



**Republic v Procurement Administrative Review Board; Kenya Revenue Authority & Accounting Officer Kenya Revenue Authority (Exparte Applicant); Peesam Limited & another (Interested Parties) (Judicial Review Miscellaneous Application E143, E144 & E146 of 2024 & Judicial Review E262 of 2024 (Consolidated)) [2024] KEHC 16332 (KLR) (Judicial Review) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16332 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E143,  
E144 & E146 OF 2024 & JUDICIAL REVIEW E262 OF 2024 (CONSOLIDATED)  
JM CHIGITI, J  
DECEMBER 20, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... RESPONDENT**

**AND**

**KENYA REVENUE AUTHORITY & ACCOUNTING OFFICER KENYA  
REVENUE AUTHORITY ..... EXPARTE APPLICANT**

**AND**

**PEESAM LIMITED ..... INTERESTED PARTY**

**PUBLIC PROCUREMENT REGULATORY AUTHORITY .... INTERESTED  
PARTY**

**JUDGMENT**

1. Judicial Review Application No. E143/2024, Judicial Review Applications Nos. E144/2024, E146/2024, and E262/2024 were consolidated by consent of the parties given that they emanated from the same cause of action.
2. Parties further agreed that Judicial Review Application No. E143/2024 should be the lead file.



3. The following are the reliefs sought in the respective petitions;
- 1) HCJRMISC E143 OF 2024
    1. Order of Certiorari to quash the decision and-orders of the Respondent communicated in its judgement dated 29th October 2024.
    2. Costs of the suit be provided for.
  - 2) HCJR MISC E146 OF 2024
    - A. ORDERS OF CERTIORARI be and is hereby issued to call the decision of the Respondent of 29<sup>th</sup> October 2024 to validate the procurement process by the Interested Parties and their decision to terminate Tender No. KRA/HQS/NCB-034/2023-2024- for Provision of Cleaning and Garbage Collection Services for KRA Offices and Residential Houses for a period of Two (2) years, into this Honourable Court for purpose of it being be QUASHED;
    - B. ORDERS OF CERTIORARI be and is hereby issued to call the decision of the Respondent of 29<sup>th</sup> October 2024 finding that the Interested Parties had satisfied the substantive requirement to terminate tender No. KRA/HQS/NCB-034/2023-2024- for Provision of Cleaning and Garbage Collection Services for KRA Offices and Residential Houses for a period of Two (2) years in line with Section 63(1) of the Act into this Honorable Court for purpose of it being be QUASHED.
    - C. ORDERS OF CERTIORARI be and is hereby issued to call the decisions of the Head of Procurement of the 2<sup>nd</sup> Interested Party of 26<sup>th</sup> August 2024 to recommend for re-evaluation process in respect to Tender No- KRA/HQS/NCB-034/2023-2024- for Provision of Cleaning and Garbage Collection Services for KRA Offices and Residential Houses for a period of Two (2) years, into this Honorable Court for purpose it being QUASHED;
    - D. ORDERS OF CERTIORARI be and is hereby issued to call the decisions of the 1<sup>st</sup> Interested Party of 26<sup>th</sup> August 2024 to issue a direction to the Evaluation Committee to re-convene and re-evaluate bidders in respect to Tender No- KRA/HQS/NCB-034/2023-2024- for Provision of Cleaning and Garbage Collection Services for KRA Offices and Residential Houses for a period of Two (2) years, into this Honorable Court for purpose of it being QUASHED;
    - E. ORDERS OF CERTIORARI be and is hereby issued to call the entire procurement process carried out by the Interested Parties and/or their persons/employees between 26<sup>th</sup> August 2024 and 23<sup>rd</sup> September 2024 in respect to Tender No- KRA/HQS/NCB-034/2023-2024- for Provision of Cleaning and Garbage Collection Services for KRA Offices and Residential Houses for a period of Two (2) years, into this Honorable Court for purpose of it being QUASHED;
    - F. ORDERS OF PROHIBITION be and is hereby issued directed at the Head of Procurement of the 2<sup>nd</sup> Interested Party to restrain him/her from directing and/or recommending the re-evaluation of bidders in respect to Tender No- KRA/HQS/NCB-034/2023-2024- for Provision of Cleaning and Garbage Collection Services for KRA Offices and Residential Houses for a period of Two (2) years.
    - A. The COSTS of this Application be provided for.



- 3) HCJR MISC E144 OF 2024
  1. An Order of Certiorari to quash the decision and orders of the Respondent communicated in its judgement elated 29<sup>th</sup> October 2024.
  2. Costs of the suit be provided for.
    - 4) HCJR E262 OF 2024
      - 1) That an order of CERTIORARI be and is hereby issued to bring into this Honourable Court for purposes of quashing the 1stRespondent's Administrative Decision dated 29 October 2024 in PPARB Application No. 99/2024 of 8 October 2024.
      - 2) That an order of MANDAMUS be and is hereby issued compelling the 1stRespondent to rehear and determine afresh the Request for Review filed in PPARB Application No. 99/2024 of 8 October 2024.
      - 3) That an order of PROHIBITION be and is hereby issued restraining the 2nd and 3rdRespondents from terminating the procurement proceedings for provision of cleaning and garbage collection services for Kenya Revenue Authority offices and residential houses for a period of two (2) years (Tender No. KRA/HQS/NCB-034/2023-2024).
      - 4) That such further and/or other appropriate orders and/or reliefs that the Honourable Court may deem just and expedient to grant in the circumstances of the case.
4. In the lead file the Application before the Court for determination is the one dated 8<sup>th</sup> November, 2024.It is supported by a statutory statement, Verifying Affidavit and Further Affidavit by Benson Kiruja sworn on 8<sup>th</sup> November, 2024 and 28<sup>th</sup> November, 2024 respectively.
5. . Kenya Revenue Authority is established under the [Kenya Revenue Authority Act](#), Cap 469 Laws of Kenya. Under Section 5 (1), the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5 (2) with respect to the performance of its functions under subsection (1), the Authority is required to administer and enforce all provisions of the written laws set out in Part 1 and 2 of the First Schedule for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
6. . The 1st Applicant is the Procuring Entity under the management of the 2<sup>nd</sup> Applicant who is the Chief Executive Officer of the Kenya Revenue Authority duly appointed in accordance with the [Kenya Revenue Authority Act](#) and performs his functions as the accounting officer of the Authority.
7. The Applicants argue that the Supply Chain Management Division of the Kenya Revenue Authority is responsible for strategic and tactical sourcing, contract administration, vendor management and supply chain services in accordance with the [Public Procurement and Asset Disposal Act](#), 2015 (referred herein as the 'Act').
8. . It is their case that they advertised and invited bids on the 30<sup>th</sup> January 2024 through an open tender No. KRA/HQS/NCB-034/2023- 2024 for the provision of cleaning services and garbage collection for KRA Offices and Residential Houses("the Tender") to provide for the cleaning services and garbage collection in the Applicants' offices and residential houses described as Lot -1( Times



Tower), Lot-2( Nairobi Region), Lot-3( Southern Region), Lot-4( Central Region), Lot-5( North Rift),Lot-6( South Rift), Lot- 7( Northern Region) andLot-8( Western Region).

9. . It is their case that the said tender has been the subject of various orders of the Respondent in Request for Review Nos. 68 and 69 of 2024 which were determined on 9<sup>th</sup> August 2024 as well as Request for Review Nos. 98 and 99 of 2024 which were determined on 29<sup>th</sup> October 2024.
10. . It is the Applicants' case that the Respondent's decision in Application No.98 of 2024 terminating procurement proceedings on account of inadequate budgetary allocation forms the cause of action in the suit that is before this Honourable court.
11. . They contend that the 1<sup>st</sup> Interested Party was dissatisfied with the termination decision and consequently registered a dispute with the Respondent vide an application for review dated 8<sup>th</sup> October 2024 challenging their decision dated 23<sup>rd</sup> September 2024.
12. . The Applicants opposed the 1<sup>st</sup> interested party's Application for review and duly filed their Memorandum of Response as well as the Notice of Preliminary Objection dated 15<sup>th</sup> October 2024 wherein they reiterated that since they had satisfied both the substantive and procedural requirements to justify the termination of the tender, the Respondent lacked jurisdiction to entertain the Application for review under section 167(4)(b) as read together with section 63 of the Act.
13. . It is further their case that in their memorandum of response to the 1<sup>st</sup> Interested party's request for review, they informed the Respondent that in satisfaction of the procedural requirement under section 63(2) of the Act, they notified the 2<sup>nd</sup> interested party through its Director General of the Termination of the Procurement on 26<sup>th</sup> October 2024 within 14 days of the termination through the Public Procurement Information Portal(PPIP) pursuant to the 2<sup>nd</sup> interested party's Circular No. 04 of 2022 dated 1st July,2022.
14. . They argue that the notification of the termination through the PPIP was equally reiterated during the hearing of the dispute on 23<sup>rd</sup> October 2024, wherein upon inquiry by the Respondent, the Applicants reiterated that the 2<sup>nd</sup> Interested party through its Director General was notified of the termination through the PPIP pursuant to the requirements of the Circular.
15. . It is their case that since the 2<sup>nd</sup> Interested party provides secretariat services to the Respondent in line with section 28(3) of the Act, the Applicants had a legitimate expectation that any report filed with the 2<sup>nd</sup> Interested party, would have been produced by its Director General as the custodian of the information and PPIP upon request/ inquiry by the Respondent in writing and not merely via a spot check on the portal as reportedly done by the Respondent thus the Applicants justified the termination of the Tender in question and specifically compliance with Section 63(2) & (3) of the Act.
16. They further argue that the Respondent in its Decision dated 29<sup>th</sup> October 2024, set aside the Applicant's termination decision on an erroneous basis that no notification of the termination of the Tender was made to the 2<sup>nd</sup> Interested party as required by Section 63(2) of the Act.
17. It is their case that the Respondent made an accidental slip when they pronounced themselves that the Applicants had not filed a report on the 2<sup>nd</sup> Interested Party Information Portal (PPIP) despite evidence to the contrary being tabled.
18. It is their case that consequent to the Orders of the Respondent vide a letter dated 30<sup>th</sup> October, 2024 they requested the Director General of the 2<sup>nd</sup> Interested party to confirm whether indeed the termination report was filed with it but the Director General of the 2<sup>nd</sup> Interested party has to date failed, neglected and/ or ignored to respond to the said letter.



