Republic v Public Procurement Regulatory Authority & another; Auto Terminal Japan Limited (Exparte Applicant); Auditor General & another (Interested Parties) (Judicial Review 55 of 2022) [2022] KEHC 10782 (KLR) (Judicial Review) (27 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10782 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW 55 OF 2022

AK NDUNG'U, J

MAY 27, 2022

IN THE MATTER OF DEBARMENT APPLICATION NUMBER 4 OF 2021 AND NO. 5 OF 2021 (CONSOLIDATED)

BETWEEN

REPUBLIC .... APPLICANT

AND

PUBLIC PROCUREMENT REGULATORY AUTHORITY ..... 1ST RESPONDENT

PUBLIC PROCUREMENT REGULATORY BOARD .... 2ND RESPONDENT

AND

AUTO TERMINAL JAPAN LIMITED .... EXPARTE APPLICANT

AND

AUDITOR GENERAL .... INTERESTED PARTY

CHARLES NZAI .... INTERESTED PARTY

JUDGMENT

Background

1. Pursuant to leave of court granted on the 12th April, 2022, Auto Terminal Japan (hereinafter the applicant) moved this court vide a Notice of Motion dated 8th April, 2022 and subsequently amended on 16th May, 2022 for orders:

(i) An order of certiorari to remove into this Honourable Court and quash the entire decision of 1st and 2nd Respondents herein in Debarment Application Number 4 and 5 of 2021, dated 2nd June, 2021 which was delivered on 25th March, 2022.

(ii) An order of Prohibition to prohibit and/or restrain the Respondents and/or its agents and any other persons from implementing the decision delivered in Debarment Application Number 4 and 5 of 2021, dated 2nd June, 2021 which was delivered on 25th March, 2022.

(iii) Such other further order and/ or incidental orders or directions as this Honorable Court shall deem just and expedient;

(iv) The costs of this application to be provided for.

2. The facts giving rise to the claim is that the 1st Respondent received a special audit report from the Auditor General (the 1st Interested Party) dated 10th July, 2019 with a recommendation for debarment of the applicant. The 2nd applicant filed a request for debarment of the applicant with the 1st Respondent vide an application dated 18th March, 2021. The 1st Respondent instituted debarment proceedings viz Debarment application no. 4 and 5 of 2021.

3. The Debarment Committee of the 2nd Respondent in a decision dated 2nd June, 2021 found both applications meritable and the applicant was debarred for the minimum period of 3 years in accordance with the provision of S41(4) of the *Public Procurement and Asset Disposal Act*. (PPADA)

The Applicant's Case:

4. The applicant challenges the outcome of the debarment proceedings first on the basis that reliance was placed on the findings of the National Assembly Committee Report whose implementation had been stayed by the High Court in Judicial Review Application No. 104 of 2020, *Republic vs. Clerk of the National Assembly and 2 others*. It is urged that similar orders had been made in Judicial Review Application no. 88 of 2020, *Republic vs. Clerk of the National Assembly and 2 others* which had stayed an investigation report by the 1st Respondent which report touched on the applicant. In so doing, the respondents are said to have acted ultra vires by making a decision arising from the National Assembly report which had been relied upon by the 1st Interested Party and thereafter by the respondents in their decision despite the stay orders.

5. It is contended that the 2nd Respondent's Debarment Committee denied the applicant a chance to cross-examine witnesses and the committee's decision was thus based on untested allegations and unverified documents. Further, that the respondent proceeded to act ultra vires by determining debarment applications that did not meet the mandatory threshold on what amounts to a request for debarment.

The Respondent's Case

6. The Respondent's case is set out in the replying affidavit of Patrick K. Wanjuki, the Director General of the 1st Respondent herein. He avers that the 1st Respondent received a special Audit Report from the 1st Interested Party dated 10th July, 2019 with a recommendation for debarment of the applicant. The said report was adopted by the National Assembly on 13th October, 2021 with recommendation that debarment proceedings against the applicant and another be commenced.

7. Mr. Wanjuki further states that vide an application dated 18th March, 2021, the 2nd Interested Party filed a request for debarment of the applicant. Seized of the recommendation for debarment by the

Auditor General and Request for debarment by the 2nd Interested Party, the 1st Respondent instituted debarment proceedings in debarment applications No. 4 and 5 of 2021 which were consolidated.

8. It is Mr. Wanjuki's case that all the parties in Debarment Applications no. 4 and 5 of 2021 were heard and given an opportunity to make presentations and after consideration of the parties' pleadings and submissions the Debarment Committee of the 1st Respondent in a decision dated 2nd June, 2021 found that both requests for debarment had disclosed a case for debarment of the applicant for falsification of information and documents contrary to Section 41(1) (d) of the PPADA. The applicant was debarred in accordance with the powers bestowed on the 2nd respondent for the minimum period of 3 years.

9. Mr. Wanjuki further states that before the delivery and publication of the decision, the applicant had moved to court in Constitutional Petition No. E1919 of 2021 where it obtained orders suspending the debarment proceedings. The petition was subsequently dismissed by the court in its ruling of 24th March, 2022. The applicant was directed to appear before the 1st Respondent and contest the debarment proceedings and any other issues.

10. It is urged that by coming back to the same court seeking similar orders, the applicant's case is res judicata. That notwithstanding, even on the substance of the applications, it is the respondents' case that the applicant is misguided and has misapprehended the law applicable in debarment proceedings.

2nd Interested Party's Response

11. The 2nd Interested Party's (Dr. Nzai) response is contained in his replying affidavit sworn on 24th May, 2022. It is his case that the applicant herein was disclosed that it flew a request for Review no. 14 of 2018 before the Public Procurement Administrative Review Board but was withheld material information contained in the decision of the Review Board dated and delivered on 6th February, 2018.

12. Quoting from the decision of the Review Board, Dr. Nzai that the Board found as follows at page 32 of the decision:

> "The Board further noted that Applicant attached a Letter of Recommendation for M/S ATJ Inspection UK Ltd from M/S Drake & Scoll Solicitors and not a Certificate of Incorporation as required. The Board further observed that, the Letter of Recommendation is dated December 8, 2017 and yet the company M/S ATI Inspection UK Ltd was alleged to have been registered on December 11, 2017. The Solicitors' letter states that M/S ATJ Inspection UK Ltd was registered company by the date of their letter, which is a contradiction going by the date of registration of the company ATJ Inspection UK Ltd."

13. Dr. Nzai maintains that there is material non-disclosure by the applicant and on that account, the application herein ought to be dismissed on account of non-disclosure.

