



**Republic v Nzai & 2 others; EAA Company Limited (Exparte Applicant) (Judicial Review Miscellaneous Application E154 of 2024) [2024] KEHC 16146 (KLR) (Judicial Review) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16146 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E154 OF 2024  
JM CHIGITI, J  
DECEMBER 20, 2024  
IN THE MATTER OF PPRB DEBARMENT APPLICATION NO. 9 OF 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**CHARLES NZAI ..... 1<sup>ST</sup> RESPONDENT**

**PUBLIC PROCUREMENT REGULATORY AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**PUBLIC PROCUREMENT REGULATORY BOARD ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**EAA COMPANY LIMITED ..... EXPARTE APPLICANT**

**JUDGMENT**

1. The application that is before this court is the one dated 30th November 2024 wherein the applicant seeks the following orders;
  - i. That Orders of Certiorari be and is hereby issued to bring into this Court and to quash the Notice of Intended Debarment of the Applicant dated 18<sup>th</sup> November 2024 in PPRB Debarment Application No. 9 of 2024, Charles Nzai vs EAA Company Limited issued by the 3<sup>rd</sup> Respondent, the entire debarment proceedings and any and all decisions made therein, 1<sup>st</sup> Respondent’s Request for the Applicant’s Debarment dated and filed on 28<sup>th</sup> October 2024, and the 3<sup>rd</sup> Respondent’s decision that found that a prima facie case had been made out by that Request For Debarment so as to commence debarment proceedings against the Applicant.



- ii. That an Order of Prohibition be and issued to stop the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from hearing the Debarment proceedings, PPRB Debarment Application No. 9 of 2024, Charles Nzai vs EAA Company Limited, and from enforcing and or implementing any and all decisions made therein.
  - iii. That this Court may deem fit and just.
  - iv. The costs shall be awarded to the Applicant.
2. The Applicant is an international company domiciled in Japan offering the inspection services required by Kenya Bureau of Standards (KEBS), of used motor vehicles, spare parts and mobile equipment that are imported from Japan, United Kingdom, Singapore, United Arab Emirates and South Africa.
3. It is the Applicant's case that Respondents contrived to have it debarred from participating in public procurement in Kenya for 3 years from the 23<sup>rd</sup> June 2021 in Debarment Applications Nos. 1&2 of 2021 (Consolidated), Charles Nzai & Auditor General vs EAA Company Limited and caused that decision to be used in an attempt to deny the Applicant from bidding for business in East Africa.
4. The Applicant is dissatisfied that the 3<sup>rd</sup> Respondent has instituted other debarment proceedings against the Applicant herein in Debarment Application NO. 9 OF 2024, Charles Nzai vs EAA Company Limited, which the Applicant seeks to challenge through these judicial review proceedings.
5. The Applicant invokes Regulation 22(1) (a) of the Regulations as read alongside the Debarment Manual.
6. It is the Applicant's case that Clauses 5(1)(a), 9(b), 9(d), (h) and (k) of the Debarment Manual outlines the evidentiary threshold required for proving various grounds of debarment, as follows:
  - i. Clauses 5(1)(a), (b) and (h) provide that a JUDGEMENT/ DECREE of a Court of competent jurisdiction MUST be produced as proof of 3 grounds of debarment, namely (a) that a bidder in a past tender had committed an offence under the Act (PPADA), (b) that one had committed an offence relating to procurement under any other Act or Law of Kenya or any other jurisdiction and (h) that one is guilty of corrupt or fraudulent practices.
  - ii. Clause 5(1)(d) on the other hand provides that to prove that one has, in procurement or asset disposal proceedings, given false information about his or her qualifications, an Applicant Requesting For Debarment must provide the following documents that are confidential and inaccessible to a Private Non-Bidding Citizen except a procuring entity, its employees, agents, commissions or committees, and to members of the Public Procurement Regulatory Board (the 3<sup>rd</sup> Respondent herein) pursuant to section 67(1)(b), (c) and (d), (3) and (4) PPADA, and even then, access would be limited to a summary of the procurement can be provided pursuant to S. 68(2)(d)(ii) PPADA:-
    - a. Tender document issued to Bidders;
    - b. Original bid document submitted by the Respondent containing false information; Minutes of the tender opening committee;
    - c. Evaluation report;
    - d. Professional opinion;
    - e. Correspondences between the Procuring Entity and the Respondent (the Bidder) relating to the issue in question;



