



**Republic v Public Procurement Administrative Review Board; Lake Victoria North Water Works Development Agency & another (Interested Parties); Toddy Civil Engineering Company Limited (Exparte Applicant) (Judicial Review E031 of 2023) [2023] KEHC 3699 (KLR) (Judicial Review) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3699 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW E031 OF 2023**

**JM CHIGITI, J  
APRIL 27, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

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

**AND**

**LAKE VICTORIA NORTH WATER WORKS DEVELOPMENT AGENCY ..... INTERESTED PARTY**

**BLUESWIFT CONTRACTORS & GENERAL SUPPLIES LIMITED ..... INTERESTED PARTY**

**AND**

**TODDY CIVIL ENGINEERING COMPANY LIMITED .. EXPARTE APPLICANT**

**JUDGMENT**

1. What is before this court is an application by way of a Notice of Motion dated March 14, 2023. It is brought under Sections 8 & 9 of the *Law Reform Act* (cap 26), Sections 7(2) (a) (v) (f) (i) (k) (m), 10, 11 & 12 of the *Fair Administrative Action Act, 2015* and Order 53 Rule 3 of the *Civil Procedure Rules 2010*.



## Reliefs Sought:

2. The *ex parte* Applicant seeks the following orders:
  1. That an Order of *certiorari* be and is hereby issued to remove to this Court and quash the decision of the Respondent herein, the Public Procurement Administrative Review Board dated February 22, 2023, dismissing the *ex parte* Applicant's PPARB Application for review No 08 of 2023.
  2. That this Honourable Court be pleased to issue a declaration that the decision of the 1<sup>st</sup> interested Party dated January 20, 2023 awarding Tender No WWDA/W/MOI-MTD/2022-2023 to Blueswift Contractors & General Supplies Limited is illegal and unconstitutional.
  3. That an Order of *mandamus* be and is hereby issued compelling the Respondent to re-hear PPARB application for review No 08 of 2023 and to consider all the grounds raised therein by the *ex parte* Applicant and the pleadings and submissions filed therein and served by all the parties.
  4. That an Order of Prohibition be and is hereby issued prohibiting and restraining the 1<sup>st</sup> Interested Party from awarding Tender No WWDA/W/MOI-MTD/2022-2023 and signing any contract with respect to the said tender pending the re-hearing and determination of the *ex parte* Applicant's Request for Review in PPARB Application for review No 08 of 2023 by the Respondent.
  5. That the costs of this application be provided for.

## Brief Facts:

3. On February 1, 2023 the *ex parte* Applicant instituted the proceedings before the Respondent in PPARB Application No 8 of 2023 by filing a Request for Review dated February 1, 2023 in respect of Tender No LVNWWDA/W/MOI-MTD/20222023/\_phase I, Tender For Construction Works For Water And Sewerage Project For Towns Of Moi's Bridge And Matunda Phase 1: Water Supply Component. .
4. A Notification of Appeal was sent out to the Procuring Entity ( 1<sup>st</sup> Interested Party herein) notifying it of the filing of the request for Review and requiring it to file its response to the Request for Review. Subsequently, on February 6, 2023, the Procuring Entity filed its Memorandum of Response and Notice of Preliminary Objection both of which are dated February 6, 2023. On February 7, 2023, the Procuring Entity filed an Amended Memorandum of Response dated February 6, 2023
5. On 6<sup>th</sup> February, 2023, the Respondent sent a notice to all the tenderers who had participated in the subject tender requesting them to file their responses to the Request for Review. On February 9, 2023, the 2<sup>nd</sup> Interested Party herein filed its Replying affidavit sworn on February 9, 2023 and a Notice of Preliminary Objection dated February 9, 2023.
6. The *ex parte* Applicant and the Interested Parties herein filed their Written Submissions on February 9, 2023 the Respondent sent a notice for an online hearing of the matter indicating that the matter would be heard on February 16, 2023.