19. . It is also their case that they are aggrieved with the Respondent's findings and consequent orders in its decision of 29th October 2024, for reasons that: -
- i. Since there was legal justification and compliance in the Ex parte Applicants decision to terminate the Tender in question vide a letter dated 23rd September 2024, the Respondent, in setting aside the Applicants' termination of procurement proceedings acted beyond the scope of its Authority by entertaining application for review that it lacked jurisdiction to render a decision on pursuant to section 167(4)(b) read together with section 63 of the Act.
  - ii. The Respondent's decision was procedurally and materially unfair having been influenced by an error of fact in particular that the Applicants had not filed a termination report with the Director General of the 2<sup>nd</sup> Interested party.
  - iii. The Respondent's decision of 29th October 2024 was irrational as failed to consider relevant factors and evidence that there was indeed compliance by the Application with section 63(2) of the Act thereby occasioning a breach of the Applicant's rights to fair hearing which is protected under *the Constitution*.
  - iv. The 2<sup>nd</sup> Respondent, in setting aside the Applicants' termination of Tender vide a letter dated 23<sup>rd</sup> September 2024 violated the Applicants' rights to legitimate expectation, right to a fair hearing under Article 50 of *the Constitution* and right to a fair administrative action under Article 47 of *the Constitution* since it failed to consider the relevant factors and evidence prior to its hugely prejudicial decision dated 29th September 2024.
  - v. The said findings and orders were irrational as it was arrived at in apparent disregard of the Applicants' evidence on the existence of the notification reports to the 2nd interested party through its Director General on termination of Tender as uploaded on the PPIP pursuant to the requirements of the Circular and in compliance with section 63(2) of the Act.
  - vi. In finding that there was no notification of the termination of the Tender to the 2nd interested party, the Respondent's decision at paragraph 99 thereof is tainted by procedural impropriety and irrationality as it makes reference to a non-existent Tender No. KRA/HQS/NCB034/2023 when the correct Tender subject to the requestforReviewApplication KRA/HQS/NCB034/2023-2024.
  - vii. The Respondent's decision requiring the Applicants to go back and complete a procurement process on a premise not supported in law is not only irrational but equally tainted with illegality as the Respondent failed to consider that procurement processes by law are time bound and no further delay ought to be occasioned.
  - viii. The Respondent's decision to the effect that there was no notification on the termination of the Tender to the 2nd interested party through its Director General was irrational, unprocedural and contrary to fair administrative action as it was arrived at despite the Respondent having failed, ignored and or neglected to request the Director General of the 2nd interested party as the custodian of such reports, a written confirmation whether indeed there was notification reports on termination in the PPIP.
20. The Applicants are aggrieved with the Respondent's findings and Orders of 29thOctober 2024, which according to them were arrived at in disregard of the correct factual position with respect to the Reporting/ notification of on termination of the Tender to the 2nd interested party.



21. They argue that by directing them to go back and conclude the procurement process, the Respondent is intending to occasion a further delay on the Applicant's procurement for the provision of Cleaning and Garbage collection for KRA Offices and Residential Houses countrywide within its allowable budget, which services are crucial and fundamental for the discharge of the statutory functions on mobilization of revenue on behalf of the government and thus the urgency of this Application.
22. . Through their submissions dated 28<sup>th</sup> November, 2024 the applicants submit that their application is merited as the Respondent's finding is tainted with procedural impropriety, irrationality and unreasonableness as the Respondent failed to consider relevant factors prior to making a finding that no notification on the termination of the tender was made to the Director General of the 2nd interested party as required by section 63(2) of the Public Procurement & Asset Disposal Act.
23. It is their submission that the crux of their Application is hinged on whether or not there was notification to the 2nd interested party on the Tender termination as required by section 63(2) of the Public Procurement & Asset Disposal Act.
24. It is further their submission that the Respondent's excerpt of the portal that is annexed to its Replying Affidavit is an attachment that makes reference to a report dated 16th February 2024 which is not a tender termination report filed with the 2nd interested party but relates to a report by the Applicants of when the Tender in question was opened after closing of the bids.
25. They contend that the Respondent considered the wrong report and the wrong part of the portal (not being Tender Termination Section) in arriving at its finding at paragraph 99 of its ruling of 29th October 2024 and its averments in its Replying Affidavit dated 24th November 2024 that there was no upload in the Portal made by Applicants on the termination of the subject tender. This makes its finding improper and not founded in law.
27. It is their submission that the Respondent's failure to consider the notification to the 2<sup>nd</sup> interested party of the tender termination as submitted by them through the Portal and equally, making reference to a wrong tender and in its finding failing to seek a confirmation ( written or otherwise) from the 2nd interested party who acts as its secretariat and offers administrative services whether indeed notification of the tender termination was done through the Portal is irrationality and amounts to procedural impropriety given that the Respondent rendered its decision without considering the evidence before it, considering the Applicant's averments during hearing or even requesting for a written confirmation from the custodians of the site who is the 2nd Interested Party.
28. They place reliance on the case of case of *Pastoli v Kabale District Local Government Council & Others* (2008) 2 EA 300 where the court 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...Illegality is when the decision-making authority commits an error of law in the process of taking 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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...Procedural Impropriety is when there is a 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.”

29. . The Applicants contend that the jurisdiction of the Respondent was ousted as it failed to consider the Applicant’s evidence and averments.
30. . They submit that Section 175 of the *Public Procurement and Asset Disposal Act* provides that a person aggrieved by the decision of the Respondent should seek judicial review of the High Court and Article 165(7) of *the Constitution* then empowers the High Court for purposes of exercising its supervisory jurisdiction under Article 165(6) of *the Constitution* and make any order or give any direction it considers appropriate to ensure fair administration of justice.
31. It is also their submission that section 7(2)(f) of the Fair Administrative Actions Act, allows this Court to review the Respondent’s decision of 29th October 2024 and Respondent lacked jurisdiction to entertain the review application filed before it pursuant to section 167(4)(b) read together with section 63 of the Public Procurement & Asset Disposal Act.
32. . Reliance is also placed in the case *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR the court held;

“Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether the in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters

- ii. There is no existing provision under the Act or Regulations which permits the Honorable Court to refer a dispute of this nature back to the Respondent. A finding to that effect will be contrary to the exercise of the Court’s jurisdiction under Section 175 of the Act.
  - iii. Any decision of this court to refer the dispute back to the Respondent even after quashing the said decision would be self-defeating to the strict timelines with respect to procurement proceedings under the Act and Regulations. It would aid and prolong unending litigation which is highly prejudicial to the Applicant.
33. . The Applicants also rely on the case of *Republic v Public Procurement Administrative Review Board & another Ex parte Intertek Testing Services (EA) Pty Limited & Authentix Inc; Accounting Officer, Energy and Petroleum Regulatory Authority & another* [2022] eKLR which relied on the case of *Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Rongo University* [2018]eKLR where it was held that:

“granting of orders of certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.”

34. The Applicants pray that this Court grants the prayers sought.



### **The Respondent's case;**

35. The 1<sup>st</sup> Respondent rely on the Replying Affidavit of James Kilaka sworn on 21<sup>st</sup> November, 2024 and the written submissions dated 2<sup>nd</sup> December, 2024 in opposition to all the Applications.
36. It is its case that on 8th October 2024, the 1st Interested Party herein filed the Request for Review Application No. 99 of 2024 challenging the decision of the Applicants in respect of Tender No KRA/HQS/NCB-034/2023-2024 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years (hereinafter referred to as the subject tender).
37. The Applicants filed a response on 15th October 2024 alongside a Notice of Preliminary Objection challenging the Respondent's jurisdiction in view of the fact that the Request for Review was on the termination of the subject tender, a subject removed from the jurisdiction of the Respondent under Section 167(4) of the *Public Procurement and Asset Disposal Act* (herein "the Act").
38. . The respondent delivered its decision on 29th October 2024 dismissing the Applicants' Notice of Preliminary Objection. It held that the termination of the subject tender was not in compliance with the procedural requirements under Section 63 of the Act.
39. . In exercise of its powers under section 173 of the Act it issued the following orders:
  - i. The Respondents' Notice of Preliminary Objection dated 14th October 2024 be and is hereby dismissed.
  - ii. The Letters of Notification dated 23rd September 2024 and issued to the Applicant and all other bidders in respect of Tender No. KRA/HQS/NCB-034/2023-2024 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be and are hereby cancelled and set aside;
  - iii. The 1st Respondent be and is hereby directed to conclude the procurement proceedings for Tender No. KRA/HQS/NCB-034/2023- 2024 for Provision of Cleaning and Garbage Collection of KRA Offices and Residential Houses Countrywide for a period of Two (2) Years in accordance with the law taking into consideration the Board's finding in this Request for Review.
40. . It is its case that it considered the parties' respective representations and found that it had jurisdiction over the Request for Review. It also considered the parties' respective representations and found that the Procuring Entity did not terminate the subject tender in accordance with the provisions of Section 63 of the Act and lastly the Applicant failed to satisfy the procedural requirements. Specifically, the Applicant failed to satisfy the Respondent that they sent a Report on the termination to the Director General of the Public Procurement Regulatory Authority.
41. . The Respondent contends that the Applicants did not produce a copy of the Report to the Director General in the proceedings before the Board nor did they produce the Confidential Documents. The said Report was equally not uploaded on the Public Procurement Information Portal and the Applicants having failed to demonstrate that they sent a Report to the Director General on the termination of the subject tender, cannot be said to have complied with Section 63(2) and (3) of the Act, and a such its decision was not made in err.
42. . The Respondent argues that it addressed itself to the procedural and substantive requirements required under Section 63 of the Act. The Applicants were granted an opportunity to present its



