



**Republic v Public Procurement Administrative Review Board; Rentco Africa Limited
(Interested Party); Accounting Officer-Kenya Electricity Transmission Company
Limited & another (Ex parte Applicants) (Judicial Review Application E153 of 2024)
[2024] KEHC 16481 (KLR) (Judicial Review) (27 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E153 OF 2024
JM CHIGITI, J
DECEMBER 27, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD RESPONDENT**

AND

RENTCO AFRICA LIMITED INTERESTED PARTY

AND

**ACCOUNTING OFFICER-KENYA ELECTRICITY TRANSMISSION
COMPANY LIMITED EX PARTE APPLICANT
KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED EX PARTE
APPLICANT**

JUDGMENT

1. The application before this court is the Applicant’s Notice of Motion dated 25th November 2024 wherein the Applicant seeks the following orders;
 1. That this Honourable Court be pleased to grant the following Judicial Review orders:
 - a. An order of Certiorari to remove into this Honourable Court for the purposes of being quashed the Decision and Order Number (2) and (3) of the Public Procurement



Administrative Board, the Respondent herein, made on 6th November 2023 under the Request for Review Application No.55/2022 in regard to Tender No.KETRACO-ST-009-2021 for Request for Proposal for Design, Construction and Commercial Operation of Tier Iv Data Centre on A Revenue Share Model wherein the Respondent ordered as follows;

“2. The 1st Respondent be and is hereby directed to ensure that the procurement contract in TENDER No.KETRACO-ST-009-2021 for Request for Proposal for Design, Construction and Commercial Operation of Tier Iv Data Centre on a Revenue Share Model is executed within the said 120 days.

3. The Applicant is at liberty to seek appropriate enforcement action in the event prayer (2) above is not complied with.”

b. Such further and other reliefs as the Honourable Court may deem just and expedient to grant

2. The application is supported by a Statutory Statement dated 20th November 2024 and an affidavit verifying the facts sworn on even date by Dr. (Eng) John Mativo MBS who introduces himself as the Managing Director of the 2nd Ex parte Applicant.
3. The Applicants’ case is that vide an Expression of Interest (EOI) Notice dated 25th May 2024, Kenya Electricity Transmission Company Limited, the 2nd Applicant herein, invited eligible bidders to submit their proposals for Provision of a Commercial Tier IV Data Centre Solution vide an open International Tender No. KETRACO-ST-009-2021.
4. According to the Applicants five firms submitted their proposals and these were Canovate Electronics Sewedy Technology—Egypt, MTN Business (K) Limited, RentCo Africa Limited in Partnership with China Mobile Limited, China Communication Services and iXAfrica Data Centre and Sterling and Wilson Pvt Limited.
5. After evaluation two bidders were found to be responsive and these were El Sewedy Technology-Egypt and Rentco Africa Limited in Partnership with China Mobile Limited, China Communication Services and iXAfrica Data Centre.
6. On 18th November 2021, the 2nd Ex parte Applicant sent a comprehensive Request for Proposal to the two (2) qualified applicants and only RentCo Africa Limited in Partnership with China Mobile Limited, China Communication Services and iXAfrica Data Centre responded to the Request for Proposal. The tender period closed on 30th December 2021.
7. Subsequently and in accordance with sections 46 and 126 of the Public Procurement & Asset Disposal Act 2015, the 2nd Applicant evaluated the bid submitted and found that the bidder had based on their previous experiences met the specifications to the proposed Data Centre.
8. The 2nd Applicant recommended the Award of tender to RentCo Africa Limited in Partnership with China Mobile Limited, China Communication Services and iXAfrica Data Centre and in order to complete the procurement process, the 2nd Applicant through the 1st Applicant extended the tender validity period twice from 28th April 2022 to 28th May 2022 and further extended to 29th June 2022.
9. According to Applicants, the Interested Party filed a Request for Review on 29th June 2022 PPARB Application Number 55 of 2022 seeking an extension of the tender validity period. The Request for review was dismissed in a decision dated 20th July 2022 and aggrieved by this decision the Interested