7. On February 16, 2023 during an online hearing of the *ex parte* Applicant's Request for Review, the Respondent gave an opportunity to all the Counsel present including the *ex parte* Applicant's Counsel to present their respective Client's case, and highlight their Written Submissions in the matter.
8. Subsequent to the online hearing, the Respondent retreated to prepare its Decision which was delivered on February 2, 2023 by sending a copy of the same by email to Counsel appearing for all the parties in the matter. In its Decision, the Respondent upheld the Notices of Preliminary Objections by the Interested Parties and found that it had no jurisdiction in the matter as the Request for Review was fatally defective.
9. Being aggrieved with the decision of the Respondent the *ex parte* Applicant filed the instant judicial review.
10. The *Ex parte* Applicants case is predicated on the Verifying Affidavit sworn on March 8, 2023 by Anthony Nganga Mwaura and a Statutory Statement dated March 8, 2023.
11. The Applicant contends that it was irrational for the Respondent to make a finding that the Applicant lacked the locus standi to seek administrative review before the Respondent allegedly for failure to plead in its request for a review that it had suffered or risked suffering, loss or damage due to breach of a duty imposed on the procuring entity as required by Section 167 (l) of the Act, without considering the fact that the Court of Appeal's decision in *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & others* (2019) eKLR (Mombasa Civil Appeal No 131 of 2018) did not prescribe the manner or form in which an applicant in a request for review ought to plead that it had suffered loss or damage.
12. The Applicant avers that the Respondent erred in law when it failed to consider the fact that the Respondent had not prescribed the manner or form in which an Applicant in a request for review ought to plead that it had suffered loss or damage in the rules and procedures that it is legally mandated to develop under Section 28(2) of the *Public Procurement and Asset Disposal Act, 2015*.
13. The Applicant avers that the the Respondent erred in law when it failed to consider the fact that the Applicant had the requisite locus standi under Section 167 of the *Public Procurement and Asset Disposal Act, 2015* due to the fact that it had participated in the subject tender as a candidate by obtaining the tender document pursuant to an invitation notice by the procuring entity and as tenderer by submitting a tender in response to an invitation by the procuring entity.
14. The Applicant avers that the the Respondent erred in law when it failed to consider the fact that the "total tender sum" offered by a tenderer is the benefit or gain or opportunity that the tenderer expects to harvest in a tendering transaction and that there cannot be any other loss or damage to a tenderer in a tendering transaction other than this since this is what a tenderer ultimately gets in a tendering transaction. The missed gain is the loss.
15. The Applicant avers that the Respondent erred in law when it failed to consider the fact that the Applicant had pleaded in the Request for Review that it deserved to be awarded the tender (the business opportunity that it sought by participating in the tender) because the procuring entity did not give reasons in the Notification of Intention to Award served on it why its bid was not responsive, and in view of the award criteria which stated that the lowest responsive bidder would be awarded the tender, as its bid was lower than the tenderer that was purportedly successful.
16. The Applicant avers that the Respondent erred in law when it made a finding that the Applicant's Request for Review was fatally defective and bad in law for not being in the prescribed form and for having been signed by the Applicant's Advocate instead of the Applicant in accordance with the



