



**Simba Corporation Limited v Public Procurement Administrative Review Board
& another; Isuzu East Africa Limited (Interested Party) (Miscellaneous Application
E078 of 2023) [2023] KEHC 21895 (KLR) (Judicial Review) (15 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21895 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E078 OF 2023
JM CHIGITI, J
AUGUST 15, 2023**

BETWEEN

SIMBA CORPORATION LIMITED APPLICANT

AND

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 1ST
RESPONDENT**

**THE ACCOUNTING OFFICER, NATIONAL TREASURY OF
KENYA 2ND RESPONDENT**

AND

ISUZU EAST AFRICA LIMITED INTERESTED PARTY

JUDGMENT

Brief Background

1. The 2nd Respondent herein advertised the subject Tender No. TNT/017/2022-2023 which was for the leasing of Motor Vehicles Phase VII and invited interested bidders to submit their respective bids by 11:00 a.m. on 8th March, 2023 in the respective Lots.
2. The Applicant and Interested Party are said to have both timeously submitted their respective bids in all the lots and specifically LOT 2A-MTD-2565-045-21 (with an availability of 30 Vehicles), LOT 2B-MTD-2566-045-21 (with an availability of 106 Vehicles) and LOT 4B-MTD-2708-045-21 (with an availability of 200 Vehicles). Further that both parties submitted their respective applications for evaluation.



3. By a letter dated 24th May, 2023, the 2nd Respondent informed the Interested Party of its results in the various Lots it had submitted and with respect to the Lots contested by the Applicant, the Interested Party emerged successful in its bid for LOTS 2B and 4B having satisfied all the attendant requirements per the tender specifications and in compliance with section 77(3) and 79(1) of the [Public Procurement and Asset Disposal Act](#) No. 33 of 2015. The Applicant was awarded LOT 2A.
4. The Applicant herein was however aggrieved by the foregoing decision of the 2nd Respondent, and as such it filed its Request for Review on 13th June, 2023 on the premise that the contested Lots had unfairly been awarded to the Interested Party.
5. The Review Board upon hearing all parties involved rendered its Decision 4th July, 2023 wholly in favour of the Applicant and it is on account of this that the 2nd Respondent proceeded to cancel the letters of Intention to Award dated 24th May, 2023 by which communication the Interested Party was declared the successful tenderer of the contested Lots.
6. The 2nd Respondent also proceeded to carry out a fresh evaluation of all successful tenders that had progressed to the Financial Evaluation Stage within the parameters of the 1st Respondent's decision. The Accounting Officer is said to have communicated to the concerned parties on 10th July, 2023 the outcome of the fresh evaluation which once more culminated in the Interested Party being declared the successful tenderer with respect to Lots 2B and 4B which the Applicant disputes.
7. The Applicant aggrieved by this outcome has filed the substantive notice of motion application before this court dated 21st July, 2023 which seeks the following orders:
 1. An Order of Certiorari to bring the Honourable Court for purposes of being quashed the decision of the 1st Respondent delivered on 4th July, 2023 in Pparb No. 42 of 2023.
 2. An Order of Certiorari to bring to the Honourable Court for purposes of being quashed the letter of unsuccessful bid by the 2nd Respondent to the Applicant dated 10th July, 2023.
 3. An Order of Mandamus to compel the 2nd Respondent to re-admit all responsive tenders to the technical evaluation stage using the procedure and criteria in the Tender document and the [Public Procurement and Asset Disposal Act](#), to the financial evaluation stage and proceed with the subject procurement process to its logical conclusion including but not limited to the making of awards to successful tenderers in the respective lots; or in the alternative;
 - a. an Order of Mandamus to compel the 1st Respondent to re-evaluate the subject tender and if successful award the ex-parte Applicant in the respective lots it challenged or remit the Tender to the 2nd Respondent for re-evaluation at both the Technical and Financial stages as per the Tender Document and Section 80 of the Ppada;
 - b. an Order of Prohibition restraining the 2nd Respondent from negotiating, executing or undertaking any further procurement in respect of TNT/017/2022-2023 for leasing of Motor Vehicles Phase VII specifically, LOT 2A-MTD-2565-045-21 (with an availability of 30 vehicles) and LOT 2B-MTD-2566-045-21 (with an availability of 106 vehicles) and LOT 4B MTD-2708-045-21.
 4. That this Honourable Court be pleased to issue such other or further relief as this Honourable Court may deem just and expedient to grant.
 5. That the costs of and incidental to this application be provided for.



8. The is supported by a Statutory Statement dated 18th July,2023 and the Verifying Affidavit of Naresh Leekha sworn on even date.
9. The Applicant before this Court contends that although the 1st Respondent found in its impugned decision that the 2nd Respondent had incorrectly evaluated the Applicant's bid at both the Technical and Financial Evaluation Stage it failed to countenance the same.
10. It is urged that at page 81 of the impugned judgment, the 1st Respondent found as follows regarding the “bungled technical evaluation exercise”

“We note that the Applicant had a meeting with the Respondents on 6th June,2023 as evidenced by the Applicant's exhibit marked "N04" being a letter dated 6th June,2023 addressed to the Respondents in reference to the debriefing meeting whereby the Applicant indicates that upon seeking clarifications on the technical evaluation it was informed of the reasons affecting its score and reads in part as follows:

a) Credit Letter/Proof of Financing

The Applicant demonstrated that they had submitted proof of financing and showed the committee the following details:

Bank reference letter from Standard Chartered Bank —Page 148 of its bid.

Financing team sheet for Kshs 7,480,000,000 in favour of Simba Corporation for the purposes of acquisition and leasing of motor vehicles to the National Treasury on behalf of National Police service —Pages 422 to 426 of its bid document.

b) Dealer Network

The Applicant demonstrated to the committee that it had the requisite branches, dealer network, approved garages and mobile workshops across the country including the ASAL Regions. That the same is shown in the tender document as follows:

- i. Main branches- Pages 504 to 606
- ii. Other branches/Dealership-Pages 607 to 754
- iii. ASAL Regions-Pages 755 to 843.

11. The 1st Respondent is said to have concluded as follows;

“Having perused the 1st and 2nd Respondents' Statement of Response, we note that the Respondents confirm at paragraphs 38 to 43 that indeed a debriefing took place and that the above reasons indicated by the Applicant in its letter dated 6th June,2023 were given to the Applicant the reasons it did not score 100% in the Technical Evaluation.

12. This finding according to the Applicant, confirms that the technical evaluation process was indeed flawed and marred with irregularities. Further that it also confirms that there was no specific reason for denial of marks being awarded to the Applicant at the technical evaluation stage.
13. The Applicant also urges that the reasons provided by the 2nd Respondent for the flawed technical evaluation process were uncertain, and a moving target showcasing the lack of transparency, accountability and public trust in the subject procurement process.