- Party filed a Judicial Review Application JR Misc. Application No.E100 of 2022 seeking an order to quash the decision of the Respondent.
10. The Court in its decision of 21st September 2022 quashed the Respondent's decision of 20th July 2022 and directed that the Respondent extend the subject tender for a period of 60 days or such period as it deemed necessary to conclude the tender process.
 11. The Applicants herein aggrieved by this decision filed Civil Appeal No.E755 of 2022 and the Court of Appeal on 21st December 2022 dismissed the appeal on the basis that the Appeal was time barred.
 12. It the Applicants' case that through various applications filed by the Interested Party the Respondent has extended the tender validity period with the last extension being granted on 6th November 2024.
 13. According to the Applicants the decision of the Respondent of 6th November 2024 in PPARB Application No 55/2022 arose from an Application by the Interested Party dated 15th October 2024. The Managing Director depones that in response to the said application he deponed a replying affidavit on 18th October 2024.
 14. Counsel for the respective parties are said to have agreed to compromise the application vide the consent dated 23rd October 2024 and filed on the even date. Subsequently the Respondent in its decision dated 6th November 2024 extended the tender validity period and ordered the Applicants to ensure that the procurement contract was executed within the 120 days.
 15. The Applicants case is that they are aggrieved with the decision number (2) and (3) and contend that the same was unlawful, capricious, irrational and beyond the powers of the Respondent.
 16. They challenge the decision on grounds that the same was ultra vires as the Respondent acted beyond the powers granted under Section 173 of the Public Procurement and Asset Disposal Act in compelling the Applicants to execute a contract.
 17. They also argue that the Respondent's decision was contrary to the law as it purported to usurp the consent dated 23rd October 2024 between the Applicants and the Interested Party.
 18. According to them the Respondent's decision was tainted with procedural impropriety as it went beyond the consent dated 23rd October 2024 and it ignored the fact that the parties had agreed to withdraw prayer number (2) of the Notice of Motion application dated 15th October 2024.
 19. It is also their case that the Respondent's decision was unreasonable as it disregarded the Applicants' reasons and submissions with respect to the legal impediments affecting the continuation of the procurement process.
 20. Further they argue that the Respondent's decision compelling the Applicants to execute a contract with the Interested Party while aware of the legal issues raised as to the validity of the procurement process contradicts the general principles of public policy and public finance management policies.
 21. The Applicants contend that the Respondent acted unreasonably within Wednesbury's principle of unreasonableness and that its conduct amounts to a breach of the Applicants' legitimate expectation and fair administrative action as provided under Article 47 of the Constitution. The Applicants also urge that the Respondent's decision is ultra vires its statutory mandate.
 22. It is the Ex parte Applicant's case that following the issues raised by the Public Procurement Regularity Authority on the validity of the applicable law for the subject tender, they wrote to the Honourable Attorney General vide a letter dated 23rd August 2024. The Honourable Attorney General responded vide a letter dated 14th October 2024 however the legal advisory did not fully address the issues in



question and as such the issue of what law should govern the subject tender according to the Applicants is still pending.

The Respondent's case;