14. He adds that having full knowledge of the above facts which are grounds for debarment under the PPAD Act and being a "person with knowledge of facts that may support one or more grounds for debarment" within the meaning of rule 22(1)(a) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter "PPAD Rules"), he lodged the Request for Debarment No. 5 of 2021 on 18th March 2021. His request for debarment is annexed thereto and marked CCN-03.

15. It is urged that debarment proceedings were commenced against the applicant. The applicant lodged Petition E191 of 2021 before the Constitutional and Human Rights Division of the High Court challenging the debarment proceedings and conservatory orders were issued. The Petition was vide the court's ruling of 24th March 2022 dismissed and conservatory orders vacated.

16. Dr. Nzai depones that he has read and understood the contents of the application, the Statutory Statement and the Verifying Affidavit thereto and whereas the Ex Parte Applicant challenges the 1st Interested Party's Special Audit Report on various fronts, the Ex Parte Applicant has not challenged any of the factual basis for his Request for Debarment of the Ex Parte Applicant. He adds that the decision reached by the debarment committee was lawful and procedural.

17. It is urged that the applicant was accorded a fair hearing and that regulation 22(5) does not make provision for cross examination of witnesses. Opportunity to controvert the evidence adduced was allowed and indeed Isaack Peter Kalua swore an elaborate replying affidavit on 15th April, 2021.

18. Dr. Nzai's further states that he believes that pursuant to Section 4(6) of the *Fair Administrative Action Act*, the Debarment Committee of the 2nd Respondent was entitled to follow its rules of procedure entrenched in rule 22(5) of the PPAD Regulations and which rules of procedure have not been faulted by the Ex Parte Applicant herein as being contrary to Article 47 of *the Constitution*.

Submissions

19. The applicant's submissions are dated 18th May, 2022 lodged in court by their counsel on record M/s. James Oketch and Company Advocates.

20. Counsel sets out 4 issues for determination namely:

    a) Whether the Respondents' decision dated 2nd June, 2021 violated the Applicant's rights under Article 10(1)(a), 47(1), Article 50 of *the Constitution* of Kenya, 2010.

    b) Whether the Respondents' decision violated Regulation 22 of the Public Procurement and Asset Disposal Regulations.

    c) Whether the 1st Interested Party acted ultra vires and in violation of Article 10(1)(a)(b)(c), Article 47(1), Article 229 (4)(5) and (6) of *the Constitution* of Kenya and Section 7 of the *Public Audit Act*, 2015 by exceeding the mandate of the Auditor General to audit third parties.

    d. Whether the respondent's decision to debar the applicant was irrational and unreasonable.

21. It is submitted that the respondents denied the applicant the right to a fair hearing under Article 50 of *the Constitution*. The applicant was never given an opportunity to have the documents relied on by the interested parties verified and/or confirmed. It is urged that denial of the right to cross examine the 1st and 2nd Interested Party denied the applicant its rights to a fair hearing. In the process, the applicant's rights under Article 47 and 50 of *the Constitution* were violated.

22. Counsel urges that the respondent relied on the findings of the 1st interested party's audit which had been made in violation of Article 47(1) of *the Constitution* by failing to hear the applicant before making the final audit.

23. On why cross examination was required, counsel submits that:

    i) Officers of the 1st Interested Party had their Visa applications, logistical and accommodations bookings made by the Applicant's main competitor and company that had previously enjoyed a long monopoly in the industry, M/S QISJ Limited. The said conduct did not inspire confidence in relation to the other prospective bidders to the tendering process, who thereafter, and coincidentally so, became unsuccessful bidders. The 1st Interested Party and its officers who conducted the audit report painted a picture of a pre-determined tendering process and

that save for one company which was awarded the tender, all the other competing companies are now all of a sudden being subjected to debarment proceedings.

ii) In a letter dated 19th June, 2020 the ex parte Applicant wrote to the interested Party citing the officer for acting contrary to section 56, 57, 58 and 59 of the *Public Audit Act* and having committed offences under section 61 of the Act.

iii) In a letter dated 19th August, 2020 from the 1st Interested Party to the Applicant, the 1st Interested Party informed the ex parte Applicant that the matter was active before the Courts and that their hands were tied until the investigations were concluded; and did not controvert any of the allegations made against its officer.

iv) The 1st Interested Party confirmed that its own officer who forwarded the audit report which gave rises to all these subsequent proceedings, was being subjected to investigations based on the allegations levelled against him. This is one of the reasons that it was pertinent for the said officer to be cross-examined during the debarment proceedings; but the Respondents' debarment committee declined and shielded the said officer and did not give any reasons for declining the application to cross-examine.

v) This was despite the ex parte Applicant's oral application to do so on 3rd May, 2021 and formal application filed on 5th May, 2021. From the foregoing, the ex parte Applicant's was not given an opportunity to cross examine the 1st Interested Party officer as well as 2nd Interested Party who relied on unverified documents which also form the debarment application before the 3rd Respondent.

24. It is further submitted that in the High Court at Nairobi in *Edward R. Ouko v Speaker of the National Assembly & 4 others* [2017] eKLR the court held that the right to cross-examine is now a component of fair administrative hearing. The court proceeded to hold as follows at paragraph 154 of the decision:

> " Cross-examination is now a component of fair administrative action. To that extent the previous decisions that held that in administrative action, cross-examination is inapplicable can no longer be good law."

25. Counsel submits that the process of finding forgery and impropriety was unfair and contrary to Article 47 (1) of *the Constitution* as no assessment has done for authenticity of the claims and thresholds of proof. Reliance is placed on the decision in *Kinyanjui Kamau vs. George Kamau* [2015] eKLR.

26. On whether the respondents' actions were in violation of Regulation 22 of Legal Notice no. 69 of Legislative Supplement no. 37 in the *Public Procurement and Asset Disposal Act* (No. 33 of 2015), Counsel submits that the respondents' debarment committee lacked jurisdiction as it purported to hear non-existent request for debarment emanating from the 1st and 2nd interested parties. It is urged that the regulations do not provide for audit reports bearing the equivalence of a request for debarment.

27. It is submitted that even assuming that an Audit Report was to be taken as a Notice of Debarment, the same ought to have been done within 30 days from when the Special Audit Report from the 1st Interested Party was made which was on 10th July, 2019 in accordance with Rule 22(5)(a) of the Regulations.

28. The 2nd Interested party's Notice of Intended Debarment dated 18th March, 2021 is challenged on the basis that it relates to an entity known as M/S EAA Co. Ltd and the 2nd Interested Party has in its pleadings extensively made reference to Messrs EAA Ltd as the respondent under the title application 1 and 2 of 2021. Wherein the applicant herein is not a party. The said reference is repeated in the reply

by the 2nd Interested Party to the preliminary objection together with grounds of opposition making further reference to application no. 1 and 2 of 2021.