14. The Applicant further invites the court to look at page 86 of the 1st Respondent's decision, which it claims confirms that the technical evaluation process of the subject tender was highly flawed. In the said page the Applicant's argues that the Board stated thus;

“Consequently, the actions by the Respondents of introducing additional reasons for the Applicant's unsuccessfulness in the subject tender in debriefing meeting which were not contained in its letter of notification of intention to award dated 24th May,2023 amounted to a breach of Section 87...”
15. The 2nd Respondent is also faulted for failing to provide a remedy for the wrongful evaluation of the Applicant's bid at the technical evaluation stage and instead directing the 1st Respondent to readmit the Applicant's bid at the financial evaluation stage, using the incorrect scores arrived at from an impugned technical evaluation exercise.
16. The Applicant's case is that the 1st Respondent improperly fettered its discretion by failing to exercise the powers conferred on it under Section 173 of the PPADA and therefore that it acted ultra vires. Also, that any illegality in the evaluation in any procurement process invalidates the whole exercise.
17. The 1st Respondent's decision is also challenged for being vague, imprecise and of no legal implication to countenance the 2nd Respondent's conduct for the following reasons as it contained generalities and was unenforceable to countenance the illegalities by the 2nd Respondent. Further that it did not specify the exact lots in the subject tender for which re-evaluation was to be conducted.
18. The Judgement is also said to have had various contradictions in the reasoning as can be seen at Page 86 where it finds that the 2nd Respondent's actions of introducing an additional criterion for unsuccessfulness in the subject tender was contra-statute, yet it did not order for a re-evaluation at the technical stage for the subject tender.
19. The Applicant also argues that the judgment failed to distinguish between the evaluation procedure and criteria and made orders only to the evaluation formula and not the evaluation procedure. This is despite finding that the 2nd Respondent flouted the evaluation procedure during the technical evaluation. The said order of the 1st Respondent it is urged flies against the evaluation criteria set out in the tender document and Section 80 of the PPADA.
20. Further the 1st Respondent is said to have made final orders in vain that despite finding numerous flaws in the evaluation procedure by the 1st Respondent and being clothed with powers under Section 173 of the PPADA, it failed to countenance the said illegal acts.
21. It is also the Applicant's contention that the impugned decision is unreasonable within the Wednesbury's principle of unreasonableness. The 2nd Respondent is said to have admitted to using extraneous factors during the technical evaluation of the Applicant's bid such as the letter of credit. However, despite the 1st Respondent acknowledging this in its impugned decision, it issued no orders to remedy the illegalities.
22. The Applicant submits that any other Review Board, sitting in place of the 1st Respondent, with the pleadings, facts, evidence and law before it in PPARB/ARB/No. 42 of 2023 would have ordered a re-admission of responsive bids/tenderers at the technical evaluation stage in order to countenance and correct the outright illegalities by the 2nd Respondent.



23. It is also the Applicant's case that the 1st Respondent's conduct amounts to a breach of Article 227 of *the Constitution*, the Applicant's legitimate expectation and fair administrative action under Articles 10 and 47 of *the Constitution* as read together with the *Fair Administrative Action Act*.
24. The Applicant further submits that from the pleadings filed, all the Interested Party and Respondents argue is that the Applicant did not pray for the re-admission of the bids to the technical evaluation stage and thus the 1st Respondent had no powers to order such re-admission.
25. The Applicant challenges the above argument on several grounds which include that prayer (f) of the Applicant's Request for Review dated 13th June 2023 in PPARB/ARB No. 42 of 2023 read thus; "in the alternative, this Honorable Board do re-evaluate the tender and award the Applicant in the Respective categories it bid" and that with this prayer alone, the Board had the discretion to re-admit the Applicant's bid at the technical evaluation stage and correct the illegalities of the Procuring Entity.
26. The Applicant further argues that throughout the tendering for the subject tender, and even all through the impugned ruling, technical and financial evaluation were intertwined and therefore it would be zero-sum, and unreasonable to order the re-evaluation of the responsive bids at the financial evaluation stage without re-evaluation at the technical evaluation stage.
27. Further to this, the Applicant urges that term evaluation criteria and formulae connotes not only the formulae alluded to by the 1st and 2nd Respondents, but the procedure of evaluating the responsive bids and this includes technical evaluation.
28. It is contended that it was unreasonable and irrational for the 1st Respondent to order the use of the correct evaluation criteria and formulae only to readmit the responsive bids at the financial evaluation stage. It is also the Applicant's argument that whilst the formula is used for the financial evaluation stage, the criteria is used at the technical evaluation stage.
29. The Applicant also urges that the 2nd Respondent also admitted that the 2nd Respondent had not factored documents which were part of the technical evaluation. The Applicant refers to Section 173 of the *Public Procurement and Asset Disposal Act*, 2015 which grants the 1st Respondent powers to inter alia;
- “(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;”
30. The Applicant contends that pursuant to the above provision the 1st Respondent cannot decry the lack of powers to countenance the manifest illegalities in the subject procurement process admitted by the 2nd Respondent and acknowledged by the impugned judgement.
31. Further, that the Interested Party attempts to argue that the instant application is a merit review of the decision in PPARB/ARB No. 42 of 2023. The Applicant argues that the scope of judicial review has greatly expanded post the 2010 Constitution and that judicial review courts are no longer tied down to the procedural fairness of a decision-making process.
32. Further, the Applicant argues that the Courts can now interrogate more than just the procedural impropriety of a decision-making process and that the judicial review court will not watch illegalities go unchecked and this ensures fair administrative action to all parties before the Court.



33. The Applicant further submits that the scope of judicial review has since been expanded to include the merits of the concerned decision as was held in the case of Super Nova Properties & Another — v- The District Land Registrar Mombasa & 2 Others, Court Of Appeal At Mombasa Civil Appeal No.98 of 2016 (unreported).
34. The Applicant argues that though the concern of judicial review has always been the decision-making process and not the merits of the case, Article 47 of *the Constitution* has expanded grounds of judicial review to include reasonableness of a decision.
35. The Court of Appeal case of Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR is cited to support this ground where the court held that had the following to say on the issue thus; “the test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role.”
36. The Applicant also argues that the *Fair Administrative Action Act* (FAAA) has breathed some life in the courts power to consider issues in judicial review beyond the traditional scope of illegality, irrationality and unreasonableness. Also, that this allows the court to delve into merit review of an impugned decision but in a limited manner as was held by the court in Republic vs Public Procurement Review Board; Kenya Airports Authority and Another Ex Parte Kenya Airports Parking Services Ltd (2019) eKLR.
37. The Applicant further contends that it has made a case for judicial review and is entitled to the orders sought. On the ground of illegality, the Applicant argues that the 1st Respondent failed to exercise its powers as envisioned under Section 173 of the PPADA, allowing the 2nd Respondent to get away with blatant contravention of the PPADA and leaving the Applicant with no other recourse other than this Honourable Court.
38. The case of Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya [2019] eKLR is referred to where the court held that safeguarding legality is the most important purpose for the judicial review of administrative actions
39. The Applicant contends that the impugned decision is patently illegal for the simple reason that despite acknowledging severally that the 2nd Respondent evaluated the Applicant's tender wrongly both at the technical and financial evaluation stages the 1st Respondent failed to exercise its powers under Section 173 of the *Public Procurement and Asset Disposal Act*, 2015.
40. The case of Republic v Nairobi City County & another [2019] eKLR, is also referred to on scope of illegality in judicial review. It is the Applicant's argument that from the above case the decision complained of was arrived at without any legal basis and in breach of the Constitutional fundamental principle of legality which requires that all action taken by a public body are based on clear provisions of the law.
41. Further that the impugned decision is in the circumstances bad in law and ought to be quashed forthwith so as to uphold the rule of law and prevent impunity on the part of public bodies such as the 2nd Respondent.
42. The Applicant also submits that the other element of fair administrative action under Article 47 of *the Constitution* is that the administrative action must be reasonable and in buttressing this argument the case of R v Kenya Revenue Authority Ex-Parte Tom Odhiambo Ojienda S/C t/a Prof. Tom Ojienda



& Associates [2018] is cited where the Court relied on the text in De Smith, Woolf and Jowell, Judicial Review of Administrative Action 17th Edition, in which it was stated that unreasonableness connotes: -

“...decisions which have been accorded manifestly inappropriate weight, strictly “irrational” decisions, namely decisions which are apparently illogical or arbitrary; uncertain decisions supported by inadequate reasons or incomprehensible reasons; or by inadequate evidence or which are made on the basis of a material mistake or material disregard of fact.”

