



**Republic v Chairperson, Public Procurement Administrative Review Board & 2 others; Authority & 2 others (Exparte); Rhombus Construction Company Limited (Interested Party) (Judicial Review Miscellaneous Application E044 & E176 of 2021 (Consolidated)) [2022] KEHC 1 (KLR) (11 January 2022) (Judgment)**

Neutral citation: [2022] KEHC 1 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION  
E044 & E176 OF 2021 (CONSOLIDATED)**

**JM MATIVO, J**

**JANUARY 11, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

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

**AND**

**KENYA PORTS AUTHORITY ..... EXPARTE**

**AND**

**RHOMBUS CONSTRUCTION COMPANY LIMITED ..... INTERESTED PARTY**

**AND**

**ACCOUNTING OFFICER KENYA PORTS AUTHORITY ..... EXPARTE**

**AS CONSOLIDATED WITH**

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION E176 OF 2021**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD .... 1<sup>ST</sup>  
RESPONDENT**



**ACCOUNTING OFFICER, KENYA PORTS AUTHORITY .... 2<sup>ND</sup> RESPONDENT**

**AND**

**RHOMBUS CONSTRUCTION COMPANY LIMITED ..... EXPARTE**

**JUDGMENT**

1. This judgment determines two consolidated judicial review applications, namely, Mombasa Judicial Review Application No. E044 of 2021, Republic v The Chairperson, Public Procurement Administrative Review Board and Rhombus Construction Company Limited (Interested Party) ex Parte The Kenya Ports Authority & The Accounting Officer, The Kenya Ports Authority (herein after referred to as the 1<sup>st</sup> application) and Nairobi Judicial Review Misc. App. No. E176 of 2021, Republic v Public Procurement Administrative Review Board and The Accounting Officer, The Kenya Ports Authority and ex parte Rhombus Construction Company Limited (herein after referred to as the 2<sup>nd</sup> application).
2. The common thread between the two applications is that they both seek to review, albeit for different reasons, the same decision rendered by the Public Procurement Administrative Review Board (herein after referred to as the Review Board) in Request for Review Application No. 123 of 2021, Rhombus Construction Company Limited v Accounting Officer, Kenya Ports Authority and another rendered on 2<sup>nd</sup> November 2021. The impugned decision relates to the same procurement process undertaken by the Kenya Ports Authority (herein after referred to as the Procuring Entity) being Tender No. KPA/073/2019-20/TE. The Procuring Entity is the applicant in the 1<sup>st</sup> application while t the applicant in the 2<sup>nd</sup> application was a tenderer.
3. Other than the instant 2 applications now the subject of this ruling, the tender has the singular distinction of enjoying an unadmirable notoriety of having been the subject of 6 previous cases, namely, Request for Review No. 119 of 2020; Request for Review No. 131 of 2020; Request for Review No. 150 of 2020; High Court Judicial Review No. E002 of 2021; Court of Appeal Civil No. E011 of 2021 and Request for Review No. 123 of 2021. So, in total, these 2 applications bring to 8 the total number of cases relating to the subject tender.
4. As was held in *Korean United Church of Kenya & 3 Others v Seng Ha Sang*,<sup>1</sup> consolidation of suits is done for the purposes of achieving the overriding objective of expeditious and proportionate disposal of civil disputes. Consolidation saves costs, time and effort and makes the conduct of several actions more convenient by treating them as one action. The rationale behind consolidation of matters is to avoid conflicting judgments, save time and money by clubbing together matters involving common questions of fact and law.
5. A brief summary of the factual matrix which triggered these applications is apposite. My reading of the respective party's pleadings is that the factual chronology of the events which triggered the proceedings is essentially common cause or uncontroverted. A preview of the history of the subject tender shows that it has been the subject of 5 court disputes, including an appeal to the Court of Appeal. In total, these 2 consolidated suits bring to 7 the total number of court cases the subject tender has suffered. Notwithstanding the fact that the two suits arise from the same set of facts and circumstances, for the sake of brevity, I will separately summarize the facts as presented by each applicant.

<sup>1</sup> {2014} e KLR.



The 1<sup>st</sup> application, ie. JR No. E044 of 2021

6. The Procuring Entity invited bids from eligible tenderers for the subject tender for the Supply and Commissioning of 12No. New Reachstackers through an advertisement published in MyGov Publication Website and on the Lloyd's list on 15<sup>th</sup> January, 2020. The bids were evaluated by the Procuring Entity's Evaluation Committee as required in a three-stage process namely; Preliminary Evaluation stage, the Technical Evaluation Stage and finally the Financial Evaluation Stage and only the Interested Party and M/s Kalmar Reachstackers met the minimum required Technical Score of 75% thereby qualifying to the final evaluation which is the Financial Evaluation stage. The Evaluation Committee concluded that the Interested Party was the lowest evaluated bidder at a price of USD 5, 628,207.01, and, it recommended that the Tender be awarded to Interested Party.
7. However, upon receiving the Evaluation Report, the Procuring Entity's Acting Head of Procurement and Supplies, vide a Professional Opinion dated 29<sup>th</sup> July, 2020, recommended that the tender be cancelled on account of inadequate budgetary provision in accordance with Section 63 (1) (b) of the *Public Procurement and Asset Disposal Act*<sup>2</sup> (herein after referred to as the PPAD Act). The reason was that the financial quotations submitted by the bidder were beyond the budgetary provision for the tender, which was pegged at Kshs 550,000,000/=, so, on 10<sup>th</sup> August, 2020, the then Acting Managing Director of the Procuring Entity approved the said Professional Opinion and Recommendation and vide a letter dated 10<sup>th</sup> August, 2020, the Procuring Entity notified all Tenderers that the subject procurement process had been cancelled due to inadequate budgetary provision.
8. Aggrieved by the decision, the Interested Party filed Request for Review at the Review Board being Application Number 119 of 2020; Rhombus Construction Company Limited v Accounting Officer Kenya Ports Authority and Kenya Ports Authority challenging the cancellation and praying that the Procuring Entity awards the subject tender to it since it. The Review Board held that the Procuring Entity ought to have engaged the Interested Party in a competitive negotiation process under Section 131 and 132 of the PPAD Act and set aside the cancellation and directed the Procuring Entity to proceed with the procurement proceedings and conclude the same within 14 days from the date of the decision. It also found that that the Procuring Entity erred by not taking into considering that the tender sum submitted by Kalmar Reachstackers was within the budgetary provision for the tender.
9. The Procuring Entity claims that it set out to comply with the said orders, but it emerged that the tender sums in the two bids were above the budgetary provision for the tender of Kshs 550,000,000/= and vide a Letter of Professional Opinion dated 17<sup>th</sup> September, 2020, the then Acting Head of Procurement and Supplies recommended to the Accounting Officer of the Procuring Entity to cancel the tender in accordance with Section 63 (1) (b) of the PPAD Act owing to inadequate budgetary provision and approve re-tendering process. The applicant states that in concluding the tendering process, it was entitled to raise concerns that the financial bids were beyond the budgetary allocation for the procurement.
10. Also, the Procuring Entity states that the orders directing it to proceed and conclude the tendering process did not take away its discretion to apply the law and that the cancellation was within the confines of the law and the orders of the Review Board. Further, vide a letter dated 21<sup>st</sup> September, 2020, it notified all tenderers of the cancellation.
11. Aggrieved by the cancellation, the Interested Party filed Request for Review No. 131 of 2020; Rhombus Construction Company Limited v Accounting Officer Kenya Ports Authority challenging the cancellation and seeking an order that the Procuring Entity awards the subject tender to it. On

<sup>2</sup> Act No. 33 of 2015.