- mandatory requirements of Regulation 203(1) as read with the Fourteenth Schedule of the [Regulations 2020](#), when the said Request for Review was in the form prescribed in the Fourteenth Schedule of the [Public Procurement and Asset Disposal Regulations 2020](#) and was signed by an Advocate who had been formally appointed by the Applicant to act for it in the said Request for Review.
17. The Applicant avers that the Respondent erred in law when it failed to consider the fact that under Section 167 (l) of the Act and Regulation 203(1) of the [Regulations](#), the Request for Review is a stand-alone document whose competence is not determined by the statements referred to in Regulation 203(2) b.
  18. The Applicant avers that the Respondent erred in law when it failed to consider the fact that Regulation 203(2)(b) of the [Public Procurement and Asset Disposal Regulations, 2020](#) does not specify a specific statement or statements which ought to be filed with the Request for review.
  19. The Applicant avers that the Respondent erred in law when it failed to consider the fact that the Statement(s) referred to in Regulation 203(2)(b) of the [Public Procurement and Asset Disposal Regulations, 2020](#) is not among the mandatory forms published in the Schedules of the said [Regulations](#).
  20. The Applicant avers that the Respondent erred in law when it failed to consider the fact that the provisions of Regulation 203 (2) (b) of the [Public Procurement and Asset Disposal Regulations 2020](#) are directional and not mandatory for the simple reason that the said provisions allow an Applicant to file such statements as the Applicant considers necessary in support of its request for review.
  21. The Applicant avers that It was irrational for the Respondent to rely on technicalities to dismiss the Applicant's request for review where it had been proved that the Respondents did not disclose to the Applicant the reasons why the Applicant was not successful in the Notification of Intention to Award served on the Applicant, and it had also been proved that the Applicant was not provided with the reasons why the successful bidder was successful contrary to the mandatory provisions of Section 87 (3) of the [Public Procurement and Asset Disposal Act, 2015](#) as read with Regulation 82 (2) and 82(3) of the Public Procurement and Asset Disposal Regulations 2020, Article 47 of the [Constitution of Kenya, 2010](#) and Section 4 of the Fair Administrative Action Act, 2015.
  22. The Applicant avers that the Respondent failed to consider the objects and purposes of the mandatory provisions of Section 87 (3) of the [Public Procurement and Asset Disposal Act, 2015](#) as read with Regulation 82 (2) and 82(3) of the [Public Procurement and Asset Disposal Regulations 2020](#).
  23. In the Verifying Affidavit in support of the Application, Anthony Ng'anga Mwaura deponed that he had been authorized to institute the proceedings and swear any affidavits in support thereof for and on behalf of the Applicant Company as demonstrated in the Minutes and Resolutions of the Board of Directors of the Applicant Company marked as Annexures "AMI" and "AM 2".
  24. According to him, the Accounting Officer breached the requirements of Section 87(3) of the [Public Procurement and Asset Disposal Act, 2015](#) and Regulation 82(2) of the [Public Procurement and Asset Disposal Regulations, 2020](#) (herein referred to as the Regulations) for failing to disclose the reasons why the Applicant was not responsive in the Notification of Intention to Enter into a Contract as required by these provisions.
  25. In his view the Accounting Officer and the procuring entity breached the requirements of Section 87(3) of the [Act](#) and Regulation 82(3) of the [Regulations](#) for failing to disclose the reasons why the successful bidder M/S Blueswift Contractors & General Supplies Limited was successful in the subject tender in the Notification of Intention to Enter into a Contract as required by these provisions.



26. According to him, this offended the principles of competitiveness and cost-effectiveness in the processing of the tender against the requirements of Article 227 (1) of the [Constitution of Kenya, 2010](#) and that the process was not in accordance with a system that is fair, equitable, transparent, competitive and cost-effective since the Applicant believes that the Applicant ought to have been awarded the tender because it made a lower bid.
27. The Applicant argues that the Respondent failed to maximize value for money in their procurement by failing to award the tender to the Applicant who was lower in price at Ksh 1,594,457,924/- while the awarded bidder quoted Ksh 1,921,422,451/- in breach of the requirements of Section 3(e), Section 86(1)(a) of the Act and Clause 1.3(iii) of Section III (page 28) and Section 53(1) and Section 44 (1) of the Act.
28. The Applicant has also taken issue with what it believes is the Accounting Officer and the procuring entity breaching the mandatory provisions of Section 87(3).
29. The Applicant believes that the procurement process was not fair and transparent. As envisaged under Article 227 of the [Constitution of Kenya, 2010](#) as read with Section 3 of the [Public Procurement and Asset Disposal Act, 2015](#).
30. The Applicant takes issue with the fact that the Respondent ruled that the Applicant's Request for Review dated February 1, 2023 was fatally defective and bad in law and struck it out on the following grounds:
- i) The Applicant lacked the locus standi to seek administrative review before the Board for failure to claim that it had suffered or risked suffering, loss or damage due to breach of a duty imposed on the procuring entity as required by Section 167 (1) of the Act on request for a review.
  - ii) Failure by the Applicant to sign the instant Request for Review.
  - iii) The Statement in Support sworn by Edwin Wachira (for the Applicant) on February 1, 2023 offended Section 37(2) of the [Companies Act](#) No 17 of 2015, Section 5 of the [Oaths and Statutory Declaration Act](#) read with Rule 10 of the [Oaths Declarations Rules](#) and so the instant Request for Review was filed contrary to regulation 203(2) (c) of [Regulations, 2020](#).
31. The Applicant argues that the Respondent did not consider the aforesaid proved violation of Section 87(3) of the [Public Procurement and Asset Disposal Act, 2015](#) as read with Regulation 82 (2) and 82(3) of the [Public Procurement and Asset Disposal Regulations 2020](#).
32. The Applicant believes that the process offended Article 47 of the [Constitution of Kenya, 2010](#) and Section 4 of the [Fair Administrative Actions Act 2015](#), and the consequences thereof in its aforesaid decision delivered on February 22, 2023
33. The Applicant believes that the Respondent erred in law when it failed to consider the fact that a bidder can only be disqualified on account of price, as indicated in the Notification of Intention to award dated January 20, 2023 served on the Applicant by the 1<sup>st</sup> Interested Party, if the Price is found to be inflated. No evidence was presented of a market survey having been carried out by the 1<sup>st</sup> Interested Party to justify such a disqualification.
34. The Applicant further argues that the Respondent's decision upholding the Preliminary objection in dismissing the request for having been signed by the Applicant's Advocate instead of the Applicant