case before the Respondent and by setting aside the Applicants' termination, it was upholding the provisions of Section 63 of the Act.

43. . The Respondent avers that in its decision misdescribed the subject tender by omitting “-2024” in the description of the subject tender but this did not affect the substance of the decision and its decision to refer the Applicants to complete the procurement process is supported under Section 173 of the Act.
44. It is also its case that instead of remedying the error in the submission of a Report, something that would have taken 14 days, the Applicants elected to file the instant suit before this court delaying their own procurement process.
45. . The Respondent deponed that The Public Procurement Information Portal does not display the subject tender among the tenders reported as having been terminated and reports received by the Public Procurement Regulatory Authority.
46. . It is further its case that Respondent observed the rules of natural justice in the exercise of its statutory mandate and powers under Section 28 and Section 173 of the Public Procurement and Asset Disposal Act respectively and ensured that all parties to the Request for Review application were granted an opportunity to be heard on all issues that emerged from parties pleadings, cases, and confidential documents submitted pursuant to section 67 of the Public Procurement and Asset Disposal Act through their arguments and by considering and interrogating all the documentation and information before it that was material to the Request for Review application before completing and determining the Request for Review application.
47. . The Respondent posits 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 29th October 2024.
48. . The Respondent places reliance on the case of *Pastoli vs. Kabale District Local Government Council and Others* [2008] 2 EA 300. Supra where the court laid down what amounts to irrationality, illegality and procedural impropriety. In the case of *REPUBLIC V PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & ANOTHER EX PARTE GIBB AFRICA LTD & ANOTHER* [2012] eKLR set out the established reach of judicial review in Kenya thus: reach of judicial review is now well established. In the case of *COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE* [1984] 3 ALL ER 935 Lord Diplock summarized the scope of judicial review thus: -

“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 are subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.” .....

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.

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."

In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means least he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals. The Court of Appeal in *GRAIN BULK HANDLERS LIMITED V J. B. MAINA & CO.LTD & 2 OTHERS* [2006] eKLR summarized the purpose of judicial review by stating that: -

"Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions."

From the foregoing it is clear that in judicial review, the court does not exercise its appellate powers. It mainly looks at the decision-making process to ensure that the citizen who has come into contact with an administrative body or tribunal has been treated fairly. But as observed by Lord Diplock in the already cited *CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE* case, the court can quash the decision if the same is so unreasonable to the extent that a reasonable tribunal addressing its mind to the facts of the case would not have arrived at such a decision. In doing so, I submit, the court will have descended into the arena of decision-making. For a court to justify such action it must be clearly obvious that the decision is truly and obviously unreasonable."

49. . Peter Kaluma in his book, *Judicial Review, Law Procedure and Practice*, page 46 which enumerates as follows:

"The remedy of judicial review is radically different from those of review and appeal. Judicial Review is not an appeal from a decision but a review of the decision making process and the legality of the decision making process itself. When determining an appeal, the court is concerned with the merits of a decision. Conversely, in Judicial Review the courts exclusive concern is with the legality of the administrative action or decision in question. Thus instead of substituting its own decision for That of some other body, as happens in appeals, the court in an application for judicial review is concerned only with the question as to whether or not the action under attack is lawful or should be allowed to stand or be quashed."



50. The Respondent also places reliance in the Court of Appeal decision in the case of Kenya Pipeline Company Limited case V Hyosung Ebara Company Limited & 2 Others [2012] Eklr where 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.

In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly.

The High Court erred in essence in treating the judicial review application as an appeal and in granting judicial review orders on the grounds which were outside the scope of Judicial Review jurisdiction.”

51. The Respondent contends that it acted within the powers conferred to it by Section 173 of the *Public Procurement and Asset Disposal Act* in reaching its decision in the request for review and its decision does not meet the threshold of unreasonableness, illegality and neither was it arrived at with procedural impropriety and that the applicant has not demonstrated the test.
52. The Respondent posits that the Applicants have not demonstrated that they are entitled to the judicial review orders of certiorari, mandamus and prohibition hence the consolidated suit should be dismissed.

### **The 1<sup>st</sup> Interested Party’s Case;**

53. In opposition to the Application, the 1<sup>st</sup>Interested Party filed a Replying Affidavit sworn by Samuel Mburu Ngang’a on 28<sup>th</sup> November, 2024 and written submissions dated 28<sup>th</sup> November, 2024.
54. . It is the 1<sup>st</sup> IP’s case that it was a bidder of the applicant’s advertised tender- for Provision of Cleaning and Garbage Collection Services for KRA Offices and Residential Houses for a period of Two (2) years Tender No. KRA/HQS/NCB- 034/2023-2024 and that it submitted its tender as required in the invitation to tender with respect to LOT 7 & 8 of the Tender and wholly participated in the impugned tender to its logical conclusion including the notification of the tender outcome.



55. On 5<sup>th</sup> July 2024 it received a Letter dated 2<sup>nd</sup> July, 2024 indicating that the Procurement Proceedings in the Tender with respect to LOT 7 & 8 of the Tender to the effect that the Procurement Entity had terminated procurement proceedings due to inadequate budgetary provision for Lot 7 & 8 and that the applicant failed to submit Certified NSSF remittance payrolls and that the Bank Letter was not certified.
56. It is its case that being dissatisfied with the applicant's decision, the applicant filed for Request of Review before the Public Procurement Administrative Review Board in Public Procurement Administrative Review Board Application No. 69 of 2024- Peesam Limited Versus The Accounting officer, Kenya Revenue Authority and Kenya Revenue Authority who on 9<sup>th</sup> August, 2024 rendered it's decision in the following terms:
- a) The Letters of Notification issued to the Applicant and all unsuccessful tenderers in respect of Lots 1 to 8 of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years be and are hereby cancelled and set aside;
  - b) The Letters of Notification issued to the successful tenderers in Lots 1, 4 and 6 under Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years be and are hereby cancelled and set aside;
  - c) The Evaluation Report dated 11<sup>th</sup> June, 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years be and is hereby cancelled and set aside;
  - d) The Professional Opinion dated 13<sup>th</sup> June, 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years be and is hereby cancelled and set aside;
  - e) The 1<sup>st</sup> Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of forwarding the Evaluation Report dated 15<sup>th</sup> March 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years to the Head of Procurement Function for preparation of Professional Opinion having regard to the Board's findings in this Decision;
  - f) Further to Order 5 above, Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years be allowed to proceed to its lawful and logical conclusion having regard to the Board's finding in this Decision; and
  - g) Each party shall bear its own costs in the Requestor Review.
57. The 1<sup>st</sup> IP also filed a Notice of Motion Application seeking enforcement of the above said orders before the Respondent, and on 25<sup>th</sup> September, 2024, the Respondent Board issued the following orders:
- a) The Respondent's Preliminary Objection filed against the applicant's Notice of Motion in regard to Tender No. KRA/HQS/NCB-034/2023-2024 for Provision of Cleaning and



Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years be and is hereby disallowed;