- f. And any other document that the applicant may deem necessary to support their case.
7. The Applicant argues that that it had been debarred previously in PPRB Debarment Application Nos. 1&2 of 2021, Charles Nzai & Auditor General vs EAA Co Ltd, in a decision given on 23<sup>rd</sup> June 2021 which term lapsed on 22<sup>nd</sup> June 2024 and the Applicant is now free to participate again in public procurement in Kenya.
  8. It is the Applicant's case that the 1<sup>st</sup> Respondent has filed a 2<sup>nd</sup> Request for debarment of the Applicant dated 28<sup>th</sup> October 2024 upon which the 3<sup>rd</sup> Respondent issued a Debarment Notice dated 18<sup>th</sup> October 2024 which is to be responded to within 14 days.
  9. The Applicant argues that there is no justification for the debarment again and that KEBS, Parliament and the Auditor General have previously confirmed that it is qualified to undertake contracts given by KEBS, the same qualifications which are being disparaged in the impugned debarment proceedings.
  10. The Applicant argues that it raised a Notice to Produce Documents dated 5<sup>th</sup> December, 2024 requesting the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to furnish the following documents and is its case that the 1<sup>st</sup> Respondent's Request for Debarment is based upon the Applicant's bid/ tender in International Tender No. KEBS/RT/011/2021-2024, information that is confidential under section 67(1)(b), (c) and (d), (3) and (4) PPADA and it is therefore founded upon illegally obtained evidence and is thus a nullity.
  11. It is also its case that The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have, by relying on the illegally obtained evidence for the Request For Debarment condoned that illegality in its finding that it had set out a prima facie case and by commencing the debarment proceedings vides the Notice of Intended Debarment dated 18<sup>th</sup> November 2024 in violation of their respective mandates under the *Public Procurement and Asset Disposal Act* 2015, and renders these decisions ultra vires.
  12. The Applicant further posits that the 1<sup>st</sup> Respondent is not a person as envisaged under Regulation 22(1)(a) of the Regulations and that by dint of Clauses 4 and 5 of the Debarment Manual it lacks locus standi, and the 3<sup>rd</sup> Respondent's Notice of Intended Debarment dated 18<sup>th</sup> November 2024 that flows from that request is a nullity.
  13. It is the Applicant's case that 3<sup>rd</sup> Respondent failed in its duty to reject an incomplete Request For Debarment under Clause 11(1)(e) of the Debarment Manual and that it failed in its duty to objectively analyse the Request for Debarment as required of it before finding that it set out a prima facie case for the debarment of the Applicant for which it should issue a Notice of Intended Debarment, a duty that it was to diligently perform under Clauses 12(1)(a) and (b) of the Debarment Manual.
  14. It is also the Applicant's case that it is exposed to double jeopardy which is inconsistent with the 5 objectives for debarment set out under Clause 2 of the Debarment Manual, by the Guiding Principles of *the Constitution* as outlined in section 3 PPADA and by creating and regulating a public procurement system that is fair, equitable, transparent, competitive and cost-effective as required by Article 227(1) of *the Constitution* 2010.
  15. The Applicant contends that renewal of debarment proceedings against it is draconian and in violation of its Constitutional rights guaranteed under Article 27 of *the Constitution* and that the debarment proceedings are also an abuse of the debarment process for being undertaken irregularly, unlawfully, illegally and unconstitutionally, and for malicious intent which is evidenced from the fact that the previous debarment decision was used to bar the Applicant from getting business in the entire East Africa, without due process or regard to the Rule of Law that is guaranteed by Article 10(2)(a) of *the Constitution*.



16. The Applicants argue that the entire debarment proceedings, directions and any and all of its decisions, are ultra vires of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' mandate, irrational, unreasonable, arbitrary, illegal, unlawful and a nullity, and in violation of Article 46 of *the Constitution* and the same should be quashed by this Honourable Court.