29. The 1st interested party is accused of violating Articles 10(1)(a)(b)(c), 47(1), 229(4)(5) and (6) of *the Constitution* and Section 7 of the *Public Audit Act*, 2015 by exceeding the mandate of the Auditor General to audit third parties. It is contended that only a procuring entity's evaluation committee is mandated to conduct due diligence on a bid document. The respondents or interested parties are not. It is urged that the 1st interested party has violated *the constitution* in the following manner;

i. The 1st Interested Party exceeded its constitutional mandate under Article 229 of *the Constitution* in auditing and making a finding against unsuccessful bidders.

ii. The 1st Interested Party acted without power in recommending the petitioner for debarment yet this arose from an audit report conducted outside the scope of its powers.

iii. The 1st interested party violated *the Constitution* in disregarding its constitutional powers and functions and engaging in a constitutional frolic.

iv. Usurping the mandate of other organs of the government which have general powers to investigate matters.

30. It is further submitted that the 1st interested party violated Article 47(1) of *the Constitution* as:

i. It is against the principle of lawfulness for the 1st Interested Party to act beyond the powers conferred under statute to only audit government funded entities.

ii. It is also a violation of the principle of fairness and lawfulness to act without power and in contravention of a mandatory provision of *the Constitution*. All violations of *the Constitution* are unfair.

iii. In acting outside the powers conferred by Article 229 and *Public Audit Act* the 1st Interested Party violated the principle of procedural fairness.

31. Counsel concludes that from the submissions made, the inference one makes is that the respondents' actions were irrational, unfair and unreasonable and reliance is placed on the case H.C. JR No. 96 of2020, *Inerification Quality Services (PVQs) Ltd v Public Procurement Regulatory Authority; Kenya Bureau of Standards (Interested Party)*

The 1st_and 2nd_Respondent's Submissions

32. Counsel submits that the issues raised herein were adjudicated within Constitutional Petition No. E191 of 2021. It is urged that in the ruling thereof, the applicant herein was directed to subject itself to the debarment proceedings of the 2nd respondent. Secondly, all the issues raised herein were raised and addressed in the debarment proceedings.

33. It is further submitted that the orders being sought are not capable of being executed as the orders of certiorari and prohibition sought have been overtaken by events as the debarment decision was long ago published in the 1st Respondent's website and is only awaiting gazettement by the Cabinet Secretary, Treasury.

34. It is denied that there was anything unprocedural and/or unlawful with the conduct of the respondents in the debarment proceedings and it is urged that where *the Constitution* has allocated certain powers and functions to various bodies and tribunals, it is important that the necessary leeway to discharge such mandate be allowed to enable them discharge their mandate. Reliance is placed on the case of

Speaker of the National Assembly v. James Njenga Karume[1992] eKLR and *Diana Kethi Kilonzo & Another v IEBC & 10 Others* [2013] eKLR.

The 1st Interested Parties Submissions

35. The 1st Interested Party's submissions are dated, 24th May 2022 lodged in court by Milcah A. Ondiek Advocate. Counsel submits that the 1st Interested Party is an independent office established under Article 229 of *the Constitution* as read together with Articles 248 and 249.

36. It is urged that;

i) *the Constitution* under Article 229(4), (5) and (6) as read together with Article 252(1) of *the Constitution* and S. 8 of the *Public Audit Act* provide the Mandate of the Auditor General.

ii) Article grants the 1st applicant the power to conduct investigations on its own initiative or on a complaint made by a member of the public.

iii) Further, S.38 of the *Public Audit Act* provides:

> The Auditor-General may examine the public procurement and asset disposal process of a state organ or a public entity with a view to confirm as to whether procurements were done lawfully and in an effective way.

37. Pursuant to S. 38 of the *Public Audit Act*, the 1st Applicant was mandated by law to conduct a procurement audit of the public procurement process carried out by Kenya Bureau of Standards (as a public entity) in respect to the Pre-Export Verification of Conformity (PVOC) to standards. The audit exercise which involved scrutiny of the documents submitted to KEBS by the Respondent in the course of Audit is therefore not an overreach because the Auditor General is well within her Mandate to examine all the documents and conduct an examination of the evidence in compliance with auditing standards.

38. The Auditor General is also mandated by law to make recommendations for debarment based on information accessed in the course of audit as stipulated in S.64 of the *Public Audit Act* which states:

1) Where the Auditor-General establishes that any person. supplier or company has been involved fraud or corrupt practice. the Auditor-General shall report to the police, Ethics and Anti-Corruption Commission or the Public Procurement Oversight Authority for their action.

2) Where the matter is referred to the Public Procurement Oversight Authority. the Auditor-General may make recommendation for debarment from future public procurement and asset disposal proceedings of a state organ or public entity with a copy to the relevant accounting officer.

The Application for Debarment was therefore properly before the debarment Committee by dint of S.41(1)(b), (d) and (h) of the *Public Procurement and Asset Disposal Act*,2015 pursuant to the findings in the Special Audit Report on the Procurement of Pre- Export Verification of Conformity (PVOC) to Standard Services; Used Motor Vehicle, Mobile Equipment and Used Spare Parts by the Kenya Bureau of Services (KeBS) and as adopted by the National Assembly.

Section 41 (1) provides thus:

(1) The Board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person—

a) has committed an offence under this Act;

b) has committed an offence relating to procurement under any other Act or Law of Kenya or any other jurisdiction;

c) has breached a contract for procurement by a public entity including poor performance;

d) has, in procurement or asset disposal proceedings, given false information about his or her qualifications;

39. On whether the absence of a request for debarment by the 1st Interested Party in the form DC1 invalidates the department proceedings, counsel submits that pursuant to its Constitutional Mandate and Statutory Mandate under the *Public Audit Act*, 1st Interested Party conducted a Special Audit on the above Tender No. KEBS/T019/2017 — 2020 whose terms of reference included review of the procurement process in line with the *Public Procurement and Asset Disposal Act* and the 2006 Regulations; identification of any suspicious forged or misrepresentation on the documents used in the procurement process by the bidders; identify and report any irregularities and culpabilities in the tender process.

40. Reference is made to Rule 22(2) of the PPAD regulations which provides:

> "Where the request for debarment is initiated through the recommendation of a law enforcement agency with an investigative mandate, or by an investigator duly appointed by the authority on its own motion, the Board shall notify the person of the intended debarment and provide details of the findings of the investigator or law enforcement agency."