- b) The Notice of Motion dated 4<sup>th</sup> September, 2024 in respect of the Board's decision dated 9<sup>th</sup> August 2024 pertaining to Tender No. KRA/HQS/NCB- 034/2023-2024 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years be and is hereby dismissed;
  - c) The First respondent is hereby directed to comply fully with the Board's Orders issued on 9<sup>th</sup> August 2024 in respect to the subject tender; and
  - d) Considering that the Procurement process is not complete, each party shall bear its own costs in the Request for Review.
58. It is its case that on 26<sup>th</sup> September, 2024, the applicant's sent a Letter of Notification dated 23<sup>rd</sup> September, 2024 whereof the Procuring Entity purports to terminate the subject tender on the basis of inadequate budgetary provisions resulting to the interested party filing before the Respondent the Public Procurement Administrative Review Board Application No. 98 of 2024 Peesam Limited Versus The Accounting officer, Kenya Revenue Authority and Kenya Revenue Authority.
59. The 1<sup>st</sup> IP urges this court to consider the history of the matter as the current impugned decision has been the subject of litigation before the Respondent Review Board on two previous instances and/or occasions as enumerated herein.
60. . It contends that the reasons for termination of the subject tender under Section 63 of the Public Procurement Act has been previously raised before the respondent in Public Procurement Administrative Review Board Application No. 69 of 2024- Peesam Limited Versus The Accounting officer, Kenya Revenue Authority and Kenya Revenue Authority.
61. . It further contends that in Public Procurement Administrative Review Board Application No. 69 of 2024- Peesam Limited Versus The Accounting officer, Kenya Revenue Authority and Kenya Revenue Authority, the applicant had awarded some of the lots in the subject tender and the interested party raised the issue that this was discriminative on other tenderers and amounted to an unfair treatment, an issue that the Respondent Board considered in Public Procurement Administrative Review Board Application No. 69 of 2024- Peesam Limited Versus The Accounting officer, Kenya Revenue Authority and Kenya Revenue Authority and raised germane and pertinent issues on the budgeting cycles in the proceedings in Public Procurement Administrative Review Board Application No. 98 of 2024 Peesam Limited Versus The Accounting officer, Kenya Revenue Authority and Kenya Revenue Authority, the current impugned decision and enumerated that: it is illogical, unreasonable and in bad faith for the procuring entity to plead that there are inadequate budgets having prepared a tender document, undertaken an evaluation and only to say that there are inadequate budgets.
62. . It is its submission that Section 53 of the Public Procurement and Assets Disposal Act anticipates that accounting officers shall prepare procurement plans with detailed budgets and this would ultimately procurement in public entities thus the logical sequence in public procurement is that budgeting is normally carried out prior to the advertisement of tenders and placement of bids.
63. . The 1<sup>st</sup> IP argues that the Applicant had their budgets in place prior to the advertisement of tenders but for such ulterior motives, the applicant decided to terminate the tender.
64. It is its position that the impugned decision ought to be reviewed.



### **Brief Background Peesam Limited Misc E146Case;**

65. In this Application Peesam Limited has sued The PPRB while the 1<sup>st</sup> Interested Party is The Accounting Officer KRA and 2<sup>nd</sup> Interested Party is KRA (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup>IP).
66. The Applicant filed a Notice of Motion dated 14<sup>th</sup> November, 2024 supported by a Statutory Statement dated 11<sup>th</sup> November, 2024 Verifying Affidavit sworn by Samuel Mburu Ng'ang'a on even date and written submissions dated 27<sup>th</sup> November, 2024.
67. It is the Applicant's case that on 30<sup>th</sup> January 2024, Kenya Revenue Authority (KRA) advertised/ floated a Tender- TENDER NO.KRA/HQS/NCB-034/2023-2024- for Provision of Cleaning and Garbage Collection Services for KRA Offices and Residential Houses for a period of Two (2) years with eight (8) different Lots and indicated to be closing/opening on the 16<sup>th</sup> day of February 2024 at 11.00 Hrs.
68. The Applicant submitted its bid and KRA's Evaluation Committee vide its Evaluation Report dated 15<sup>th</sup> March 2024 recommended for the Applicant to be awarded the tender in respect to Lots 7 and 8.
69. . After evaluation, the Evaluation Committee forwarded the Evaluation Report to the Head of Procurement Function (the 3<sup>rd</sup> Interested Party's Deputy Commissioner, Supply Chain Management) in line with Section 80 (4) of the Act, who directed the evaluation committee to re-evaluate the bid from the preliminary stage.
70. . Upon re-evaluation as per the Head of Procurement Function directions, the Applicant's bid was disqualified and found to be non-responsive for failure to satisfy the criteria under the mandatory requirements numbers 10 and 22 of the tender document and more specifically for allegedly failing to provide certified payrolls and NSSF remittance receipt.
71. . Consequently, the Evaluation Committee prepared another Evaluation Report which was forwarded to the Head of Public Procurement for his professional opinion.
72. . The Professional Opinion dated 13<sup>th</sup> June 2024, recommended the award of the tender in respect Lot numbers 1, 4 and 6 to Kamtix Cleaners Limited as per the Evaluation Report and on 14<sup>th</sup> June 2024, the Accounting Officer KRA adopted the Professional Opinion and the recommendation therein which terminated the tender in respect to Lot numbers 2, 3, 5, 7 and 8 owing to alleged inadequate budgetary provisions and awarded the tender in respect Lot numbers 1, 4 and 6 to Kamtix Cleaners Limited.
73. Being aggrieved it filed a review with the Respondent Review No. 69 of 2024 while another aggrieved bidder Colnet Limited filed Review No. 68 of 2024.
74. . The Respondent in its decision dated and delivered on 9<sup>th</sup> August 2024 found that KRA'S Head of Procurement acted ultra vires by directing the Evaluation Committee to conduct a re-evaluation and set aside his professional opinion dated 13<sup>th</sup> June 2024 directing for a re-evaluation and the subsequent decision to terminate the tender in respect to Lot numbers 2, 3, 5, 7.
75. . The Respondent ordered the 2<sup>nd</sup> IP to reconvene the Evaluation Committee for purposes of forwarding its Evaluation Report dated 15<sup>th</sup> March 2024 to the Head of Procurement Function for preparation of a professional opinion in strict adherence with Section 84 (1) of the Act.
76. . The Applicant contends that the 2<sup>nd</sup> IP took long to comply with the Respondents' orders and directions prompting it to file a Notice of Motion Application dated 4<sup>th</sup> September 2024 in Review 69 of 2024 seeking the Respondent to enforce its orders of 9<sup>th</sup> August 2024.



77. . It is its case that the Respondent convened the evaluation committee while the Notice of Motion Application was yet to be determined which culminated in the decision to unlawfully terminate the tender on 23<sup>rd</sup> September 2024 allegedly due to inadequate budgetary provision and further aggrieved with the process and the decision by KRA to re-evaluate the bids and terminating the tender, the Applicant lodged Request for review No. 98 of 2024 dated 7<sup>th</sup> October 2024 with the Respondent.
78. The Applicant contends that the Evaluation Committee was once again reconvened and evaluated the bids afresh right from the preliminary stage in which the Applicant was disqualified for failure to satisfy the Mandatory Requirements and the evaluation committee forwarded its Evaluation Report dated 15<sup>th</sup> March 2024 to the Head of Procurement vide a memo dated 21<sup>st</sup> August 2024.
79. . It was the committee's finding that all the lowest evaluated bids for all the lots bore tender sums that were above 25% budgetary allocation provision and therefore recommended for the termination of the entire tender on grounds of inadequate budgetary allocation.
80. . It is its case that the Respondent in its decision dated and delivered on 29<sup>th</sup> October 2024 found that the Interested Parties satisfied the substantive requirement to terminate a tender in line with Section 63(1) of the Act having established that the all the lowest bids in all the 7 lots quoted tender prices that exceeded the available budget by 25% and only found fault in the 2<sup>nd</sup> IP's inaction to give to the Director General of the Public Procurement Regulatory Authority a written report on the termination of the tender in line with section 63(2) of the Act.
81. . Aggrieved with the Respondent's decision dated 29<sup>th</sup> October, 2024 the Applicant filed the instant suit.
82. . It is the Applicant's submission that by dint of Section 175 of the Act, it has a right to institute judicial review proceedings against the decision of the Respondent if that decision is illegal, irrational and improper.
83. . It maintains that the impugned decision by the Respondent is illegal, irrational and improper and places reliance to the Pastoli case.
84. . The Applicant invokes Section 175 (1) of the Act which stipulates that a person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.
85. . Section 167 (4) of the Act states that a termination of procurement or asset disposal proceedings in accordance with Section 63 of the Act shall not be subject to the review of procurement proceedings.
86. . The Applicant argues that this court has however held that the Board will only be divested with jurisdiction when a procuring entity strictly complies with the provisions of section 63 in terminating a tender. It goes then that if a tender is not terminated in compliance with the provisions of Section 63 of the Act, the Board will be vested with jurisdiction and thus this Honourable Court will retain jurisdiction under section 175 to review the decision of the Respondent.
87. . It is their submission that this court has jurisdiction to hear the instant suit.



88. . Reliance is placed in the case of Republic v Public Procurement Review Board; Leeds Equipment & Systems Limited Ex Parte Kenya Veterinary vaccines Production Institute (2018) eKLR where the court held that: -

“In a nutshell therefore and based on the above decided cases where the decision of a procuring entity to terminate procurement process is challenged before the Board, the procuring entity is under a duty to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and the procedural requirements set out under the provisions of Section 63 of the *Public Procurement and Asset Disposal Act* 2015. Based on all the above decisions, the Preliminary Objection on jurisdiction therefore fails and is disallowed and the Board finds and holds that it has the jurisdiction to hear and determine this Request for Review on its merits.”

Further the court held;

“a plain reading of section 167(4)(b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory precondition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted”

89. Further reliance is placed on the case of Republic v The Public Procurement & Administrative Review Board, Director General Kenya National Highways Limited, Ex Parte Dar- Yuksel-Ama 2022, where the court held that where it is disputed whether termination was proper, the Board must arise to the occasion and resolve the dispute within its mandate under Section 167 of the Act, anything contrary would be a carte blanche to procuring entities to seek refuge in Section 63 even when not deservedly so.

90. . The Applicant also invokes Section 63 (1) of the Act which provides that, an accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where there is inadequate budgetary provisions.