43. The Court is said to have defined unreasonableness in the case of Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya [2019] eKLR as follows:

Wednesbury’s unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;

- i. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the “range” within which reasonable minds may differ;
- ii. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was “not reasonably open” is the same as saying that “no reasonable decision maker” could have made it;”

44. The case of Republic v Inspector General of Police, David Kimaiyo Ex-parte Akitch Okola [2014] eKLR is also referred to on what constitutes irrationality where the Court cited Lord Diplock in the case of Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D.

45. The impugned decision is said to have acknowledged severally that the 2nd Respondent considered irrelevant/extrinsic factors in evaluating the Applicant’s bid both at the technical and financial evaluation stages. Further that the impugned decision also found that the 2nd Respondent omitted relevant factors in evaluating the Applicant’s bid.

46. The Applicant submits that the role of the 1st Respondent upon receiving the Request for Review, was to audit the entire procurement process undertaken by the 2nd Respondent and that if it established that there was breach of the law or non-compliance with the requirements in tender documents, issue orders pursuant to Section 173 of the PPADA to correct the said breach and/or non-compliance. This would ensure accountability by the 2nd Respondent. Further than any other tribunal seized of these facts would have sanctioned the 2nd Respondent in the circumstances.

47. The Applicant contends that as a result of the 1st Respondent’s impugned decision hundreds of millions of tax payer’s money will be lost since the Applicant submitted the lowest financial bids for both Lots 2B and 4B.

48. It is the Applicant’s argument that it had legitimate expectation that the 1st Respondent would countenance the excesses and violations of the Public Procurement and Asset Disposal Act by the 2nd Respondent.

49. The case of Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya (supra) is cited on what constitutes an order of certiorari and prohibition. On



the order of mandamus, the case of Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 is referred to where Goudie, J stated as follows:

“Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy.”

50. The Applicant submits that it has demonstrated that whereas the 1st Respondent had the legal duty and power to act and stop the breach of statute by the 2nd Respondent, it improperly fettered its discretion and power. As such, there is no other remedy available to the Applicant than to seek an order of mandamus to compel the 1st Respondent to perform this public duty. Further, that there is no equitable bar to the grant of the said relief.

Respondents' Case

51. The 1st Respondent filed a replying affidavit to the application sworn by James Kilaka on 2nd August,2023 while the 2nd Respondent through the Hon. Attorney General filed a replying affidavit sworn by Dr. Chris K. Kiptoo on 8th August,2023.
52. In the 1st Respondent's affidavit it is deponed that on 13th June,2023, the Ex Parte Applicant filed a Request for Review Application No. 42 of 2023 dated 13th June,2023 before the 1st Respondent in respect of Tender No. TNT/017/2022-2023 for Motor Vehicles Leasing Programme Phase VII.
53. The deponent deposes that in a Notification of Appeal and a letter dated 13th June,2023, he, notified the Procuring Entity and the 2nd Respondent of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender pursuant to section 168 of the [*Public Procurement and Asset Disposal Act*, 2015](#) via email.
54. He also forwarded to the parties a copy of the Request for Review together with the Respondent's Circular No. 02/2020 dated 24th March,2020 which is published on the Public Procurement Regulatory Authority website, www.ppra.go.ke.
55. On 19th June,2023 it is deponed that the Procuring Entity and the 2nd Respondent herein filed their response to the Request for Review through Mr. Calleb Ogot and submitted confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.
56. The deponent deposes that after he had received the Procuring Entity's and 2nd Respondent's response and confidential documents which included contacts of tenderers who participated in the subject tender, vide a letter dated 20th June,2023 transmitted via email on even date he notified all the tenderers who had participated in the subject tender of the existence of the Request for Review.
57. Further that he also forwarded a copy of the Request for Review application together with the Respondent's Circular No.02/2020 dated 24th March,2020 which is published on the Public Procurement Regulatory Authority website, www.ppra.go.ke and requested them to file their responses to the Request for Review within three (3) days from 20th June,2023.
58. The Procuring Entity and 2nd Respondent filed a Preliminary Objection on 22nd June,2023 through Mr. Calleb Ogot while the Interested Party herein filed its response before the 1st Respondent on 23rd June, 2023. A Further Statement together with a List of Authorities was filed by the Ex parte Applicant herein on 27th June,2023.



59. The parties are said to have been notified vide a hearing notice dated 27th June,2023 that an online hearing of the Request for Review was slated for 29th June,2023 at 10.30 a.m. and a link availed on the said Hearing Notice.
60. The 1st Respondent is said to have allowed an application by Mr. Calleb Ogot representing the Procuring entity and 2nd Respondent herein on the said which culminated in the hearing being adjourned to 30th June,2023 at 3.30 p.m. The deponent urges that during the online hearing on 30th June,2023, parties through their respective advocates and representatives presented their cases and submissions in the matter.
61. The 1st Respondent retreated to prepare its Decision and upon considering each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the 1st Respondent, transmitted to parties via email, its decision dated 4th July,2023.
62. The deponent contends that the Notice of Motion by the Ex Parte Applicant is unmeritorious as it seeks under Order No. 3 of the Notice of Motion for this Honourable court to issue an order of Mandamus to compel the 2nd Respondent to readmit all responsive tenders to the technical evaluation stage yet this was not a prayer made before the 1st Respondent.
63. The 1st Respondent's case is that the orders sought by the Ex Parte Applicant before the 1st Respondent were reproduced in the 1st Respondent's decision dated 4th July,2023 at page 17 to 18 and as can be seen under Order no. (d), the Ex Parte Applicant prayed for the Board to direct the Procuring Entity's Evaluation Committee to admit the Applicant's tender to the Financial Evaluation stage, and not the Technical Evaluation stage, in the respective categories and proceed with the subject procurement process to its logical conclusion culminating in the award to the lowest evaluated bidder.
64. The 1st Respondent is said to have before addressing the issues considered for determination, found that the complaints filed in the proceedings before it in Request for Review No. 42 of 2023 by Urysia Limited touching on its tender's disqualification could not be entertained since it did not file a request for review in accordance with provisions of Section 167(1) of the Act read with Regulation 203 of the Public Procurement and Asset Disposal Regulations 2020.
65. The deponent deposes that in determining the first sub-issue of the first issue the 1st Respondent at pages 36 to 40 of its Decision dated 4th July,2023 considered whether the grounds of objection under grounds 4, 5, 6, 7 and 8 of the Preliminary Objection filed by the Procuring Entity and the 2nd Respondent herein were proper in law and having considered the parameters of a preliminary objection, found that the said grounds were not proper grounds of a preliminary objection in law.
66. In determining the second sub-issue of the first issue it is said to have considered whether the Request for Review was filed within the statutory period of 14 days of notification of award or occurrence of alleged breach by the 1st and 2nd Interested Party in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 and took into account arguments made by the Procuring Entity and the 2nd Respondent, the Interested Party and the Ex-Parte Applicant.
67. The 1st Respondent is said to have considered that it is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and ought to enquire into a question of jurisdiction raised before proceeding with anything concerning a matter and further took note of various precedents touching on the issue of jurisdiction and provision of the Act and Regulations 2020 on the options available to an aggrieved candidate or tenderer in invoking the jurisdiction of the Board as provided under Section 167(1) of the Act read with Regulation 203 (2)(c) of Regulations 2020



