



**Republic v Public Procurement Administrative Review Board & 2 others; Increate Technologies Limited & another (Interested Parties) (Application E130 of 2024) [2024] KEHC 8987 (KLR) (Judicial Review) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8987 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW  
APPLICATION E130 OF 2024**

**J NGAAH, J  
JULY 26, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD .... 1<sup>ST</sup>  
RESPONDENT**

**ACCOUNTING OFFICER OF JUDICIARY ..... 2<sup>ND</sup> RESPONDENT**

**JUDICIARY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**INCREATE TECHNOLOGIES LIMITED ..... INTERESTED PARTY**

**INTERGRATED SUPPLIES & CONSULTANCY LIMITED .... INTERESTED  
PARTY**

**JUDGMENT**

1. The application before court is a motion dated 13 June 2024 expressed to be brought under Articles 10, 27, 47, 50, 201, 227 and 232 of the Constitution; Sections 3, 28, 44(1), 44(2)(g) and G), 55, 74, 79, 80, 86, 167(1), 175, (3) and (6) of the *Public Procurement and Asset Disposal Act*, 2015; Sections 4, 7 and 9 of the *Fair Administrative Action Act*, 2015; Sections 8 and 9 of the *Law Reform Act*, cap. 26 and order 53 Rule 3 of the Civil Procedure Rules, 2010. It seeks the following orders:

“1. An order of certiorari to bring into this Honourable Court, to be quashed, the 1<sup>st</sup> Respondent's decision dated 30<sup>th</sup> May 2024 in Public



Procurement Administrative Review Board Application No.42 of 2024 Specicom Technologies Limited v Accounting Officer of the Judiciary & the Judiciary (as Respondents therein) and Increate Technologies Limited & Integrated Supplies & Consultancy (as Interested Parties therein) (hereinafter the "impugned decision") to the extent that the impugned decision dismissed the Applicant's Request for Review Application No.42 of 2024 Specicom Technologies Limited v Accounting Officer of the Judiciary & the Judiciary (as Respondents therein) and Increate Technologies Limited & Integrated Supplies & Consultancy (as Interested Parties therein) (hereinafter 'PPARB Application No.42 of 2024');

2. An order of mandamus compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to re-admit the Applicant's bid with respect to Tender No.: JUD/OT/048/2023-2024 for Supply, Delivery , Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years , renewable annually (once) subject to satisfactory performance back into the evaluation process and specifically at Stage 2A: Technical Evaluation of the Technical Solution of Section III - Evaluation and Qualification Criteria at page 29 of the Tender Document for re evaluation together with all other bids that made it to Stage 2A: Technical Evaluation of the Technical Solution of Section III - Evaluation and Qualification Criteria at page 29 of the Tender Document in accordance with the Constitution , the Act and the Tender Document.
3. An order of prohibition precluding the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and their officers, subordinates , servants and agents from entering into a contract with the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties herein or any other natural or juridical persons with respect to Lot 1 and Lot 2 of Tender No .: JUD/OT/048/2023-2024 for Supply, Delivery , Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance respectively , or awarding the subject tender to any other bidder who responded to the subject tender.
4. Alternatively , and without prejudice to the foregoing , an order of mandamus compelling the 1<sup>st</sup> Respondent to within twenty one (21) days from the date hereof re-admit Request for Review Application No.42 of 2024 Specicom Technologies Limited v Accounting Officer of the Judiciary & the Judiciary (as the Respondents therein) and Increate Technologies Limited & Integrated Supplies & Consultancy (as the Interested Parties therein) for purpose of re-consideration and issuance of appropriate and effective relief(s) taking into consideration the Judgment of this Honourable Court in the intended substantive judicial review application."