It is urged that the debarment proceedings as initiated by the 1st interested party (Applicant) arose from the recommendations contained in the 1st interested party's Special Audit Report which according to Rule 22(2) above only requires the Board to notify the person recommended for debarment and furnish details of the findings of the 1st Applicant. There is no requirement for lodging a request for debarment.

41. Counsel profers the argument that even assuming for argument's sake, that the 1st Interested Party's Special Audit Report as adopted by the National Assembly on 13th October 2020 constitutes the Request for Debarment, the 1st Interested Party submits that the mere departure from a Request for Debarment in the form prescribed by the First Schedule of the PPADA Regulations does not invalidate the 1st Interested Party's Special Audit Report as adopted by the National Assembly on 13th October 2020 and which recommended debarment of the Ex Parte Applicant.

It is urged that these submissions are supported by the provisions of Section 26(2) of the Statutory Instruments Act and Section 72 of the *Interpretation and General Provisions Act*. Section 26(2) of the Statutory Instruments Act which provides that "Where any form has been prescribed by or under any legislation, a document or statutory instrument which purports to be in such form shall not be void by reason of any deviation therefrom which does not affect the substance thereof or which is not calculated to mislead" Similarly, Section 72 of the *Interpretation and General Provisions Act* provides that "Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead." Reliance is placed on the Supreme Court decision in *Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another* [2018] eKLR.

42. On whether it was mandatory under regulation 22(3) to use the form DC1, Counsel submits it is not. Even though the regulation provides that 'the request for debarment shall be made in the format provided in the first schedule', counsel submits that the word 'shall' as used in the regulation is permissive or directory. Reliance is placed on the case of *Republic v Council of Legal Education & Another Ex Parte Sabiha Kassamia & Another* [2018] eKLR for the proposition that 'shall' does not always mean 'shall'. 'Shall' sometimes means 'may'.

43. On the question of opportunity to be heard on the audit report, counsel submits that as can be readily discerned from the Special Audit Report; the 1st Interested Party's representatives visited the Applicant's premises and interviewed the Applicant's leading personnel such as:

a.) Mamoru Fujie CEO/Director-ATJ

b) Isaac P. Kalua Director, African Affairs - ATJ

c) Seiichi Funami Technical Manager - ATJ

d) Kaori Nishida Accounting Et Admin Manager - ATJ

e) Osamu Nishihara Sates Manager - ATJ

f) Mirane B. Nakata Quality Management Officer - ATJ

g) Shinya Nakatsugawa Quality Management Chief - ATJ

h) Tomoko Sakihama Quality Management Staff — ATJ

i) Yushi Kurihara Quality Management Staff - ATJ

j) Nikul Lakshman Director, PAL Auto Garage

k) Wilson Mutabazi Agent for ATJ in UK

44. It is further submitted that the procedure for debarment under regulation 22 does not provide for cross examination. The established procedure for debarment under regulation 22 provides for debarment hearing to enable the committee determine disputed facts and it is submitted that in this instance, the applicant was accorded an opportunity to respond to the Notice of intended debarment and filed a response andwritten submissions. It is urged that Section 4(6) of the *Fair Administrative Action Act* was complied with.

2nd_Interested Party's Submissions:

45. The submissions are dated 24th May, 2022. Counsel reiterates the averments of the 2nd Interested party in his replying affidavit. He sets out issues for determination as:

a) Whether the Respondent's debarment decision is ultra vires, illegal, in breach of the Ex parte Applicant's rights, irrational and/or unreasonable as alleged by the Ex Parte Applicant or at all.

b) Whether the Ex Parte Applicant has demonstrated circumstances which warrants the Honourable Court to exercise its judicial discretion in favour of granting the judicial review orders of Certiorari and prohibition as sought herein.

46. It is submitted that the court must have regard to the nature of proceedings which were being conducted by the Debarment Committee. The right to a fair hearing and each of the components espoused in Article 50(2) of *the Constitution* apply to an accused person who is facing criminal trial. Counsel urges that the debarment proceedings which were conducted before the Debarment

Committee of the 2nd Respondent were administrative in nature and were therefore not criminal proceedings to which the rights espoused under Article 50(2) of *the Constitution* would apply. Reliance is placed on the decision in *Dry Associates Limited vs. Capital Markets Authority & Another; Interested Party Crown Berger (K) Ltd* [2012] eKLR.

47. It is urged that there was no violation of Article 47(1) of *the Constitution* and Section 4 of the FAAA since the rules of procedure which are to be applied by the Debarment Committee are contained in rule 22(5) of the PPAD Regulations which were issued pursuant to Section 41(5) of the PPAD Act. Further, that the Civil Procedure Rules, particularly Order 19, rule 2 which was invoked by the Ex Parte Applicant before the Debarment Committee for cross-examination do not form part of the rules of procedure of the Debarment Committee having regard to Section 41(5) of the PPADA which provides that "The procedure for debarment shall be prescribed by Regulations". Counsel adds that Regulation 2(5) has clearly outlined the procedure to be followed by the Debarment Committee in conducting debarment proceedings before it and that Section 4(6) of the Fair Administrative Action is instructive as follows:

> "(6) where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure."

48. It is submitted that the reasons advanced by the Ex Parte Applicant at paragraphs 28 to 33 of the written submission for seeking to cross-examine witnesses were not pleaded in the Application, Statutory Statement or the Verifying Affidavit. The Ex Parte Applicant cannot therefore purport to be raising the said reasons for the first time in its submissions.

49. Counsel adds that Judicial Review orders are discretionary in nature. He places reliance on the case of *Republic v Public Procurement Administrative Review board & Another Ex parte Express DDB Kenya Limited* [2018] eKLR where the court stated;

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

Analysis and Determination

50. I have carefully considered the pleadings, the affidavit evidence, learned submissions by counsel and case law cited. Gleaned therefrom, the issue for determination is whether the applicant has established a case to the threshold required for the grant of the prerogative writs sought and, if in the affirmative, what reliefs should issue. To unravel this broad question the following auxiliary issues arise viz;

    i. What are the applicable legal principles?

    ii. Whether there were 2 competent Requests for debarment before the debarment committee.

    iii. Whether the 1st Interested Party contravened the applicant's right to be heard before it prepared the adverse audit report contrary to Article 47(1) and 10(1) of *the constitution*.

    iv. Whether the applicant was denied the right to a fair hearing under Article 50 of *the constitution* having been denied the right to cross examine witnesses.

v. Whether there was disregard of stay orders of court staying the implementation of the National Assembly's Committee Report.

vi. Whether the respondent's decision to debar the applicant was irrational and unreasonable.