was unfounded as the same had been signed by the Applicant's duly appointed representative, who had been appointed through a Power of Attorney, pursuant to the provisions of Sections 34 (2)(b)(i) as read with Section 40 (1) and (2) of the [Companies Act, 2015](#).

### Respondent's Case

35. In response the Respondent filed a Replying Affidavit sworn by one James Kilaka on March 24, 2023 where it highlighted that on February 16, 2023 during an online hearing of the *ex parte* Applicant's Request for Review, it gave an opportunity to all the Counsel present including the *ex parte* Applicant's Counsel to present their respective Client's case, and highlight their Written Submissions in the matter and that subsequent to the online hearing, the Respondent retreated to prepare its Decision which was delivered on February 22, 2023.
36. The Respondent opposes the *ex parte* Applicant's Notice of Motion dated March 14, 2023, Statutory Declaration dated March 8, 2023, and Verifying Affidavit sworn by Anthony Ng'ang'a Mwaura on March 8, 2023 because according to it, the same is an appeal against the Respondent's Decision dated February 22, 2023.
37. The Respondent's case is that it at all times observed the rules of natural justice in the exercise of its statutory mandate and powers under Section 28 and Section 173 of the 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 Act through their written submissions 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.
38. According to the Respondent, the question of jurisdiction is well settled in the celebrated case of [Owners of the Motor Vessel "Lillian S"](#) (supra) where the Court held:

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no Jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. "
39. The Respondent is in support of its decision in PPARB Application No 8 of 2023 that it had no jurisdiction to hear the matter as the *ex parte* Applicant's Request for Review dated 1<sup>st</sup> February, 2023 was fatally defective and bad in law for want of jurisdiction.
40. It is the Respondent's case that:
  - a) The Board complied with all the provisions of the Act and was well guided by decisions of the court that are binding on it.
  - b) The decision was not tainted with any error of law as the Board understood the laws and Regulations that regulated its decision and gave effect to all the issues that were presented before it, including looking at the 1<sup>st</sup> interested party's preliminary objection dated 6<sup>th</sup> February, 2023. The Respondent considered the Preliminary Objections which disposed of the proceedings without the need of a hearing of the merits of the Request for Review.
  - c) The *ex parte* Applicant lacked locus standi to institute the proceedings before the Respondent. There was no competent request for review before the board.



- d) The Respondent relied on the Court of Appeal decision in *James Oyondi Va Betoyo Contractors another v Elroba Enterprises Limited & 8 others* [2019] eKLR.
- e) That the Request for Review should have been accompanied by a statement in support of the Request for review. In the present case, the Respondent found that both the Request for Review and its statement in support thereof were defective.

### Interested Parties

- 41. The 1<sup>st</sup> Interested Party's position is that the Applicant's sworn statement in Support of the Request for Review offended the provisions of section 5 of the Oaths and Declarations Act as it failed to state where the purported statement was made and thus the absence of a competent Statement in Support of the request for review offended the provisions of rule 203 (2)(b) of the *Public Procurement and Asset Disposal Regulations*.
- 42. Further that the Applicant also excluded the successful bidder contrary to Section 170 (c) of the Act. It is also the 1<sup>st</sup> Interested Party's case that the Applicant failed to exhaust internal mechanisms and further that no exceptional circumstances were demonstrated as to why these mechanisms had not been exhausted.
- 43. The 1<sup>st</sup> Interested Party argues that the Tender WWDA/W/MOI-MTD/2022-2023 referred to by the *ex parte* Applicant is non-existent and was never before the Respondent. It is also its case that the *ex parte* Applicant has failed to show itself as a "person aggrieved" by the decision of the Respondent as contemplated under section 175(1) of *Act* and as such it lacks locus standi to institute and sustain the instant proceedings.
- 44. The 2<sup>nd</sup> Interested Party's argument other than reiterating the 1<sup>st</sup> Interested Party's argument contends that the *ex parte* Applicant has failed to disclose to this Honourable Court that its bid was non-responsive on account of failing to fill and submit Forms of Personnel (Form PER-1) as required under ITT 12.1 of the Tender document.
- 45. Further the 2<sup>nd</sup> Interested Party contends that the Applicant's application raises issues of merit review, has not pleaded with specificity any illegality and unconstitutionality and further that the Applicant has willfully concealed substantial facts and matters.