- and found that the Request for filed by the Ex Parte Applicant was filed within the statutory period prescribed in the Act.
68. On the 2nd issue it is deponed that the 1st Respondent considered whether the Procuring Entity's Evaluation Committee evaluated the subject tender in accordance with the applicable provisions of the Tender Document, the Act and *the Constitution*.
 69. The deponent contends that the Evaluation Committee used extrinsic factors in evaluation of its tender by applying the wrong formulae of 0.75:0.25 in computation of the combined Technical and Financial score instead of 0.80:0.25 as provided in the Tender Document.
 70. The 1st Respondent is said to have also taken note of the Ex Parte Applicant's contention that the feedback during the debriefing meeting revealed that the reasons given on purported gaps in its tender affected its overall technical score and weighed significantly in its final rating and it was unfair for the Evaluation Committee to elect to award it LOT 2A and not LOT 2B.
 71. The 1st Respondent is also said to have carefully studied the provisions of the Tender Document, the Act, *the Constitution* and the confidential documents submitted to it and took note of the scoring of the Applicant's tender and found at page 75 of its decision that the Applicant had not cogently demonstrated why it ought to be awarded any additional scores.
 72. The 1st Respondent is said to have considered whether the letter of Notification of Intention to Award dated 24th May,2023 issued to the Applicant met the threshold required under Section 87 of the Act read with Regulation 82 of Regulations 2020 and noted that a debrief meeting took place where the Applicant was given reasons why it did not score 100% at the Technical Evaluation stage.
 73. The deponent further deposes that the 1st Respondent found that the 2nd Respondent introduced additional reasons for the Ex Parte Applicant's unsuccessfulness in the subject tender during the debriefing meeting and these reasons were not contained in the notification letter amounting to a breach of Section 87 of the Act read with Regulation 82 of Regulations 2020 which requires a tenderer to be notified with all the reasons why its tender was unsuccessful.
 74. It is averred that the 1st Respondent's Decision dated 4th July,2023 was precise and had no contradictions in its reasoning further that it was reasonable, rational and lawful without overreaching the Respondent's mandate and jurisdiction.
 75. The deponent also contends that the duty to evaluate tenders is a preserve of the Evaluation Committee as provided under Section 46 of the Act read with Regulation 30 of Regulations 2020 and therefore the 1st Respondent cannot be compelled to reevaluate the subject tender noting that the 1st Respondent hears, reviews and determines tendering and asset disposal disputes in addition to the powers stipulated under Section 173 of the Act.
 76. The 1st Respondent's case is that the Ex Parte Applicant has failed to demonstrate any elements of illegality, irrationality, procedural impropriety and/or unfairness in the manner in which the 1st Respondent considered and interrogated the evidence, documents, pleadings, and information before it in arriving at its Decision dated 4th July 2023 in the Request for Review No. 42 of 2023.
 77. The deponent also avers that in the event that the court is minded to allow the Ex parte Applicant's Notice of Motion the 1st Respondent prays that in the interest of justice, it be pleased to remit the Request for Review application for re-hearing by the 1st Respondent subject to this Honorable Court's directions.



78. The 2nd Respondent's case as seen in its Replying Affidavit is that it had the highest combined technical and financial score in lots 2a,2b and 4b and that the tender was awarded to the tenderer with the highest combined technical and financial score in accordance with ITT 33.4 and ITT 38.1 of the tender and section 86(1)(b) of the PPADA,2015 and not the bidder with the lowest financial price.
79. The deponent avers that the Board's decision was well reasoned and fair as the applicant's prayers were granted and further that the invitation to tender was done with utmost good faith, fairness, transparency and public interest.
80. Further that the starting point in public procurement and disposal is *the Constitution* and that a procurement proceeding must therefore, before any other consideration is taken account whether in the parent legislation or the rules and regulations made thereunder, meet the constitutional threshold of fairness, equity, competitiveness and cost-effectiveness.
81. The Respondents' case is that pursuant to Section 173 of the *public Procurement and Asset Disposal Act*, 2015, the Review Board upon completing a review 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; substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
 - c. order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
 - d. order termination of the procurement process and commencement of a new procurement process."
82. Further that the 1st Respondent in granting the orders herein remained faithful to its powers and mandate as authorized under Section 173 of the Act and did not divert from the same contrary to what is alleged by the Applicant.
83. The Respondents also contend that the purpose of Judicial Review is to ensure that a party receives fair treatment in the hands of public bodies. Further that it is not the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court.
84. It is also urged that this court is not empowered to venture into correcting the decision of the Review Board on the merits and that the High Court's jurisdiction in Judicial Review is circumscribed by the provisions of the *Law Reform Act* which confers to the court the jurisdiction to issue any of the three judicial review orders.
85. The Respondents cite the case of *Pastoli vs. Kabale District Local Government Council and Others* [2008] 2 EA 300 on the grounds upon which the Court grants judicial review and urge that it is upon a party in a judicial review application who seeks the issuance of any of the orders to prove breach of any of the above criteria for that party to succeed in their claim.
86. Further that for an Applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the applicant must demonstrate that there is indeed a mistake that goes



to the jurisdiction of the tribunal. The Respondents contend that misinterpretation of the law is not sufficient to move a judicial review application.

87. The Respondents herein argue that the instant Application is an appeal disguised as a Judicial Review Application and that the same should therefore not be entertained. It is also their case that once a judicial review court gives a clean bill of health to the process, it must down its tools without considering the merits of the decision for to do so would amount to usurping the power of the body that was mandated by the law giver to make the decision.
88. The Court of Appeal case of *Municipal Council of Mombasa V Republic & another* (2002) eKLR is cited on the issuance of judicial review orders. On the issuance of an order or prohibition the case of *Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005* is referred to where the court held as follows;

“What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not herein lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. That is why it is said prohibition looks to the future so that if a tribunal were to arrange in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made ... an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made it can only prevent the making of a contemplated decision. There is nothing the respondents have failed to do, as matter of statute law or legal duty.

89. The cases of *Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 eKLR* and *JR Case No. 382 OF 2014 Republic v Land Disputes Tribunal, Karuri & 2 others* are also cited on the order of prohibition.
90. The Respondents also submit that as was held by the Court of Appeal in the case of *Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572*, as a matter of common-sense the judicial order of prohibition must be pre-emptive in nature, that is, it must be directed at preventing what has not been done.
91. The case of *Okiya Omtatah Okoiti v Kenya Revenue Authority & 2 others [2016] eKLR* is also quoted where the court relied on the writings of Ferris in his Book on the Law of Extraordinary Legal Remedies and observed:

“It is well settled that a writ of prohibition may not be used to usurp or perform the functions of an appeal, writ of error or certiorari, or to correct any mistakes, errors or irregularities in deciding any question of law or fact within its jurisdiction.”

