



**Republic v Public Procurement Administrative Review Board; Dignity Traders Limited (Interested Party); Kenya Maritime Authority (Exparte Applicant) (Judicial Review Application E001 of 2023) [2023] KEHC 3176 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3176 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**JUDICIAL REVIEW APPLICATION E001 OF 2023**

**OA SEWE, J**

**MARCH 29, 2023**

**IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND DECLARATION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015**

**AND**

**IN THE MATTER OF PUBLIC PROCUREMENT ADMINISTRATION REVIEW BOARD**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

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

**AND**

**DIGNITY TRADERS LIMITED ..... INTERESTED PARTY**

**AND**



JUDGMENT

1. The substantive Notice of Motion dated January 30, 2023 was filed by the Ex Parte applicant, Kenya Maritime Authority, on February 1, 2023 for orders that:
  - (a) The Court be pleased to issue an Order of Certiorari to remove and bring into the High Court for purposes of being quashed the decision by the respondent delivered on December 29, 2022;
  - (b) The Court be pleased to issue an Order of Declaration that the Letter of notification dated November 30, 2022 in respect of Tender No KMA/ONT/011/2022-2023 for Proposed Office Fit Outs at KMA-IP CCTV Surveillance, Access Control, IP PBX and Structured Cabling System Installation Works addressed to the Interested Party be upheld and reinstated.
  - (c) That the costs of the application be provided for.
2. The application is premised on the grounds that the decision of the respondent directing the respondent's Evaluation Committee to re-admit the interested party's tender at the Financial Evaluation stage and to conduct a re-evaluation of the interested party's tender at that stage despite the interested party's bid being non-responsive, contravenes the Constitution, the Public Procurement and Disposal of Assets Act, 2015, the Public Procurement and Disposal of Assets Regulations, 2020, *Fair Administrative Actions Act*, 2015 and the *Public Finance Management Act*, 2012.
3. In the Supporting Affidavit sworn by the applicant's Acting Director General, Mr John O Omingo, it was averred that the decision of the respondent misconstrued the intention of Regulation 74(2) of the *Public Procurement and Disposal of Assets Regulations, 2020 (PPDAR)* which categorically classifies errors of oversight arising from miscalculations of unit price, quantity, subtotal and total bid price as a major deviation that affects the substance of the tender. The applicant further averred that there exists no legitimate reason to re-admit the interested party's tender at the Financial Evaluation Stage and therefore that the decision of the respondent goes against the competitive nature of an open tender.
4. In support of the its averments, the applicant annexed the impugned decision to the Supporting Affidavit as Annexure 'PT1' and the Letter of Notification to the interested party as Annexure 'PT2'. The rest of the exhibits annexed to the Supporting Affidavit are the documents pertaining to the subject tender.
5. In response to the application, the respondent filed a Replying Affidavit on March 7, 2023, sworn by its Acting Secretary, Mr James Kilaka. He averred that, on December 8, 2022, the interested party filed a Review Application No 104 of 2022 in respect of Tender No KMA/ONT/011/2022-2023 for Proposed Office Fit Outs at KMA-IP CCTV Surveillance, Access Control, IP PBX and Structural Cabling System Installation Works, on grounds that it was unlawfully disqualified on account of failing to adhere to the provisions of Section 63 and 79(a) and (b) of the PPDAA despite being responsive.
6. At paragraphs 9 to 11, Mr Kilaka explained the procedural steps taken thereafter by way of processing the Request for Review. He averred that prior thereto, he had informed members of the public that Review applications would be canvassed by way of written submissions. He accordingly shared the documents with all the parties and the bidders via email, after which the Board made its decision on the basis of the documentation filed before it and issued the orders in issue.