### Analysis and Detremination

- 46. This court is fully guided by the Supreme Court Judgment in *Praxedis Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated))* [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) Neutral citation: [2023] KESC 6 (KLR) where it held as follows;

“Paragraph 7. In order for the court to get through this extensive examination of Section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly “in the circumstances of the case”, without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words



of the Court of Appeal in *Judicial Service Commission & another v Lucy Muthoni Njora*, Civil Appeal 486 Of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against Article 259 of the [Constitution](#) which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance. 76. Be that as it may, it is the Court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialized institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in Section 11 (1) and (2) of the Fair Administrative Actions Act. Third, the Court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in Section 11(1)(e) and (h) of the [Fair Administrative Action Act](#). The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this Court held in the case of *Kenya Vision 2030 Delivery Board v The Commission on Administrative Justice, the Attorney General and Eng. Judah Abekah*, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.”

47. In determining the *ex parte* Application, this court is also guided by the holding of the Court of Appeal on the nature of the remedy of *mandamus* in its decision in [Republic v Kenya National Examinations Council ex parte Gathenji and 9 Others](#), [1997] eKLR. The said Court held as follows in this regard:

“The next issue we must deal with is this: What is the scope and efficacy of an order of *mandamus*. Once again we turn to Halsbury's Law of England, 4<sup>th</sup> Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says:-

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

48. At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of



performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.”

49. What do these principles mean? They mean that an order of *mandamus* will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.
50. In the case of *Republic v Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & another* [2018] eKLR the court stated as follows:

“*mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. v Canada (Attorney General)*, [23] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. [24] The eight factors that must be present for the writ to issue are:-

- i. There must be a public legal duty to act;
- ii. The duty must be owed to the Applicants;
- iii. There must be a clear right to the performance of that duty, meaning that:
  - a. The Applicants have satisfied all conditions precedent; and
  - b. There must have been:
    - 1) A prior demand for performance;
    - 2) reasonable time to comply with the demand, unless there was outright refusal; and
    - 3) An express refusal, or an implied refusal through unreasonable delay;
- iv. No other adequate remedy is available to the Applicants;
- v. The Order sought must be of some practical value or effect;
- vi. There is no equitable bar to the relief sought;
- vii. On a balance of convenience, *mandamus* should lie
- viii. The Applicant must satisfy itself that it has fulfilled the principles as set out in the said cases.

#### **Issue on Jurisdiction:**

51. In *R vs Public Procurement Administrative Review Board ex parte Meru University of Science & Technology; M/S Aaki Consultants and Urban Designers (Interested Party)* 2019 eKLR the Court made a finding that:

“99. The Respondent’s wide powers under Section 173 of the Act can only be invoked if there is a competent request for review before it. Invoking powers under Section 173 where there is no competent request for review or where the



request for review is filed outside the period prescribed under the law is a grave illegality and a ground for this Court to invoke its judicial review powers.”