92. The Respondents also submit that as far as the Order of Prohibition is concerned, the Interested Party already re-tendered, accepted, evaluated and awarded the successful bidders on 2nd October, 2019 and as such the order of prohibition has been overtaken by events thus cannot issue in this circumstance.
93. The Respondents' case is also that Judicial Review only determines 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 considered relevant matters or did consider irrelevant matters.

94. It is also their case that judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise and that to do so in amounts to abuse of the judicial process. The Respondents also argue that the Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant.
95. The Respondents' also argue that the grant of the Orders of Certiorari, Mandamus and Prohibition is discretionary and that the court is entitled to consider the nature of the process against which judicial review is sought and satisfy itself that there is a reasonable basis to justify the orders sought.
96. The 2nd Respondent is said to have reiterated that it followed all the procurement laws as deponed in the affidavit sworn by Dr. Chris K. Kiptoo further that Article 227 of *the Constitution* of Kenya 2010 further requires that a contract for goods and services ought to be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.
97. It is also contended that the subsequent invitation to Tender in which the applicant was duly invited to participate was done in utmost good faith, fairness, transparency and public interest and therefore the 2nd Respondent had to move with speed and invite tenders for the new contract noting that the vehicles are to be used for security operations all over the country and there would definitely be catastrophic consequences should the security apparatus in the country grind to a halt due to lack of motor vehicles.
98. The Respondents case is also that this court should decline the issuance of the orders sought in the circumstances of the present case and that the Courts while exercising their Judicial Review jurisdiction have been alive to considerations of public interests in declining the issuance of Judicial Review orders even where a party has made out a case of issuance of Orders of Judicial Review.
99. In conclusion the Respondent's urge that the application fails to meet the basic tenets of a judicial review application and that it should therefore be dismissed.

Interested Party's Case:

100. In opposition to the Applicant's Notice of Motion Application dated 21st July, 2023 the Interested Party filed a Replying Affidavit sworn by Anthony Musyoki on 31st July, 2023.
101. According to the Interested Party, the principles which guide the granting of the orders in the nature sought by the Applicant are, without contest, now crystallized in this jurisdiction. Further that the scope within which the Court is entitled to prohibit, bring to a halt or quash decisions emanating from public bodies is undoubtedly limited.
102. The Interested Party also urges that while exercising its mandate the Court is enjoined to be cautious to limit itself to a review of the process while restricting itself from making definitive findings on matters which go to the merit of the impugned proceedings.
103. The Interested Party's case is also that under clause (xvi) of the Applicant's Statutory Declaration dated 18th July, 2023, the Applicant asserts that the Decision of the Review Board was based on extraneous factors and ought to in the circumstances be quashed it has however failed to highlight in its Statutory Statement or its Verifying Affidavit, the said "extraneous factors" that allegedly compelled the 1st Respondent to improperly consider the facts and the law before it.



104. The case of Republic vs. Public Procurement Administrative Review Board & 2 Others Ex-parte Pelt Security Services Limited [2018] eKLR is referred to on the Board making an objective determination. In the case the Court identifies two issues that were considered in reaching one, and these are what matters were considered by a decision-maker and two, were any of the matters that were considered an irrelevant consideration.
105. It is contended the 1st Respondent as evidenced in its Decision shows that it took into consideration each of the grounds raised in the Applicant's Request for Review dated 13th June, 2023 and that according to it, none of the issues outlined for consideration deviated from the essence of the Request for Review.
106. The Interested Party's case is that judicial review proceedings do not entertain a re-hearing of the merits of a particular case but as was held in the case of Republic vs. Public Procurement Administrative Review Board & 2 Others Ex-parte Pelt Security Services Limited (supra) it is where a court reviews a decision to make sure that the decision-maker used the correct legal reasoning or followed the correct legal procedures. Judicial Review is said to be a more limited right than a right of appeal
107. The Court in the case of Republic vs. Public Procurement Administrative Review Board & 2 Others Ex-parte Pelt Security Services Limited is said to observe that rationality as a ground for review of administrative action is dealt with in Section 7(2) of the *Fair Administrative Action Act*.
108. The Interested Party also refers to the case of in re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC where the court addresses its mind on rationality and reasonableness as a ground for the review of an administrative action.
109. The case of Bato Star Fishing Pty Ltd v Minister of Environmental Affairs & others and Department of Lands & others v Goedgelegen Tropical Fruits Pty Ltd CCT 69/06; [2007] ZACC 12(10) BCLR 1027 CC approved the reasonableness test as stated in the case of R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd, {1995} 1 All ER 129 (HL) at 157;
- “The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock... as ‘conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt’. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. ... Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him.”
110. The Interested party urges that it is persuaded that Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law.
111. The Interested Party's case is that if a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably.
112. Further that the legal standard of reasonableness must be the standard indicated by the true construction of the statute. The Interested Party contends that it is necessary to construe the statute



because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

113. It is argued that legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight in the sense of more than was reasonably necessary to some factors and insufficient weight to others.
114. It is further submitted that, a careful examination of the impugned decision will undoubtedly reveal that the Decision of 4th July, 2023 mirrors the prayers sought by the Applicant in its Request for Review of 13th June, 2023. The Applicant is said to have benefitted from that decision as its tender was re-evaluated at the Financial Evaluation Stage as sought in its prayers and that because the outcome communicated on 10th July, 2023 was not in its favour cannot invalidate the 1st Respondent's Decision of 4th July, 2023 as one tainted by irrationality and unreasonableness.
115. The Interested Party also contends that there is nothing to show that, faced with the same set of facts and the law, a different Tribunal would have arrived at a different conclusion.
116. It is urged that the Applicant did not take issue with the impugned remedies until after the 2nd Respondent's fresh evaluation which outcome of 10th July, 2023 the Applicant is once more aggrieved with. The Interested party questions the fact that the Applicant has gone so far as to seek for orders in the instant judicial review proceedings which it did not seek before the Review Board, to be precise, Orders 3 and 3(a) where it has sought for, in the primary, that the 2nd Respondent be compelled to re-admit all responsive tenders to the Technical Evaluation stage or in the alternative, to compel the 1st Respondent to re-evaluate the subject tender and if successful award the ex-parte Applicant in the respective lots it challenged or remit the Tender to the 2nd Respondent for re-evaluation at both the Technical and Financial stages as per the Tender Document and Section 80 of the PPADA.
117. The Interested Party's case is that the Court ought to be slow to substitute its own decision solely because a party or the Court itself does not agree with the permissible option chosen by the body. The case of Republic vs. The Public Procurement Administrative Review Board; Shenzen Instrument Company Limited and Another (Interested Party) Ex-parte Kenya Power and Lighting Company Limited [2019] eKLR is referred to support this argument.
118. The Interested Party argues further that the 1st Respondent applied its discretion both under sections 173 (a) and (b) to afford the parties the most fitting remedy guided expressly by their review of the tender document as well as the prayers sought by the Applicant in its Request for Review. Also, that its exercise of discretion was within the permissible range afforded to it in law and the Applicant has not shown how such exercise ought to be construed by this Court as an abuse of power.
119. In determining the issue of costs, the Interested Party urges that the Court should be guided by the principle that 'costs follow the event'.



Analysis & Determination:

Issues for determination: Whether the orders sought can be granted

120. In the Ugandan case of *Pastoli vs. Kabale District Local Government Council and Others* [2008] 2 EA 300 in which the Court citing *Council of Civil Unions vs. Minister for the Civil Service* [1985] AC 2 and an *Application by Bukoba Gymkhana Club* [1963] EA 478 at 479 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...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.”