I. The applicable legal principles

51. Judicial review orders are discretionary in nature. The court's jurisdiction under judicial review is distinct from the appellate jurisdiction of court. In *Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Ex parte Kenya Power and Lighting Company Limited* [2019] eKLR Mativo J while relying on the decision in *Paul Kiplagat Birgen & 25 Others v Interim Independent Electoral Commission & 2 Others* {2011} eKLR held as follows;

a. "A Judicial Review court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the body. Where a body is granted wide decision-making powers with a number of options or variables, a judicial review court may not interfere unless it is clear that the choice preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, a Judicial Review court may not interfere only because it favours a different option within the range..."

52. Judicial review is concerned with the decision making process not the merits of the decision. In *Republic v Public Procurement Administrative Review Board & another Ex-parte Express DDB Kenya Limited* [2018] eKLR it was held;

> " Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.
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> 13. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji[10]:-
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> "Judicial review applications do not deal with the merits of the case but only with the process. In other words, 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 took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort

to the normal forums where such matters ought to be resolved. Therefore, 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. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant……"

53. It is trite that specialised bodies should not be interfered with in exercise of statutory mandate and the court will only exercise its supervisory role over them if the decision or administrative action is tainted with illegality, irrationality or procedural impropriety. In *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others* [2012] eKLR the court of appeal expressed itself as follows;

> "The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.
>
> Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1st Respondent's tender had met the mandatory conditions. The issue whether or not the 1st Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it."

54. The court will not interfere with the decision or administrative action where the proceedings are regular and the body making it is seized of the requisite jurisdiction and an order of certiorari will not issue on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute or that its decision is wrong in matters of fact or that it misdirects itself in some matter.

That principle was clearly enunciated by Lord Reid in *Anisminic Ltd Vs Foreign Compensation Commission* [1969] 1 ALL ER 208 at p. 213, para H – 214 para A where his Lordship said: -

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is annuity. 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 question. But there are many cases where, although the tribunal has jurisdiction to enter on the inquiry, it has done or failed to do something in the course of 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 has 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 misconstrued provisions giving it powers 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 is 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 rightly."

II. Whether there were 2 competent Requests for debarment before the debarment committee

55. In our instant suit, the applicant's complaints can be categorised into 5 broad areas. The first one relates to the lack of jurisdiction on the part of the Debarment Committee. It is anchored on the applicant's contention that there was no request for debarment emanating from the 1st and 2nd Interested parties. It is contended that the special audit report is not equivalent to a request for debarment. I have applied my mind to this contention and the applicable law. Debarment is a creature of section 41 of the PPADA. The section provides;

Debarment

(1) The Board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person—

(a) has committed an offence under this Act;

(b) has committed an offence relating to procurement under any other Act or Law of Kenya or any other jurisdiction;

(c) has breached a contract for a procurement by a public entity including poor performance;

(d) has, in procurement or asset disposal proceedings, given false information about his or her qualifications;

(e) has refused to enter into a written contract as required under section135 of this Act;

(f) has breached a code of ethics issued by the Authority pursuant to section 181 of this Act or the code of ethics of the relevant profession regulated by an Act of Parliament;

(g) has defaulted on his or her tax obligations;

(h) is guilty of corrupt or fraudulent practices; or

(i) is guilty of a serious violation of fair employment laws and practices.

(2) Without limiting the generality of subsection (1) the Board may debar a person from participating in any procurement process if that person—

(a) has breached the requirements of the tender securing declaration form in the tender documents; or

(b) has not performed according to professionally regulated procedures.

(3) The Authority, may also debar a person from participating in procurement or asset disposal proceedings—

(a) on the recommendation of a law enforcement organ with an investigative mandate;

(b) on grounds prescribed by the Authority in Regulations.

(4) A debarment under this section shall be for a specified period of time of not less than three years.

(5) The procedure for debarment shall be prescribed by Regulations

56. The procedure for debarment is prescribed by Public Procurement and Asset Disposal Regulations 2020 and in particular Regulation No.22 which provides:

22.

(1) A request for debarment may be initiated—

(a) by the accounting officer of a procuring entity, or any other person with knowledge of facts that may support one or more grounds for debarment;

(b) by the Director-General on his or her own motion based on findings from investigations, inspections, or reviews; or

(c) on the recommendation of a law enforcement agency with an investigative mandate.

For purposes of section 41(5) of the Act and this regulation, debarment procedures shall be as follows—

(a) upon receipt of a request for debarment, the Board shall analyze the case within thirty days to determine whether there is a prima facie case for debarment;

(b) if the analysis establishes a prima facie case for debarment, the Board shall issue a notice of intended debarment to the party, who shall be the subject of the debarment proceedings requiring him or her to file a written response with the Board;

(c) the notice of intended debarment issued under paragraph (b)shall contain the grounds of debarment, a brief statement of the facts in support of debarment and the consequences that may arise from the debarment;

(d) the respondent shall within fourteen days of receipt of a notice of intended debarment, file a written response with the Board;

(e) where the facts of the intended debarment are contested, the debarment committee shall within twenty-one days of receipt of the response in paragraph (d) hold a debarment hearing to determine the disputed facts;

(f) a seven (7) days' notice shall be given to the parties to appear before the debarment committee;

(g) the debarment committee shall prepare a report of its findings and recommendations, and make a determination on the request for debarment within thirty days from the date of hearing;

(h) where the request for debarment is approved, such debarment shall be for a period of not less than three years;

(i) the decision to debar a person shall promptly be communicated to the parties involved in the debarment proceedings;

(j) after the expiry of twenty-one days from the date of the debarment decision, the Authority shall publish the details of the person debarred and the corresponding period of debarment;

(k) the Authority shall forward the details of the debarred person to the Cabinet Secretary for gazettement.

57. On the propriety of the 1st Interested party's request for debarment a look at the law governing the office of the Auditor General is necessary. The office of the auditor General is established under Article 229 of *the constitution*. Article 252(1)(a) grants the office the power to conduct investigations on its own initiative or on a complaint made by a member of the public. Section 38 of the *Public Audit Act* provides that the Auditor General may examine the Public Procurement and Asset Disposal process of a state organ or a public entity with a view to confirm as to whether procurements were done lawfully and in an effective way. It follows then that the 1st Interested party's audit of the subject procurement herein was within the law.

58. Section 64 of the *Public Audit Act* provides as follows;

" 64.

(1) Where the Auditor-General establishes that any person, supplier or company has been involved in fraud or corrupt practice, the Auditor-General shall report to the police, Ethics and Anti-Corruption Commission or the Public Procurement Oversight Authority for their action. (2) Where the matter is referred to the Public Procurement Oversight Authority, the Auditor-General may make recommendation for debarment from future public procurement and asset disposal proceedings of a state organ or public entity with a copy to the relevant accounting officer."

