government officials in charge of finances. The Act aims to secure transparency, accountability and sound financial management in government and public institutions.

The Act clarifies the laws in relation to the National and Provincial Treasuries, the National and Provincial Revenue Funds, and the National Budgets. It also governs the management of finances in departments, public entities like ESKOM, Parliament and the provincial legislatures, and constitutional institutions.

A peculiar and most important provision in this Act is Section 7.[193] It provides among others that a department authorised to open a bank account in terms of the prescribed framework, a public entity or a constitutional institution may open a bank account only— (*a*) with a bank registered in South Africa and approved in writing by the National Treasury; and (*b*) after any prescribed tendering procedures have been complied with **(underline mine)**

Curiously the provisions requiring compliance with prescribed tendering procedures in the South Africa Public Finance Management Act are missing in the Kenyan one. This is what necessitates the legislative intervention to have the same provision in the Kenya public finance law.

In a nutshell, the Constitution of South Africa calls for among others transparency, competition and cost-effectiveness in the public procurement of goods and services. This is made possible through an enabling framework under among others the Public Finance Management Act, 1999, Local Government: Municipal Finance Management Act, 2003, the Preferential Procurement Policy Framework Act, 2000 and The Construction Industry Development Board Act, 2000. There is a general rule that contracts must be advertised in at least the *Government Tender Bulletin.*[194] Public entities are also required to disclose beforehand the criteria to be applied in the evaluation and selection of successful bidders.

African Airways Act, No. 5 of 2007 [with effect from 13 July, 2009], Financial Management of Parliament Act, No. 10 of 2009.

[193] Captioned banking, cash management and investment framework.

[194] Available on the National Treasury website, www.treasury.gov.za (accessed 15th October, 2018) and the website of the South African government, www.info.gov.za/documents/tenders/index.htm (accessed 15th October, 2018.

4.2.2. Case Law

The South African courts have been clear that compliance with the public procurement laws is peremptory with any instance of noncompliance resulting to invalidation. A classic case is *TEB Properties CC – v - The MEC, Department of Health and Social Development, North West.*[195] The main issue in this case was that the procurement process failed to comply with statutory prescripts. In particular the Supreme Court was called upon to determine whether a contract which had been concluded by acting head of the Department of Health and Social Development was valid. This was especially so when the decision was not supported by rational reasons as provided for under the Regulations 13.2 and 16A.6.4 of the Treasury Regulations. The argument by Mr. Malaka who succeeded Kgasi argued that Kgasi failed to conclude the lease agreement through a competitive bidding process under the incorrect premise that the procurement of office accommodation in this instance was urgent and that the accounting officer was entitled to enter into the agreement without limitations based on the officers interpretation of Regulation 13.2.4. Mr. Malaka offered three grounds of justification for the termination. One was that the lease was irregularly concluded for want of compliance with the legal precepts. Second, he asserted that the appellant 'knowingly participated in an irregular acquisition of accommodation and/or office space.' Third, he claimed that the appellant failed to provide any proof of his participation in a public bidding system nor could it advance any cogent reasons why the irregular lease should not be terminated.

The court correctly found that the lease agreement was invalid for failing to comply with the peremptory procurement requirements. The appellant argued, based on the Turquand rule, that the failure of the Department to follow the competitive bidding process as it was required to, was an internal formality and that it was unaware that this formality had not been complied with and thus the agreement should be allowed to stand. The court referred to the *Eastern Cape Provincial Government – v – Contractprops* 25 (Pty) Ltd[196] where it was stated that where one of the parties has no power in law to conclude a contract and has been deprived of that power (if it ever had it) in the public interest the agreement cannot be held to be valid. That the other party was misled into believing that the Department had the power is regrettable but that this cannot alter the fact that such agreement is *ultra vires* the powers of the Eastern Cape Provincial government Department.

In *The Chief Executive Officer of the South African Social Security Agency N.O – v – Cash Paymaster Services (Pty) Ltd*[197], non-compliance with a competitive bidding process was allowed to stand on this

[195] Case No. 792/10 [2011] ZASCA 243 (01 December 2011)
[196] 2001 (4) SA 142 (SCA).
[197] (Case No. 90/2010) [2011] ZASCA 13 (11 March 2011)

basis. This case involved the awarding of a contract for the provision of banking and payment services for the South African public that receive social grants. SASSA chose not to use the public procurement process in granting the award to the South African Post Office (SAPO) another public body. In this case, SASSA found that using SAPO to provide the required banking services meant that it was getting greater value for money as SAPO was cheaper than the contractors previously used and the Postbank (which operated under SAPO) was more easily accessible to the citizens that received these social grants.