23. In response the Respondent filed a Replying Affidavit sworn on 28th November 2024 by James Kilaka who introduces himself as the Acting Secretary of the Public Procurement Review Board.
24. According to the Respondent the Ex parte Applicants have been consenting to extension of the tender validity period to allow for the conclusion of the tender. Such instance includes on 27th September 2022 when the Respondent extended the tender validity period of the subject tender for a period of 182 days from 28th May 2022 at the instance of the Interested Party and with the concurrence of the Ex parte Applicants.
25. On 16th March 2023, the Respondent again extended the validity period of the subject tender by 90 days, from 26th February 2023, at the request of the Interested Party and with the agreement of the Ex parte Applicants.
26. The Respondent also asserts that on 12th September 2023, the validity period of the subject tender was extended by 120 days, starting from 24th August 2023, at the request of the Interested Party and with the approval of the Ex parte Applicants.
27. On 9th January 2024, the Respondent further extended the validity period of the subject tender for 180 days, beginning from 22nd December 2023, again at the request of the Interested Party and with the agreement of the Ex parte Applicants.
28. On 5th July 2024, the Respondent extended the validity period of the subject tender for 120 days from 19th June 2024, at the request of the Interested Party and with the consent of the Ex parte Applicants.
29. Lastly, on 6th November 2024, the Respondent extended the validity period of the subject tender for 120 days, starting from 16th October 2024, at the request of the Interested Party and with the approval of the Ex parte Applicants.
30. According to the Respondent throughout all the applications made before it, the parties sought time to conclude the procurement process which as at the date of the Replying Affidavit before this Court was overdue by over 2 years.
31. The Respondent's case is that on 16th October 2024, the Respondent sent a Notification of Appeal to the Ex parte Applicants, inviting them to respond to the application. The same day, the Respondent also notified both the Ex parte Applicants and the Interested Party about an online hearing for the Request for Review scheduled for 30th October 2024 at 2:00 p.m.
32. On 23rd October 2024, the Ex parte Applicants filed their response, which included a Consent between the parties agreeing to extend the tender validity period. They confirmed that additional time was needed to conclude the subject tender.
33. During the hearing on 23rd October 2024, the Board agreed to the extension and decided to issue a substantive ruling via email to the Advocates for both parties. Following the online hearing, the Respondent took time to prepare its Decision, which was sent by email to the Advocates appearing for the parties on 6th November 2024. The Respondent's Decision granted the extension of the tender validity period and instructed the Ex parte Applicants to ensure the tender was concluded within the extended timeframe.
34. In its decision the Respondent held as follows;



1. The tender validity period for TENDER No. KETRACO-ST-009-2021 for Request for Proposal for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model for a period of One Hundred and Twenty (120) days from 16th October 2024.
 2. The 1st Respondent be and is hereby directed to ensure that the procurement contract in TENDER No. KETRACO-ST-009-2021 for Request for Proposal for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model is executed within the said 120 days;
 3. The Applicant is at liberty to seek appropriate enforcement action in the event Payer (2) above is not complied with.
 4. Given the Board's finding above, each party shall bear its own costs.
35. In response to paragraph 20 of Dr. (Eng.) Mativo's affidavit, the Respondent states that there has been significant delay in executing the procurement contract for the subject tender and that although the Ex parte Applicants awarded the tender to the Interested Party in 2022, the contract had not been signed by 2024, despite multiple requests for extensions.
 36. It is emphasized that such requests for extension cannot continue indefinitely, and the procurement process must eventually conclude. Further that the Respondent's directive to the Ex parte Applicants to execute the contract was neither irrational, illegal, nor unreasonable, and no such issues were pointed out by the deponent.
 37. In response to paragraph 21 of Dr. Mativo's affidavit, it is noted that under Section 173(b) of the *Public Procurement and Asset Disposal Act*, the Respondent has the authority to direct an Accounting Officer on actions to take in a procurement process. In this case, the Respondent was within its rights to direct the 1st Ex parte Applicant to ensure the contract is concluded within the extended validity period.
 38. In response to paragraph 22 of the affidavit, it is clarified that the Respondent's Decision did not override the Consent of the parties. Instead, it established a framework for concluding the tender process.
 39. In response to paragraph 23 of Dr. (Eng.) Mativo's affidavit, it is reiterated that the tender has been delayed for over two years. The Ex-parte Applicants' objections to the Respondent's directions for signing the procurement contract within the extended period raise concerns about their commitment to concluding the tender. It is also the Respondent's case that the extension would serve no purpose if they are uninterested in finalizing the process.
 40. According to the Respondent the Ex-parte Applicants' reasons for delaying the tender process are insufficient. The Applicants it is urged have not shown that 120 days would be too short to conclude pending negotiations, and there has been no indication that investigations by the Ethics and Anti-Corruption Commission have halted the procurement process.
 41. Additionally, the Respondent's position is that conflicting advisories should not have prevented the Ex parte Applicants from seeking guidance from the Attorney General, and they have not demonstrated that 120 days would be insufficient to obtain the required advisory.
 42. In response to Dr. Mativo's affidavit, the Respondent asserts that there is no challenge to the validity of the tender and that it has been litigated in various courts. The Respondent also states that it acted reasonably and that there is no legitimate expectation to delay the conclusion of the



public procurement process. Finally, the Respondent affirms that its decision aligns with its statutory responsibilities.