23<sup>rd</sup> October, 2020 the Review Board found that the reasons for cancellation lacked merit and also the Procuring Entity failed to comply with the orders in PPARB Review No. 119 of 2020 issued on 7<sup>th</sup> September, 2020. The Review Board set aside the letter dated 21<sup>st</sup> September, 2020, and ordered the Accounting Officer of the Procuring Entity to comply with the Orders of the Board in PPARB Review Number 119 of 2020. It ordered the Procuring Entity to extend the tender validity period for a further 30 days from the date of its expiry and the Procuring Entity to engage the bidders in competitive negotiations under Part X Section 131 and 132 of the PPDA Act.

12. The applicants state that in compliance with the Review Board's orders in Number 131 of 2020, vide a letter dated 5<sup>th</sup> November, 2020, it invited revised financial bids from the Interested Party and M/s Kalmar Reachstacker, and the Interested Party herein submitted the lowest revised financial bid which was within the budgetary provision of the Authority, and, it was recommended that the subject tender be awarded to it. However, it states that before it could conclude the process, it received complaints from the Public Procurement Regulatory Authority (PPRA) and the Director of Criminal Investigations on the tendering process including claims that the Interested Party had submitted forged documents in its bid. It also states that the letter by PPRA was clear that the tender could not be awarded on the basis of competitive negotiations because Part X Section 131 and 132 of the PPAD Act was only applicable in respect of the procurement of professional consultancy services. It states that the matters raised in the above letters raised fundamental issues affecting the integrity of the procurement process which were material governance issues envisioned under section 63(1) (e) of the PPADA Act which warranted a termination of the tender.
13. They state that before they could terminate the tender, the Interested Party filed a Request for Review Number 150 of 2020; Rhombus Construction Company Limited vs Accounting Officer Kenya Ports Authority citing failure by the Procuring Entity to notify it of the award despite yet only one day remained prior to the expiry of the tender on 17<sup>th</sup> December, 2020. On 6<sup>th</sup> January, 2021 the Review Board ordered the Accounting Officer of the Procuring Entity to fully comply with the orders of the Board in Application No.131 of 2020 within 14 days from the date of the decision, taking into consideration the findings of the Board in this Review. It also ordered the Accounting Officer of the Procuring Entity to furnish the Review Board with the status report on compliance with the orders of the Board issued in Application No. 131 of 2020 within 21 days from the date of the decision. Further, it extended the tender validity period by a further period of 30 days from the 7.01.2021 and ordered the Procuring Entity shall bear the costs of the Request for Review amounting to Ksh. 255,000/=.
14. Aggrieved by the above orders, the Procuring Entity filed Judicial Review Application No. E 002 of 2021; Republic vs Public Procurement Administrative Review Board & Another Ex Parte Kenya Ports Authority & Another seeking to quash the same which was dismissed on 5<sup>th</sup> March, 2021 and the High Court ordered the 1<sup>st</sup> ex parte applicant to fully comply with the orders of PPARB issued on 6<sup>th</sup> January, 2021. Aggrieved by the above High Court decision, the Procuring Entity appealed to Court of Appeal in Civil Appeal No. E11 of 2021; Kenya Ports Authority and the Accounting Officer Kenya Ports Authority v Rhombus Construction Company Ltd and the Public Procurement Administrative Review Board, and by a judgment delivered on 26<sup>th</sup> April, 2021 the Court of Appeal upheld the High Court decision and dismissed the appeal. The applicants state that they set out to complete the procurement process, but an important part of completing the procurement process included the consideration of the criminal complaints and integrity issues that had been raised, so, the Procuring Entity wrote to the DCI seeking their confirmation that they had concluded their investigations and the DCI responded on 17<sup>th</sup> May, 2021 which letter was received by the on 6<sup>th</sup> August, 2021, but by the said date, the tender validity period had lapsed, consequently, the then Head of Procurement and Supplies issued an opinion that the tender be terminated by operation of the law because its tender



validity period had lapsed in accordance with section 63(1)(a)(i) as read together with Section 88(3) of the PPAD Act, so the Accounting Officer issued a termination letter dated 21<sup>st</sup> September, 2021.

15. However, the Interested Party, aggrieved by the decision, filed an application dated 28.09.2021 seeking to commit the acting Managing Director of KPA to jail for alleged contempt of court in Mombasa Judicial Review No. E002 of 2021; Rhombus Construction Company Limited v AMB. John Mwangemi. It also filed Request for Review Application 123 of 2021; Rhombus Construction Company Limited and The Accounting Officer Kenya Ports Authority and Kenya Ports Authority seeking orders inter alia that the termination letter be declared void and set aside; that the Review Board orders the extension on the tender validity period; that the Procuring Entity be directed to award the tender to the Interested Party; that the Review Board recommends appropriate sanctions against the Respondent for failure to comply with the orders of the Review Board in Review No. 131 of 2020 and Review No. 150 of 2020. It also prayed for costs and any other relief that the Board may deem fit and just to grant.
16. The Procuring Entity contends that the orders contemporaneously sought by the Interested Party before the Review Board and before the High Court are the same or substantially the same, but that notwithstanding, the Review Board proceeded to review, hear and determine the Review application on its merit and on 2<sup>nd</sup> November, 2021 it ordered: -
  - a. The 1<sup>st</sup> Respondent's letter of termination dated 21<sup>st</sup> September, 2021 with respect to Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12. No. New Reachstackers, be and is hereby nullified and set aside.
  - b. The Board directs its secretary to furnish the Director General of the Public Procurement Regulatory Authority with this decision within a day of the making of this decision.
  - c. The Board recommends for the Director General of the Public Procurement Regulatory Authority, as a Regulator, to take necessary measures against the Respondents herein provided in law, for deliberately failing to comply with the Orders of the Board in PPARB Application No. 150 of 2020.
  - d. Each party shall bear its own costs in the instant Request for Review.
17. The Procuring Entity states that it is aggrieved and prejudiced by Order No. (c) above because the tender was terminated under section 63(1) (a) (i) because the tender validity period had expired; that the Respondent committed an error of law in failing to appreciate that compliance with its order had to be undertaken within the confines of the PPAD Act and for failing to appreciate the ex parte applicants were entitled to inter alia terminate or cancel the tender under section 63 of the PPAD Act. Also, the Procuring Entity states that the Review Board arrived at a decision which was tainted with illegality because it effectively required the applicants to act in contravention of express provisions of Part X Section 115 and 131 of the PPAD Act which only permit an accounting officer to engage in competitive negotiations in the procurement of consultancy and professional services, but not in the subject tender which was for the procurement of goods.
18. Also, the Procuring Entity states that the recommendation to the Director General of Public Procurement Regulatory Authority to take necessary measures against the ex parte applicants was unreasonable and erroneous in the circumstances and ultra vires. Lastly, it states that the Review Board acted illegally, unreasonably, without jurisdiction and committed an error of law by proceeding to review, hear and determine a dispute that the Interested Party had already submitted to the High Court.



19. The applicants also state that the sanctions envisioned under Part XVI of the PPAD Act are extremely drastic and criminal in nature and includes the imposition of huge fines, jail terms, disciplinary actions, as well as debarment. Further, that the subject Tender involves the utilization of a huge amount of public funds and tax payers' money, so applicants and the public will be prejudiced, and, that, it in the interest of justice and fairness that the court grants the orders sought.
20. As a consequence of the foregoing, the applicants pray for Certiorari to quash the determination and orders issued on 2<sup>nd</sup> November, 2021 in Request for Review Application No. 123 of 2021. They also pray for costs of and incidental to the application to be provided for.