2. The motion is based on a statutory statement dated 12 June 2024 and an affidavit verifying the facts relied upon sworn on even date by Mr. Henry Kamau who has sworn that he is the managing director and a shareholder in the applicant company.
3. According to the averments and depositions in these documents, the applicant is a limited liability company whose core business is providing Information and Communication Technology (ICT)



hardware and software solutions, Information Technology (IT) security and consultancy services to its clients; these clients include the government, the private sector, non-governmental organizations and multinational organizations.

4. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are said to have advertised a tender described as “Tender No.: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract”. The tender was to run for a period of two (2) years but renewable for a one-year term, subject to satisfactory performance of the tender. The tender was, however, terminated or cancelled sometime in November 2023 for the reason that all the evaluated tenders were found to be non-responsive. In so finding, the procuring entity invoked Section 63(1)(f) of the *Public Procurement and Asset Disposal Act*, 2015 (the Act).
5. Subsequently, the subject tender was re-advertised as a Framework Contract by means of an open tender. The advertisement was carried out in February 2024 in the Daily Nation Newspaper, the Public Procurement Information Portal, [www.tenders.go.ke](http://www.tenders.go.ke) and the 3<sup>rd</sup> Respondent’s website, [www.judiciary.go.ke](http://www.judiciary.go.ke). The tender submission deadline was set for 7 March 2024. The 3<sup>rd</sup> Respondent held a virtual pre-bid meeting with prospective bidders on 27 February 2024 when bidders sought clarity on various technical issues. In response to those clarifications, the 3<sup>rd</sup> Respondent issued Addendum No. 1 dated 4 March 2024.
6. The Applicant participated in the tender and prepared its bid in accordance with the Invitation to Tender and Instructions to Tenderers (ITT) in the blank tender document issued by the Respondents. The tender comprised two (2) lots. Lot 1 was for three (3) types of switches and two (2) types of access points while Lot 2 was for four (4) types of IP Phones. The Applicant duly filled, completed its bid and submitted to the Respondents a duly compliant bid in response to both Lot 1 and Lot 2 of the subject tender by the tender submission deadline of 7 March 2024.
7. By a letter dated 23<sup>rd</sup> April 2024 and received by the Applicant via email on 25<sup>th</sup> April 2024, the 2<sup>nd</sup> Respondent notified the Applicant that its bid was determined non-responsive at the preliminary evaluation stage for both Lot 1 and Lot 2 of the subject tender since the Applicant’s Forms SD I and SD2 were signed by a person without the power of attorney.
8. The Applicant was also notified that Lot 1 of the subject tender was awarded at a total cost of Kshs.4,884,789. 00 although the successful bidder was not disclosed. Lot 2 was awarded to the 2<sup>nd</sup> interested party at a total cost of Kshs.491,687.81. Subsequently, the Applicant was notified vide an email of 29 April 2024 that Lot 1 of the subject tender was awarded to the 1<sup>st</sup> Interested Party.
9. Since the applicant was dissatisfied with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ decision of 9 May 2024, it sought for its review before 1<sup>st</sup> Respondent in Application No.42 of 2024. In the proceedings before the 1<sup>st</sup> respondent, the Accounting Officer of the Judiciary and the Judiciary were named as respondents while Increate Technologies Limited and Integrated Supplies & Consultancy were named as interested parties. The application was opposed.
10. On 30 March 2024, the 1<sup>st</sup> respondent delivered its decision and ordered the Letters of Notification of Intention to Award dated 23<sup>rd</sup> April 2024 addressed to the Applicant with respect to Tender No. JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance be nullified and set aside.
11. The procuring entity was also directed to issue the Applicant with a fresh letter of Notification of intention to Award with respect to the tender subject to satisfactory performance disclosing reasons for its disqualification as captured in the Evaluation Report in addition to the name of the successful