43. In response to paragraph 24, it is stated that the Respondent's Decision was not procedurally improper. Instead, it aimed to bring the tender to a lawful conclusion, ending prolonged litigation and benefiting the public who have been deprived of the benefits of the tender. The Respondent is said to have considered the Ex parte Applicants' reasons for delay, which included pending negotiations, investigations by the Ethics and Anti-Corruption Commission, conflicting advisories on the tender process, and awaiting guidance from the Attorney General.
44. The Respondent's case is that its Decision of 6th November 2024 is reasonable, rational, and lawful, and it does not exceed its mandate or jurisdiction.
45. It also argues that it ensured compliance with the rules of natural justice, granting all parties the opportunity to present their cases, arguments, and relevant documents, in line with the [Public Procurement and Asset Disposal Act](#). Further that all relevant evidence was considered before making the decision.
46. According to the Board the Ex parte Applicants have failed to prove any illegality, irrationality, procedural impropriety, or unfairness in the Respondent's handling of the case. The Respondent is urged properly notified all parties of the completion of the review process, and the decision was shared via email on 6th November 2024.
47. The Respondent requests that the Notice of Motion dated 25th November 2024 be dismissed with costs. However, if the Court finds the application valid, the matter should be referred back to the court for further determination. Additionally, should the Court uphold the Ex parte Applicants' application, it is urged to disallow costs, as Section 175(7) of the Act prohibits the awarding of costs if the Respondent's decision is set aside.

The Interested Party's case;

48. The Interested Party also filed a Replying Affidavit sworn 29th November 2024 by Robert Kanda Nyasi who introduces himself as the Group Chief Executive Officer at Rentco Africa Limited.
49. The Interested Party's case is that on 6th November 2024, the Board ordered KETRACO to ensure the procurement contract is executed within 120 days, with the Interested Party free to seek enforcement if not done. The Applicants, in a letter dated 23rd August 2024, had requested guidance from the Attorney General regarding whether the procurement fell under Public Private Partnerships or Public Procurement.
50. The Applicants' affidavit, dated 18th October 2024, expressed that it had not yet received the legal opinion from the Attorney General. On 14th November 2024, the Interested Party contacted the Solicitor General for an update, and on 20th November 2024, the Solicitor General confirmed the Attorney General's opinion was issued on 14th October 2024, urging completion of the procurement process to avoid delays and increased costs.
51. According to the Interested Party the Solicitor General's opinion supported the view that investigations by the Ethics and Anti-Corruption Commission should not impede the procurement process without a court order.
52. It is urged that RentCo Consortium had agreed to a Letter of Award on 1st February 2023, but the Applicants have delayed execution of the contract. The Applicants are said to have invited the



Interested Party to meetings in May and December 2023, but the meetings were postponed indefinitely due to delays on their side.

53. The Interested Party argues that the Public Procurement Administrative Review Board (PPARB) has the mandate and discretion to extend the validity period and manage the tendering system, as per Sections 88 and 173 of the *Public Procurement and Asset Disposal Act* (PPADA 2015). Further that the High Court and Court of Appeal have upheld the enforceability of PPARB's decisions, which the Applicants are bound by.
54. The Interested Party requests that the current application be dismissed with costs, emphasizing the binding nature of previous court orders and the PPARB's final decisions.

The Applicants' submissions;

55. The Applicants filed written submissions dated 5th December 2024. In their submissions the Applicants rely on the case of *Pastoli vs Kabale District Local Government & Others* [2008] 2 EA 300 on the scope of judicial review and instances when a court can grant judicial review orders.
56. The Applicants refer to Section 173 of the Public Procurement Act on the powers of the Respondent. They submit that the powers prescribed under this Section ought to be exercised judiciously and within the context of the review application under consideration by the Respondent.
57. It is submitted that execution of a contract is the culmination of successful negotiations between the parties and that the Board under Section 173 does not have the power to compel a procuring entity to execute a contract as this would be against the general principle of the freedom to contract.
58. Reliance is placed on the case of *Republic v Cabinet Secretary for Interior & Co-ordination of National Government & another Ex parte Applicant: Peter Adiele Mmegwa & another* [2020] eKLR where the Court held that procedural impropriety is where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common rules of natural justice and fairness.
59. It is submitted that the Respondent went ahead and created an issue for determination that was not before it but that was also not properly heard and made a substantive decision on the same.
60. The Applicants argue that Section 4 of the *Fair Administrative Action Act* aligns with Article 47 of *the Constitution*, ensuring that every Kenyan is entitled to administrative actions that are efficient, lawful, reasonable, and fair. The Ex parte applicants contend that during negotiations with the Interested Parties, they faced legal challenges, including conflicting legal advice, investigations by the Ethics and Anti-Corruption Commission, and pending clarifications from the Attorney General on the applicable law for the tender in question.
61. The Applicants submit that the Respondent acted unreasonably by ordering the execution of a procurement contract within 120 days, despite the unresolved legal issues that could render the contract invalid. They conclude that decisions promoting illegality are inherently irrational and unreasonable, urging that the Respondent's actions in this case should be reconsidered.