#### The Respondent

21. The Review Board did not file a response to this application despite being served.

#### The Interested Party's Reply

22. On record is the Replying affidavit of Mr. Evanson Githinji Kinyanjui, a Director and Chief Executive Officer of the Interested Party dated 22<sup>nd</sup> November 2021. The Interested Party's case as I glean it from the said affidavit is that the applicant is re-litigating issues which have been determined by the Review Board in Request for Review Application Nos. 119 of 2020, 131 of 2020, 150 of 2020, High Court in Mombasa High Court JR No. E002 of 2021 and the Court of Appeal Civil Appeal No. E11 of 2021, hence the issues are res judicata.
23. It is the Interested Party case that Procuring Entity is only aggrieved by order No. (c) in No. 123 of 2021, that the tender validity period had not lapsed because the moment the applicants failed to fully comply with the orders of the Review Board within the stipulated timelines, time stopped to run based on the rule of nullities. Further, having failed to comply with the orders in No. 150 of 2020 and, they had no discretion to conclude the tender process through termination. Also, the orders in Review No. 119 of 2020 and 131 of 2020 on competitive negotiation was never challenged and they are final and binding upon the applicants, and, that the applicants are approbating and reprobating on compliance with the said orders because in review application nos. 150 of 2020 and E002 of 2021 they agreed that its Evaluation Committee and Head of Procurement function recommends the award to the Interested Party after competitive negotiations.
24. Also, it is the Interested Party's case that the order recommending the Director General of PPRA to take necessary measures against the applicants is neither unreasonable nor erroneous but it is within the purview of the prayer for "any other relief that the Board may deem fit and just to grant" and section 11 of the *Fair Administrative Action Act*<sup>3</sup> (the FAA Act) as read with section 28(1)(b) of the PPAD Act and section 48 of the *Interpretation and General Provisions Act*.<sup>4</sup>
25. The Interested Party also states that the Review Board did not act illegally, unreasonably, without jurisdiction or through an error of law by hearing no. 123 of 2021 while that the contempt proceedings in the High Court because under section 174 of the PPAD Act, the right to administrative review is in addition to any other legal remedy a person may have. Additionally, the application is a mere stratagem to circumvent their statutory obligation to comply with the orders in Review Nos. 119 of 2020, 131 of 2020 and 150 of 2021.

#### The 2<sup>nd</sup> application

<sup>3</sup> Act No 4 of 2015.

<sup>4</sup> Cap 2, Laws of Kenya.



26. M/s Rhombus Construction Company Limited the Interested Party in E 044 of 2021 is the applicant in the 2<sup>nd</sup> application dated 19<sup>th</sup> November 2021. It seeks orders: -

- a. Certiorari to quash the decision of the Public Procurement Administrative Review Board in the request for review Application No. 123 of 2021, Rhombus Construction Company Limited v The Accounting Officer, Kenya Ports Authority & Kenya Ports Authority to the extent that the said decision declared that tender number KPA/073/2019-20/TE FOR Supply, Testing and Commissioning of 12 No. New Reachstackers is dead and incapable of being brought back to life and that any award of the subject tender would be unlawful.
- b. Certiorari to quash the decision of the Public Procurement Administrative Review Board in the request for review Application No. 123 of 2021, Rhombus Construction Company Limited v The Accounting Officer, Kenya Ports Authority & Kenya Ports Authority dismissing prayers (b) and (c) of the Applicant's Request for Review.
- c. Mandamus compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to extend the tender validity period for the said Tender by thirty days to enable the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to conclude the tender process through award and execution of a procurement contract with the successful bidder.
- d. Mandamus compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to award of the subject Tender to the applicant in accordance with the recommendation of the tender evaluation committee and the professional opinion of the Head of Procurement function issued on 19<sup>th</sup> November 2020.
- e. Mandamus compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to execute a procurement contract with the Applicant in respect to the subject Tender within the extended tender validity period herein.
- f. Any other relief which the Honourable Court deems fit and just in the circumstances.
- g. The costs of this application be in favour of the Applicant.

27. The applicant is aggrieved by the Review Board's findings that: -

- a. That the subject tender "died a natural death" on or about 14<sup>th</sup> May 2021 and was incapable of being brought back to life;
- b. That as a result of the lapse of the tender validity period, any award of the subject tender would be unlawful;
- c. That the Review Board is unable to grant prayers (b) and (c) of the Applicant Review Application no. 123 of 2021 seeking extension of tender validity period and an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein to award the subject tender to the Applicant.

28. The applicant contends that the above ruling is tainted with illegality and error of law, irrationality and violation of the applicant's legitimate expectations and therefore ought to be quashed. In particular,



the applicant states that the Review Board misconstrued the scope of its statutory powers, failed to take account of relevant considerations, took account of irrelevant considerations and consequently failed to exercise its lawful statutory mandate and jurisdiction under sections 28 and 173 of the PPAD Act as read with section 48 of the *Interpretation and General Provisions Act*.

29. The applicant states that where any action by a party to the review application is deemed to be contrary to the decision of the Review Board and is therefore null and void as contemplated under section 175(6) of PPAD Act, time does not run on the tender validity period. It states that the Review Board proceeded on an erroneous assumption that the tender validity period could not be extended, and, so, it committed an error of law in purporting to declare that the subject tender “died a natural death” on or about 14<sup>th</sup> May 2021. The applicant also states that the Review Board committed a fatal error of law by failing to take account of and give effect to relevant considerations namely section 59 of the *Interpretation and General Provisions Act* pursuant to which it could order extension of tender validity period even if such period.
30. Further, the applicant states that the Review Board committed an error of law and wrongfully failed to exercise its statutory mandate, jurisdiction and powers under section 173(b) of the PPAD Act pursuant to which it could lawfully direct extension of tender validity period. It states that the Review Board committed a fatal error of law in purporting to find that the subject tender “died a natural death” on or about 14<sup>th</sup> May 2021 and in so doing misinterpreted the PPAD Act which provides only that a tender process comes to an end when either the subject tender is awarded to the successful bidder and a contract signed pursuant to section 135 of the Act or when the tender process is terminated on the grounds and in accordance with the procedure stipulated under section 63 of the PPAD Act.

#### The 1<sup>st</sup> Respondent’s Reply

31. The Review Board filed the Replying affidavit of Mr. Stanley Miheso, Senior Officer at the Review Board dated 15<sup>th</sup> December 2021. The nub of its case as I discern it from the said affidavit is the applicant was aware that the tender validity period had lapsed and agreed for the extension for 30 days from 18<sup>th</sup> November 2021 to expire on 17<sup>th</sup> December 2020. Further, that No. 150 of 2020 was filed on 16<sup>th</sup> December 2020 by which date the tender validity had only one day remaining, and the Procuring Entity extended the period for 30 days from 7<sup>th</sup> January 2021 to expire on 6<sup>th</sup> February 2021. Additionally, as at the time of filing JR E002 of 2021, the tender validity had only 18 days left, and even if the Procuring Entity was to consider that the tender validity was not running between 7<sup>th</sup> January 2021 and 20<sup>th</sup> January 2021 being the date when JR No. E002 of 2021 was filed, then 30 days remained, so, the tender validity would still have expired on 26<sup>th</sup> May 2021 or 7<sup>th</sup> August 2021 going by the dates when the Court of Appeal rendered its decision and the full judgment, but the Request for Review was filed on 12<sup>th</sup> October 2021.
32. It also states that where the tender validity period has expired, Review Board has no powers over the tender, which position has been buttressed by court decisions such as them Republic v PPARB ex parte National Irrigation Board where the court held that once the tender validity period has lapsed, it cannot be resuscitated by consent of the parties or even by the Review Board.

#### The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ Reply

33. Mr. Moses Sirgoi, the Procuring Entity’s Acting Principal Procurement Officer (Tenders) swore the Replying affidavit dated 6<sup>th</sup> December 2021 in opposition to the application. Essentially, the Procuring Entity maintains that the application is incompetent, bad in law, misconceived and incurably defective; that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent cannot be sued as substantive parties; that the applicant has made this



court the first part of call-in respect of the substantive orders sought in prayers (c), (d) and (e) of the application, which cannot be granted.