SASSA stated that its intention was to meet its constitutional object of providing social assistance to the needy and this it did by delegating this duty to SAPO. Paymaster disputed the manner in which the agreement between SASSA and SAPO was concluded on the basis that SASSA failed to comply with its own procurement policies as well as the peremptory requirements. The court held that Paymaster had to show that the reasons that SASSA relied on for not making use of the public procurement process were irrational. While Paymaster was able to show that the reasons were "wrong" in that they did not comply with the requirements for a competitive-process, they could not show that these were irrational and therefore did not fall within the ambit of Regulation 16A6.4. The court stated that it also needs to consider public interest, pragmatism and practicality before choosing to invalidate an administrative act. In this case, the court found that the deviation from the public procurement process was justified in terms of the Regulations and therefore should be allowed to stand, much to the chagrin of Paymaster.

4.2.3 Further Reforms in South Africa's Procurement

Another interesting and important feature of the public procurement process of banking services in the Republic of South Africa is that it is mandatory for them to be centrally negotiated and contracts executed on this basis. To reduce corruption the procurement is also now managed through e-tender portal hence no tenders are submitted on paper. According to the National Treasury, the e-Tenders portal has published well over 2,500 tenders worth R35bn since its inception in 2015. Towards this end, transparency in the public procurement of banking services in South Africa has greatly improved with advertisement and administrative costs coming down significantly. It is also mandatory for all bidders interested to procure for the South African government to be registered on the central supplier database.[198]

[198] https://www.cips.org/en-AU/supply-management/news/2016/february/south-africa-to-reform-public-procurement-processes. Accessed on 29.09.2018.

4.3. CONCLUSION

This Chapter has attempted to benchmark the public procurement law in Kenya especially as it relates to banking services with that under UNICTRAL Model Law with a conclusion that there are much similarities than there are differences. The Chapter has analysed the various laws governing public procurement and public finance management in South Africa these being the Constitution, the Public Finance Management Act, the Preferential Procurement Policy Framework Act and the Black Economic Empowerment Act and the various regulations among others.

The Chapter has demonstrated that the South Africa public finance law is more clearer in that it brings the public procurement of banking services right within the realm of public procurement law by specifically stating that any approvals for banking services to the treasury should only be sought upon satisfaction that the procurement process has been first done within the laid out tendering process. The Chapter has through case law demonstrated that the courts in South Africa take public procurement legal precepts principles and provisions seriously and any procurement decision outside the said precepts can only be sustained if the same is specifically within the few allowed exceptions and is a rational procurement decision as was the case in *Cash Paymaster* decision which centred on public procurement of banking services between two public bodies.

CHAPTER 5: CONCLUSION & RECOMMENDATIONS

5.0 CONCLUSION

This study was premised on a number of research questions and objectives as discussed in Chapter One. In response to these questions and objectives, the study has established that there currently exists two statutes in apparent conflict with each other as relates to the procurement of banking services by public entities. These statutes are the Public Finance Management Act, 2012 and Public Procurement and Asset Disposal Act, 2015.

The study has identified the various provisions in these two statutes and the relevant regulations derived out of these laws. In a bid to resolve the incongruence and conflicts in these laws the study has pointed out how the same needs to be resolved by use of various tools and aids to statutory interpretation. The net effect of the study is that public procurement of banking services ought to be procured within the legal regime of the Public Procurement and Asset Disposal Act, 2015 and that the provisions under the Public Finance Management Act, 2015 should be utilised in obtaining the approvals for the approval of the identified banking services provider once the procurement process has been procured within the legislative framework of the Public Procurement and Asset Disposal Act, 2015.

As was restated in the Supreme Court in the Advisory Opinion No. 2 of 2013[199] while citing with approval the decision in the Ugandan case of *Tinyefuza – v – Attorney-General*[200]:-

> *"The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and rule of paramountcy of the Constitution."*

Accordingly, Articles 201 and 227 of the Kenya Constitution cannot be read as standalone provisions or as mutually exclusive. They must co-exist, complement each other and read as meant to achieve common constitutional objectives. Therefore whether one looks at the issue from a constitutional standpoint or from a statutory angle, the values and principles of national governance and public finance must guide any public procurement and asset disposal by State organs and a public entities"[201] If anything, the Constitution of Kenya, 2010 reigns supreme, binds

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[199] *The Speaker of the Senate and Another - v – Honourable Attorney-General and Others* [2013] eKLR.

[200] Constitutional Petition No. 1 of 1996 [1997] UGCC3.

[201] *Republic – v – Independent Electoral and Boundaries Review Commission and Al Ghurair Printing and Publishing LLC & 6 Others*, Judicial Review No. 378 of 2017 p.71 [2017] eKLR.

all persons and state organs of the Republic at both levels of the government and any law that is inconsistent with it is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.[202]

For avoidance of doubt the two statutes are equally important in meeting the constitutional principles of value for money, accountability and prudence in the expenditure of public funds. The basis for this conclusion is that it's only then that the real objective and purpose of Articles 10, 227 and by extension 201 of the Constitution can be realised and sense made of them.