The Respondent's submissions

62. The Respondent filed written submissions dated 4th December 2024. Therein it is submitted that as was held by the Court in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* [2014] eKLR judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision as long as the processes followed



by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.

63. Reliance is also placed in the case of *Pastoli V Kabale District Local Government Canal & Others* (2008) 2EA on the grounds upon which judicial review orders can be granted.
64. It is submitted that Section 173(b) of the *Public Procurement and Asset Disposal Act*, the Respondent has powers to give directions to an Accounting Officer with respect to anything to be done or redone in a procurement process and as such the Respondent was within its powers to direct the 1st Ex parte Applicant to ensure the procurement contract in the subject tender is concluded within the extended period of the tender validity period.
65. It is also submitted that the applicants have failed to demonstrate any elements of illegality, irrationality, procedural impropriety and/or unfairness in the manner in which the Respondent considered and interrogated the evidence, documents, pleadings, and information before it in arriving at its Decision of 6th November 2024 and in the manner parties to the Request for Review were notified of the completion of the Request for Review application by the Respondent when the Decision dated 6th November 2024 was transmitted to all parties to the Request for Review application via email on 6th November 2024.

The Interested Party's submissions

66. The Interested Party also filed written submissions dated 3rd December 2024 and in the submissions it is urged that the Respondent's direction to extend the tender validity period and order the Applicant to execute the procurement contract with the Interested Party falls squarely within the Board's powers under Section 173 of the Public Procurement and Assets Disposal Act, to ensure that the procurement contract in the tender is concluded within the extended period.
67. To further buttress this position reliance is placed in the case of *Republic v Public Procurement Review Board; Rhombus Construction Company Ltd (Interested Party) Ex Parte Kenya Ports Authority & Another* [2021] eKLR.
68. The Interested Party submits that the Respondent's decision was driven by public interest, as the Board noted that the subject procurement under the subject tender was meant to benefit the general public, but over 2 years had passed and there was little or no progress towards the conclusion of the said tender.
69. Reliance is placed in the case of *Fursys (K) Limited v Public Procurement Oversight Authority & 2 others* [2015] eKLR where the Court observed that the *Public Procurement and Asset Disposal Act* was enacted to hasten and expedite procurement procedures for the benefit of the public. Section 176(1) (c) of the said Act it is submitted speaks to delay without justifiable cause.
70. It is submitted that having complied with the order partly by extending time, the Applicants acknowledged the legality of the Respondent's decision and therefore cannot be heard to allege commission of any illegality by it.
71. The Interested Party also submits that this Court ought to align itself with the position held by the Court in the case of *Republic vs National Water Conservation & Pipeline Corporation & 11 Others* [2015] eKLR where it was held that once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith.



Analysis and Determination;

72. From the Application and the Responses thereto, the following issues present themselves for determination:
- i. Whether the Respondent acted beyond its powers, in an unlawful, irrational, or capricious manner by compelling the Applicants to execute the procurement contract within the extended validity period.
 - ii. Whether the Respondent's decision to extend the validity period conflicted with or overruled the consent agreement between the Applicants and the Interested Party regarding the procurement process.
 - iii. Who will Bear the Costs of this Application?

Whether the Respondent acted beyond its powers, in an unlawful, irrational, or capricious manner by compelling the Applicants to execute the procurement contract within the extended validity period.