34. The Procuring Entity also states that the applicant in Judicial Review No. E002 of 2021 Rhombus Construction Company Limited v Kenya Ports Authority and Others sought similar orders as in the instant application, so, the applicant seeks to re-litigate the same issues. The Procuring Entity also states that a common thread in all the cases is its alleged failure to comply with orders issued by the Review Board in Request for Review Nos. 119 & 131 of 2020.
35. It is the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's case that the Procuring Entity set out to comply with the orders issued by the Review Board to conclude the procurement process within the confines of the PPAD Act, but their efforts to conclude the procurement process resulted in termination or cancellation albeit on different grounds within the provisions of Section 63 of the PPAD Act. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents state that on 10.08.2020 and on 21.09.2020 they concluded the procurement process pursuant to the provisions of Section 63(1) (b) of the PPAD Act by terminating the tender on the ground that the financial bids submitted by the parties were beyond the budgetary provision. Also, that they concluded the procurement process in line with the PPAD Act and Article 227 of the Constitution while also complying with the orders of the Review Board after establishing that it was indeed illegal to engage in competitive negotiations because it was a tender for the procurement of goods.
36. Further, they contend that in the process of complying with the orders of the Review Board, in Nos 119 of 2020 and 131 of 2020, the Public Procurement Regulatory Authority wrote to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents raising serious issues affecting the integrity of the tender process including allegations that the applicant had submitted forged bid documents. Also, the DCI wrote informing them that they were investigating the procurement process, so, the Procuring Entity formed the opinion that the matters raised amounted to material governance issues that compromised the integrity of the tendering process, so, the tender was amenable to termination under section 63 (1) (e) of the PPAD Act.
37. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's state that on 28<sup>th</sup> September 2021, they concluded the procurement process by terminating the tender in line with Section 63(1)(a)(i) since the tender validity period had expired, so, in finding that the tender died a natural death is legal, rational, reasonable, proportionate and is not made in error of law. Lastly, that the Review Board could not exercise its statutory mandate under Sections 28 & 173 of the PPAD Act and section 48 of the *Interpretation and General Provisions Act* to resuscitate a tender which had lapsed nor did the tender contain a provision for extension of the validity period after the same had expired.

The applicant's supplementary affidavit

38. Mr. E. Githinji Kinyanjui, the applicant's director and Chief Executive Officer swore the supplementary affidavit dated 14<sup>th</sup> December 2021 in reply to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's Replying affidavit. He averred that the Respondents have misconstrued the purpose and significance of tender validity in public procurement process which can be readily gleaned from the tender document.
39. He averred that the effect of failure by a party to comply with the decision of the Review Board is that any action by a party contrary to the decision of the Review Board is null and void. He averred that with effect from 27<sup>th</sup> April 2021, the tender validity period started to run but was stopped on 29<sup>th</sup> April 2021 the moment the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents embarked on a null and void exercise of seeking directions from the Directorate of Criminal Investigations which was contrary to the decision of the High Court. He averred that the tender validity period could not have lapsed on 14<sup>th</sup> May 2021 as erroneously held by the Review Board, that the tender is still valid for 102 days as tabulated in his affidavit.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's Reply to the applicant's further affidavit



40. In their further affidavit sworn by Mr. Moses Sirgoi, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents state that:- the Tender Data Sheet (TDS) and the Instructions to Tenderers (ITT) provided the tender validity period shall be 150 days; that the Accounting Officer of the Procuring Entity extended the tender validity period once for 30 days; that the Review Board extended the tender validity period; and, all the extensions were granted by the Respondents before the expiry of the tender validity period. Additionally, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents state that calculation of the tender validity period is a mathematical exercise and the reckoning of the tender validity period commenced on 5<sup>th</sup> February 2020 which was the deadline date for the submission of bids. Further, that by the 21<sup>st</sup> September 2021 when the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents terminated the tender on account of expiry of the tender validity period, the tender validity period had long lapsed. Lastly, that the applicant's computation of the tender validity period is erroneous.

#### Mode of hearing

41. Both applicant's filed written submissions which they extensively highlighted orally. Counsel for the 1<sup>st</sup> Respondent only filed a reply to the 2<sup>nd</sup> application and submitted orally. For good order, I will here below summarize the parties' submissions on the 1<sup>st</sup> application, then I will address their submissions on the 2<sup>nd</sup> application.

#### The submissions on the 1<sup>st</sup> application

##### a. The applicant's advocates submissions on the 1<sup>st</sup> application

42. The applicant's counsel cited *Pastoli v Kabate District Local Government Council & Others*<sup>5</sup> which 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. He submitted that the scope of Judicial Review remedies has been broadened by the 2010 Constitution and the FAA Act. He argued that in determining Judicial Review proceedings, this court exercises its inherent jurisdiction under Article 165 (6) and Section 7 of the FAA Act and it is required to interrogate the merits of the decision and cited *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others*<sup>6</sup> and *Republic v Public Procurement Administrative Review Board & 3 others Ex parte Techno Relief Services Limited*<sup>7</sup> which held that while exercising supervisory jurisdiction the court can review the merits of a decision, the only restraints being it must not interfere with the matters entrusted to an administrative body or subordinate court. Counsel submitted that the Review Board acted illegally, unreasonably and committed an error of law by proceeding to review, hear and determine a dispute that the Interested Party had already submitted to the High Court. On this ground, he urged the court to review the decision and relied on *Republic v Paul Kihara Kariuki, Attorney General & 2 Others and the Law Society of Kenya*<sup>8</sup> which held that the sub judice rule like other maxims of law has a salutary purpose which is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, same subject matter and the same relief so as to pin down the parties to one litigation to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and to prevent multiplicity of proceedings.

<sup>5</sup> {2008} 2 EA 300.

<sup>6</sup> {2016} KLR

<sup>7</sup> {2021} e KLR.

<sup>8</sup> Nairobi HCC Judicial Review E045/2020.



43. He argued that the Respondent acted unreasonably and committed an error of law by holding that the applicants had not complied with the orders in Request for Review No 150 of 2020. He submitted that the applicants demonstrated that they were at all material times ready to comply with the orders within the confines of the PPAD Act and that the procurement process may be concluded in various ways including termination, cancellation or signing a contract. He argued that there was no decision that the tender be concluded by awarding the tender contract to the Interested Party or any other person.
44. Counsel argued that the Review Board committed an error of law by failing to appreciate that compliance with its order to conclude the procurement process had to be undertaken in accordance with the law, and that in proceeding with the tender process to its conclusion, the applicants were entitled to terminate or cancel the tender in accordance with the provisions of the law. He argued that the decision was tainted with illegality because it effectively required the applicants to act in contravention of the express provisions of Part X Section 115 and 131 of the PPAD Act. It was his submission that the Review Board effectively directed the applicants to defy the provisions of the PPAD Act. He also argued that the Review Boards findings that the applicants failed to comply with the orders was erroneous and unreasonable, and, so was the recommendation that the Director General of the Public Procurement Regulatory Authority, as a regulator, takes measures against the applicants for allegedly failing to comply with the orders.
45. Additionally, counsel submitted that the impugned decision was erroneous, ultra vires the Review Board's jurisdiction and made against the rules of natural justice because the Request for Review did not contain a prayer for such an order, so the, applicants did not have an opportunity to defend themselves against the issuance of the order. Further, that, the said orders expose the applicants to the sanctions set out under Part XVI of PPAD Act. He submitted that the said order was issued in excess of jurisdiction and that section 173 of the PPAD Act does not confer powers to the Review Board to recommend to the Director General to take measures against the applicants. Additionally, he submitted that res judicata is in applicable in the instant case and cited a passage in *Denver Law Review*.<sup>9</sup> Lastly, he argued that the tender involves the utilization of huge sums of tax payers' money, so it is important that the applicants are allowed the leeway to conduct the tendering process in accordance with the law.
- b. The Interested Party's advocates submissions on the 1<sup>st</sup> application
46. The Interested Party's counsel submitted that the decision in No. 150 of 2020 was up held by the High Court and the applicants appeal in Civil Appeal was dismissed by the Court of Appeal, so, the Procuring Entity is obligated to comply with the orders of the Review Board, but instead of complying the applicants terminated the tender pursuant to section 63(1)(a)(i) of the PPAD Act on account of operation of law, i.e., the tender validity period has expired. He argued that the Interested Party successfully challenged the decision before the Review Board in the Review Application No. 123 of 2021.
47. He submitted that the applicants' pleaded that it is aggrieved by order No. (c) issued in 123 pf 2021 yet it seeks to quash the entire decision without demonstrating that they are "persons aggrieved" by the entire decision as contemplated in Section 175(1) of the PPAD Act. He submitted that the term "person aggrieved" is not defined in the PPAD Act although courts in Kenya have interpreted "person