7. At paragraph 19 of the Replying Affidavit, the respondent explained that, in determining whether the interested party's tender was evaluated in accordance with the specifications and terms set out in the Tender Documents, the respondent took the view that the arithmetic errors in the tender amounted to a minor deviation; and upon reviewing the provisions of Article 227 of the *Constitution*, Sections 80(2) and 82 of the Act, Regulations 74(2) and 77 of the PPDAR in addition to precedents on previous decisions of the respondent and the High Court, the respondent found that Regulation 74(2) does not vest an automatic action for a procuring entity to find a tender non-responsive as a result of arithmetic errors detected at the Financial Evaluation.
8. Accordingly, the respondent averred that it neither misconstrued Regulation 74 nor did it overreach its mandate or jurisdiction. Mr Kilaka added that the respondent has continued to uphold procurement procedures as required by law and has promoted the integrity and fairness in the discharge of its mandate.
9. While Ms Salim for the applicant opted to rely on the Supporting Affidavit and documents filed in support of the application dated January 30, 2023, Ms Lang'at relied on her written submissions filed on March 16, 2023. She proposed the following two issues for determination:
  - (a) Whether the subject tender was evaluated in accordance with the terms of the tender as per the tender documents and the applicable law;
  - (b) Whether the appeal against the respondent's decision is on the substance of the matter.
10. Ms. Lang'at reiterated the facts of the case as evinced in the parties' affidavits. She underscored the respondent's finding, at pages 13 and 22 of the impugned decision, to demonstrate that the respondent considered the arguments presented by the interested party in the light of the provisions of the law, notably Articles 227 of the Constitution, Section 80(2) and 82 of the PPDA and Regulations 74(2) and 77 of the PPDAR as well as applicable precedents. It then arrived at the conclusion that Regulation 74(2) does not envisage an automatic disqualification on account of arithmetical errors.
11. As to the exact nature of the dispute herein, Ms Lang'at was of the view that it is in fact an appeal on the merits as opposed to a judicial review. She pointed out that the duty of the Judicial Review Court is to check the challenged decision for any illegalities, unreasonableness or procedural improprieties. She relied on *Republic Kenya Revenue Authority, Ex Parte Yaya Towers Limited [2008] eKLR* and *Municipal Council of Mombasa v Republic & Another [2002] eKLR* to support her argument.
12. Counsel also relied on the decision of the Court of Appeal in *Aluoch Dan Pwino & 3 Others v Kenyatta University [2014] eKLR* and *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another [2014] eKLR* and *Pastoli v Kabale District Local Government Council and Others (2008) 2 EA 300*, among other decisions, to underscore the argument that it is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The applicant must go further to demonstrate the illegality, unreasonableness or breach alleged for judicial review remedies to be granted. Accordingly, Ms Lang'at urged the Court to find that application dated January 30, 2023 is an abuse of the court process and therefore ought to be dismissed with costs.
13. I have given due consideration to the application dated January 30, 2023. It essentially seeks two orders by way of judicial review, namely, an Order of Certiorari to remove and bring into this Court for purposes of being quashed the respondent's decision dated December 29, 2022. The second prayer is for a Declaration that the Letter of Notification dated November 30, 2022 in respect of Tender No KMA/ONT/011/2022-2023 for Proposed Office Fit Outs and KMA-IP CCTV Surveillance, Access



Control, IP PBX and Structured Cabling System Installation Works addressed to the Interested Party be upheld and reinstated.

14. The background facts are largely undisputed, and are well-summarized by Ms Lang'at in her written submissions filed on March 16, 2023, as well as in the impugned decision of the respondent. Briefly, the facts are that the applicant, as the procuring entity, floated an open tender by way of advertisement, being Tender No KMA/ONT/011/2022-2023 for Proposed Office Fit Outs for IP CCTV Surveillance, Access Control, IP PBX and Structured Cabling System Installation Works. A total of 14 bidders responded to the advert and submitted their respective bids by the closing date of October 19, 2022. The bids were thereafter evaluated by the applicant; and the impugned decision shows that the interested party's bid emerged as one of the responsive bids, both at the preliminary stage and at the technical evaluation stage. Accordingly, the interested party's bid proceeded to financial evaluation stage in which arithmetic errors were noted. Thus, the respondent's Evaluation Committee declared the interested party's bid non-responsive and disqualified it at that stage.
15. The errors noted were set out at page 5 of the impugned decision thus:

'Page 00000556 (H/6)- error i.e ITEM 1.05 has indicated 135,500.00 instead of 135,000.00 -page 00000567 (H/17)- Grand summary has indicated 43,170,000.00 instead of 43,125,000.00'
16. It is further manifest from the material presented herein that the Evaluation Committee did not recommend an award to any of the bidders as none had passed all the stages of evaluation. Accordingly, the applicant's procurement officer, Ms Catherine Mumbi , gave a professional opinion dated November 22, 2022 recommending that the tender should not be awarded since none of the bidders passed all the evaluation stages. The decision was approved by the accounting officer of the applicant and Letters of Notification issued on November 30, 2022, informing the bidders of the outcome of the tender evaluation exercise. In the case of the interested party, it was notified that its tender was unsuccessful on account of the arithmetic errors noted.
17. Being aggrieved by the decision of the applicant, the interested party filed a Request for Review with the respondent, dated December 7, 2022, seeking orders as hereunder:
  - (a) A declaration that the procurement entity breached the provisions of Article 227(1) of the Constitution and Sections 63 and 79(1) and (2) of the Public Procurement and Disposal of Assets Act;
  - (b) That the decision of the procuring entity to terminate the procurement proceedings with respect to the tender be annulled and set aside;
  - (c) That the procurement process be completed and the applicant be evaluated as per the provisions of Section 80 of the Act;
  - (d) An order directing the procuring entity to complete and release the outcome of the procurement process in regard to the tender;
  - (e) An order compelling the procuring entity to award the tender to the applicant who strongly believes it was the lowest evaluated bidder;
  - (f) An order compelling the respondents to that review to pay the costs of the Request;
  - (g) Such further orders as the Board may deem fit and appropriate to ensure that the ends of justice are met.



18. Upon hearing the parties, the respondent found in favour of the interested party and issued orders as hereunder:
- (a) The Applicant's Request for Review dated December 7, 2022 in respect of the decision of the Accounting officer of the Kenya Maritime Authority in relation to Tender No KMA/0NT/011/2022-2023 for Proposed Office Fit Outs for Kenya Maritime Authority for IP CCTV Surveillance, Access Control, IP PBX and Structural Cabling System Installation Works is hereby allowed.
  - (b) The Letters of Notification dated November 30, 2022 of award of Tender No KMA/0NT/011/2022-2023 for Proposed Office Fit Outs at Kenya Maritime Authority for IP CCTV Surveillance, Access Control, IP PBX and Structural Cabling System Installation Works addressed to the applicant and all other bidders be and are hereby cancelled and set aside.
  - (c) The Accounting Officer of the Kenya Maritime Authority is hereby ordered to direct the Evaluation Committee to re-admit the interested party's tender at the Financial Evaluation stage and conduct a re-evaluation of the interested party's tender at that stage in accordance with Section 82 as read with Regulation 77 Regulations 2020, taking into account the Board's finding in the Request for Review.
  - (d) The Accounting Officer of the Kenya Maritime Authority is hereby directed to proceed with the procurement process to its logical conclusion including the making of an award within 14 days from the date of the decision.
  - (e) Given that the procurement process is not complete, each party shall bear its own costs in the Request for Review.
19. That is the decision that has been challenged in this Judicial Review Application. The application was brought under Order 53 Rule 3 of the [Civil Procedure Rules](#) upon leave being granted on January 16, 2023. The applicant also relied on Article 227 of the Constitution, which provides thus in relation to procurement of public goods and services:
- (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.
  - (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—
    - (a) Categories of preference in the allocation of contracts;
    - (b) The protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
    - (c) Sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and
    - (d) Sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practice.
20. The law envisaged under aforesaid Article, no doubt, is the PPDA and the rules thereunder. The procedure for open tender is provided for in Sections 91 and 92 of the PPDA ; while the role of the Public Procurement Administrative Review Board is set out in Sections 27 to 32 and 167 to 175 of the



Act as well as Regulations 203 to 224 of the PPDAR . There is therefore no denying that the respondent had the mandate and the jurisdiction to entertain the interested party's Request for Review.

21. In the light of the foregoing, the issue for determination is whether the applicant has made out a good case for the issuance of the order of Certiorari; and if so, whether the declaratory order sought herein is warranted. Needless to say that by dint of Article 47 of the Constitution , judicial review is now a constitutional mechanism for addressing administrative wrongs and omissions by public entities; and therefore the remedies available have likewise been expanded to include declaratory orders. Article 47 of the Constitution states:
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
  - (3) Parliament shall enact legislation to give effect to the rights in Clause (1) and that legislation shall—
    - (a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
    - (b) Promote efficient administration.
22. Hence, under the [Fair Administrative Action Act](#), No 4 of 2015, it is recognized, under Section 11 thereof that,
- (1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order—
    - (a) Declaring the rights of the parties in respect of any matter to which the administrative action relates;
    - (b) Restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;
    - (c) Directing the administrator to give reasons for the administrative action or decision taken by the administrator;
    - (d) Prohibiting the administrator from acting in a particular manner;
    - (e) Setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;
    - (f) Compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;
    - (g) Prohibiting the administrator from acting in a particular manner;
    - (h) Setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;
    - (i) Granting a temporary interdict or other temporary relief; or
    - (j) For the award of costs or other pecuniary compensation in appropriate cases.