73. The Applicant's main bone of contention is that the Respondent went ahead to give conditions that is a timeline of 120 days within which the Procuring Entity was expected to execute a contract with the Interested Party before this Court.
74. According to the Applicant's this was in excess of the Respondent's powers as envisaged under Section 173 of the *Public Procurement and Asset Disposal Act*.
75. The Applicant accuses the Respondent of failing to consider what had led to the application for extension in the first place and the fact that the legal impediments affecting the continuation of the procurement process had not been resolved.
76. The Respondent is also accused of failing to consider that in the consent dated 23rd October 2024 the parties had agree to withdraw prayer number (2) of the Notice of Motion application dated 15th October 2024 which sought the following prayer;
2. The Board be pleased to direct the Accounting Officer Kenya Electricity Transmission Co. Ltd, the 1st Respondent to finalise contract negotiations with the applicant for Tender No. KETRACO-ST-))(-2021 for proposal for Design, Construction and Commercial Operation of Tiers IV Data Centre on Revenue Share Model within the further extended tender validity period.
77. In response to this the Respondent urges that the extension would serve no purpose if Applicants are uninterested in finalizing the process and that the reasons adduced by the Applicants for delaying the tender process are insufficient.
78. It is also the Respondent's argument that the Applicants have not shown that 120 days would be too short to conclude pending negotiations, and there has been no indication that investigations by the Ethics and Anti-Corruption Commission have halted the procurement process.
79. The Respondent also argues that conflicting advisories should not have prevented the Ex parte Applicants from seeking guidance from the Attorney General, and further that they have not demonstrated that 120 days would be insufficient to obtain the required advisory.



80. The Respondent also urges that in reaching its decision it aimed to bring the tender to a lawful conclusion, ending prolonged litigation and benefiting the public who have been deprived of the benefits of the tender.
81. According to the Respondent its decision was reasonable, rational and lawful. The Respondent also states that it ensured that it complied with the rules of natural justice.
82. The Interested Party in its response informs the Court that as the Applicants had alluded in their affidavit of 18th October 2024 that the Attorney General’s opinion had been issued on 14th October 2024 urging the completion of the procurement process to avoid delay and increased costs.
83. The Solicitor General is also said to have been of the opinion that investigations by the Ethics and Anti-Corruption Commission should not impede a procurement process without a court order.
84. According to the Interested Party the Public Procurement Administrative Review Board (PPARB) has the mandate and discretion to extend the validity period and manage the tendering system, as per Sections 88 and 173 of the *Public Procurement and Asset Disposal Act* (PPADA 2015).
85. The Public Procurement Administrative Review Board is established under Section 27 of the *Public Procurement and Asset Disposal Act*.
86. The Powers of the Board are set out under Section 173 of the same Act to include the following,
 Upon completing a review, the Review Board may do any one or more of the following—
- a. ...
 - 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;
87. Section 88 of the Act on Extension of the tender validity period. The Sections states thus;
- (1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.
 - (2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.
 - (3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.
 - (4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).
88. Section 173 (b) grants the Respondent the powers to give directions to the accounting officer of a procuring entity who according to Section 88 has the authority to extend the validity period of a tender directions in respect to anything to be done or redone in the procurement process.
89. The law does not limit the number of the times the Respondent can grant an extension of the Tender validity period.
90. In the case of *Pastoli vs Kabale District Local Government Council & Others*, (2008) 2 EA 300, it was held that:
- “In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural



impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also, Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

91. In its reasons for crafting the orders as it did the Respondent observed as follows;

“ 17. In all the instances above, the parties were seeking more time to conclude negotiations on the terms of the contract and were in each occasion recording a consent for the extension of the tender validity period.

18. In view of the foregoing background, the Board takes great exception of the manner in which the subject tender is being conducted. The parties’ attention is drawn to the fact that the subject procurement under the subject tender is meant to benefit the general public but for over two years now, little to no progress at all has been made towards the conclusion of the subject tender, For purposes of bringing the matter to an end, the Board adopts the Consent by the parties as per the dispositive orders of this decision.”

92. In the case of Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Exparte Applicant; Kenya Ports Authority & Accounting Officer-Kenya Ports Authority (Judicial Review E002 of 2021)[2021] KEHC 8109 (KLR)(5 March 2021) upheld by the Court of Appeal in Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others [2021] eKLR the Court observed as follows;

“Under section 173(a)(b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer.”