<sup>9</sup> Sandy Gail Nyholm, Volume 52, Issue 2 in January 1975, at page 52.



aggrieved.” He cited *In re Estate of Kimani Nzioki (Deceased)*<sup>10</sup> which considered the interpretation of “person aggrieved” by a decree or order as used in section 80 of the *Civil Procedure Act* as follows: -

“The expression “person aggrieved” was considered to mean a person who has been injuriously affected in his rights or has suffered a legal grievance in *Yusufu v Nokrach* (1971) EA 104 where it was held that the term “any person considering himself aggrieved” under what is Section 80 of the *Civil Procedure Act* meant a person who has suffered a “legal grievance”. What then is a “legal grievance”? Is it a grievance by the definition and standard of law? ... “the words “person aggrieved” do not really mean a man who is disappointed by a benefit which he must have received if no other order had been made: A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title.”

48. Buttressed by the above decision, counsel argued that the applicant ought to establish (i) legal rights (if any) affected by the impugned decision; (ii) legal grievance(s) suffered as a result of the decision; (iii) whether the applicants been wrongfully deprived of anything or title as a result of the decision; and (iv) whether they pleaded and/or disclosed any of the above. He cited *Kenya Ports Authority & Another v Rhombus Construction Company & 2 Others*<sup>11</sup> in which the Court of Appeal considered the import of “person aggrieved” under section 175(4) of PPAD Act (which is in pari materia with the provision of section 175(1)) and held as follows: -

“The 1<sup>st</sup> Respondent has raised an issue of the appellants’ lack of locus standi. According to counsel for the respondent, the appellants are not “persons aggrieved” under section 175(4) of the *Public Procurement and Asset Disposal Act* (PPADA). They are said not to be aggrieved because they have not suffered any injury or deprivation from the decision of the PPADA. Although the term “aggrieved persons” is not defined in the relevant Act, a parallel has been drawn from the *Civil Procedure Act*, more particularly Section 80 thereof. It is the respondents’ case that the appellants have not demonstrated that they have been deprived of any legal rights, and nor have they suffered any loss or injury from the decision that is subject of this appeal...

In a nutshell, we are not persuaded that the Appellants have any legal grievance as against the respondents in this matter. This appeal in our view lacks merit and is hereby dismissed.”

49. He also cited *James Oyondi t/a Betooyo Contractors & another v Elroba Enterprises Limited & 8 others*<sup>12</sup> in which the Court of Appeal held: -

“... It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA.... It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage.

<sup>10</sup> {2020} e KLR.

<sup>11</sup> Mombasa Civil Appeal No. E11 of 2021.

<sup>12</sup> {2019} e KLR.



...The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so.”

50. Fortified by the above authorities, counsel submitted that the applicants ought to have specifically pleaded and demonstrated that they have suffered a legal grievance due to the entire determination and orders of the Review Board in the Review Application No. 123 of 2021. He submitted that the applicants cannot be heard to say that they are aggrieved only by order No. (c) but on the other hand seek substantive orders to quash the entire decision in respect to which they have neither specifically pleaded nor shown themselves as aggrieved by the entire decision of the Review Board. He submitted that in the absence of the specifically pleading the legal grievance suffered as a result of the entire decision of the Review Board, this court ought to find that the applicants lack locus standi to institute these judicial review proceedings. Accordingly, counsel submitted that this court lacks the requisite jurisdiction to take cognizance of, hear and determine the application. In the alternative, he argued that even if the court had jurisdiction, the orders sought cannot be granted in the circumstances because the orders sought are against the entire decision of the Review Board in Review no. 123 of 2021 yet the grievance pleaded is limited in scope to order no. (c) of the Review Board’s decision.
51. Without prejudice to the above, counsel argued that the applicant’s assault on the decision in Review No. 123 of 2021 is founded on illegality, errors of law, unreasonableness and ultra vires. He argued that the Interested Party was aggrieved by the applicants’ failure to comply with their obligations under the PPAD Act and the Regulations thereunder particularly the applicants’ obligation under section 175(6) of PPAD Act to comply with the final and binding decision of the Review Board. He argued that under Section 174 of the PPAD Act the right to request a review is in addition to any other legal remedy a person may have and cited the Black’s Law Dictionary which defines “legal remedy” as “A remedy historically available in a court of law, as distinguished from a remedy historically available only in equity.”
52. He submitted that the Interested Party rightfully invoked its right to seek administrative review notwithstanding the pendency of contempt of court proceedings (which is quasi-criminal in nature). He submitted that the Review Board is not precluded from hearing and determining Application no. 123 of 2021 by the doctrine of sub judice.
53. He submitted that the tender validity period had not lapsed and that the applicants had no discretion to conclude the process by way of termination, so the purported termination is unlawful and contrary to the substantive and procedural requirements of section 63 of PPAD Act. He argued that the order directing the parties to engage in competitive negotiations were not challenged and it is therefore final. He submitted that the applicant’s case is founded on misconception of the legal principles and grounds for judicial review. He argued that the Review Board made its decision lawfully and procedurally so prayer (c) cannot be faulted because the Review Board had jurisdiction.
54. Further, he argued that Review Board acted fairly and it considered all the submissions by the parties nor has the Procuring Entity demonstrated any illegality and/or unreasonableness in the order no. (c) which was within the scope of orders which the Review Board can grant under section 11 of the FAA Act as read with section 28(1)(b) of the PPAD Act and section 48 of the *Interpretation and General Provisions Act*.<sup>13</sup> He argued that judicial review orders are discretionary in nature (Citing *Republic v Public Procurement Administrative Review Board & another Ex-parte Express DDB Kenya Limited*<sup>14</sup>). He submitted that the Review Board is established under section 27 of the PPAD Act, and pursuant

<sup>13</sup> Cap 2, Laws of Kenya.

<sup>14</sup> {2018} e KLR.



to section 28 of the Act, it has mandate to review, hear and determine tendering and asset disposal disputes. He also cited its powers under section 173.

55. He cited the remedies available under section 11 of the FAA Act and argued that section 48 of the *Interpretation and General Provisions Act* which provides Where a written law confers power upon a person to do or to enforce the doing of an act or thing, all powers shall be deemed to be also conferred as are necessary to enable the person to do or to enforce the doing of the act or thing and submitted that the Review Board had jurisdiction to take cognizance of, hear and determine the Request for Review Application No. 123 of 2021. He argued that the applicant has failed to demonstrate that the Review Board's decision in review no. 123 of 2021 was so irrational such that no reasonable body properly directing itself as to law could have reached such a decision. To buttress his argument, he cited *Halsbury's Laws of England*<sup>15</sup> in support of the proposition that discretionary power must be exercised for proper purposes which are consistent with the statute.