121. The order of Mandamus is an equitable remedy that serves to compel a public authority to perform its legal duty and it is a remedy that controls procedural delays. The circumstances under which an Order of Mandamus can be issued were stated in the Court of Appeal case of *Kenya National Examination Council Vs Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others* (1997) eKLR as: -

“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 or 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.”

122. During the Hearing of 30th June, 2023, the Board framed and considered three (3) primary issues as set out at pages 36-88 of the Decision dated 4th July, 2023:

- a. Whether the Board has jurisdiction to hear and determine the instant Request for Review.
- b. Whether the 2nd Respondent’s Evaluation Committee evaluated the subject tender in accordance with the provisions of the Tender Document, the Act and *the Constitution* and
- c. Whether the Letter to Notification of Intention to Award dated 24th May, 2023 issued to the Applicant met the threshold required under Section 87 of the Act as read with Regulation 82 of the Regulations, 2020.

123. I have looked at the impugned decision and arrived at a conclusion that the decision of 4th July, 2023 mirrors the prayers sought by the Applicant in its Request for Review of 13th June, 2023.



124. The Court ought to be slow to substitute its own decision solely because a party or the Court itself does not agree with the permissible option chosen by the body. Indeed, Hon. Justice Mativo in *Republic vs. The Public Procurement Administrative Review Board; Shenzen Instrument Company Limited and Another (Interested Party) Ex-parte Kenya Power and Lighting Company Limited* [2019] eKLR offers some well-reasoned input on this account:

“ 116. The Court’s role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification.”

125. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the ‘area of decisional freedom’ of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

126. Supreme Court in *Petition No. 6 (E007) of 2022 Edwin Dande & Others v The Inspector General, National Police Service & Others* - paragraph 78 has now reaffirmed that Judicial review was entrenched in *the Constitution* of 2010 to a substantive and justiciable right under Article 47. The court held as follows:

‘It is clear from the above decisions that when party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the Court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in *SGS Kenya Ltd* and not the merits of the decision parse.’

127. The Applicant moved this court under Order 53. I have looked at the Application dated 10th July 2023. It is evident that the Applicant did not plead nor raise a claim that any of its rights under *the Constitution* have been violated, infringed and or threatened.

128. The Applicant has invoked Section 8 and 9 of the *Law Reform Act* Cap 26 Laws of Kenya and Order 53 Rule 3(1) of the Civil Procedure Rules and all enabling provisions of the Law. No doubt the case is a regular judicial review Application and the arguments are not within the purview of what would be classified as a strict rights-based suit. This Court has to in the circumstances limit itself to the process and manner in which the decision complained of was reached or action taken. It is my finding that the Applicant’s case does not fall within the purview of what would amount to a rights-based grievance.

129. In arriving at its decision, this court has looked at the process and manner in which the decision complained of was arrived and the court is satisfied that:

- a. The Applicant had access to the administrative review platform under The PPAD Act.
- b. The Applicant was allowed and accorded an opportunity to lodge documents.
- c. The Board was comprised of a chairman and four members as gleaned from page 1 of the impugned decision.



- d. The board is competent and empowered under Section 167 of The PPAD Act.
 - e. No challenge was mounted on the composition of the said board.
 - f. There was no allegation of a delay in the determination of the dispute before it.
 - g. The board applied its mind to the facts, evidence and the law and the Regulations 2020.
 - h. A reasoned decision was arrived at on 4th July 2023.
 - i. The finding was communicated to the Applicant on 10.7.23.
 - j. The Applicant has invoked the powers of this court through the Judicial review under Order 53 of The Civil Procedure Rules.
130. This court is satisfied that the above process was within the dictates of Section 7 of The *Fair Administrative Action Act* which provides that: -
- 1. Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to–
 - a. A court in accordance with section 8; or
 - b. A tribunal in exercise of its jurisdiction conferred in that regard under any written law.
 - 2. A court or tribunal under subsection (1) may review an administrative action or decision, if–
 - a. The person who made the decision–
 - i. Was not authorized to do so by the empowering provision;
 - ii. Acted in excess of jurisdiction or power conferred under any written law;
 - iii. Acted pursuant to delegated power in contravention of any law prohibiting such delegation;
 - iv. Was biased or may reasonably be suspected of bias; or
 - v. Denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
 - b. A mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - c. The action or decision was procedurally unfair;
 - d. The action or decision was materially influenced by an error of law;



- e. The administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
- f. The administrator failed to take into account relevant considerations;
- g. The administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
- h. The administrative action or decision was made in bad faith;
- i. The administrative action or decision is not rationally connected to–
 - i. The purpose for which it was taken;
 - ii. The purpose of the empowering provision;
 - iii. The information before the administrator; or
 - iv. The reasons given for it by the administrator;
- j. There was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
- k. The administrative action or decision is unreasonable;
- l. The administrative action or decision is not proportionate to the interests or rights affected;
- m. The administrative action or decision violates the legitimate expectations of the person to whom it relates;
- n. The administrative action or decision is unfair; or
- o. The administrative action or decision is taken or made in abuse of power.

131. This court has satisfied itself that the proceedings were conducted fairly by the 2nd Respondent. This conclusion has been safely arrived at after following the binding authorities of The Court of Appeal in *Kenya Pipeline Company Limited V Hyosung Ebara Company Limited & 2 Others (2012) eKLR* drew the boundaries for reviewing the decisions of the Review Board as follows:

“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity...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 procuring 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 of the procuring 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 natural justice of 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 review orders on the grounds which were outside the scope of Judicial Review jurisdiction.”

132. In Republic Vs Kenya Power & Lighting Company Limited & Another [2013] eKLR the learned Judge quoting a decision of the Court of Appeal stated:

“The Board considering all the arguments of the Applicant and made findings on each of these issues. The Board may have been wrong in its decision but this Court would be usurping the statutory function of the Board were it to substitute its own views for those of the Board”

133. In Republic v Public Procurement Administrative Review Board Ex-parte Giant Forex Bureau De' Change Limited & 2 others [2017] eKLR where the Court opined that:

“That misapprehension, or error of law or fact, however, is not an issue within the judicial review purview of this court. This proposition was upheld by the Court of Appeal in the cited Kenya Pipeline Company Limited (supra) case in the following words: - 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.”

The Applicant's statutory statement, the verifying Affidavit and the Replying Affidavits set out very elaborate arguments on what to me are issues that the Review board considered before arriving at the impugned decision.

134. The 2nd Respondents Replying Affidavit has in particular given a detailed analysis from Paragraph 5 to 16 of the events right from the time of the advertisement to the decision of the board.