Lack of clear laws leaves gaps, which can lead to multiple interpretations. Public entities should apply the open method of procurement unless otherwise justified. This will help to promote transparency and competition since the alternative methods of procurement if applied without checks create opportunities for corruption.

Good governance promotes accountability and transparency which has been enshrined in the Constitution which is the supreme law of the land.[203] This will save the government from loss of funds through opaque and shoddy deals. To meet these goals, the principles of openness, transparency, value for money, equality of opportunity for all businesses and accountability should be promoted. Procurement activity needs to therefore reflect best practices in procurement which will ensure the promotion of the above objectives. Publicity for banking services helps realise value for money by ensuring that the best suppliers know about an opportunity, and helps open up contracts to competition.

5.1 RECOMMENDATIONS

The relevance of the PFMA 2012 and in particular Sections 6(e) and (f), 28(1), 119(1) and 29(1) cannot be underestimated. This Act has a great role to play, otherwise management of public funds will go amok.

Competitive bidding under the PPADA 2015 however provides better mechanisms and structures for a more detailed and satisfactory due diligence on the bidding banking entities. The Act also has a more structured enforcement mechanisms for any breach that may arise in that any procurement will result to a contract.

[202] Constitution of Kenya, 2010, Article 2(1) and (4).

[203] The Constitution of the Republic of Kenya, 2010, Article 227.

Whereas the public procurement of banking services in Kenya is not in dire straits and legislative intervention may not be the panacea to the challenges it currently faces, I recommend that the PFMA 2012 be amended to provide that any approval for the banking arrangements and/or loan facilities or any other banking services shall be granted but subject to the competitive procurement of the particular banking service provider in line with the provisions of the PPADA 2015. This is the case in South Africa where their Public Finance Management Act, 1999 so provides. Any clearance by the national or county treasury as envisaged under the PFMA should then be sought and effected once the banking services providers have already been identified through competitive bidding and in this case in line with the principles under Article 227 of the Constitution. To this end the National Treasury in liaison with the Office of the Attorney-General, the Public Procurement Regulatory Authority and the Kenya Law Reform Commission should take cue from the Republic of South Africa and take the lead by initiating this legislative proposal through the Parliament

As a stop gap measure and ending such a review of the law, I recommend that the Kenyan procurement officials, judges, members of the review board must adopt and yield to the interpretation in favour of aligning the procurement of banking services to the dictates of Articles 227 and 201 of the Constitution. These dictates easily find favour in the PPADA 2015. On matters procurement, the PFMA 2012 should be limited to the approvals of the already procured banking services provider within the tenets of the said Articles and the PPADA 2015.

The government (both the national and county) and public entities (both at the national and county level) should receive effective banking services at reasonable costs. Where the government and government entities are sourcing banking services the following practice is recommended:-

a. Having in place procurement processes which facilitate competition and negotiation. This is the practice in the Republic of South Africa;
b. Ensure that the public procurement of banking services is supported by written contracts and that the contracts specify the applicable costs, fees, and any hidden costs are disclosed beforehand; A written contract makes civil enforcement of any breach by the service provider certain, easier and with better and diverse choices of remedies available for the aggrieved public entity procuring the services.

c. Ensure that the public entity needs are evaluated against the costs and benefits of the specific banking services being rendered;
d. Ensure that there is established a relationship manager who best understands the needs of the public entity and is able to provide service improvement as and when need arises[204];

[204] *Also refer* to the Government Finance Officers Association (GFOA) recommendations 'dubbed' *Procurement of Financial Services* approved by the GFOA Executive Board, 2005. Some aspects of the practice have been revised by the Financial Management Capacity Building Committee (FMCBC) for use by Nova Scotia municipal governments. For further insights refer to http://www.gfoa.org/procurement-banking-services accessed 17th June, 2018.

APPENDIX 1 – Sample Questionnaire

Name of Public Official (Not Compulsory to indicate)

Position:

Division (Either Procurement, Finance or Legal)

Number of years in the Organisation:

1. How often does your institution require banking services?
2. What are the various banking services often required by your institution?
3. Have you ever heard of the Public Finance Management Act, 2012? If yes how relevant is it to your banking arrangements?
4. Have you ever heard of the Public Procurement and Asset Disposal Act, 2015? If yes how often have you used this Act in sourcing for banking services?
5. Is your procurement/finance division involved when deciding on banking arrangements? If so what is the role played by each division?
6. How many accounts does your institution have and with how many banks?
7. How do you identify which bank to offer which services in your institution? NB: The services in this case include opening of bank accounts, pay bill numbers, loan facilities etc.

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