The submissions on the 2<sup>nd</sup> application

c. The applicant's advocates submissions

56. Mr. Omollo, counsel for the applicant in the 2<sup>nd</sup> application also cited *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others*<sup>16</sup> and argued that the scope of judicial review was expanded by the 2010 Constitution and the FAA Act.<sup>17</sup> He faulted the decision on grounds that it is tainted with illegality, error of law, irrationality and violation of the applicant's legitimate expectations. On the alleged illegality and errors of Law, he argued that 7(2) of the FAA Act mandates this court to review a decision for failure to take into account relevant considerations. He cited De Smith's Judicial Review 8<sup>th</sup> Ed in support of the proposition that a decision suffers from illegality if the decision maker misinterprets the law, lacks authority to render the decision and improper exercise of discretionary power or takes into account irrelevant considerations or improperly delegates his power. He cited Halsbury's Laws of England in support of the proposition that a public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law; takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant considerations into account, or fails to take relevant considerations into account; admits inadmissible evidence, or takes a decision on no evidence; misdirects itself as to the burden of proof; fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power.
57. He argued that the Review Board failed to take into account relevant considerations in holding that the tender died a natural death and by failing to determine the scope of its powers. He argued that the Respondents misconstrued tender validity in public procurement process which is essentially to commit the tenderer to keep the validity period for specific period to safeguard against withdrawal or modifications. He submitted that under section 176(6) of the PPAD Act, any action taken contrary to the act is null and void and any act of nullity is incapable of commencing the reckoning of time for time-bound actions in statute. He relied on *Stephen Kibowen v Chief Magistrate's Court Nakuru & 2 others*<sup>18</sup> and faulted the Review Boards computation of time.

<sup>15</sup> 4<sup>th</sup> Edition Vol 1(1), para. 86 and also para. 84.

<sup>16</sup> {2016} e KLR.

<sup>17</sup> {2016} e KLR.

<sup>18</sup> {2017} e KLR.



58. Counsel reiterated computation of time in the affidavit and maintained the tender is still valid for 102 days. He faulted the Review Board for failing to take into account the scope of its powers under sections 27 and 28 of the PPAD Act and section 11 of the FFA Act. He cited section 7(2)(i) of the FAA Act and argued that this court can review a decision on grounds of irrationality which should include failure to comply with court orders. Additionally, he argued that section 7(2)(m) mandates this court to review a decision on grounds of breach of legitimate expectation and cited *Revenue Authority Ex- Parte Aberdare Freight Services Ltd & 2 others*<sup>19</sup> and [\*Kenya Revenue Authority & 2 others v Darasa Investments Limited\*](#).<sup>20</sup> He argued that the applicant had legitimate expectation that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents would comply with the court orders. Citing a catena of decided cases, counsel argued that the applicant has established a case for the orders sought.

d. The 1<sup>st</sup> Respondents advocates submissions

59. M/s Nyakora, counsel for the 1<sup>st</sup> Respondent supported the submissions by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. She submitted that in granting the orders, the Review Board acted in accordance with sections 173 and 28 of the PPAD Act. She urged this court not to disturb the decision citing Halsbury's Laws of England<sup>21</sup> in support of the proposition that if a body arrives at a decision within its jurisdiction, the same will not be disturbed even if the court does agree with the decision. She submitted that the Review Board has no powers where the tender validity period has lapsed (Citing *Republic v Public Procurement Administrative Review Board; Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S (interested party); National Irrigation Board Ex Parte*<sup>22</sup>). She submitted that once a tender validity period has lapsed, it cannot be resuscitated even by consent of the parties or the Review Board. She submitted that the Review Board acted lawfully and procedurally. Further, she submitted that judicial review does not deal with merits nor can this court substitute its decision with that of the Review Board.

e. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's advocates submissions on the 2<sup>nd</sup> application

60. Counsel submitted that the Respondents neither committed any illegality nor errors of law; that the 1<sup>st</sup> Respondent properly exercised her jurisdiction and statutory mandate by holding that the tender validity period had lapsed and the same could not be extended. (Citing *Pastoli vs Kabate District Local Government Council & Others* (2008) 2 EA 300). Counsel also cited *Joubert Galpin Searle & 3 others v The Road Accident fund & 34 others* while citing *Allopay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others*<sup>23</sup> which held that the primary focus in scrutinizing administrative action is on the fairness of the process, not the substantive correctness of the outcome.

61. Counsel submitted that once it is established that the tender validity period has lapsed, the tendering process is deemed to be complete albeit unsuccessfully and cited *Telkom SA Limited v Merid Training (Pty) Ltd and Others, Bihati Solutions (Pty) Ltd v Telkom SA Limited and Others*. He also cited *Republic v Public Procurement Administrative Review Board; Consortium of GBM Projects Limited*

<sup>19</sup> {2004} e KLR.

<sup>20</sup> 2018} e KLR.

<sup>21</sup> Vol 1 Page 74.

<sup>22</sup> {2020} e KLR.

<sup>23</sup> 2014 (1) SA 604 (CC) C.



and *ERG Insaat Ticaret Ve Sanayi A.S (interested party); National Irrigation Board Ex Parte*<sup>24</sup> which held that once the validity period of a tender has expired, the tender proceedings are concluded albeit unsuccessfully. He argued that time was only held in abeyance until the 26<sup>th</sup> April, 2021 when the Court of Appeal rendered its decision in Mombasa Civil Appeal No. E11 of 2021 and as at that point as correctly pointed out the Review Board at page 65 of the impugned decision, only 18 days remained for the expiry of the tender validity period.

62. Counsel dismissed the applicant's claim on legitimate expectation as a misconception. He also described the applicant's computation of time as erroneous and illogical. On the submissions on illegality, counsel argued that at all times, the Procuring Entity was required to follow the law and cited *Mistry Amar Singh vs Serwano Wofunira Kulubya*<sup>25</sup> in support of the proposition that no court ought to enforce an illegal contract. He argued that it is not correct to say that the tender could only be concluded by an award to the applicant. He submitted that the Respondent's decision was not tainted with irrationality and relied on *Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited*.<sup>26</sup> Lastly, counsel faulted the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are sued as principal parties in this application.

#### Determination

63. I propose to start by addressing a pertinent issue which was urged by Mr. Omollo against the 1<sup>st</sup> application. He argued that the Procuring Entity in its pleadings clearly averred that it is aggrieved by order number (c) of the orders issued on 2<sup>nd</sup> November, 2021 in Request for Review Application No. 123 of 2021; which reads: - "The Board recommends to the Director General of the Public Procurement Regulatory Authority, as a Regulator, to take necessary measures against the Respondents herein provided in law, for deliberately failing to comply with the Orders of the Board in PPARB Application No. 150 of 2020.
64. The relevant averments are to be found at paragraph 43 of the grounds in support of the substantive application. They are replicated at paragraph 43 of the application seeking leave and paragraph 43 of the Statutory Statement. Despite this clear averment postulating its only grievance, the Procuring Entity in its substantive application seeks to quash the entire decision in No. 123 of 2021. This apparent oxymoron, a contradiction of terms is what Mr. Omollo urged this court to address and find that it is impermissible. As I seek to address this manifest incongruity, it is important to accentuate the function of and purpose of good pleadings. I cannot think of a better way than to reminiscence the following excerpt.<sup>27</sup>

"In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything. ... Elegance is the simplicity found on the far side of complexity.

<sup>24</sup> {2020} e KLR.

<sup>25</sup> 1963 EA 408, at page 414.

<sup>26</sup> {2018} e KLR.

<sup>27</sup> In *SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* {2011} VSC 492 at [3]-[6]



While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.

... Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination.”<sup>28</sup> (Emphasis supplied)

65. Pleadings must be lucid and logical and in an intelligible form. (See the Court of Appeal in *Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited*<sup>29</sup>). As Mr. Omollo correctly pointed out the PPAD Act does not contain a definition of the term ‘aggrieved person.’ However, courts have had occasions to deal with the meaning of the term in various other statutory contexts. In *Jeeva and another v Tuck NO and others*,<sup>30</sup> dealing with the term in the context of the South African *Insolvency Act*, the court said that although the interest need not be measurable in money, a legal right must still be proved:

“Aggrieved” means injured or wronged in one’s rights (see The New Shorter Oxford English Dictionary). It follows that any person who was so injured or wronged may take the matter on review ..., and that is no different from the position at common law. The expression “aggrieved person” was defined by James LJ in *Ex parte Sidebotham* (1880)14 ChD 458 (CA) at 465 as follows:-

“...A “person aggrieved” must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title to something.”