**The 1<sup>st</sup> Respondent's case;**

17. In opposition to the Applicants' Application, the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn on 2<sup>nd</sup> December, 2024.
18. He argues that he has locus to commence debarment proceedings by dint of section 41 of the *Public Procurement and Asset Disposal Act* (PPADA) and Regulation 22(l)(a) of the Public Procurement and Asset Disposal Regulations, 2020 which provides that a request for debarment may be initiated (a) by the accounting officer of a procuring entity, or any other person with knowledge of facts that may support one or more grounds for debarment and relies on the case of Nairobi Judicial Review No 55 of 2022 Republic v Public Procurement Regulatory Authority & another; Auto Terminal Japan Limited (Exparte Applicant); Auditor General & another (Interested Parties).
19. He denies the Applicant's claim that the Request for its Debarment, dated 28th October 2024, and the debarment proceedings instituted by the 2nd Respondent against it, PPRB Debarment Application No. 9 of 2024, Charles Nzai vs EAA Company Limited, are an abuse of the debarment proceedings.
20. He also denies that the debarment proceedings have violated the Applicant's legal and Constitutional rights.
21. It is his case that debarment proceedings are lawful and proper and that they should be allowed to proceed to conclusion where after the Applicant shall have an opportunity to challenge that decision before this Court if aggrieved.
22. It is also his case that the Applicant has come to this Court prematurely by its failure to exhaust the available legal remedies for resolving the dispute at hand.
23. He contends that Applicant's claim that it is a victim of double jeopardy is a false claim because a request for debarment may be brought against a bidder for each and every public bid/ tender that it has participated in, which have to be interrogated independently.
24. He further contends that he did not illegally obtain its bid documents in International Tender No. KEBS/RT/011 /2021-2024(opened in January 2022) to lodge his present request for the Applicant's debarment for the following reasons: -
  - (a) The National Assembly and the Auditor General have found that the Applicant used forged documents in its bids, and he continued to do so in its bid that is the subject of this judicial review and the debarment proceedings.
  - (b) I had previously lodged a complaint against the Applicant for using forged documents in its bid before the Investigating Agencies who investigated and found that those documents used by the Applicant in its bids were forgeries.
  - (c) This investigation continued even after the current bid was presented where it became clear that the Applicant had continued to present forgeries to prove its qualifications in the subject bid, International tender no. KEBS/RT/011 /2021-2024.



25. It is his case that the documents were available to him as a complainant and the people of Kenya deserved to be protected from the Applicant, even after its previous debarment, no matter that criminal proceeding against it are outstanding.
26. It is his case that by dint of Regulation 22(1)(a) of the Public Procurement and Asset Disposal Regulations 2022 he is competent and has the locus standi to present his debarment proceedings, individually as a private citizen.
27. The 1<sup>st</sup> Respondent argues that the debarment of the Applicant was public information because it was relayed in Kenya Gazette Notice 14023 of 2021 and, this subject tender was in public domain as KEBS put it in its website.
28. It is his case that the Applicant was debarred in 2021 for a period of 3 years pursuant to Debarment application number 2 of 2021 where the 1st Respondent was the applicant and where the Exparte Applicant was found to have provided falsified documents.
29. It is the 1<sup>st</sup> Respondent's case that Applicant filed a barrage of cases all related to its previous debarment in court without mentioning that the same had extensively been determined which is material non- disclosure done in bad faith.
30. The cases include:
  - a. Judicial review number 88 of 2019 - Republic vs Public Procurement Regulatory Authority & Kenya Bureau of Standards, Naivana Agencies Limited, Potterman Agencies ex parte EAA Company Limited.
  - b. Judicial Review case number 104 of 2020 Republic v Clerk of the National Assembly, National Assembly & Okiya Omtatah Okoiti Ex Parte; Applicant EAA Company Limited
  - c. Nairobi Judicial Review No 90 of 2020 R vs Kenya Bureau of Standard and Another and EAA Company & 3 Others (Interested Parties)
  - d. Nairobi Judicial Review Misc. Application no 39 of 2020 Republic v Office of the Auditor General, Clerk of the National Assembly & National Assembly Ex Porte EAA Company Limited.
  - e. Nairobi Judicial Review No 44 of 2021 Republic v Public Procurement Regulatory Authority Ex parte EAA Company limited (Formerly East Africa Automobile Services Co. Ltd).
  - f. Milimani Chief Magistrate Commercial Suit No El 615 of 2021 EAA Company limited vs Officials Procurement Department Committee.
31. It is the 1<sup>st</sup> Respondent's case that he has furnished sufficient evidence for the current application for the Applicant's debarment as provided under clauses 4 and 5 of the debarment manual.
32. The 1<sup>st</sup> Respondent contends that the Applicant poses a grave threat to the public and the procurement processes in Kenya by using falsifying impugned documents and that participating in procurement proceedings while serving debarment, is akin to a mockery of the Kenyan institutions.
33. He further contends that the debarment committee is a statutory committee and that the applicant has the statutory right of reply to the debarment notice and further a right to be heard and to adduce evidence to controvert his assertions in the debarment proceedings.
34. The 1<sup>st</sup> Respondent posits that the Applicant has not met the threshold to be issued with the orders sought in the motion and prays that the application should be dismissed with costs.