- bidder in Lot 1 in the subject tender and reasons why the said bidder was rendered successful in accordance with Section 87 of the Act of the [Public Procurement and Asset Disposal Act](#) as read with Regulation 82 of Regulations 2020 within two (2) days from the date of the 1<sup>st</sup> respondent's decision and, further, taking into consideration the 1<sup>st</sup> respondent's findings. The procuring entity was directed to proceed with the procurement proceedings for the tender bearing in mind the findings of the 1<sup>st</sup> respondent.
12. The applicant has been advised by its advocates, which advice it verily believes to be true, that the impugned decision is tainted with errors of law and fact. In particular, the decision is so tainted because the 1<sup>st</sup> respondent is said to have flouted sections 79 and 80 of the [Public Procurement and Asset Disposal Act](#) and regulations 74 and 75 of the Public Procurement Regulations, 2020 by failing to take into consideration the mandatory requirements MR 9 and MR10 of the Tender document. The 1<sup>st</sup> respondent is also alleged to have failed to consider the templates provided in the Tender Document were to be made by the Applicant's Company Secretary or Chief Executive or Managing Director or Principal Officer or Director and not the Applicant's Sales Executive.
  13. The 1<sup>st</sup> respondent is also said to have failed to consider that Forms SD I and SD2 were not submitted while blank but were rather submitted duly filled because they were made by the Applicant's Managing Director, and signed by Tabitha Mwangi, the Applicant's Sales Executive pursuant to a power of attorney. The decision is also impugned for having ignored the decisions of this Honourable Court to the effect that an evaluation committee of a procuring entity should evaluate bids in accordance with the criteria and procedure set out in a tender document, the [Public Procurement and Asset Disposal Act](#) and the Procurement Regulations.
  14. A replying affidavit sworn by Mr. James Kilaka on behalf of the 1<sup>st</sup> respondent was filed opposing the application. Mr. Kilaka has sworn that he is a procurement professional and the acting secretary of the 1<sup>st</sup> respondent.
  15. As is the 1<sup>st</sup> respondent's custom in this sort of matters, Mr. Kilaka has chronicled the mostly undisputed events leading to the impugned decision and defended the decision as being fair, reasonable, rational and lawful. In particular, it has been sworn on behalf of the 1<sup>st</sup> respondent that in determining whether the 3<sup>rd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document as read with provisions of [the Constitution](#), the Act and Regulations 2020, the 1<sup>st</sup> Respondent took into consideration the provisions of Article 227 of [the Constitution](#), Sections 58, 60(1), 70(3), 79, and 80 of the Act and Regulation 74(1) of the Public Procurement and Asset Disposal Regulations 2020.
  16. The 1<sup>st</sup> respondent also took note of the decision in High Court in Miscellaneous Civil Application No. 85 of 2018, Republic V Public Procurement Administrative Review Board; ex parte, Meru University of Science & Technology; M/S AAKI Consultants Architects and Urban Designers (Interested Party) [2019] eKLR. In these provisions and decision, the 1<sup>st</sup> respondent established that mandatory requirements cannot be waived and that the Evaluation Committee was mandated to evaluate the Applicant's tender together with all other tenders submitted in the subject tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and [the Constitution](#).
  17. Further, the 1<sup>st</sup> Respondent took note of the reasons issued by the procuring entity for the disqualification of the Applicant's tender at the preliminary evaluation stage and also submissions made by the Applicant to the effect that there was no requirement for the Self-Declaration forms SD1 and SD2 to be signed since the only requirement was for the said forms to be filled and that the person who made the declaration under forms SD1 and SD2 and who was to be held accountable was



the Applicant's Managing Director, Mr. Henry Kamau. The 1<sup>st</sup> respondent also noted the applicant's submission that the said forms were signed on Mr. Kamau's behalf by Ms. Tabitha Mwangi by virtue of the authority donated to her in a power of attorney submitted in the Applicant's bid document.