66. Lord Denning in *Attorney-General of the Gambia v N’jie*<sup>31</sup> stated that the definition of aggrieved person given by James LJ in *Sidebotham* was not exhaustive. However, it will suffice to say that such a person must surely be a person who has a legitimate legal grievance, for example, a person against whom a decision has been pronounced that wrongfully deprives him or her of something, for instance an entitlement, benefit or right, or unlawfully accuses him or her of something, or wrongfully affected his or her title to do something. In this regard, section 175(1) of the PPAD Act provides: -

A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board’s decision, failure to which the decision of the Review Board shall be final and binding to both parties.

<sup>28</sup> See also *Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2008] VSC 77 [1-4]; *Hoh v Frosthollow Pty Ltd and Ors* [2014] VSC 77 at [13] – [20].

<sup>29</sup> {2015} e KLR.

<sup>30</sup> 1998 (1) SA 785 (SE).

<sup>31</sup> [1961] 2 All ER 504 (PC).



67. A reading of the provision leaves no doubt that a person seeking review must show that he is aggrieved by the decision. To the extent that the Procuring Entity in its application clearly pleaded that it is only aggrieved by order (c), it cannot mutate its application and purport to seek review of the entire decision, yet it did not plead its aggrieved by the rest of the orders nor did it prefer an amendment to cover the entire ruling. The Procuring Entity is bound by its pleadings. It has not brought itself within the phrase of an “aggrieved person” to seek to review the entire ruling. On this ground alone, I find and hold that I will have no basis to review all the final orders since the it was explicit that it is was only aggrieved by order (c).
68. With regard to order (c), the core issue as I see it is whether the Review Board acted without jurisdiction or in excess of jurisdiction in granting the said order in which it recommended the Director General of the Public Procurement Regulatory Authority, as a Regulator, to take necessary measures against the Procuring Entity as provided in law, for deliberately failing to comply with the Orders of the Board in PPARB Application No. 150 of 2020.
69. A convenient starting point for a discussion of jurisdictional error is the following proposition: “any grant of jurisdiction will necessarily include limits to the jurisdiction granted, and any grant of a power remains subject to conditions.”<sup>32</sup> When the legislature grants authority to an administrative decision-maker, the authority will perforce be limited; the decision-maker must act within the jurisdiction it has been granted.
70. Where an administrative decision-maker commits an error of law by interpreting the law incorrectly, a reviewing court may intervene. *Anisminic v Foreign Compensation Commission*<sup>33</sup> was a watershed case. A majority of the House of Lords held that an error in interpreting an Order in Council justified judicial intervention, even in the face of a privative clause.<sup>34</sup> As Lord Pearce put it, administrative decision-makers must “confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament.”<sup>35</sup> When courts intervene to keep an administrative decision-maker within boundaries established by legislation, this represents “simply an enforcement of Parliament’s mandate to the tribunal.”<sup>36</sup> That the “very effectiveness” of statute should be ensured by judicial review<sup>37</sup> is underpinned by rule-of-law concerns: “By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law.”<sup>38</sup>

<sup>32</sup> *Union des employés de service, local 298 v Bibeault* [1988] 2 SCR 1048 at 1086, *per* Beetz.

<sup>33</sup> {1969} 2 A.C. 147.

<sup>34</sup> It is now widely accepted that the logic of *Anisminic* means that errors of law will generally justify judicial intervention. See *e.g. In re A Company*, [1981] A.C. 374, at p. 383, *per* Lord Diplock: “The break-through made by [*Anisminic*] was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished”; *R. v Hull University Visitor, ex parte Page*, [1993] A.C. 682, at p. 701, *per* Lord Browne-Wilkinson: “In my judgment the decision in [*Anisminic*] rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires”.

<sup>35</sup> {1969} 2 A.C. 147, at p. 194.

<sup>36</sup> {1969} 2 A.C. 147, at p. 196. See similarly *R. v Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 K.B. 338, at p. 346.

<sup>37</sup> *R. (Cart) v Upper Tribunal*, [2009] EWHC 3052, [2010] 1 All E.R. 908, at para. 38, *per* Laws L.J.

<sup>38</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 29.



71. However, a statute might grant significant decisional authority to an administrative decision-maker, which a court paying due respect to the scope of the authority would be obliged to take into account: -

“The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more.... [In such a case] it is an erroneous application of the [jurisdictional error] formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends...”<sup>39</sup>

72. Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.<sup>40</sup> A more specific definition of Jurisdictional error is defined as follows:-

“Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers.”<sup>41</sup>

73. Section 28 of the act provides for functions of the Review Board as (a) reviewing, hearing and determining tendering and asset disposal disputes; and (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law. Section 8 of the PPAD Act gives the PPRa a wide mandate, the only limitation being it cannot investigate matters which are subject to administrative review. The Review Board having rendered its final decision, the matters cannot be said to have been subject to administrative review. Lord Reid in *Animistic v Foreign Compensation Commission*<sup>42</sup> held that: -

“It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in questions. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have

<sup>39</sup> *R v Income Tax Special Commissioners, ex parte Cape Copper Mining Company* (1888) 21 QBD 313, at pp. 319-320, per Lord Esher MR. See e.g. *Tithe Redemption Commission v Wynne* {1943} KB 756.

<sup>40</sup> See *R v Hillingdon London Borough Council, ex parte Publhofer*, {1986} AC 484, at p. 518, per Lord Brightman.

<sup>41</sup> *Craig v South Australia* [1995] HCA 58.

<sup>42</sup> {1969} 1 All ER 20.



misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.”

74. Here is a situation whereby the Review Board flouted orders issued by the Review Board. Here is a case whereby the Review Board directs the body which is statutorily ordained to perform the functions in section 9 of the PPAD Act to perform a matter within the ambit of its mandate. A holistic and purposive reading of the Act leaves no doubt that there is no bar, legal, equitable, or otherwise preventing the Review Board from recommending the investigations. It would be an absurdity and an unfaithful interpretation of the law to suggest otherwise. The invitation to find otherwise amounts to what I call unnecessary straining the language and intent of a statute without due regard to the intention of Parliament. I decline the invitation to subscribe to such unfaithful interpretation of the law. In the words of Baroness Helena Kennedy QC, a woman activist and chair of the British Council:<sup>43</sup>

“Law is the bedrock of a nation, it tells who we are, what we are, what we value...almost nothing else has more impact on our lives. The law is entangled with everyday existence, regulating our social relation, and business dealings, controlling conduct which could threaten our safety and security, establishing the rules by which we live. It is the baseline.”

75. In several of my decisions I have stated that law is the bloodline of every nation. The end of Law is justice. It gives justice meaning. It is by yielding Justice that law is able to preserve order, peace and security of lives and property, make the society secure and stable, regulate and shape the behaviour of citizens, safe guard expectations, function as a means of governance, a device for the distribution of resources and burdens, a mechanism for conflict resolution and a shield or refuge from misery, oppression and injustice. Through the discharge of these functions, the law has today assumed a dynamic role in the transformation and development of societies. It has become an instrument of social change.<sup>44</sup> I am unable to fault the Review Board’s decision in issuing prayer (c). Also, I find no merit in the grounds cited by the 1<sup>st</sup> applicant.

76. However, I will address the argument that the 2<sup>nd</sup> Applicant sought the same orders it was seeking in the High Court, so, the Review Board erred by addressing matter which were the subject of a pending application in the High Court. In its ruling, the Review Board considered this argument and ruled that what was before the High Court was an application under section 5 of the *Judicature Act*.<sup>45</sup> To me, this is a merit finding and the invitation to this court to delve into the said issue is a ground of appeal. I decline the invitation to travel along that forbidden route.

77. I now turn to the 2<sup>nd</sup> application. To me, the core issue is whether the tender validity period had lapsed. Mr. Omollo deployed a lot energy in his bid to persuade the court to accede to his argument that the Review Board erred in finding that the tender validity period had lapsed and that it was dead. Mr. Omollo’s argument on this is issue including an attempt to compute time is appealing. But that is how

<sup>43</sup> Published in Just Law {2004}.