Section 63 (2) stipulates that an accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days while sub section (4) requires the accounting officer to notify all persons who submitted their tenders of the termination.

91. The Applicant submits that the Respondent’s finding that the 1<sup>st</sup> IP and 2<sup>nd</sup> IP had satisfied the substantive requirement to terminate a tender was irregular as KRA failed to advance the grounds on which they made a determination that the budgetary allocation was inadequate.

92. In the case of Republic v Public Procurement Administrative Review Board; Ex- Parte SGS Kenya Limited 2017 eKLR, where it was held that:-

“the power of discretion to terminate a tender prior to the notification of the tender award is restricted by the law to the said condition and they must be demonstrated to be present for such a termination to be allowed to stand. It is not sufficient for the procuring entity to seek refuge in the termination clause in the tender document clause in the tender award



documents. The termination clause in the tender award document cannot exonerate the procuring entity from providing the Board with sufficient evidence....”

93. The Applicant contends that the termination of the tender by the 2<sup>nd</sup> IP falls short of the process laid down in Section 63 of the Act, for it failed to show evidence of having submitted a report as required by Section 63 (2) and (3) and this has also been confirmed by the Respondent.
94. . It is also its submission that the Respondent in its decision 29<sup>th</sup> October 2024 in Review 98 of 2024 contradicts its decision of 9<sup>th</sup> August 2024 by validating the Head of Procurement’ illegal actions of conferring the Head of Procurement Powers beyond those donated to him by the Act hence there is a need to review the irrational decision of the Respondent rendered on 29<sup>th</sup> October 2024.
95. The Applicant argues that it is not in dispute that the procurement process stood suspended from 4<sup>th</sup>September 2024 to 26<sup>th</sup> September 2024 when the Notice of Motion was determined or so it was expected.
96. The Applicant posits that the decision of the Respondent’s is an affront of the provisions of sections 63, 84 (1) and 168 of the Act and Regulation 78 (2) and (4) of the Regulations and prays that pray that this Honourable Court does exercise its power under Section 175 of the Act, reviews the illegal decision of the Respondent and grant the orders sought by it in Notice of Motion Application dated the 14<sup>th</sup> November 2024.

#### **Interested Parties case;**

97. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties in opposition to the Application, filed their Replying Affidavit sworn by Titus Mwele on 21<sup>st</sup> November, 2024 and written submissions dated 2<sup>nd</sup> December, 2024.
98. It is their case that by dint of section 175(1) of the PPADA which this application is predicated upon, this court exercises a specialized and a limited jurisdiction under the limb of judicial review, rather than an appeal of the Respondent’s decisions.
99. It is also their case that the Notice of Motion dated 14<sup>th</sup>November, 2024 is an appeal which seeks a merit review of both the Respondent’s and the interested parties’ decisions and asking this court to substitute the decision arrived at procedurally with its own.
100. They contend that the Applicant has not cited, particularized or proved any grounds for judicial review of the Respondent’s decision that it seeks this Court to interrogate.
101. They aver that Courts have held that judicial review jurisdiction should not act like an appeal and make reference to, Peter Kaluma’s book, Judicial Review, Law Procedure and Practice( 2009) on page 46 and the case of Republic –v- Public procurement Administrative review Board & another Ex Parte Intertek Testing Services( EA) Pty Limited and Authentix Inc, Energy and Petroleum Regulatory Authority & Accounting Officer, Energy and Petroleum Regulatory Authority( 2022) eKLR supra where the court held thus:
  - 23: This court’s jurisdiction in matters procurement is donated by section 175 (1) of the PPADA whereby a party aggrieved by the decision of the Board may seek judicial review orders.
  24. It is opportune at this stage to appreciate that the review envisaged is under the special jurisdiction of judicial review with the court’s mandate being exercise of supervisory jurisdiction over the Board, a quasi- judicial body within the legally established scope. That



scope was aptly captured by the court in *Pastoli v Kabale District Local Government Council & Others* (2008) 2 EA 300 where the court held;

“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...Illegality is when the decision-making authority commits an error of law in the process of taking 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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...Procedural Impropriety is when there is a 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.”

102. They posit that its only after the decision of the Respondent pursuant to an application being made under section 167 of the Act can a party or a tenderer make an application before this Court to challenge the respondent’s decisions. Effectively therefore, decisions of the IPS as the procurement entity cannot be transmitted directly before this Court by bypassing the mandate of the Respondent under section 167 of the Act.

103. In *OJSC Power Machines Limited Trancentury Limited & Civicon Limited (Acting jointly as A Consortium/Joint Venture v Public Procurement Administrative Review Board, Kenya Electricity Generating Company Limited (Kengen) & Rentco East Africa Limited, Lantech & Toshiba* [2016] KEHC 7280 (KLR) stated as follows: -

“ 80. In my view the applicant cannot under the guise of challenging the decision of the Respondent attack the decision of the Procuring Entity when the same was not the subject of the proceedings before the Respondent. In any case for this Court to find that the 2nd interested party was incorporated in Kenya on 6th June 2012 thus turned 3 years only 18 days to the closing date for the EOI hence would not have been in a position to demonstrate “Evidence of financial capability to lease the Wellheads-attachmost recent three (3) year audited financial statements”, would necessitate making findings of fact in light of the Respondent and Interested Party’s positions that the 2nd interested was a consortium hence met the necessary conditions. That discourse is however outside the scope of this investigation.”

104. It is their submission that this court lacks jurisdiction to not only grant but equally to interrogate the merits of Orders C, D, E & F as prayed and would be excess of its jurisdiction under section 175(1), since the said orders as prayed were not part of the orders or findings made by the 1st Respondent in its decision dated 29th October 2024 as requested vide application for review dated 8th October 2024.



105. It is also their submission that where a statute has provided a remedy to a party, a court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425, where it held that;

“Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed”.

106. The IPs urge this court to exercise restraint in setting aside or quashing the Respondent’s decision unless a clear case based on the ground of judicial review has been brought to justify the Court’s interference with the Respondent’s decision as was reaffirmed in the case of Republic –v- Public procurement Administrative review Board & another Ex Parte Intertek Testing Services( EA) Pty Limited and Authentix Inc, Energy and Petroleum Regulatory Authority & Accounting Officer, Energy and Petroleum Regulatory Authority( 2022) eKLR supra.

107. The IPs contend that the budget line for any tender is dictated by the Annual Procurement Plans (APP) and nothing else which were produced before the Respondent and where it was conclusively demonstrated that the lowest evaluated bidders were way above the amounts as per the APP.

In view of the APP and the amounts quoted by the least evaluated bidders, there were indeed inadequate budget allocation to necessitate award of contract on the subject Tender.

108. . They pray that this court dismisses the instant application before it with costs to them.

#### **Brief Background Colnet Limited Misc E144 Case;**

109. This suit had the Kenya Revenue Authority & Accounting Officer as the Applicant, with the Respondent as PPRB, the 1<sup>st</sup> Interested Party is Colnet Limited and 2<sup>nd</sup> Interested Party the PPRA.

#### **Applicants’ case;**

110. The Applicant filed a Notice of Motion dated 8<sup>th</sup> November, 2024 supported by a Statutory Statement dated 8<sup>th</sup> November, 2024 Verifying Affidavit sworn by Benson Kiruja on even date, a further affidavit sworn by Benson Kiruja dated 18<sup>th</sup> November, 2024 and written submissions dated 28<sup>th</sup> November, 2024.

111. The Application seeks to quash the Respondent’s decision dated 29<sup>th</sup> October 2024 with respect to Application for review No. 99 of 2024 which Application before the Respondent sought to set aside the Applicant’s termination of tender No. KRA/HQS/NCB- 034/2023-2024 for the provision of cleaning services and garbage collection for KRA Offices and Residential Houses as communicated in its letter dated 23<sup>rd</sup> September 2024.

112. It is the Applicant’s case that the Respondent erroneously concluded that it had jurisdiction to entertain the Application for review before it as there was procedural non- compliance on the part of the Applicants as to the notification of the Director General of the 2<sup>nd</sup> interested party of the tender termination as required by section 63(2) of the Public Procurement and Assets Disposals Act.

113. . The Applicants contend that the Respondent erroneously found that there was no evidence that the Applicants had notified the Director General of the 2<sup>nd</sup> interested party of such termination and at



paragraph 99 of its decision it argued that having accessed the Public procurement Information Portal such evidence do not exist.

114. They argue that the Respondent acted beyond the limits of its statutory authority since termination of procurement proceedings on account of inadequate budget is not one that the Respondent can assume jurisdiction over as the same is expressly barred under section 167(4)(b) read together with section 63 of the Public Procurement & Asset Disposal Act.
115. They argue that by dint of section 63(2) of the Act, and in compliance with the requirements of the Circular, termination of a Tender is required to be notified to the 2nd interested party through the Portal and within 14 days of termination of such Tender.
116. It is their submission that they complied with this requirement by submitting the reports to the 2<sup>nd</sup> interested party in satisfaction of the requirements of section 63(2) of the Act when it uploaded the said reports on the Public Procurement Information Portal on 26th September 2024.
117. The Applicant believes that it discharged its burden of proving its compliance with the procedural requirement under section 63(2) of the Act.
118. It is its case that The Respondent considered the wrong report and the wrong part of the portal (not being Tender Termination Section) in arriving at its finding and ruling dated 29<sup>th</sup> October, 2024.
119. They contend that Annexure BK5 of their Verifying Affidavit as filed before this Court shows the tender termination reports that were uploaded on 26th September 2024 at 14.48 pm.
120. It is their submission that the Respondent's decision is irrational and tainted with procedural impropriety and nothing in its Replying Affidavit nor decision demonstrates that it sought a written confirmation or at all of notification of such reports from the 2nd interested party as the custodian of the report under section 63(2) of the Act and rely on the Pastoli case which sets out the three "I's" principle.
121. It is their submission that the Respondent lacked jurisdiction to entertain the review application filed before it pursuant to section 167(4)(b) read together with section 63 of the Public Procurement & Asset Disposal Act.
122. The Applicant argues that they have made out a case for granting of prayers in their Notice of Motion dated 8<sup>th</sup> November, 2024 and Applicants therefore prays that this Court grants the prayers sought by quashing the decision of the Respondent and finding that the Applicant had complied with the procedural requirements under Section 63(2) of the Act.