A reading of the provisions on the constitutional mandate of the Auditor General, The *Public Audit Act* and section 41(1)(b), (d) and (h) of the PPADA readily shows that there was a competent request for debarment before the committee.

59. I have not lost sight of the applicant's contention that the 1st Interested party did not have a proper request for debarment in the prescribed form. Rule 22(2) of the PPADA provides as follows;

> "Where the request for debarment is initiated through the recommendation of a law enforcement agency with an investigative mandate, or by an investigator duly appointed by the authority on its own motion, the Board shall notify the person of the intended debarment and provide details of the findings of the investigator or law enforcement agency."

60. To begin with, it is worth noting that the recommendation for debarment made by the 1st Interested Party was contained in the special audit report that was transmitted to the 1st Respondent as mandated in law. There is no legal requirement that the Auditor General is required to submit form DC1 to the Authority. In my view, the request for debarment emanating from the Auditor General is in a special category mandated under section 64 of the *Public Audit Act*.

61. Be thus as it may, the defect in form of the request for debarment would not invalidate the request. The law readily comes to the aid of a party who deviates from a prescribed form. Section 26(2) of the Statutory Instruments Act Provides that "where any form has been prescribed by or under any legislation, a document or statutory instrument which purports to be in such form shall not be void by reason of any deviation therefrom which does not affect the substance thereof or which is not calculated to mislead." In the same breadth, Section 72 of the *Interpretation and General Provisions Act* provides that "save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."

62. The Supreme Court weighed in on the import of these provisions when in the case of Alfred Nganga Mutua (supra) it held as follows when faced with a question of non-conformity with a statutory form (form 37C prescribed by the Election (General) Regulations, 2012) in declaring results of a gubernatorial election:

> "In the light of the provisions of Section 72 of *Interpretation and General Provisions Act* and Section 26 of the Statutory Instruments Act, and in the absence of any challenge to the results posited on it, even if Regulation 87(2)(b)(iii) were not ultra vires, we agree with counsel for the appellants that the variation on Form 37C in this case was minor and inconsequential.
>
> Section 72 of the *interpretation and General Provisions Act* and Section 26(2) of the Statutory Instruments Act, 2013, provide that "an instrument or document ... shall not be void by reason of a deviation" from the prescribed form if the deviation "... does not affect the substance of the instrument or document thereof or ... is not calculated to mislead."

63. All the information required to be filled in the form DC1was in the audit report viz; the name of person recommended for debarment, the reasons for debarment and the sections or regulations breached, particulars of the subject procurement and the person requesting debarment. The enactment of section 41 of the PPADA on debarment was certainly meant to promote the ethos that the people set in Article 227 (1) of *the constitution* and the principles set is section 3 of the PPADA which includes integrity in public procurement processes. In my view, debarment is such an important component in enforcing the constitutional edicts and principles on public procurement, and the public interest in it is so high, to be left to the nuances of technicalities of form which Article 159 (d) of *the constitution*

flowns upon, except where there is a clear breach of statute. On the whole, am satisfied that there was a competent request for debarment from the 1st Interested party.

64. Turning to the request for debarment by the 2nd Interested party, it is contended by the applicant that in the Notice of Intended Debarment dated 18th March 2021, the particulars related to false information submitted by M/s EAA Co. Ltd. The 2nd Interested party is said to have extensively made reference to M/s EAA Co. Ltd under the title Application 1 and 2 of 2021. It is maintained that in its response and grounds of opposition in the debarment proceedings, the 2nd Interested Party made reference to application 1 and 2 wherein the applicant was not a party. The applicant was unaware and confused as to which proceedings it was to respond to.

65. I have keenly gone through the record. Specifically, I have trained my eyes and mind on annexure IPK 12 at page 198 of the bundles of documents hosting the substantive application dated 8th April 2022. The Document marked IPK 12 has reference to EAA Co. Ltd but it is clear from the document that it relates to and refers to the applicant as the main body of the application shows. The timing of this complaint is also suspect. The perfect forum in which it ought to have been raised ought to have been at the debarment committee hearing. It is quite telling that Isaack Kalua who swore a multi-page affidavit did not find it necessary to put even a single sentence in the affidavit over the complaint now raised. The complaint seems to suggest that the applicant was non suited in the proceedings before the committee. In my view, had that been the case, nothing would have been easier than for the applicant to raise that formidable defence before the committee. This complaint is a belated afterthought. The applicant was clear on the case against them at the committee and they duly responded to it without a whimper of a complaint about not being sure of what to respond to. In the premises I find and hold that the debarment request by the 2nd Interested Party was a proper one.

66. In view of the foregoing, I come to the conclusion that before the 1st Respondent were 2 competent requests for debarment and the Debarment Committee had the jurisdiction to determine them.

III. Whether the 1st Interested Party contravened the applicant's right to be heard before it prepared the adverse audit report contrary to Article 47(1) and 10(1) of the constitution.

67. Having established that there were 2 competent requests for debarment before the 1st Respondent and that the Debarment Committee had the requisite jurisdiction to hear and determine the consolidated requests, I now move on to examine whether the process in the hearing was tainted with illegality, irrationality or procedural impropriety. The question that begs answers as I embark on this endeavor is; was the applicant treated fairly, natural justice observed and most fundamentally, the tenets of *the constitution* and the FAAA observed?

68. A good point to start from would be the consideration of the applicant's contention that the audit report was procured contrary to Articles 10(1) and 47(1) of *the constitution* of *the constitution* in that the applicant's right to be heard was contravened in that;

    i) The 1st Interested Party violated Article 47(1) of *the Constitution* by failing to hear the Petitioner before making the final audit.

    ii) The 1st Interested Party failed employed unfair process which did not give the Petitioner an opportunity to respond to any query.

    iii) Specifically, the 1st Interested Party violated Article 47(1) of *the constitution* and Section 4 of *Fair Administrative Action Act* in the following manner

a) Failure to give the ex parte Applicant a prior and adequate notice of the nature of audit queries and reasons for the queries.

b) Failure to give the ex parte Applicant an opportunity to be heard and make representation on the queries against facing them.

c) Failure to give the ex parte Applicant reasons for many of the conclusions in the audit report.

d) Failure to provide the ex parte Applicant with information relied upon and evidence to comment on before making conclusions in the audit report.

69. The conduct of an audit is an investigation by its very nature. The outcome determines whether there are elements of impropriety and based on the outcome, it would lead to adverse action against the person or body being investigated. The principles of natural justice must thus apply to ensure the subject of the audit has an opportunity to know the nature of the queries and give answers to them. In essence, the subject must be accorded a fair hearing.

