



Republic v Public Procurement Administrative Review Board & 2 others; H Young & Company (East Africa) Limited (Exparte); Comacon Limited JV Gulf Energy Limited (Interested Party) (Judicial Review Miscellaneous Application E058 of 2022) [2022] KEHC 10201 (KLR) (Judicial Review) (27 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E058 OF 2022
AK NDUNG’U, J
JUNE 27, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

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

**THE ACCOUNTING OFFICER , KENYA PIPELINE COMPANY
LIMITED 2ND RESPONDENT**

KENYA PIPELINE COMPANY LIMITED 3RD RESPONDENT

AND

H YOUNG & COMPANY (EAST AFRICA) LIMITED EXPARTE

AND

COMACON LIMITED JV GULF ENERGY LIMITED INTERESTED PARTY

JUDGMENT

1. A brief background of this suit is that in or about November 2021, the 3rd Respondent (hereinafter, “the Procuring Entity”) advertised Tender Number KPC/PU/OT-087PROJECTS-NBI-21-22; Tender for Engineering, Procurement, Construction Tender for the Connectivity of KPRL Port Reitz Tank Farm to Line 5, KOT 2, & KOSF (hereinafter “the initial Tender”). The Ex parte Applicant



herein submitted its bid in accordance with the law. The initial closing/opening date of the initial Tender was 24th November,2021 but was extended to 5th January,2022.

2. The Procuring Entity is said to have informed the Ex parte Applicant through its letter dated 2nd February,2022 that it had attained the minimum qualifying marks in its technical proposal and that it had been invited for financial opening on 3rd February,2022. According to the Ex parte Applicant only 1 more bidder had made it to the financial opening. Subsequently, in a letter dated 11th March 2022, the Ex parte Applicant was informed by the Procuring Entity that the initial Tender had been terminated pursuant to section 63 (1) (b) of the *Public Procurement and Asset Disposal Act* due to inadequate budgetary provision and it was requested to collect its tender security.
3. The subject Tender was later re-advertised sometime in the same month as Tender Number KPC-PU-OT-087-PROJECTS-NBI-21-22; Tender for connectivity of KPRL Port Reitz Tank Farm to Line 5 KOT, Open National Tender, Re-Tender (hereinafter “the Tender”) and again the Ex parte Applicant participated in the bidding in accordance with the Invitation to Tender and Instructions to Tenderers, as issued under the Tender Document and in accordance with the relevant legal provisions. The bids were opened on 1st April ,2022 and upon conclusion of the evaluation, the Tender was awarded to Comacon Limited JV Gulf Energy Limited, the Interested Party at the bid price of KES.1,08,835,314.00 inclusive of taxes.
4. The Ex parte Applicant aggrieved by this decision filed a Request for Review on 27th April,2022 which was accompanied by a Statement in Support of the Request with a total of 16 Annexures. The Ex parte Applicant also filed a Further Statement in response to the 1st and 2nd Respondents Response and Submissions on 13th May 2022. Upon hearing the said Request for Review, the 1st Respondent herein in its Ruling dated 17th May 2022 and issued on 18th May 2022 at 21:42 P.M. dismissed the said request and it is this Ruling that led to the Ex parte Applicant filing its Chamber Summons dated 27th May,2022 seeking leave to apply for Judicial Review orders of Certiorari Prohibition and Mandamus.
5. Subsequently, the Court in its Ruling dated 31st May,2022 granted leave to the Ex parte Applicant and directed it to file its substantive motion. The same is dated 3rd June,2022 and is supported by a Verifying Affidavit sworn on 27th May,2022 by Paul Murage. The motion seeks a raft of Orders as follows;
 - i. That this Honourable Court be pleased to grant an order of Certiorari to remove and bring to this Honourable Court for purposes of quashing the 1st Respondent’s (hereinafter “the Board”) entire decision and subsequent orders dated 17th May, 2022 and issued on 18th May,2022 in Request for Review Application Number 38 of 2022, dated 27th April,2022 in respect of Tender No. KPC-PU-OT-087-PROJECTS-NBI-21-22; Tender for Connectivity of KPRL Port Reitz Tank Farm to Line 5 KOT (hereinafter “the Tender.”).
 - ii. That this Honourable Court be pleased to grant an order of Prohibition restraining the 2nd Respondent and the 3rd Respondent (hereinafter “the Procuring Entity”) from implementing the decision and consequential orders of the Board in Request for Review Application No. 38 of 2022 dated 17th May,2022 and issued on 18th May,2022.
 - iii. That this Honourable Court be pleased to grant an order of MANDAMUS directing the Board to review the confidential bundle/documents availed to it by the Procuring Entity under section 67(3) (e) of the *Public Procurement and Asset Disposal Act* (hereinafter “the Act”) and make a fresh determination



as to whether the evaluation was conducted fairly and if the Interested Party complied with all mandatory requirements in the Tender Document and in particular, requirements on construction turnover at page 48, clause 3 (b) and (c) of the Tender Document.