135. I have keenly gone through the impugned ruling dated 4th July,2023 and I find that the Review board considered the evidence and submissions of the parties before arriving at its decision.
136. The board applied its mind in determining the following issues:
- a. Whether the Board has jurisdiction to hear and determine the instant Request for Review
 - b. Whether the 2nd Respondent’s Evaluation Committee evaluated the Financial Proposals of the subject tender in accordance with the applicable provisions of the Tender Document, the Act and *the Constitution*;
 - c. Whether the Letter of Notification of Intention to Award dated 24th May,2023 issued to the Applicant met the threshold required under Section 87 of the Act read with Regulation 82 of Regulations 2020, and what orders should the Board grant in the circumstances?
137. The Board considered the provision of section 167 (1) of the Act, Regulation 203 (1), (2), (3), & (4) of Regulations 2020, Section 80(2) and 86 of the Act, Article 227(1) of *the Constitution* and provisions of the Tender Document on the evaluation criteria.
138. The Board also observed that the jurisdiction of the Board is provided for under Part XV— Administrative Review of Procurement and Disposal Proceedings specifically at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act
139. A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020, Article 227(2) of *the Constitution*, Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity.
140. It also observed that the tenderers were to be awarded the various Lots in the subject tender based on the highest combined technical and financial score per lot which would be computed using the set-out formulae and weights of 0.80: 0.20 given to the Technical and Financial Proposals. Tenderers were only eligible for award of a maximum of one item per lot and where only one tenderer emerged responsive in a Lot, then all items in that Lot would be awarded to it.
141. The board observed that, in the Financial Evaluation Report submitted to the it as part of the confidential file pursuant to Section 67(3)(e) of the Act that the financial score of tenderers in the various Lots of the subject tender was calculated using the formulae set out in the Tender Document but against the weight of 0.75:0.25.
142. It gave an analysis while exercising its discretion and also gave reasons for its decision. This court sitting as a judicial review court lacks the jurisdiction to rehear the merits of the case all over again. I do not have the requisite machinery nor capacity to do what the review board is empowered to do. Whether or not the board misapplied the applicable law is an issue that only the Court of Appeal can determine if and when appropriately moved.
143. The board in exercise of its powers made a finding that, considering that all the responsive tenderers in the subject tender were awarded the subject tender based on an erroneous computation of their highest combined technical and financial score in the various Lots of the subject tender, they were of the view that the Evaluation Committee used extraneous evaluation criteria in evaluating and comparing tenders in the subject tender with regard to computation of the highest combined technical and financial score based on 0.75:0.25 weights for the Technical and Financial Proposals as opposed to using a computation based on 0.80:0.20 weights.



144. The assertion by the Respondents that they were in the course of issuing an addendum was not persuasive since no such addendum was placed before us. The Board was also doubtful as to how such an addendum would have cured the use of the wrong formula, without cancelling the notification with the erroneous information.
145. On the issue of the notification of the award the board made a finding that, they had perused the Letter of Notification of Intention to Award the subject tender dated 24th May 2023 and received by the Applicant on 30th May 2023 and note that the Applicant was notified of the reasons as to why it was not successful.
146. The board then made a finding that the 2nd Respondent's Evaluation Committee evaluated and compared tenders in the subject tender at Clause 7 Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 83 of 285 of the Tender Document using an erroneous formula contrary to the evaluation criteria and formulae set out under Clause 7 Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 83 of 285 of the Tender Document read with Section 80(2) of the Act and Article 227(1) of *the Constitution*.
147. The board in its ruling noted that the Applicant held a meeting with the Respondents on 6th June, 2023 as evidenced by the Applicant's exhibit marked "NO4" being a letter dated 6th June, 2023 addressed to the Respondents in reference to the debriefing meeting whereby the Applicant indicates that upon seeking clarifications on the Technical Evaluation it was informed of the reasons affecting its score.
148. Having perused the 1st and 2nd Respondents Statement of Response, they noted that the Respondents confirmed at paragraphs 38 to 43 that indeed a debriefing took place and the above reasons indicated by the Applicant in its letter dated 6th June, 2023 were given to the Applicant being the reasons it did not score 100% in the Technical Evaluation.
149. The Board found that consequently, the actions by the Respondents of introducing additional reasons for the Applicant's unsuccessfulness in the subject tender in the debriefing meeting which were not contained in its Letter of Notification of Intention to Award dated 24th May, 2023 amounted to a breach of Section 87 of the Act read with Regulation 82 of Regulations 2020.
150. As such, the letter of Notification of Intention to Award dated 24th May 2023 issued to the Applicant did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.
151. In exercise of the powers conferred upon it by Section 173 of the *Public Procurement and Asset Disposal Act*, No. 33 of 2015, the Board then proceeded to issue the following orders in the Request for Review dated 13th June 2023 and filed on even date:
 - a. The 1st and 2nd Respondents Preliminary Objection be and is hereby dismissed.
 - b. The Letters of Notification of Intention to Award dated 24th May 2023 to the Interested Party and all other successful tenderers with respect to the various Lots in Tender No. TNT/017/2022-2023 for Motor Vehicles Leasing Programme Phase VII be and are hereby nullified and set aside.
 - c. The Letters of Notification of Intention to Award dated 24th May 2023 to the Applicant and all other unsuccessful tenderers with respect to the various Lots in Tender No. TNT/017/2022-2023 for Motor Vehicles Leasing Programme Phase VII be and are hereby nullified and set aside.



- d. The 1st Respondent is hereby ordered to direct the Evaluation Committee to admit the Applicant's tender at the Financial Evaluation stage together with all other tenders that made it to the Financial Evaluation stage and conduct a re-evaluation of the tenders at the Financial Evaluation stage (being all other tenders that made it to the Financial Evaluation stage including the Applicant's tender) strictly using the criteria and formulae set out in the Tender Document, the Act, Regulations 2020 and *the Constitution*, and to take into considerations the findings made by the Board in this decision. For the avoidance of doubt, such re-evaluation shall be based on the documents already submitted by the parties and not any new documents
 - e. Further to Order No. 4 above, the 1st Respondent is hereby directed to proceed with the procurement process in Tender No. TNT/017/2022-2023 for Motor Vehicles Leasing Programme Phase VII to its logical conclusion including making awards to the successful tenderers in the various Lots within fourteen (14) days from the date of this decision while taking into consideration the Board's findings in this Request for Review.
 - f. Given that the procurement process for the subject tender is not complete, each party shall bear its own costs in the Request for Review.
152. The Applicant argues that the Decision of the 1st Respondent is irrational and unreasonable for being in breach of the provisions of the PPADA for an alleged "failure to correct the breaches of the 2nd Respondent as required under Section 173 of the PPADA.
153. The Board clearly applied its mind to the evidence and the law and it gave its reasons for the manner in which it exercised its discretion in awarding its final orders. This court finds no justification whatsoever to interfere with the finding of the Board in PPARB/ARB/No.42 of 2023 and I so find.
154. In so finding, am guided by the case of *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) the Supreme court held as follows:
- "76. Be that as it may, it is the court's firm view that the intention was never to transform judicial review into 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 do 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 Commission on Administrative Justice, 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."