- (2) In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order-
- (a) Directing the taking of the decision;
  - (b) Declaring the rights of the parties in relation to the taking of the decision;
  - (c) Directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
  - (d) As to costs and other monetary compensation.

23. Accordingly, in the case of Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR, a Five-Judge bench held:

'In our considered view presently, judicial review in Kenya has Constitutional underpinning in articles 22 and 23 as read with article 47 of the Constitution and as operationalized through the provisions of the Fair Administrative Action Act . The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the Civil Procedure Act and rules is a procedure for applying for remedies under the common law and the Law Reform Act . These common law remedies are now part of the constitutional remedies that the High Court can grant under article 23(3)(c) and (f) of the Constitution . The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches.'

24. That said, it is equally important to bear in mind that judicial review is not concerned with the merit of the decision sought to be quashed. It is designed to interrogate the process employed by the decision-making entity. This point was made in Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002]eKLR, the Court of Appeal held that: -

'Judicial review is concerned with the decision making process, not with the merits of the decision 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 in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision.'

25. Similarly, in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR the Court of Appeal held:

'An order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for Judicial Review,



he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal .’

26. In the premises, I have scrutinized the impugned decision in the light of the averments of the respondent. There is no disputing the relevant provisions of the PPDA and PPDAR as to the functions of the respondent and the procedure employed by it in reaching its decision cannot be faulted. Each step taken was set out in Mr Kilaka’s Replying Affidavit, in particular at paragraphs 8 to 15 thereof. Those averments were not rebutted. Likewise, looking at the decision made from the prism of Section 173 of the PPDA , it is plain that the respondent had the powers to make the orders it did. The provision states:

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

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

27. I am therefore unable to find fault with the manner in which the respondent handled the interested party’s Request for Review. Of course it is a different matter altogether whether the decision arrived at by the respondent was the result of a correct appreciation of Section 80(2) of the PPDA, which states that:

- (1) Subject to subsection (2) of this section, the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way by any person or entity.
- (2) For avoidance of doubt, the provisions of subsection (1) shall not apply to sections 103, 131 and 141 of this Act.’

28. Indeed, it is manifest from the grounds set out on the face of the Notice of Motion dated January 30, 2023 that the applicant’s complaint is an attack on the merits of the decision dated December 29, 2022 in so far as it alleged, for instance, in Ground (v) that:

’The decision of the Respondent marred the Ex Parte Applicant with confusion and lack of clarity as to the manner and quantification criteria to deploy in determining which arithmetical error qualifies as a substantive deviation or a minor deviation when it comes to detected arithmetical error or oversights in bids submitted by tenderers.’



29. And in the Supporting Affidavit, the applicant challenged the merit of the decision in a more pointed manner at paragraph 7 when it averred that:

'The decision of the Respondent misconstrued the intention of Regulation 74(2) of the Public Procurement and Disposal of Assets Regulations, 2020 which categorically classified errors or oversight arising from miscalculation of unit price, quantity, subtotal and total bid price as a major deviation that affects the substance of the tender.'

30. In the circumstances, the applicant ought to have invoked the jurisdiction of the Court by way of appeal instead of review. I find succor for this posturing in *Republic v Chief Magistrate's court Nairobi & 4 others ex parte Beth Wanja Njoroge [2013] eKLR*, Nairobi Civil Misc Appl 327 of 2011, in which Hon Odunga J, held:

20. 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. 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.'

25. I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or the 'wrongness' or error in interpretation or application of the law is not appropriately tested in a judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs.'

31. Similarly, in *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others, CA Civil Appeal 145 of 2011 [2012] eKLR* the Court of Appeal expressed the view that:

21] Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter.'

32. Consequently, I would agree entirely with the position taken by Hon Mativo, J (as he then was) in *Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co Limited & another (Interested Party) Ex parte Kenya Power and Lighting Company Limited [2019] eKLR* that:



- a. 'A Judicial Review court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the body. Where a body is granted wide decision-making powers with a number of options or variables, a judicial review court may not interfere unless it is clear that the choice preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, a Judicial Review court may not interfere only because it favours a different option within the range.'
33. In the result, I find no merit in the application dated January 30, 2023. The same is hereby dismissed with an order that each party shall bear own costs of the application.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29<sup>TH</sup> DAY OF MARCH  
2023**

**OLGA SEWE**

**JUDGE**