<sup>44</sup> *Masinga vs Director of Public Prosecutions and Others* (21/07) {2011} SZHC 58 (29 April 2011: High Court of Swaziland.

<sup>45</sup> Cap 8, Laws of Kenya.



far it goes. This because before the Review Board Mr. Omollo took a diametrically different position as captured at page 37 of the judgment: -

“... the appellant has not disputed that the tender validity has expired but has challenged the purported termination of the proceedings of the subject tender on grounds that such termination is contrary to the final binding decisions of the Board in PPARB Bo. 131 of 2020 and 150 of 2020 and therefore null and void because...”

78. In fact, at prayer (b) in Request for Review No. 123 of 2021, he sought a specific prayer for extension of the tender validity period, an admission that the tender validity period had lapsed. Now the same party has taken a strong position that the tender was valid and even suggested it was valid by 102 days. At page 65 of the judgment, the Review Board had this to say: -

“...we note that the applicant has not controverted the assertion that the tender validity period of the subject tender has expired. In the premises, the Board finds it common ground that at the time of filing the instant Request for Review, the tender validity period had expired.”

79. After meticulously and admirably analyzing the facts, the Review Board extensively cited Republic v Public Procurement Administrative Review Board; Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S (interested party); National Irrigation Board Ex Parte<sup>46</sup> and concluded that the subject tender is dead and incapable of being brought back to life. It also held (and correctly so), that any award subsequent to an expiry of the tender validity period would be unlawful since an award of a tender is required to be made within the tender validity period of a tender as enshrined in section 87 of the Act.

80. Two consequences flow from the foregoing position taken by Mr. Omollo and his client before the Review Board. One, is whether it is open for Mr. Omollo and his client to now take a contrary position before this court and urge this court to find that the tender is valid by a whopping 102 days. Simply put, does the doctrine of estoppel apply in such circumstances.

81. Talking about estoppel, I find it prudent to state that there are two species of estoppel per rem judicatam namely: - (i) cause of action estoppel; and (ii) issue estoppel. The particular type of estoppel in this case is issue estoppel. The classic modern statement of the nature of issue estoppel is to be found in a passage from the judgment of Diplock LJ (as he then was) in *Mills v Cooper*,<sup>47</sup> approved subsequently by the House of Lords in *DPP v Humphreys*.<sup>48</sup> Diplock LJ said: -

“This doctrine [namely of issue estoppel], so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him.”

<sup>46</sup> {2020} e KLR.

<sup>47</sup> {1967} 2 All ER 100 at 104.

<sup>48</sup> {1976} 2 All ER 497



82. This doctrine applies even though the decision on the first occasion, said to give rise to the estoppel, had resulted from a mistaken appreciation of the underlying facts, or from an incorrect view of the underlying law, as is apparent from what Coleridge J said in *R v Hartington Middle Quarter (Inhabitants)*<sup>49</sup> when delivering the judgment of the court: -

“The question then is, whether the judgment concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue. And we think it does conclude to that extent. It is unnecessary now to rely on the judgment having been in rem; for it was a judgment between the same parties: the matters which are cardinal in the present litigation cannot now be disputed, without asserting that the decision upon them in the former case was erroneous. But this they cannot do directly; they have passed their time, and neglected the lawful mode; they cannot now shew by adducing new evidence that the Court was misled as to the facts, nor by new argument or authority that it drew a wrong conclusion in law. In the case of *Regina v. Wye* ((1838) 7 Ad & El 761, 112 ER 656), a case sometimes misunderstood, this principle was very clearly affirmed, in accordance with prior decisions. If, then, the former decision cannot be impeached, and these facts are so cardinal to it that without them it cannot stand, on principle, when these facts are again in question between the same parties, they must be considered as having been conclusively determined.”

83. To establish an issue estoppel there must have been a final judgment between the same parties or their privies, litigating in the same capacity in the same issue, and the estoppel must be pleaded.<sup>50</sup> The operation of issue estoppel, therefore, is subject to the following five requirements being met: - Finality of judgment, Identity of parties, Identity of capacity, Identity of issue and pleading of estoppel. The authorities show that from the outset the doctrine of issue estoppel has been expressed to be subject to exceptions, as is apparent from the passages from the judgement of Wigram V-C in *Henderson v Henderson*<sup>51</sup> and the judgment of Diplock LJ in *Mills v Cooper*.<sup>52</sup> This enabled *Browne-Wilkinson V-C* in *Arnold v National Westminster Bank*<sup>53</sup> to say:-

“It is therefore clearly established (and counsel for the landlords accepts) that there can be exceptional circumstances which prevent an issue estoppel from arising. In my judgment it is equally clear that in order for such special circumstances to exist it must be shown earlier that the first decision is impeachable on the usual grounds (that is to say fraud, collusion, etc) or that the first relevant new material, not available at the time of the first decision, has since become available.”

<sup>49</sup> (1855) 4E & B 780 at 794, 119 ER 288 at 293.

<sup>50</sup> See *Murphy's A Practical Approach to Evidence*, 3rd Ed, p313.

<sup>51</sup> (1843) 3 Hare 100.

<sup>52</sup> {1967} 2 QB 459.

<sup>53</sup> {1988} 3 All ER 977 at 981D.



84. And at 982D:-

“Res judicata, whether cause of action estoppel or issue estoppel, is based on the fundamental principle that it is unjust for a man to be vexed twice with litigation on the same subject matter coupled with the public interest in seeing an end to litigation. So far as cause of action estoppel is concerned, the rule is absolute: you cannot sue twice for the same relief based on the same cause of action even if new facts or law have subsequently come to light. But it is clear that the rule as to issue estoppel is different as the authorities which I have quoted demonstrate; there are circumstances in issue estoppel where the injustice of not allowing the matter to be relitigated outweighs the hardship to the successful party in the first action in having to relitigate the point...”

85. Authorities show that the exception applying to 'special circumstances' is designed to ensure that where justice requires the non-application of issue estoppel, it shall not apply.<sup>54</sup> As Lord Upjohn said: -<sup>55</sup> "All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind." In the instant case, the applicant before the Review Board did not dispute that the tender validity period had lapsed. In fact, it sought a specific prayer for its extension, a clear admission that the validity period had lapsed. That prayer was considered and declined, evidently drawing the curtain on the tender. It is not open for the same applicant to turn around and take a diametrically opposed position and attempt to argue that in fact, the same tender was still valid. The attractive computation of time being proffered before me ought to have been canvassed before the Review Board. On this ground alone, the 2<sup>nd</sup> application collapses.

86. The other reason why the 2<sup>nd</sup> application collapses is that as the Review Board correctly held, the tender is dead and any award subsequent to an expiry of the tender validity would be unlawful because an award of a tender is required to be made within the tender validity period as articulated in section 87 of the PPAD Act. This being the position, it would serve no salutary purpose to discuss any of the other grounds argued in the 2<sup>nd</sup> application.

Final orders

87. Flowing from my analysis of the facts and the law and the conclusions arrived at, the only order which commends itself for the consolidated Judicial Review applications is that of dismissal. The upshot is that the Judicial Review applications dated 16<sup>th</sup> November 2021 (the 1<sup>st</sup> application) and the application dated 19<sup>th</sup> November 2021 (the 2<sup>nd</sup> application) be and are hereby dismissed. Each party shall bear its own costs.

**SIGNED, DATED AND DELIVERED VIA E-MAIL AT MOMBASA THIS 11<sup>TH</sup> DAY OF JANUARY 2022.**

**JOHN M. MATIVO**

**JUDGE**

<sup>54</sup> see *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd* [1975] AC 581 at 590.

<sup>55</sup> see *Carl-Zeiss-Stiftung vs. Rayner & Keeler Ltd* (No 2) at 554