155. In prayer (d) of the request for review signed on 13th June 2023, the Ex parte Applicant sought an order that the Honorable Board do direct the and Respondent's evaluation committee to admit the Applicant's Tender to the Financial Evaluation stage in the respective categories, and proceed with the subject procurement process to its logical conclusion culminating in the award to the lowest evaluated bidder.
156. On 4th July 2023, the review board in direction 4 directed the Evaluation Committee to admit the Applicant's tender at the Financial Evaluation stage together with all other tenders that made it to the Financial Evaluation stage and conduct a re-evaluation of the tenders at the Financial Evaluation stage (being all other tenders that made it to the Financial Evaluation stage including the Applicant's tender) strictly using the criteria and formulae set out in the Tender Document, the Act, Regulations 2020 and *the Constitution*, and to take into consideration the findings made by the Board in this decision. For the avoidance of doubt, such re-evaluation shall be based on the documents already submitted by the parties and not any new documents.
157. In the Application dated 10th July, 2023 that is before this court, the Applicant seeks an order of mandamus to compel the 2nd Respondent to re-admit all responsive tenders to the technical evaluation stage using the procedure and criteria in the Tender document and the *Public Procurement and Asset Disposal Act*, to the financial evaluation stage and proceed with the subject procurement process to its logical conclusion including but not limited to the making of awards to successful tenderers in the respective lots; or in the alternative.
158. The 1st Respondent has raised a concern at paragraph 21 of the Replying Affidavit of DR. CHRIS K. KIPTOO dated 2nd August, 2023 to the extent that the Applicant seeks under Order No. 3 of the Notice of Motion for this Honourable court to issue an order of Mandamus to compel the 2nd Respondent to re-admit all responsive tenders to the technical evaluation stage yet this was not a prayer made before the 1st Respondent and as such, the Ex Parte Applicant is attempting to mislead this Honourable Court in exercising its jurisdiction in a procurement dispute and issue orders which were never sought in its prayers in Request for Review No. 42 of 2023 before the 1st Respondent being the specialized central independent body mandated to review, hear and determine tendering disputes.
159. On its part, the Applicant submits as follows:

"From the pleadings filed, all the Interested Party and Respondents argue is that the Applicant did not pray for the re-admission of the bids to the technical evaluation stage and thus the 1st Respondent had no powers to order such re-admission. According to the Applicant, this argument collapses on not one, two, three but five fronts as demonstrable below:

Prayer (f) of the Applicant's Request for Review dated 13th June 2023 in PPARB/ARB No. 42 of 2023 read as follows:

"in the alternative, this Honorable Board do re-evaluate the tender and award the Applicant in the Respective categories it bid"

With this prayer alone, the Board had the discretion to re-admit the Applicant's bid at the technical evaluation stage and correct the illegalities of the Procuring Entity.



- i. Throughout the tender document for the subject tender, and even all through the impugned ruling, technical and financial evaluation were intertwined. It would be zero-sum, and unreasonable to order the re-evaluation of the responsive bids at the financial evaluation stage without re-evaluation at the technical evaluation stage. (See Pages 367 and 368 of the Applicant's Bundle of Documents).
- ii. Further to this, the term evaluation criteria and formulae connotes not only the formulae alluded to by the 1st and 2nd Respondent, but the procedure of evaluating the responsive bids and this includes technical evaluation. It was unreasonable and irrational for the 1st Respondent to order the use of the correct evaluation. Page 6 of 13 of the Applicant's Written Submissions criteria and formulae only to readmit the responsive bids at the financial evaluation stage. It is noteworthy that whilst the formulae is used for the financial evaluation stage, the criteria is used at the technical evaluation stage.
- iii. The admission by the 2nd Respondent and the Board that the 2nd Respondent had not factored documents which were part of the technical evaluation;
- iv. Finally, Section 173 of the *Public Procurement and Asset Disposal Act*, 2015 grants the 1st Respondent powers to inter alia:
 - (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;"

160. This court agrees with the 1st Respondent and the Interested Party. To grant the order of mandamus to compel the 2nd Respondent to re-admit all responsive tenders to the technical evaluation stage using the procedure and criteria in the Tender document and the *Public Procurement and Asset Disposal Act* pegged on the Application dated 10th July,2023 would mean that this court will be allowing a late admission of a request for review out of time.
161. The Applicant should have captured and/or sought for a specific order before the Review Board within the Request for review dated 13th June,2023 within the statutory 14 days. The affected parties would have had the opportunity to submit on the weighty issue as a result of which the board would have made a finding directing the manner in which the technical evaluation should have been reconducted.
162. To grant an order of mandamus to compel the 2nd Respondent to re-admit all responsive tenders to the technical evaluation stage using the procedure and criteria in the Tender document and the *Public Procurement and Asset Disposal Act* at this juncture as sought will offend the rules of Natural justice which the court refuses to do.
163. Nothing stopped the Applicant from seeking an order that 2nd Respondent re-admit all responsive tenders to the technical evaluation stage using the procedure and criteria in the Tender document and the *Public Procurement and Asset Disposal Act* during the appropriate stage in clear terms with precision and clarity like it did when it sought the order that the 1st Respondent is hereby ordered to direct the Evaluation Committee to admit the Applicant 's tender at the Financial Evaluation stage. This order



cannot be granted. The Applicant is bound by its pleadings and it cannot seek to introduce what it intended at this juncture.

- a. I am guided by the case of *Anarita Karimi Njeru v Republic (No1)*- [1979] KLR 154 where the court stated as follows:

“... if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (see also *Meme v Republic & another* [2004] 1 KLR 637) This court is also bound by the Court of Appeal in *Mumo Matemo v Trusted Society of Human Rights alliance* [2014] eKLR, stated that:

“...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”.

164. In its submissions, the Applicant argued that it had the legitimate expectation that the 1st Respondent would arrest the excesses and violations of the *Public Procurement and Asset Disposal Act* by the 2nd Respondent.

165. The Supreme Court of Kenya in *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others* SC Petition Nos. 14, 14A, 14B & 14C of 2014 held as follows: -

“Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation.”

166. In *Republic vs. Kenya Revenue Authority ex-parte Shake Distributors Limited* HC Misc. Civil Application No. 359 of 2012 it was held that:

“On the issue of legitimate expectation, the Applicant submitted that it met all the pre-requisite conditions and obtained all the documents necessary for the importation of sugar. The Applicant argued that it had received an assurance that after meeting the necessary conditions its legitimate expectation would be protected and not breached. In reply the Respondent submitted that it did not make any representation to the Applicant that it would clear its imports without imposing conditions permitted in law or release them on terms which contravene customs law or practice.

“According to Harry Woolf, Jeffrey Jowell and Andrew Le Sueur at page 609 of the 6th Edition of *De Smith’s Judicial Review*, ‘Such an expectation arises where a decision maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken)’. It follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a



public body that it will act or not act in a certain manner. For the promise to hold, the same must be made within the confines of law. A public body cannot make a promise which goes against the express letter of the law.”

167. It is this court’s finding that upon declining to grant the orders sought by the Applicant, the legitimate expectation argument falls by the way side since the court does not find any fault with the decision dated 10th July, 2023 and I so hold.

Disposition;

168. The Applicant has also not proven that the 2nd Respondent acted without jurisdiction or acted ultra vires, or contrary to the provisions of a law or illegally. The 2nd Respondent invoked the provisions of Section 167 in awarding the said orders.

169. The Applicant has not tendered evidence to justify how in its decision the 2nd Respondent failed to give proper weight to relevant factors or acted unreasonably. It is a well-established principle that if an administrative or quasi-judicial body considers any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated. Without delving into the merits of the decision, it is this court’s finding that the 2nd Respondent acted within the law in arriving at the finding it delivered.

170. From the impugned ruling, it can be gleaned that the 2nd Respondent gave reasons for its decision. This court cannot look at the legal analysis nor attempt to get into the mind of the 2nd Respondent. Only the Court of Appeal can do that if appropriately moved.

171. 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.

172. Procedural Impropriety on the other hand 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 unfairness 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 in a legislative Instrument by which such authority exercises jurisdiction to decide.

173. I find that the Applicant has failed to prove that the decision or act complained of against the Respondents is tainted with illegality, irrationality and procedural impropriety. The Application dated 21st July 2023 lacks merit.

Order:

The Notice of Motion Application dated 21st July,2023 is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF AUGUST 2023

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J. CHIGITI (SC)
JUDGE