18. I was not able to open or download from the case tracking system portal documents purportedly filed by the rest of the respondents. It would also appear that none of the interested parties filed any documents. They also did not file at, at the registry, any hard copies of the documents they ought to have filed on the portal. The only submissions that could be retrieved were those filed by the applicant. Those purportedly filed by the 1<sup>st</sup> respondent were not retrievable. For purposes of making my determination I can only work with the available material.
19. The crux of the applicant's application revolves around mandatory requirements itemized as No. 9 and 10 in the tender document. According to these requirements, a tenderer was required to fill self-declaration forms described as "SD 1" and "SD 2". In the applicant's case, the declarant in the forms is indicated as Henry Kamau but they are signed, not by Henry Kamau, but by one Tabitha Mwangi. This fact is not disputed and the explanation given by the applicant why the person who has introduced himself as the declarant is not the same person who signed the declaration forms is that that the signatory signed under a power of attorney donated by the declarant.
20. According to the applicant, it was never a requirement that the declarant would be the same person who signed the forms. The applicants' case is captured in paragraphs 46 and 47 of submissions filed on its behalf as follows:

“46. My lord, a fact which the Respondent has failed to bring out in its submissions and Replying Affidavit is that the Applicant submitted a fully responsive bid by the aforesaid provisions of Section 79(1) of the Act read together with Regulation 74 of the Regulations, 2020, and that its bid was unfairly knocked out at the preliminary evaluation stage for the following reasons as stated at page 3 of the said Notification of Intention of Award dated 23rd April, 2024 (hereafter referred to as 'the Notification of Regret') as follows; The SD I is not signed by a person with a power of attorney. The SD2 is not signed by the person with the power of attorney.

(See page 3 of the Notification of Regret as annexure HK-5 to the Verifying Affidavit)

47. My lord, from the above reasons given by the 2nd Respondent in the Notification of Regret, it is important to note that no such requirements were ever provided for under the mandatory requirements provided for at Section III-Evaluation and Qualification Criteria at page 28 of the blank tender document with respect to the completion of the cited standard tender forms SD 1 and SD2. On the contrary, the only action that was required of the Applicant and all bidders were to only fill the Self-Declaration forms SD I and SD2 as is evident from mandatory requirements MR9 and MR 10 at page 28 of the Tender document.



48. My lord, we invite this Honorable Court to take note that the requirement of filling in the Self-Declaration forms SD I and SD2 was categorically presented at page 28 of the blank tender document as hereof:

"MR9. Must fill Self declaration forms SD I: - self-declaration that the person / Tenderer is not debarred in the matter of the *Public Procurement and Asset Disposal Act* 2015

MR I 0. Must fill Self declaration forms SD2: - self-declaration that the person /Tenderer will not engage in any corrupt or fraudulent practice"

(See mandatory requirements MR9 and MR 10 of on page 28 the blank tender annexed and marked as HK-3 to the Verifying Affidavit)

49. Thus, if the 2nd and 3rd Respondent would have wished to have forms SD I and SD2 in a particular manner they would have provided for the same."

21. It is worth noting that the question of compliance with the mandatory requirements no. 9 and 10 and, in particular, the manner of filling and signing the SD 1 and SD 2 forms is the same question that formed the basis of the applicant's request for review before the 1<sup>st</sup> respondent. For the avoidance of doubt, the applicant's argument on this question was captured by the 1<sup>st</sup> respondent and this is apparent in paragraphs 28, 29 and 30 of its decision. The applicant's arguments were captured as follows:

- "28. counsel referred the Board to Mandatory Requirements Nos. 9 and 10 (MR 9 and 10) of the Tender Document and pointed out that the said requirements only required a bidder to fill the self-declaration forms SD 1and SD2 as -compared to Mandatory Requirements Nos.4, 5, and 7 of the Tender Document which required a bidder to sign the same and as such, there was a dear distinction between a bidder being required to sign as compared to when the bidder is required to fill in a form.
29. Mr. Mwirigi invited the Board to look at page 38 and 39 of the Applicant's original bid submitted in response to the subject tender and pointed out that the Applicant submitted a duly filled Form SD1 and Form SD2 made by Henry Kamau in his capacity as the Applicant's Managing Director who was duly authorised and competent to make the said forms in addition to being duly signed by Tabitha Mwangi, an employee of the Applicant who had a duly executed Power of Attorney to sign on behalf of the Applicant and the Managing Director. Counsel referred the Board to page 61of the Applicant's bid document where it submitted a duly executed power of attorney and as such, Tabitha Mwangi was duly authorized to sign forms SDI and SD2 despite the fact that MR9 and 10 did not require the same forms to be signed.
- 30 ...He pointed out that forms SD1and SD2 in the Applicant's bid were made by the Applicant's Managing Director, Henry Kamau and that Tabitha Mwangi was duly authorised by the said director to sign forms SD1 and 502 on his behalf and on behalf of the Applicant and as such the forms were valid and compliant to MR 9 and 10."



22. That the applicant has raised before this Honourable Court the same question that it raised before the 1<sup>st</sup> respondent only goes to show that the applicant is aggrieved more by the decision of the respondent than with the process by which the decision was arrived at. That notwithstanding, for purposes of judicial review, it is necessary to interrogate whether the 1<sup>st</sup> respondent's consideration of the applicant's request for review can be faulted on any of the grounds of judicial review raised by the applicant. I will revert to the question of whether this Court can interrogate the merits of the 1<sup>st</sup> respondent's decision later.
23. In determining the issues raised by the applicant, the 1<sup>st</sup> respondent considered the provisions of Article 227 of *the Constitution* on procurement of public goods and services. It noted that under this provision, the procurement must be done through a system that is fair, equitable, transparent, competitive and cost-effective. The 1<sup>st</sup> respondent also relied on this Honourable Court's decision in Republic versus The Public Procurement Administrative Review Board & Another; ex parte Tuv Austria Turk (2020) eKLR where this provision of *the Constitution* was applied. Apart from *the Constitution*, the 1<sup>st</sup> respondent also considered and applied sections 58, 60(1), 70, 79 and 80 of the *Public Procurement and Asset Disposal Act*.
24. The 1<sup>st</sup> respondent then reproduced the SD forms in question in its decision. After considering and evaluating the evidence, it concluded at paragraphs 67 and 68 of its decision as follows:
67. From the above Power of Attorney, it is evident that the Applicant's Director, Mr Henry Kamau, fully delegated authority to Ms. Tabitha Mwangi and Mr. Solomon Njihia to undertake the roles, stipulated therein with regard to the subject tender. It is our considered opinion therefore that in reference to Forms SD 1 and SD 2 of the subject tender, Mr. Henry Kamau having delegated his authority as per the above power of attorney, ought not to have filled his name as the deponent of the declarations made in Forms SD 1, and SD 2 on behalf of the Applicant. Ms. Tabitha Mwangi was better placed to make the declarations under Forms SD1 and SD2 on behalf of the Applicant and sign the same as the deponent in view of being the donee authorized in the power of attorney to, inter alia, sign and submit bids on behalf of the Applicant, sign contracts awarded to the applicant and more importantly, sign the applicant's bid document submitted in the subject tender.
68. It was irregular and contrary to Mandatory Requirements No. 9 and 10 of the Tender Document as read with Section 62 of the Act, Regulation 47 of Regulations 2020 and the Fifth Schedule of Regulations 2020 for the Applicant's Forms SD1 and SD2 to be made in the name of Henry Kamau as the deponent and signed by another individual on account of the existing delegated authority to Tabitha Mwangi. We say so because the purpose of a deponent executing a self- declaration by himself or herself is to bind him or her to the declarations made. Forms SD1 and SD2 of the Tender Document are statutory forms and the persons listed therein are required to not only sign but to also disclose their titles as they are the ones responsible for making the declarations on behalf of the tenderer. Failure to do so amounts to non-compliance and cannot be deemed as a minor deviation as argued by the Applicant."
25. The 1<sup>st</sup> respondent then invoked section 79 (2) and (3) of the *Public Procurement and Asset Disposal Act* and held that a procuring entity cannot waive a mandatory requirement or term it as a "minor deviation" since a mandatory requirement is instrumental in determining the responsiveness of a tender. Ultimately, the 1<sup>st</sup> respondent came to the conclusion that the applicant failed to comply with the mandatory requirements nos. 9 and 10 of the tender document.