### **The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' case;**

35. In opposition to the Applicants' Application, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their Replying Affidavit sworn by Raphael Muia Ngalatu on 3<sup>rd</sup> December, 2024.
36. It is their case that on 28<sup>th</sup> October, 2024 the 3<sup>rd</sup> Respondent received a Request for debarment of the Applicant in the instant suit by the 1<sup>st</sup> Respondent pursuant to the provisions of Regulation 22 (1) (a) of the Regulations wherein Kenya Bureau of Standards (KEBS) which is the Procuring Entity.
37. The Request for Debarment was premised on the grounds of giving false information about qualifications in procurement proceedings through falsification of documents and information in International Tender No. KEBS/RT/011/2021-2024 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts (Re-Tender) of Kenya Bureau of Standards.
38. On 30<sup>th</sup> October, 2024 The 3<sup>rd</sup> Respondent wrote to the Managing Director of KEBS, informing them of the Request for Debarment (of the Applicant herein) requesting for the bid document submitted by the Applicant in the subject tender so as to verify the contents of the Request for Debarment and the authenticity of the annexures therein. In their response letter of 4<sup>th</sup> November, 2024 the Interested Party, KEBS, forwarded the said Applicant's bid document.
39. It is the 3<sup>rd</sup> Respondent's case that it considered the Request for Debarment in accordance with Regulations 22 (5) (a) and (b) which provides that (a) upon receipt of a request for debarment, the Board shall analyze the case within thirty days to determine whether there is a prima facie case for debarment; (b) if the analysis establishes a prima facie case for debarment, the Board shall issue a notice of intended debarment to the party, who shall be the subject of the debarment proceedings requiring him or her to file a written response with the Board.
40. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' contend that in the analysis for a prima facie case, the 3<sup>rd</sup> Respondent established several anomalies and discrepancies regarding the authenticity of the documents submitted by the Applicant in its bid which necessitated the Applicant to be put on its defense and issued a Notice of Intended Debarment to the Applicant dated 18<sup>th</sup> November, 2024 together with directions on filing and more specifically granting the Applicant fourteen (14) days to file and serve its written response but instead of filing a Response with the 3<sup>rd</sup> Respondent, the Applicant proceeded to this court to challenge the debarment proceedings and obtained interim ex parte orders staying the debarment proceeding pending the hearing and determination of its application.
41. They invoke section 41 of the Act, which provides that the 3<sup>rd</sup> Respondent is the only body empowered with the mandate of hearing debarment proceedings.
42. The 3<sup>rd</sup> Respondent did not conduct itself unprocedurally and/or unlawfully in the impugned debarment proceedings such that this Court should find it fit to interfere with its proceedings.
43. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contend that where *the Constitution* has allocated certain powers and functions to various bodies and tribunals, it is important that these bodies and tribunals be given leeway to discharge the mandate bestowed upon them by *the Constitution* so long as they comply with *the Constitution* and national legislation.
44. It is their case that the Applicant has not demonstrated how the 3<sup>rd</sup> Respondent acted with illegality, irrationality or procedural impropriety in determining that the 1<sup>st</sup> Respondent's Request for Debarment established a prima facie case therefore they urge this court not to interfere with the 3<sup>rd</sup> Respondent's decision based on the Applicant's unconnected and unfounded allegations and in