52. The jurisdiction of the court is the power and the authority of a Court or a Tribunal to determine a case. The power of the Court to inquire into facts, rules and regulations, apply the law, make decisions and to arrive binding findings is what amounts to the jurisdiction of the Court. This power flows from the *Constitution* and statutes. It can be limited and expanded by statutes. The power of the Respondent flows from Sections 167(1), 172 and 173 of the *Public Procurement and Assets Disposal Act 2015*.
53. What amounts to a competent request for review is found under Regulation 203 (1) of *Regulation 2020* which provides that a request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations. A Request for a review (1) shall—
- (a) state the reasons for the complaint, including any alleged breach of the *Constitution*, the Act or these Regulations;
  - (b) be accompanied by such statements as the applicant considers necessary in support of its request an aggrieved party should move the Respondent by way of a request for review.
54. The statutory form shall be made in the Form set out in the Fourteenth Schedule as reproduced below:
- “Request for Review I/We....., the above-named Applicant(s), of address: Physical address.....P. O. Box No..... Tel. No.....Email ....., hereby request the Public Procurement Administrative Review Board to review the whole/part of the above-mentioned decision on the following grounds, namely: 1.
2. By this memorandum, the Applicant requests the Board for an order/orders that: 1. 2. Signed.....(Applicant) Dated on.....day of ...../...20.....”
55. In its analysis and finding on the question of the legality of the statement in support of the request for review, The Respondent made reference to the requirements of Section 5 of the Oaths and Statutory Declaration Act which provides that the place where the jurat was made and the date when the oath or Affidavit was taken are a mandatory requirement.
56. Regulation 203 1(b) of 2020 stipulates that the Request for review”... be accompanied by such statements as the applicant considers necessary in support of its request...”
57. This means that an Applicant may elect not to file a statement and that in the event an Applicant opts to file one, then such an Applicant cannot be confined to a particular form of statement. I say so since the Regulations have no prescribed form that an Applicant can adopt. This means that the Applicant has the liberty to file a statement in the form they feel suits their case. What should count would be the question as to whether or not such an Applicant has persuaded the fact finder in this case the Respondent that they have an arguable review. No doubt, the merits of the Applicant’s case depends on the evidence and the contents of the statement. It is upon the fact finder in this case the Respondent to determine the review pegged on the evidence contained in the statement irrespective of form.
58. It is this court’s finding that the Respondent acted illegally in upholding the Notice of Preliminary Objection after considering the Provisions that guide Affidavits and Jurats.
- Did the Respondent act within the law in failing to delve into the merits of the Request for Review?



59. The Applicant raises concerns around the fact that the Respondent failed to pay the following that:

- i. The Respondent erred in law when it failed to consider the fact that a bidder can only be disqualified on account of price, as indicated in the Notification of intention to Award dated January 20, 2023 served on the Applicant by the 1<sup>st</sup> interested party, if the price is found to be inflated. No evidence was presented of a market survey having been carried out by the 1<sup>st</sup> interested party to justify such a disqualification. The Applicant's bid was in any event much lower than that of the purported winning bidder.
- ii. The Respondent erred in law in failing to consider the fact that the Respondent failed to uphold the principle of cost effectiveness and or value for money set out under Article 227 (1) of the *Constitution* by failing to Award the tender to the Applicant who was lower in price at Kshs 1,594,457,924 compared to the awarded bidder who quoted Kshs 1,921,422,451.
- iii. The Respondent erred in law when it failed to consider the fact that the reasons given by the 1<sup>st</sup> interested party in the Notification of intention to award dated January 20, 2023 for the Applicant's disqualification differed from the reasons given by the 1<sup>st</sup> Interested Party before the Respondent, which was prima facie evidence that the relevant procurement process was not fair and lacked transparency.
- iv. The Respondent erred in law when it failed to consider the fact that a bidder who fails to pass the preliminary (mandatory) evaluation stage will not proceed to the technical and later financial evaluation stages. The limited contents of the Notice of Intention to Award dated January 20, 2023 served on the Applicant show that it had reached the financial evaluation stage, otherwise price would not have been an issue.

60. It is this court's view and I so find that such evidence as set out in the Verifying Affidavit dated March 8, 2023 would best be attended to and/or canvassed on appeal and not by way of proceedings by way of Judicial Review which this Court's powers are limited to.

61. This Court also lacks the jurisdiction to analyze, review, or assess the contents of the memorandum of response, Amended Memorandum of Response as this form the primary documents that the Respondent would have analyzed while presiding over the request for review on merit which it didn't.

62. This Court does not have the powers to determine who the highest bidder was. The power to do so rests elsewhere and it would lead to gross injustice to the litigants for this court to attempt to get into that arena. The court lacks the legislative capacity.

63. Issues of preliminary, financial or any other form of evaluations are governed by a totally different legislative structure and not this Court.

64. The request for review is a distinct process that is guided by a very strict legislative framework that is different from the strict unique tendering and the evaluation processes. Each of the stages in the public procurement journey is guided by its own legislative dictates that speak not only to form but also to timelines, eligibility and redress inter alia.