70. From the record in Debarment Applications nos. 4 & 5 of 2021, the applicant's response to application no. 4 is found in the replying affidavit of Isaac Peter Kalua. The specific reference to the audit report is found in paragraphs 9 to 36 of the said affidavit. In the averments therein, Mr. Kalua has sought to answer the issues raised in the audit report. Nowhere in the said averments is the audit process leading to the audit report challenged. The report shows at page 33, that the following officers of the applicant were interviewed by the Auditor;

1) Mamoru Fujie, CEO/Director – ATJ

2) Isaac P. Kalua, Director African Affairs – ATJ

3) Seiichi Funami, Technical Manager – ATJ

4) Kaori Nishida, Accounting Et Admin Manager – ATJ

5) Osamu Nishihara, Sates Manager – ATJ

6) Mirane B. Nakata, Quality Management Officer – ATJ

7) Shinya Nakatsugawa, Quality Management Officer – ATJ

8) Tomoko Sakihama, Quality Management Staff – ATJ

9) Yushi Kurihara, Quality Management Staff – ATJ

10) Nikul Lakshman, Director, PAL Auto Garage

11) Wilson Mutabazi, Agent for ATJ in UK

71. This is a clear indication that the applicant through its officers were accorded an opportunity to answer the queries relevant to the audit. This court's powers under judicial review does not extend to new issues that were not raised before a tribunal or an administrative body. The jurisdiction is limited to calling for the record of the tribunal or administrative body and scrutinize if the decision made meets the criteria set in law both under *the constitution* and statute. In any event, it's not enough to claim contravention of a constitutional right. The duty is upon the claimant to prove in what manner such contravention has occurred.

72. It is a principle of law that he who asserts must prove, and in this regard, Section 107(1) of the *Evidence Act* (Cap 80) provides that "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist". Section 109 of the *Evidence Act* again provides that "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person". It is the duty of a claimant to prove the breach and with particularity.

73. In the case of *Anarita Karimi Njeru v Republic (No.1)*-[1979] KLR 154 the Court stated;

> " 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).

In our instant case, the claim by the applicant of denial of the right to be heard before the adverse audit report was made is watered down by the evidence in the audit report, evidence which has not been controverted, to the effect that officers of the applicant, including Isaack Kalua who has sworn the verifying affidavit in these proceedings, were interviewed in the process of the audit and therefore had opportunity to offer explanations to the auditors.

IV. Whether the applicant was denied the right to a fair hearing under Articles 10(1) 47(1) and 50(1) of the constitution having been denied the right to cross examine witnesses.

74. It is the applicant's case that it was denied the right to cross examine the officer who forwarded the audit report to the National Assembly. This was despite an oral application to do so on the 3rd May 2021 and a formal application on 5th May 2021. At page 70 and 72 of the applicant's bundle of documents are 'notices of intention to cross examine Dr. Charles Nzai and Fredrick Odhiambo respectively. In rejoinder, the 2nd Interested Party maintains that the regulations do not provide for cross examination of witnesses and that the applicant was accorded an opportunity to controvert the evidence that was adduced in the Requests for debarment and indeed did do this through an elaborate replying affidavit sworn by Peter Kalua.

75. The debarment committee is a quasi-judicial body. It is not bound by strict rules of evidence and procedure. It has a wide latitude to self-regulate within the confines of the statute or regulations governing its procedure. The Supreme court in *SGS Kenya Ltd vs. Energy Regulatory Commission, Public Procurement Administrative Review Board and Intertrek Testing (EA) Ltd* [2020] eKLR put it succinctly thus;

> " 42. From the two contending propositions, it emerges, in our view, that tribunals, in their primary category, are specialized bodies charged with programming and regulatory tasks of the socio-economic, administrative and operational domains. Membership in such tribunals generally reflects the essential skills required for the specific tasks in view. The Public Procurement Administrative Review Board falls within this category. It is endowed with requisite experience from its membership, and has access to relevant information and expertise, to enable it to dispose of matters related to procurement. The question is: whether it is bound by its previous decision, as it takes decisions on different matters lately coming up.

(43) Such a variegated range of implementation scenarios, it is apparent to us, calls for flexibility in the regulatory scheme. In principle, matters on the agenda of an administrative tribunal will merit determination on the basis of the claims of each case, and will depend on the special factual dynamics. The relevant factors of materiality, and of urgency, will require individualized response in many cases: and in these circumstances, a strict application of standard rules of procedure or evidence may negate the fundamental policy-object. On this account, the specialized tribunal should have the capacity to identify relevant factors of merit; be able to apply pertinent skills; and have the liberty to prescribe solutions, depending on the facts of each case. Such a tribunal should fully take into account any factors of change, in relation to different cases occurring at different times: without being bound by some particular determination of the past.

76. This court is aware of the High Court decision in Edward R. Ouko vs. Speaker of The National Assembly & 4 Others [2017] eKLR where the court held that cross examination is now a component of fair administrative action and that, to that extent, the previous decisions that held that in administrative action, cross examination is inapplicable can no longer be good law. I concur with this finding save to add that as clearly put by the Supreme Court, the quasi-judicial bodies must be left the flexibility to determine when cross examination would be necessary and appropriate and the court should only intervene under judicial review where on the material before it such a body fails to consider relevant factors or considers irrelevant factors in denying cross examination.

77. In this case the Debarment Committee gave directions that the debarment proceedings were to be disposed of through the written pleadings and submissions. In the absence of a set procedure on the taking of evidence, my considered view is that the Debarment Committee has administrative discretion whether to call witnesses or to allow cross-examination.

78. The record of the Debarment proceedings clearly shows that that the applicant received debarment notices and directions as to the hearings before the debarment Committee. The Debarment Committee afforded all parties a reasonable opportunity to present their cases and indeed the applicant filed an elaborate response complete with documentary evidence as well as submissions. This meets the criteria set by the Supreme Court in the SGS Kenya Ltd case (supra). A reading of the Debarment Committee's decision shows that it considered evidence from both divides and made findings thereon as it was mandated to do. Am satisfied that the applicant was accorded a fair hearing and there was no breach of Article 50 or 47of *the constitution*.