### **1<sup>st</sup> Interested Party's case;**

123. The 1<sup>st</sup> Interested Party in opposition to the Applicant's Application, (hereinafter referred to as IP) filed their Replying Affidavit sworn by Harriet Wahome on 28<sup>th</sup> November, 2024 and written submissions dated 28<sup>th</sup> November, 2024.
124. It is their case that prior to the litigation before the Respondent, the subject tender had been the subject of litigation in Public Procurement Administrative Review Board Application No. 68 of 2024- Colnet Limited Versus The Accounting officer, Kenya Revenue Authority and Kenya Revenue Authority and on 9<sup>th</sup> August, 2024 rendered its decision whereof this Respondent Board ordered as follows:
  - a) The Letters of Notification issued to the Applicant and all unsuccessful tenderers in respect of Lots 1 to 8 of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage



Collection for KRA Offices and Residential Houses Country wide for a period of Two (2) years be and are hereby cancelled and set aside;

- b) The Letters of Notification issued to the successful tenderers in Lots 1, 4 and 6 under Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years be and are hereby cancelled and set aside;
- c) The Evaluation Report dated 11<sup>th</sup> June, 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Country wide for a period of Two (2) years be and is hereby cancelled and set aside.
- d) The Professional Opinion dated 13<sup>th</sup> June, 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years be and is hereby cancelled and set aside;
- e) The 1<sup>st</sup> Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of forwarding the Evaluation Report dated 15<sup>th</sup> March 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years to the Head of Procurement Function for preparation of Professional Opinion having regard to the Board's findings in this Decision;
- f) Further to Order 5 above, Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years be allowed to proceed to its lawful and logical conclusion having regard to the Board's finding in this Decision; and
- g) Each party shall bear its own costs in the request for Review.

125. The interested party also filed a Notice of Motion Application seeking enforcement of the above said orders before the Respondent Public Procurement Administrative Review Board Application No. 68 of 2024 Colnet Limited Versus The Accounting officer, Kenya Revenue Authority and Kenya Revenue Authority and on 25<sup>th</sup> September, 2024, the Respondent Board issued the following orders inter alia:

- a) The Respondent's Preliminary Objection filed against the applicant's Notice of Motion in regard to Tender No. KRA/HQS/NCB-034/2023-2024 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years be and is hereby disallowed;
- b) The Notice of Motion dated 4<sup>th</sup> September, 2024 in respect of the Board's decision dated 9<sup>th</sup> August 2024 pertaining to Tender No. KRA/HQS/NCB-034/2023-2024 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) years be and is hereby dismissed.

126. It argues that the Respondent's decision in Public Procurement Administrative Review Board Application No. 99 of 2024 Colnet Limited Versus The Accounting officer, Kenya Revenue Authority and Kenya Revenue Authority was prompted by the Applicant's decision to terminate the subject procurement process on the basis of inadequate budgetary provision and which the interested party challenged before the Respondent Board.



127. The 1<sup>st</sup> IP contends that the applicant had previously attempted to terminate the procurement process on similar grounds and this was the subject of proceedings in Public Procurement Administrative Review Board Application No. 68 of 2024- Colnet Limited Versus The Accounting officer, Kenya Revenue Authority and Kenya Revenue Authority.
128. It is their case that the logical sequence in public procurement is that budgeting is normally carried out prior to the advertisement of tenders and placement of bids.
129. . It is the interested party's position that the applicant had their budgets in place prior to the advertisement of tenders but for such ulterior motives, the applicant decided to terminate the tender.
130. It invokes Section 53 of the Public Procurement and Assets Disposal Act anticipates that accounting officers shall prepare procurement plans with detailed budgets and this would ultimately procurement in public entities.
131. The 1<sup>st</sup> IP submits that there is tender capable of being awarded and as such review the decision of both Respondent and the Applicants for an award in the subject tender and essentially the Applicants' urgent need to have in place a provider for the subject services shall have been met.

#### **Brief Background Colnet Limited JR E262 Case;**

132. This suit had Colnet Limited as the Ex Parte Applicant, the 1<sup>st</sup> Respondent is PPRB, The Accounting Officer KRA 2<sup>nd</sup> Respondent and KRA the 3<sup>rd</sup> Respondent.

#### **Applicant's case;**

133. The Applicant filed a Notice of Motion dated 14<sup>th</sup> November, 2024 supported by a Statutory Statement dated 11<sup>th</sup> November, 2024 Verifying Affidavit, Supporting Affidavit sworn by Harriet Wahome on 11<sup>th</sup> November, 2024 and 14<sup>th</sup> November, 2024 respectively as well as written submissions dated 28<sup>th</sup> November, 2024.
134. It is its case that by a letter dated 23 September 2024, the 2nd and 3rd Respondents informed it of the termination of the procurement proceedings due to inadequate budgetary provisions pursuant to Section 63 (1) (b) of the [Public Procurement and Asset Disposal Act](#).
135. Aggrieved with the above decision, the Applicant lodged PPARB Application No.99/2024 of 8 October 2024 challenging the validity of the reason for which the 2nd and 3rd Respondents gave to justify the termination of the procurement proceedings. The 1st Respondent considered the Applicant's Request for Review and on 29 October 2024 issued its Administrative Decision thereon.
136. The Applicant is aggrieved by the fact that, in arriving at its decision, the 1st Respondent failed to consider or otherwise ignored relevant matters, and thereby arrived at a manifestly wrong conclusion with regard to the propriety of the 2nd and 3rd Respondents decision to terminate the procurement proceedings due to inadequate budgetary provisions pursuant to Section 63 (1) (b) of the [Public Procurement and Asset Disposal Act](#) as particularized in the Statutory Statement and Supporting Affidavit filed herewith.
137. The Applicant contends that a reasonable Board properly addressing itself to its bid documents, the 2nd and 3rd Respondents Tender Evaluation Committee's Due Diligence Report dated 22 April 2024, and its Annual Procurement Plan could never have arrived at such an unreasonable conclusion, almost in defiance of logic and acceptable judicial standards.



138. In the case of Republic v Attorney General; Law Society of Kenya - Nairobi Branch (Ex-parte); Law Society of Kenya (Interested Party) (Application E010 of 2020) [2023] KEHC27503 (KLR), this Court stated, that to a great degree, though not expressly stated, the above grounds are now codified in the Fair Administrative Actions Act (FAA Act), in particular Section 7(2) of the FAA Act, by virtue of Article 47 of *the Constitution* guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
139. The Applicant invokes Section 7 of the FAA Act provides for institution of proceedings under the FAA Act, and permits any person who is aggrieved by an administrative decision to apply for review of the administrative decision to this Court, which may review the administrative decision, if the decision was materially influenced by an error of law; the administrator failed to take into account relevant considerations; the decision is not rationally connected to the information before the administrator; or the administrative decision is unreasonable; the administrative action or decision is unfair.
140. The Applicant places reliance on the case of Republic v Public Procurement Administrative Review Board; Pelican Insurance Brokers (K) Limited (Interested Party); Ex Parte Kenya Revenue Authority [2019] eKLR, this Honourable Court held:
- “ 33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.”
141. It is its submission that Section 53 (8) of the PPAD Act provides that the 3rd Respondent should not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates. The 1st Respondent failed to consider the relevant fact that the 2nd and 3rd Respondents contravened the provisions of Sections 3 and 53 of the PPAD Act by commencing a procurement process without satisfying themselves as to whether there was an adequate budget for the subject procurement process.
142. It also submits that Article 22(3) and 47 of *the Constitution*, as read together with Section 175 (1) of the PPAD Act and Sections 7 and 9 of the FAA Act confer upon this Court all the jurisdiction required to hear and determine this Judicial Review Application and grant the judicial review reliefs sought therein.
143. The Applicant urges this Court to be persuaded by the case of Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR held:
- “ 109. It is my conclusion that the termination, the reasons for the termination, and the manner in which the termination was undertaken and communicated is consistent with the relevant provisions of the law. Differently put, the applicant has succeeded in establishing that the Respondent’s decision is tainted with illegality and that the procurement process if allowed to proceed as ordered will in the circumstances of this case offend the principles laid in Article 227, namely, fairness, transparency, competitiveness, equitable and cost effectiveness. It will also offend the principle that procurement entities are



bound by the Bid terms and conditions and that bidders should compete on equal footing. Differently put, mandatory bid terms must be complied with.”