65. This court cannot open nor determine the issues like total tender sum, failure to give reasons in the notification of intention toward the argument that a bidder can only be disqualified on account of



- price issues of market survey, the fact that the *ex parte*'s bid was the lowest principle of cost effectiveness or value for money, the reasons given by the Interested Party or such evidence.
66. It is this court's finding that it is not in dispute that the Respondent did not delve into these issues. These being Judicial Review proceedings, this Court's power is very limited.
  67. The *ex parte* Applicant argued that the request for review is a stand-alone document. This is not an accurate position. The *ex parte* Applicant proceeded to file the Supporting Statement under Regulation 203 (2) (b) which the Respondent found to be defective. The *ex parte* Applicant is blowing hot and cold air.
  68. The fact that the Regulations do not specify or point out a particular or specific form of statement is neither here nor there. The *ex parte* Applicant found it necessary to file one. Had the Respondent dismissed the Notice of Preliminary Objection then the Review Board would have evaluated or assessed the Applicant's request for review on the basis of the evidence as with information or a statement.
  69. On the issue of failure to plead in its request for a review that it had suffered or risked suffering, loss or damage and locus standi, Section 167 (1) of the [Public Procurement and Assets Disposal Act 2015](#) stipulates that, subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.
  70. It is the *ex parte* Applicant's case that it was irrational for the Respondent to make a finding that the Applicant lacked the locus standi to seek administrative review before the Respondent for failure to plead in its request for a review that it had suffered or risked suffering, loss or damage due to breach of a duty imposed on the procuring entity as required by Section 167 (1) of the [Act](#).
  71. According to the *Exparte* Applicant the Court of Appeal's decision in [James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited & Others](#) [2019] eKLR (Mombasa Civil Appeal No 131 of 2018) did not prescribe the manner or form in which an applicant in a request for review ought to plead that it had suffered loss or damage.
  72. The *Exparte* Applicant argues that The Respondent erred in law when it failed to consider the fact that the Respondent has not prescribed the manner or form in which an applicant in a request for review ought to plead that it had suffered loss or damage in the rules and procedures that it is legally mandated to develop under Section 28(2) of the [Public Procurement and Asset Disposal Act, 2015](#).
  73. The *Exparte* Applicant further argues that the Respondent erred in law when it failed to consider the fact that the Applicant had the requisite locus standi under Section 167 of the [Public Procurement and Asset Disposal Act, 2015](#) due to the fact that it had participated in the subject tender as a candidate by obtaining the tender document pursuant to an invitation notice by the procuring entity and as tenderer by submitting a tender in response to an invitation by the procuring entity.
  74. The argument by the *ex parte* Applicant that it had Locus Standi since it had participated in the subject tender as a candidate is persuasive.
  75. The request for review procedure is clearly laid out in Section 167(1) of the [Public Procurement and Asset Disposal Act, 2015](#). The applicable forms are set out in [Regulations 2020](#).
  76. The *ex parte* Applicant did not plead that it had suffered or risked suffering loss or damage.



77. This court is of the considered view that the nature of the lapses and the gaps that led the Respondent to arrive at its finding are curable under Article 159 (2) which provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles—(d) justice shall be administered without undue regard to procedural technicalities. Article 227 (1) of the Constitution provides that 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. Article 47(1) of the Constitution further provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Respondents decision to deny the Exparte Applicant an opportunity to ventilate the request for review on the basis of technicalities is in my assessment drastic, unreasonable and procedurally unfair.
78. The findings of the Respondent offend Section 3 of the PPADA 2015 which stipulates that Public procurement and asset disposal by State organs and public entities must embrace a process that shall be guided by the national values and principles provided for under Article 10 and in particular the rule of law. Article 50 (1) provides that every person including the Exparte Applicant has the right to have any dispute that can be resolved by the application of law decided in a fair hearing before a court or, if appropriate, another independent and impartial tribunal or body.
79. The *ex parte* Applicant deserves and is entitled to an opportunity to enjoy the right to a fair hearing before the Respondent. The Respondent and indeed all the parties to the Review shall get an opportunity to be heard before the Respondent who will thereafter arrive at a finding that will be within the dictates that all the parties can call fair and reasonable.
80. I find that the *ex parte* Applicant has proven its case.

#### **Orders**

81. The Application dated March 14, 2023 is hereby allowed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF APRIL 2023.**

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**J. CHIGITI (SC)**

**JUDGE**