93. In the instant case the Applicants have failed to execute their contract with the Interested Party despite having been granted several extensions to finalise on the same. The Respondent pursuant to its wide discretionary powers as observed in the above case on 6th November 2024 directed the 1st Applicant to do so within 120 days as previous extensions did not seem to bear any fruits.



94. In my opinion in doing so the Respondent was acting within its powers as envisaged under Section 173 of the Act. This decision was obviously for the better management of the tendering process as failure to do so would mean that there would be extension of the tender validity period indefinitely to the detriment of the public.
95. The Court of Appeal in the case of Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others (Civil Appeal E510 of 2022) [2022] KECA 982 (KLR) (9 September 2022) (Judgment) observed as follows; “Procurement of public goods and services plays an important role in the country’s economic development. Over the years the Government has taken various measures to streamline it with a view to sealing many gaps that have made it prone to corruption. We, the people of Kenya, in adopting, enacting, and giving to ourselves *the Constitution* of Kenya, 2010 stated at Article 227 that:
- “(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost- effective.”
96. Having denied the people of Kenya the chance to enjoy public goods that ought to have been provided through the subject tender the Applicants have acted against Article 227 of *the Constitution*, 2010.

Whether the Respondent’s decision to extend the validity period conflicted with or overruled the consent agreement between the Applicants and the Interested Party regarding the procurement process.

97. Another issue that came up from the Applicants’ case is that in arriving at its decision the Respondent failed to take into consideration that the parties had entered into a consent agreement. It was even argued that the Respondent did not ensure fair administrative action as the parties were not heard on certain issues. The Applicants argue that the Respondent’s actions override the consent agreement made with the Interested Party.
98. In response the Respondent asserts that it did not override the agreement but sought to ensure the procurement process was completed.
99. In reaching this decision the Respondent was acting within its mandate as provided under Section 173 of the Act so as to ensure that the procurement process was undertaken as required under *the Constitution*.
100. In my opinion the Respondent’s decision did not override the consent between the Applicants and the Interested Party. The decision was arrived at for purposes ensuring that the procurement process proceeded to completion timeously and in accordance with the law there having been several extensions culminating from consents from the said parties.
101. The Respondent also rightfully observes that the application before this Court should not be allowed, as the Applicants have not provided evidence before this Court that whatever impediment is preventing execution of the contract cannot have been sorted out within the 120 days period.
102. It is also clear from what is adduced before this Court as evidence by the Applicants that no substantial steps have been taken to ensure that the issues preventing execution of the contract are dealt with 2 years on.
103. Through the consent dated 23rd October 2024 the parties agree to withdraw prayer number (2) of the Notice of Motion application dated 15th October 2024 which sought the following prayer;



2. The Board be pleased to direct the Accounting Officer Kenya Electricity Transmission Co. Ltd, the 1st Respondent to finalise contract negotiations with the applicant for Tender No. KETRACO-ST-(-2021 for proposal for Design, Construction and Commercial Operation of Tiers IV Data Centre on Revenue Share Model within the further extended tender validity period.
104. It is this courts' finding that the said consent did not bar the Respondent from considering any matters placed before it subsequent to the consent.
105. To allow this prayer as sought would be tantamount to ordering that The Respondent is barred from intervening in perpetuity on future contracts.

Who will Bear the Costs of this Application?

106. It is trite that costs follow the event as highlighted in the Rai & 3 others v Rai & 4 others(Petition4 of 2012)[2014] KESC 31 (KLR)(4 March 2014)(Ruling).

Disposition;

107. In light of the foregoing, the Court finds that the Respondent acted within its lawful powers as provided under the Public Procurement and Asset Disposal Act, particularly Section 173, in directing the Applicants to execute the procurement contract within the extended validity period. The decision was neither unlawful, irrational, nor capricious but was made in the public interest to ensure the timely completion of the procurement process and to avoid more costs being incurred.

Order;

The application dated 25th November 2025 is hereby dismissed with costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF DECEMBER 2024

.....

J. M. CHIGITI (SC)

JUDGE