144. The Applicant prays that this court grants them the judicial reliefs sought in their application.

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

145. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (hereinafter referred to as the Respondents) in opposition to the Applicant’s Application, filed their Replying Affidavit sworn by Titus Mwele on 21<sup>st</sup> November, 2024 and written submissions dated 2<sup>nd</sup> December, 2024.

146. The Respondents deponed that the 1st Respondent made correct findings and was correct in finding that the 3rd Respondent satisfied the substantive requirements under section 63 of the Public Procurement and Asset Disposal Act for the termination of procurement proceedings for tender No. KRA/HQS/NCB-034/2023- 2024 for the provision of cleaning services and garbage collection for KRA Offices and Residential Houses.

147. It is their case that Section 175(1) of the PPADA gives the jurisdiction of judicial review over the 1<sup>st</sup> Respondent’s decision dated 29th October 2024.

148. A judicial review Court is concerned with the decision making process, not with the merits of the decision itself.

149. . In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters thus this court lacks jurisdiction to determine the application before it challenging the decision of a procuring entity disguised as an application challenging the decision of a review board.

150. Reliance is placed on the case of OJSC Power Machines Limited, Trancentury Limited & Civicon Limited (Acting jointly as A Consortium/Joint Venture v Public Procurement Administrative Review Board, Kenya Electricity Generating Company Limited (Kengen) & Rentco East Africa Limited, Lantech & Toshiba [2016] KEHC7280 (KLR) stated as follows: -

“ 80. In my view the applicant cannot under the guise of challenging the decision of the Respondent attack the decision of the Procuring Entity when the same was not the subject of the proceedings before the Respondent. In any case for this Court to find that the 2nd interested party was incorporated in Kenya on 6th June 2012 thus turned 3 years only 18 days to the closing date for the EOI hence would not have been in a position to demonstrate “Evidence of financial capability to lease the Wellheads-attach most recent three (3) year audited financial statements”, would necessitate making findings of fact in light of the Respondent and Interested Party’s positions that the 2nd interested was a consortium hence met the necessary conditions. That discourse is however outside the scope of this investigation.”

151. It is their case that given that this court lacks jurisdiction then the Prohibition orders the Applicant seeks cannot be granted and if they should grant the same, this Honourable court shall be seating in excess of its jurisdiction under section 175(1).



152. They posit that nowhere in its decision of 29th October 2024 did the 1st Respondent direct the 2nd and 3rd Respondent to terminate the procurement proceedings.
153. It is their case that this court's jurisdiction is only concerned with the 1st Respondent's decision making process, not whether or not the 1st Respondent's decision was correct or erroneous.
154. The Respondents contend that have been wrongly sued as Respondents, since it is the decision of the 1st Respondent that should be subjected to judicial review proceedings under section 175 of the PPADA and not their decision.
155. They place reliance on the case of Republic v Public Procurement & Administrative Review Board & 2 others; Peesam Limited (Ex parte) [2023] KEHC 23398 (KLR) when it stated as follows: -

“ 36. In interrogating the grounds upon which relief is sought in the statement, one thing that comes out clearly in this application is that the applicant has effectively escalated to this forum its grievances against the procuring entity before the 1st respondent. Its attack is mainly targeted at the procuring entity for terminating the procurement process.

37. Little wonder that in the motion before court, the 2nd and 3rd prayers are targeted at the 2nd and 3rd respondents.

.....

39. . The course adopted by the applicant is obviously contrary to section 175 of the Act according to which it is only the decision of the 1st respondent that may be subject to judicial review of this Honourable Court. The section reads as follows: 175. Right to judicial review to procurement (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

40. . The court cannot proceed as if it is interrogating the decision of the procuring entity and overturn the decision of the Review Board as if this latter decision has been brought before this court on a second appeal.

41. . And even assuming that that this court was entitled to address the decision of the procuring entity, it is trite that in exercise of its judicial review jurisdiction, the court will not assume appellate jurisdiction. It would not, therefore, seek to evaluate afresh the evidence presented before the procuring entity and substitute its decision with the court's decision. Neither can it fault the Review Board on its findings on facts and interpretation of the law unless the findings are clearly inconsistent with evidence. Or the purported interpretation of the law clearly shows that the decision maker did not understand the law that regulates its decision making power and, further, the decision maker did not give effect to it. A decision tainted in such circumstances will be quashed not necessarily because the judicial review court would have reached different conclusions or interpreted the law differently but because no tribunal, given similar facts, would have reached similar conclusions on the facts or the law. In



short, in judicial review circles, the decision would fall on the judicial review grounds of irrationality and illegality.”

156. They contend that the 1st Respondent and 3<sup>rd</sup> Respondent’s decision is in compliance with substantive requirements of section 63 of the PPADA as they considered all the material facts and circumstances as follows:
- a. on the budgetary allocation for each lot of the Tender based on the annual Procurement Plan for the Financial year 2024-2025. With respect to Lots 3 and 5 which is subject to the dispute herein, the 1st Respondent found at paragraph 89 that Lot 3’s Budget was Kshs.36,395,109.07; while Lot 5’s budget was Kshs. 20,249,851.39.
  - b. At paragraph 90 of the decision dated 29th October 2024, the 1st Respondent found that the lowest Bidder’s Tender sum for Lot 3 was 113% more than the allocated budget, while for Lot 5, the lowest Bidder’s tender sum was 97.7% more than the allocated budget.
  - c. At paragraph 91 of the decision dated 29th October 2024, the 1st Respondent made findings that there was budgetary allocation for the services save that the lowest bids quoted tender prices that exceeded budgetary allocation for the Lots.
  - d. At paragraph 92 of the decision dated 29th October 2024, the 1st Respondent made a finding that the procuring entity set out with an honest belief that the available budget was sufficient which turned out not the case.
  - e. At paragraphs 92 –to 95 of the decision dated 29th October 2024, the 1st Respondent made findings that section 132 to 133 of the PPADA which permits competitive negotiations in among other instances where the lowest bidders tender prices exceeds the available budget was not applicable in this instance for Lots 1 to 7 since the subject tender quoted process that exceeded the available budget for the various Lots by a margin of over 25%.
157. It is their submission that Application is an abuse of the Court process and the same should be dismissed with costs to them and place reliance on the case of OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya, Electricity Generating Company Limited (KENGEN), Rentco East Africa Limited, Lantech Africa Limited & Toshiba Corporation (Consortium) [2017] KECA 386 (KLR). Supra.

#### **Analysis and determination:**

158. . Upon perusing the pleadings and the rival submissions alongside the authorities cited by counsel, and the applicable Law, this court finds the following to be the issues for determination;
1. Whether or not the Applicants issued a written report on the termination in compliance with Section 63 of the Public Procurement and Assets Disposal Act (PPAD Act) and Circular No. 04 of 2022 dated 1<sup>st</sup> July 2022 (“Circular”).
  2. Whether or not the Applicants are entitled to the orders sought.
  3. Who shall bear the issue of costs?

#### **The 1st issue;**

159. . In order to succeed in the suit, the applicants have to satisfy the court that their case fits into the principles as enunciated in the case of 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) where in it was held that;

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)."

160. . Sections 107(1), (2) and 109 of the *Evidence Act*, Cap. 80 of the Laws of Kenya deals with the burden of proof. They states as under: -

Sections 107(1) stipulates that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Sections 107 (2) stipulates that when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 109 Provides that The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

161. . The foregoing provisions bring out what is referred to as the legal burden of proof. That burden remains on the Applicant throughout the case.

162. . Section 63 of The *public procurement and asset disposal act* provides for the termination or cancellation of procurement and asset disposal proceedings as follows;

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.

163. . According to the Ex-parte applicants since they had satisfied both the substantive and procedural requirement to justify the termination of the Tender, the Respondent lacked the jurisdiction to entertain the Application for review pursuant to section 167(4)(b) read together with section 63 of the Act.



164. . From the perusal of the PPIP evidence availed to the court, I am satisfied that the applicant has demonstrated that the report on the termination of Procurement proceedings for the Tender was indeed filed as required by section 63(2) of the Act. This is clear from annexure BK-5.
165. . The report required under section 63(2) and (3) of the Act was made in accordance with the guidelines issued by the Authority.
166. . The court has looked at Regulations 48(2) of the PPAD Act on the termination or cancellation of procurement and asset disposal proceedings. A glean at annexure BK at the annexed screenshot under annexure JK-1 which lists the subject tender (KRA/HQS/NCB-034/2023-2024) under KRA Terminated tenders which demonstrates compliance with the law contrary to the argument that KRA had not uploaded the said Report.
167. . It is this court's finding that KRA uploaded termination of the tender documents on the PPIP and to this extent, The Respondent acted illegally in finding that the applicant had not complied with section 63(2) and (3) and Regulations 48(2) of the PPAD Act.
168. . Over and above the foregoing, The Ex parte Applicants, sent a letter dated 30<sup>th</sup> October 2024 to the Respondent. It stated as follows in part;

“We note that the RPARB arrived at the above decision, highlighted in Paragraph 99, that upon accessing the portal, they could not find an upload by KRA of the termination of the subject tender. As the custodians of the system, we hereby request your good office to verify and issue a report on whether KRA uploaded termination of the tender documents on the PPIP. This request is made pursuant to the provisions of Sections 38 and 106E of the Evidence Act which provide as follows:

38. Entries in public records

An entry in any public or other official book, register or record, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept is itself admissible.

106E. Presumption as to Gazette in electronic form.