26. Against this background, would the 1<sup>st</sup> respondent's decision be said to be tainted on the grounds of illegality and irrationality which are the judicial review grounds upon which reliefs are sought? In order to answer this question, it is necessary to understand what these grounds are. Together with the ground of procedural impropriety, these grounds are ordinarily regarded as the traditional grounds of judicial review. They were first defined in the English decision of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review" and he identified them as illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred,



even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.”

26. Of concern in the instant application is the ground of illegality and irrationality. As far as the ground of illegality is concerned, I am not satisfied that 1<sup>st</sup> respondent can be said to have misunderstood the law that regulates its decision-making power or that it did not give effect to it. The extent of its powers is circumscribed in section 173 of the [Public Procurement and Asset Disposal Act](#) which states as follows:

173. Powers of Review Board

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

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
- (e) order termination of the procurement process and commencement of a new procurement process.

Courts will only intervene on the ground of illegality to ensure that the powers with which a particular public body is endowed are exercised lawfully. A body will not be deemed to act lawfully if it acts ultra vires or outside the limits of its jurisdiction. (See Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/paragraph 610).

27. Talking of jurisdiction, it has been held that a body lacks jurisdiction in a narrow sense if it has no power to adjudicate upon the dispute or to make the kind of decision or order in question (see *Anisminic Ltd v Foreign Compensation Commission* (1969) 2 AC 147 at 171). But it lacks jurisdiction in a wide sense if, having power to adjudicate upon the dispute, it abuses its power either by acting in bad faith or for an improper purpose. It is also said to lack jurisdiction in a wide sense if, though it has jurisdiction, it acts in a manner which is procedurally irregular or is unreasonable in a *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*. (1948) 1 KB 223) or commits any other error of law, for instance by asking itself the wrong question or failing to take into account relevant considerations or taking into account irrelevant considerations. Looking at the 1<sup>st</sup> respondent's decision, I am unable to find any instance where it can be said that the respondent acted ultra vires section 173 of the Act or that it abused its powers, or it acted mala fides or that it acted in a manner that was procedurally irregular or unreasonable. There is also no evidence that the 1<sup>st</sup> respondent made irrelevant considerations and ignored relevant considerations.
28. If a body arrives at a decision which is within its jurisdiction in the narrow sense, and does not commit any of the errors which go to jurisdiction in the wide sense, the court will not quash its decision on an application for judicial review even if it considers the decision to be wrong (*Anisminic Ltd v Foreign Compensation Commission* (supra) at p. 171).
29. This leads me to the question whether it is open to this Court to consider the merits of the 1<sup>st</sup> respondent's decision. It has been consistently held that judicial review is concerned with reviewing



not the merits of the decision in respect of which the application for judicial review is made, but with ensuring that the bodies exercising public functions observe the substantive principles of public law and that the decision-making process itself is lawful. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected yet it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power (see *Chief Constable of the North Wales Police v Evans* (1982) 3 All ER 141 at 143 and 154).

30. I am well aware that the Court of Appeal in *Suchan Investment Limited versus Ministry of National Heritage & Culture & 3 Others* (2016) Eklr held that a judicial review court may to some degree entertain merit determination, but while so holding the court was quick to point out that:

“56. Analysis of Article 7 of *the Constitution* as read with the *Fair Administrative Action Act* reveals the implicit shift of judicial review to include aspects of merit review of administrative action... It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in section 11 of the Act. On a case by case basis, future judicial decisions should delineate the extent of merit review under the provisions of the *Fair Administrative Action Act*.”