any event if any party is aggrieved by the decision of the 3<sup>rd</sup> Respondent's Debarment Committee, the aggrieved party has a recourse in judicial review as provided for in section 42 of the Act which provides:

“A party to the debarment may seek Judicial Review from the decision of the Authority to the High Court within fourteen days after the decision is made.”

45. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their response to the notice to produce documents vide their affidavit sworn by Raphael Muia Ngalatu on 3<sup>rd</sup> December, 2024.
46. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents pray that the Notice of Motion dated 30<sup>th</sup> November, 2024 should be dismissed with costs.

### **Analysis And Determination**

47. Upon perusing the application, the affidavits, the rival submissions of the parties' the court finds the following to be the issues for determination;
  - 1) Whether this court has jurisdiction.
  - 2) Whether the documents were illegally obtained can be used in court.
  - 3) Whether the Applicant is entitled to the orders sought.
  - 4) Who will bear the costs of the suit?

### **The 1st Issue;**

#### **Whether this court has jurisdiction to hear and determine this suit;**

48. In the case of Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR, the supreme court pronounced itself on jurisdiction thus [paragraph]:

“

“(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Jurisdiction to entertain a matter before it, is not one of mere procedural Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, Commission (Applicant), Constitutional Application Number 2 of 2011. Where they cannot expand its jurisdiction must operate within the constitutional limits. It confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, court or tribunal by statute law.” (Emphasis provided) where it quoted with approval the oft cited case of Owners of Motor Vessel 'Lillian S' v Caltex In Re The Matter of the Interim Independent Electoral Commission where the Court stated: -

“[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):



“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”(underlining supplied)

[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*."

49. On 28th October, 2024 the 3<sup>rd</sup> Respondent received a Request for debarment of the Applicant in the instant suit by the 1<sup>st</sup> Respondent under Regulation 22 (1) (a) of the Regulations.
50. This prompted the 3<sup>rd</sup> Respondent to write a letter to the Managing Director of KEBs on 30<sup>th</sup> October, 2024 requesting for the bid document submitted by the Applicant in the subject tender so as to verify the contents of the Request for Debarment and the authenticity of the annexures therein.
51. KEBs, forwarded the said Applicant's bid document in compliance with the said request.
52. The Request for Debarment was considered by the 3<sup>rd</sup> Respondent in accordance with Regulations 22 (5) (a) and (b) which provides that (a) upon receipt of a request for debarment, the Board shall analyze the case within thirty days to determine whether there is a prima facie case for debarment; (b) if the analysis establishes a prima facie case for debarment, the Board shall issue a notice of intended debarment to the party, who shall be the subject of the debarment proceedings requiring him or her to file a written response with the Board.
53. The 3<sup>rd</sup> Respondent established several anomalies and discrepancies regarding the authenticity of the documents submitted by the Applicant in its bid which necessitated the Applicant to be put on its defense and thereby issuing a Notice of Intended Debarment to the Applicant dated 18<sup>th</sup> November, 2024.
54. The Applicant was furnished with directions granting him fourteen (14) days to file and serve its written response.
55. The foregoing precipitated the filing of this suit.
56. Section 41 of the Act, provides that the 3<sup>rd</sup> Respondent is the only body empowered with the mandate of hearing debarment proceedings.
57. The applicant has not demonstrated to this court how the 3<sup>rd</sup> Respondent conducted itself unprocedurally and/or unlawfully in the impugned debarment proceedings.
58. Section 42 of the Act provides that a party to the debarment may seek Judicial Review from the decision of the Authority to the High Court within fourteen days after the decision is made.
59. Section 9(2) and (4) of Fair Administrative Actions Act stipulates that:
  - “(2) The High Court or a subordinate court under Sub section (I) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.