V. Whether there was disregard of stay orders of court staying the implementation of the National Assembly's Committee Report

79. It is the applicant's case that the 2nd respondent proceeded to make findings that were ultra vires as they relied on the findings of the National Assembly Committee Report which at all material times was subject to judicial proceedings in the High Court. It is urged that in Judicial Review Application No. 104 of 2020 in Republic vs. Clerk of The National Assembly and 2 others, the Court stayed and suspended through a Ruling dated 29th May, 2020 the implementation of the National Assembly's report that was adopted on 13th October, 2020 which was extensively relied on by the 1st Interested

Party's audit report and in turn by the Respondents when delivering their decision. The said Ruling directed that:

> " Pending the hearing and determination of the Notice of Motion on 9th November, 2020, interim orders of stay are hereby granted, staying any and further implementation of the recommendations made in the Parliamentary Investments Committee's Report and recommendations dated 28th May, 2020 as adopted on 13th October, 2020, only in so far as they touch on and affect tender no. KEBS/T010/2019-2021 and the contract entered into thereto by the ex parte applicant."

80. Further, that the respondents acted ultra vires as there were stay orders in Judicial Review Application No. 88 of 2020, in Republic vs. Clerk of The National Assembly and 2 others, in which the Court stayed and suspended the implementation of the Public Procurement and Regulatory Authority investigation report dated 21st April, 2020 on corruption and irregularities in Tender No. KEBS T010/2019-2021 for Pre-Export Verification of Conformity (PVOC) to Standards Services — Used Motor Vehicles, Mobile Equipment and Used Spare Parts. The said report touched on the ex parte Applicant herein and was extensively relied on by the 1st Interested Party's audit report and in turn by the Respondents when delivering their decision. The said Ruling set out that:

> " The leave so granted herein to institute these judicial review proceedings shall operate as stay of implementation of the Respondent's investigation report dated 21st April, 2020 on Corruption and Irregularities in Tender No. KEBS/T010/2019-2021 for Pre-Export for Provision of Pre-Export Verification of Conformity(PVOC) to Standards Services-used Motor Vehicles, Mobile Equipment and used Spare Parts, pending the hearing and determination of the substantive Notice of Motion."

81. I have had recourse to the record. I note that in so far as the orders in Judicial Review Application No. 104 are concerned, the ex parte applicant therein was M/s EAA Company Limited and not the applicant herein. The operative words in the order made by the court were;

> " ...only in so far as they touch on and affect tender No KEBS/T010/2019/2021 and the contract entered into thereto by the ex parte applicant" (read, EAA Company Limited). Certainly, these orders did not affect the applicant herein who was not a party in those proceedings. The stay orders did not therefore stay any action of whatever nature against the applicant herein.

82. In Judicial Review Application No. 88 of 2020, the court orders were as follows;

> " The leave so granted herein to institute judicial review proceedings shall operate as a stay of implementation of the respondent's investigation report dated 21st April 2020 on corruption and irregularities in Tender No. KEBS/T010/2019-2021 for provision of pre export verification of conformity (PVOC) to standard services- used motor vehicles, Mobile Equipment and Used Spare Parts, pending the hearing and determination of the substantive motion."

> It is worth noting that the Requests for debarment herein were not based on the investigation report alluded to in the order of the court above. The proceedings of the Debarment Committee were thus not conducted against an existing court order. On

the whole, I find no merit in the applicant's contention that the debarment proceedings contravened lawful court orders.

VI. Whether the respondent's decision to debar the applicant was irrational and unreasonable.

83. It is contended for the applicant that the inference one makes from a consideration of the issues raised by the applicant is that the respondents' actions were irrational, unfair and unreasonable. I think the analysis given hereinabove in this judgement quite clearly captures the answer to this issue but I find it necessary to put the matter in perspective. Rationality, as a ground for the Review of an administrative action is dealt with in Section 7(2)(i) of Fair Administrative Action which provides that: -

> " A court or tribunal under subsection (1) may review an administrative action or decision, if-
>
> i. the administrative action or decision is not rationally connected to-
>
> a) the purpose for which it was taken;
>
> b) the purpose of the empowering provision;
>
> c) the information before the administrator; or
>
> d) the reasons given for it by the administrator."

84. What constitutes irrationality finds explanation in the case of Chaskalson P, in Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (4) SA 674 (CC) at page 708; paragraph 86. where the court stated that:-

> " The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."

85. Mativo J, in Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] eKLR adopted the decision of the court in *Trinity Broadcasting (Ciskei) v ICA SA* 2004(3) SA 346 (SCA) at 354H- 355A. where Howie P stated the rationality test as follows: -

> " In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at."

86. The question of unreasonableness as a ground for review has in the advent of the FAAA been anchored on statute and is dealt with in Section 7(2)(k) of the Act. The test of Wednesbury unreasonableness has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated. In *Prasad v Minister for Immigration,* {1985} 6 FCR 155, the Federal Court of Australia held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt, and when "looked at objectively... so devoid of any plausible justification that no reasonable body of persons could have reached them".

87. Armed with these principles, the question this court must pose is whether the decision by the Debarment Committee was irrational and unreasonable. This court has already established that there were 2 competent Requests for debarment made to the 1st respondent and that the Debarment Committee had jurisdiction. The court has made a finding that the process, including the procurement of the special audit report and the propriety of the hearing was within the legal parameters allowed. This court must defer to the Committee's statutory power to make decisions on debarment. The grounds in the Request for Debarment fall squarely within those provided for in section 41 of the PPADA. The Committee thus employed the correct criteria. The decision arrived at was based on the evidence adduced. I find no evidence of irrationality or unreasonableness in the decision arrived at by the Debarment Committee. I associate myself with the holding on Ngugi J in where he stated;

> "I have considered these complaints lobbed at the Re-test Report by the Respondent. I have considered the complaints in light of two important but related issues. First, as aforesaid, the nature of this suit is Judicial Review not an appeal from the decision of the Respondent as the technical agency with the statutory mandate to carry out the duty of enforcing standards. Second, while on the outer limits the Court is permitted to carry out a substantive review of the decisions of the Respondent and other technical agencies, it does so only utilizing the standards of irrationality and Wednesbury unreasonableness – not merit review. Differently put, the Court must defer to the finding of the technical agency (in this case, the Respondent) unless it is clearly irrational or meets the threshold of Wednesbury unreasonableness. Using this standard of review, the Ex Parte Applicant's complaints do not meet the threshold. There is simply no forbidding evidence of irrationality or unreasonableness to warrant a review of the substantive merit-based decision of the statutorily mandated technical agency in the area."

88. It is trite law that the court's role in judicial review 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 the power. The legal principle now entrenched in precedent is that 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. 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. The Committee, in my respectful view, lawfully exercised power within statutory limits. It cannot be faulted for doing what the law mandated it to do.

89. From the foregoing and for reasons above stated, am satisfied that the application dated 8th of April 2022 and amended on 16th May 2022 is without merit. The same is dismissed with costs to the respondents and Interested Parties.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY 2022

....

A. K. NDUNGU

JUDGE