A court shall take recognizance of every electronic record purporting to be the official Gazette, or purporting to be electronic record directed by any law to be kept by any person, if such electronic record is kept substantially in the form required by law and is produced from its proper custody.

We appreciate your urgent response.”

The letter is annexed and marked as BK-7.

169. . Section 4 (1) of The Fair Administrative Action Act provides that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
170. . It is this court's finding that the refusal or failure to furnish the applicant with the information requested in the letter dated 30<sup>th</sup> October 2024 without any justification amounts to an unfair administrative action.



171. There is a presumption in law that he who has information but refuses to produce it, then such information is detrimental and or adverse to their case.
172. . Though this procedure wasn't mandatory the Applicant embraced the step out of abundance of caution and it does not form the basis of this court's determination of this issue.
173. . In concluding this issue, this court makes a finding that it is satisfied that the Applicant has proven that it's report on the terminated tender No. KRA/HQS/NCB-034/2023-2024 for the provision of cleaning services and garbage collection for KRA Offices and Residential Houses ("the Tender") were uploaded on 26<sup>th</sup> September 2024, within the dictates of section 63(2) of the *Public Procurement and Asset Disposal Act* and Circular No. 04 of 2022.

**The second issue;**

174. . In the case of Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR it was held:

“ 109. It is my conclusion that the termination, the reasons for the termination, and the manner in which the termination was undertaken and communicated is consistent with the relevant provisions of the law. Differently put, the applicant has succeeded in establishing that the Respondent's decision is tainted with illegality and that the procurement process if allowed to proceed as ordered will in the circumstances of this case offend the principles laid in Article 227, namely, fairness, transparency, competitiveness, equitable and cost effectiveness. It will also offend the principle that procurement entities are bound by the Bid terms and conditions and that bidders should compete on equal footing. Differently put, mandatory bid terms must be complied with.”

175. . The Applicant in judicial review number 262 of 2024 raised the issue that The 1<sup>st</sup> Respondent failed to consider the following relevant matters which were presented to it by the Ex-Parte Applicant in its Application for Review:
- (a) That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were duty bound to provide, but did not provide, sufficient reasons and evidence to substantively justify and support their reason to terminate the procurement proceedings due to inadequate budgetary provisions.
176. . The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were under a duty to establish, but did not establish that there was an adequate budgetary allocation for the subject tender before initiating the procurement process.
177. . The applicant also argued that that the Due Diligence Report dated 22 April 2024 issued by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Tender Evaluation Committee recommended the award of the Tender to the Applicant under LOT 3 and 5, which recommendation meant that the Ex-Parte Applicant had satisfied all the requirements under the Preliminary/Mandatory Evaluation, Vendor Evaluation, Financial Evaluation and Due Diligence stages of the Tender.
178. . The Applicant further argued that by the Orders given in PPARB Application No. 68/2024 of 19 July 2024, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were directed by the 1<sup>st</sup> Respondent to reconvene the Tender Evaluation Committee for purposes of forwarding the Evaluation Report dated 15th March 2024 in respect of the Tender to the Head of Procurement Function for preparation of a Professional Opinion having regard to the 1<sup>st</sup> Respondent's findings in the Decision.



179. . It was further it's case that instead of adhering to the orders and directions given by the 1<sup>st</sup> Respondent in PPARB Application No. 68/2024 the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Head of Procurement purported to review the manner in which the subject procurement process was undertaken, including undertaking his own evaluation of bids.
180. . It further advanced their argument that The 1<sup>st</sup> Respondent failed to consider and or ignored the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Head of Procurement's was not authorized to undertake an evaluation of the bids by Section 84 (2) of the PPAD Act and Regulation 78 of the PPAD Regulations, when there were no dissenting opinions between tender evaluation and award recommendations.
181. . Section 84 (1) of the *Public Procurement and Asset Disposal Act* provides that the head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.
- (2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.
- (3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).
182. . Regulation 78 (1) (i) of the PPAD Regulations provides that an evaluation report should include any dissenting opinion and the reasons thereof and such other recommendations as may be deemed necessary by the evaluation committee.
183. . In the case of *Municipal Council of Mombasa vs. Republic & Another* [2002] eKLR the Court of Appeal expressed itself as follows:
- “The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was sufficient evidence to support the decision –and that, as we have, is not the province of judicial review”.
184. . It is my finding and I so hold that this court will be acting on appeal if it delves into the issue of whether or not The 1<sup>st</sup> Respondent failed to consider the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Tender Evaluation Committee's Due Diligence Report dated 22 April 2024 had recommended the award of the Tender to the Applicant under LOT 3 and 5, and there were no dissenting opinions between tender evaluation and award recommendations.
185. . It is further this court's finding and I so hold that it will require a merit analysis for the court to determine whether or not the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Head of Procurement contravened the Section 84 (2) of the PPAD Act and Regulation 78 of the PPAD Regulations by failing to consider the recommendations made in the Tender Evaluation Committee's Due Diligence Report dated 22 April 2024.



186. . This court however finds that the 1<sup>st</sup> Respondent failed to consider the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Head of Procurement acted in ultra vires or in excess of the power conferred upon it under Section 84 (2) of the PPPAD Act and Regulation 78 of the PPAD Regulations when it recommended that the Tender Evaluation Committee re-evaluates all the bids from the preliminary stage. The said administrative act that is ultra vires must be quashed through an order of certiorari.
187. . The 1<sup>st</sup> Respondent failed to consider the fact that the Ex-Parte Applicant having initially passed the mandatory and financial requirements of the tender, it was not open for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Head of Procurement Function or Tender Evaluation Committee to go back and re-evaluate whether the Ex-Parte Applicant's bid complied with the mandatory evaluation criteria when there were no dissenting opinions between tender evaluation and award recommendations.
188. . On another front, Section 53 (8) of the PPAD Act provides that the 3<sup>rd</sup> Respondent should not commence any procurement proceedings until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates. The Decision of the 1<sup>st</sup> Respondent is not rationally connected to the purpose for which it was taken.
189. . The 1<sup>st</sup> Respondent failed to consider the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contravened the provisions of Sections 3 and 53 of the PPAD Act by commencing a procurement process without satisfying themselves as to whether there was an adequate budget for the subject procurement process.
190. . This Court agrees with the arguments as fronted by Samuel Mburu Ng'ang'a for the 1<sup>st</sup> interested Party that the reasons for termination of the subject tender under Section 63 of the Public Procurement Act have been previously raised before the respondent in Public Procurement Administrative Review Board Application No. 69 of 2024- Peesam Limited Versus The Accounting officer, Kenya Revenue Authority and Kenya Revenue Authority.
191. . The interested party had raised germane and pertinent issues on the budgeting cycles in the proceedings in Public Procurement Administrative Review Board Application No. 98 of 2024 Peesam Limited Versus The Accounting officer, Kenya Revenue Authority and Kenya Revenue Authority.
192. . It is against the rules of natural justice for the applicant to initiate a procurement process, invite bids and later on terminate the procurement process midair. This generates and or makes a mockery of such a critical process. This can only conclusively happen where there is an ulterior motive which in the end offends the Fair administrative Action guarantee under Article 47 of *the Constitution*.
193. . It is this court's finding and I so hold that The 1<sup>st</sup> Respondent failed to consider the fact that the Applicant's bid fell within the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents budgetary allocation for the period 2024/2025.
194. . In the case of Olive telecommunication PVT Limited case (supra) it was held that,  
“ this Court would have abetted an illegality. This Court cannot countenance illegalities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role to do so.”
195. . The applicant had a legitimate expectation that it would benefit from a fair and transparent process which the respondent failed to avail.
196. . It is my finding that indeed, the 1<sup>st</sup> Respondent did not give justification or offer satisfactory explanations within acceptable economic standards around the issue of budgetary constraints.
197. . The issue of the budgetary constraints was handled in a manner and timing that does not accord with article 227 of *the Constitution*.



198. . Halsbury’s Laws of England, 4<sup>th</sup> Edition at paragraph 77 states as follows:

“There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed. In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete. A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power.”

199. . Section 63 of the PPAD Act must be complied with fully when it comes to both the procedural and substantive requirements which the respondent did not fulfil. The requirements are conditions are conjunctive.

200. . It is this court’s finding that even though the court found that the applicant did not act illegally in the manner in which it issued the notice terminating the procurement, the court finds that the procuring entity acted illegally in failing to comply with section 63 of the *Public Procurement and Asset Disposal Act* to the extent that it did not give sound reasons why the procurement process was terminated.

201. . Having arrived at this conclusion, the court has to decide on the way forward.

202. . In the case of Kenya Pipeline Company Limited case V Hyosung Ebara Company Limited & 2 Others [2012] Eklr where 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.

203. Justice will be best served if all the consolidated administrative reviews are sent back to the board for rehearing.

**On the issue of costs;**

210. There shall be no orders as to costs.

**Disposition:**

211. The Applicant issued a written report on the termination in compliance with Section 63 of the Public Procurement and Assets Disposal Act (PPAD Act) and Circular No. 04 of 2022 dated 1<sup>st</sup> July 2022("Circular") but failed to justify the termination.

**Order;**

1. An Order of Certiorari to quash the decision and orders of the Respondent dated 29th October 2024 is hereby issued.
3. There shall be no orders as to costs.
2. All the administrative reviews shall be reheard within 10 days of today's date.

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

.....  
**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.)