- (4) notwithstanding sub section (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the Applicant, exempt such person from obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

60. In the case of Clifford Keya v Jackline Ingutiah & 5 others; Atieno Aoko & 3 others (Interested Party) [2022] eKLR;

“The doctrine of exhaustion is applicable to constitutional Petitions. If successfully raised, it is a complete bar and a Court will not move an inch ahead. There are, however, instances where the doctrine will be inapplicable.

The doctrine of exhaustion traces its origin in Article 159(2)(c) of *the Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution.

The doctrine is further entrenched in Section 9 of the *Fair Administrative Action Act*; 2015 which provision forbids the High Court from assuming jurisdiction in matters where a party does not exhaust internal remedies except where exceptional circumstances for exemption are proved to exist.”

61. It is this court’s finding and I so hold that this suit is not properly before this court.
62. The applicant has not demonstrated nor advanced any evidence to show that that he will not get redress before the statutory alternative dispute resolution institution as created under The Act.
63. Article 159 of *the Constitution* envisaged a situation where alternative access to justice avenues would be created and accessed through legislative frameworks like the one under Section 41 of The PPAD Act.
64. An unjustified refusal to harness alternative dispute resolution mechanisms that are created under the Law will render Article 48 otiose and moribund at the expense of the tax payers.
65. Further ashore, the Applicant argued that the Respondent lacks the locus standi under Regulation 22(1) (a) of the Regulations to initiate or institute a debarment claim.
66. The issues herein can be addressed effectively before the available statutory alternative dispute resolution institution, which has the jurisdiction to deal with matters around the debarment claim.
67. On another front, the Applicant argued that that it wrote to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein vide its Notice to Produce Documents dated 5<sup>th</sup> December, 2024 requesting to be furnished documents in regard to replying affidavit dated 3<sup>rd</sup> December 2024.
68. The Applicant contends that the 1<sup>st</sup> Respondent’s Request for Debarment is based upon the Applicant’s bid/ tender in International Tender No. KEBS/RT/011/2021-2024, information that is confidential under section 67(1)(b), (c) and (d), (3) and (4) PPADA and which he cannot lawfully access; it is therefore founded upon illegally obtained evidence and is thus a nullity.
69. In the case of Kenya Pipeline Company Limited case V Hyosung Ebara Company Limited & 2 Others [2012] Eklr the Court pronounced itself as follows:

“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers



given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.

Having regard to the wide powers of the Review Board we are satisfied That the High Court erred in holding That the Review Board was not competent to decide whether or not the 1st Respondent's tender had met the mandatory conditions. The issue whether or not the 1st Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it."

70. If is this court's finding that the board has the power to invoke the provisions of the Debarment Manual in the process of assessing the evidentiary threshold required for proving various grounds of debarment.
71. This Court cannot take away that mandate from the board.
72. Having earlier arrived at a finding that the applicant is trapped by the web of the doctrine of exhaustion, this Court is not in a position to deal with the issue of the notice to produce and the question of whether or not the evidence was illegally obtained.
73. In any event, the 3rd Respondent has already furnished the documents in an affidavit.
74. This court cannot delve into the contents of the documents.

#### **The 2<sup>nd</sup> issue;**

#### **Whether or not the Applicant is entitled to the orders sought.**

75. Having found that this court lacks jurisdiction, this court cannot determine the other issues and I so hold.
76. In so holding, I am guided by the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step." (underlining supplied).

#### **Who will bear the costs of the suit;**

77. The applicant shall bear the costs of this suit given that costs follow the event.

#### **Disposition:**

78. This court lacks jurisdiction to determine this suit.

#### **Order:**

This suit is hereby struck out with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.**



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**J. M. CHIGITI (SC)**

**JUDGE**

(The court is currently on leave. Being a Public Procurement matter that must be heard and determined within 45 days, the judgment is delivered and uploaded on CTS by the consent of all the advocates in the consolidated suits.)