31. Thus, according to this decision, a judicial review court is now free to play a more intrusive role in exercise of its supervisory jurisdiction by way of judicial review over subordinate courts, tribunals and other such like bodies whose decisions are amenable to judicial review, and subject decisions of these bodies to merit examination. But that the merit review may not be of much consequence because a judicial review court will not substitute its own decision for that of the court, tribunal or other public body. It is also worth noting that in that case, the Court of Appeal was addressing the specific ground of proportionality.
32. That said, I appreciate the reality that there is room for development in this area of the law and indeed the growth of judicial review has been dynamic over the years. But while embracing these developments, I would adopt the words of Donaldson LJ in *R v Crown Court at Carlisle, ex p Marcus-Moore* (1981) Times, 26 October, DC, where he said that judicial review was capable of being extended to meet changing circumstances, but not to the extent that it became something different from review by developing an appellate nature. Judicial review, as we know it, must be keep to its lane.
33. Just as there is no much substance in proving the ground of illegality, so it is with the ground of irrationality. No material has been provided by the applicant to demonstrate that the 1<sup>st</sup> respondent’s decision is “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”.
34. I have had opportunity to consider the forms whose filling and signing form the basis of the applicant’s grievances. They are standard forms and in order to understand why the applicant’s case fall short of the threshold for judicial review reliefs, it is necessary that I reproduce them here:

“Form SD1



Self Declaration That The Person/ Tenderer Is Not Debarred In The Matter Of The Public, Procurement and Asset Disposal Act 2015

I,..... of Post Office Box.....being a resident of .....in the Republic of.....do hereby make a statement as follows:

1. That I am the Company Secretary/Chief Executive/Managing Director/ Principal Officer/Director of .....(insert name of the, company) who is a Bidder in respect of Tender No....for.....(insert tender title/ description) for.....,..... (insert name of the Procuring entity) and duly authorized and competent to make this statement.
2. That the aforesaid bidder, its Directors and subcontractors have not been debarred from participating in procurement proceeding under Part IV of the Act.
3. That what is deponed to hereinabove is true to the best of my knowledge, Information and belief.

.....

(Title) (signature) (Date)

Bidder Official Stamp

Form SD2

Self Declaration That He Person/tenderer Will Not Engage In Any Corruption Or Fraudulent Practice

I, .....of Post Office Box.....being a resident of .....in the Republic of.....do hereby make a statement as follows:

1. That I am the Chief Executive/ Managing Director/Principal Officer/Director of..... (insert name of the company) who is a bidder in respect of Tender No....for... (insert tender title/description) for..... (insert name of procuring entity) and duly authorised and competent to make this statement.
2. That the aforesaid bidder, its servants and/or agents/subcontractors will not engage in any corrupt or fraudulent practice and has not been requested to pay any inducement to ant member of the board, management, staff and/or employees and/or agents of ..... (insert name of the procuring entity) which is the procuring entity.
3. That the aforesaid bidder, its servants and/or agents/subcontractors have not offered any inducement to any member of the Board, Management, staff and/ or employees and/or agents of.....(name of the procuring entity)
4. That the aforesaid bidder will not engage/has not engaged in any corrosive practice with other bidders participating in the subject tender.
5. That what is deponed to herein above is true to the best of my knowledge information and belief.

.....



(Title) (Signature) (Date)”

35. The forms fall short of affidavits or statutory declarations by which the deponents are bound on oath. Nonetheless, the point here is, the 1<sup>st</sup> respondent’s interpretation that whoever introduces himself as the declarant is the same person that signs or ought to sign the forms cannot be said to be irrational. In my humble view, the suggestion that the declarant need not sign despite having introduced himself as such is what I find to be irrational.
36. For the reasons I have given, I decline to exercise my discretion in favour of the applicant. Its application is hereby dismissed with costs. It is so ordered.

**SIGNED, DATED AND DELIVERED ON 26 JULY 2024**

**NGAAH JAIRUS**

**JUDGE**