- iv. That this Honourable Court be pleased to grant an order of Mandamus directed at the Procuring Entity compelling it to apply the margin of preference in accordance with the law, in respect of the Tender, and to re-evaluate the Interested Party's bid in accordance with the provisions of the Tender Document and the Act, including those of page 48, clause 3 (b) and (c) on total construction turnover and acid test ratios of the Tender Document.
 - v. That this Honourable Court be at liberty to grant any further orders as it may deem just and fit.
 - vi. That the cost of this Application be provided for.
6. It is the Ex parte Applicant's case that the Board was guided by irrelevant issues which resulted to procedural impropriety and unfairness and that its decision was tainted with illegality and irrationality. The Ex parte Applicant is said to have brought to the attention of the Board the Procuring Entity's failure to apply the margin of preference in the tender, yet there were foreign bidders participating in the tender, an example being Gulf Energy Limited, that emerged as the successful bidder as a joint venture with a citizen bidder.
 7. The Ex parte Applicant further contended that it had demonstrated to the Board that Gulf Energy Limited was a foreign bidder and that it was not recognized as a qualified contractor in Kenya by virtue of not being registered with the National construction Authority (NCA). In addition, that the foreign bidder's activities in Kenya were limited to participating in open tender system business for the importation of oil in Kenya and in oil retail trading generally.
 8. It is contended that Gulf Energy was acquired by Auron Energy Limited a Mauritian Company. The Ex parte Applicant questioned how an entity whose main business is oil trading and is not registered with NCA and EPRA acquired construction experience over five years to be able to provide its share of construction turnover towards the required Kshs. 1 billion construction turnover.
 9. It was also the Ex parte Applicant's case that neither Gulf Energy Limited's nor its joint venture partner Comacon Ltd was registered as an electrical contractor with the EPRA as at 25th April, 2022. The Ex parte Applicant urged that the said evidence produced before the Board was dismissed and termed as "No evidence".
 10. The Board is also faulted for not considering the evidence produced before it in determining the issue on whether the Interested Party had met the evaluation criteria under the Tender Document. The Board instead faulted the Ex parte Applicant's evidence and termed it as "No evidence" and proceeded to state that the Ex parte Applicant should have brought in evidence demonstrating that the Interested Party was not qualified to participate in the Tender. The Board also failed to address the eligibility of the joint venture of the Interested Party pursuant to Section 55 (1) (c) of the Act.
 11. The Ex parte Applicant also argued that the Board's action of ignoring the evidence presented to it in form of confidential documents is an injustice and is not rationally connected to the purpose of the empowering provision under the Act. Further that the Board also ignored the fact that even though the tender was titled an "open national tender", Gulf Energy Limited and China Petroleum Pipeline



Engineering Company Limited which are foreign bidders, were allowed to participate in the Tender, and even made it to financial evaluation.

12. The Board is also faulted for considering issues of margin of preference in international tenders and Request for Proposals which was totally irrelevant in this case and also for failing to consider the circumstances surrounding the impugned tender. It was the Ex parte Applicant's case that the Board determined that the Procuring Entity was within the law for failing to apply the margin of preference, simply because it did not provide for the same under the Tender Document and ignored that the application of a margin of preference to citizen shareholders is a matter of law where foreign bidders are allowed to participate in a tender, regardless of whether the Procuring Entity had provided for it in its Tender Document.
13. The Board's decision was also faulted for being tainted with illegality as it found that margin of preference is applicable at the technical evaluation stage, contrary to Regulation 148 (2) of the Regulations. The Ex parte Applicant stated that it had benefitted before from the 20% margin of preference on its bid price accorded by the Board in two matters that is PPARB Application No. 47 of 2016 – H. Young & Co. (E.A) Limited v KENHA and PPARB Application No. 7 of 2016- China Overseas Engineering Group Company Limited v Kenya Rural Roads Authority.
14. The Ex parte Applicant also argued that in contrast to section 86(2) of the Procuring Act which provides that the percentage of Kenyan shareholding is the primary factor in determining whether a margin of preference is applicable when domestic and international bidders are vying for the same contract, provided that the domestic contractors have attained the minimum technical score, the Board erroneously found that the application of a margin of preference was dependent on the method of procurement applied by the Procuring Entity.
15. The Ex parte Applicant also argued that Section 175 (1) of the Act gave it a 14 days' window within which to seek Judicial Review orders and any purported contract signed within the window was illegal ab initio and not enforceable under the law. The Court's decision can therefore be rendered nugatory on the basis of an illegal contract.
16. Upon receipt of the Board's Ruling dated 17th May,2022 on 18th May,2022, the Ex-parte Applicant wrote a letter dated 19th May 2022 to the 2nd Respondent, communicating its intention to appeal the decision of the Board to this Honourable Court, and cautioning the 2nd Respondent not to enter into an illegal contract with the Interested Party before the matter was fully dispensed with. The letter was delivered both electronically on 19th May,2022 and physically on 20th May,2022.
17. The Ex parte Applicant urges that the Judicial Review Application was filed well within the timelines under section 175 (1) of the Act as according to section 57 of the *Interpretation and General Provisions Act*, on computation of time the 14 days started running the next day (19th May,2022), which would mean that the 14th day for filing the judicial review application fell on 1st June,2022. That since the said day was a Public Holiday and thus an excluded day in the computation of time, the last day for filing was 2nd June,2022. The Ex-parte Applicant's Application for leave to apply for the Judicial Review was filed on 30th May,2022, which is the 12th day of the 14 days' appeal window.
18. It is the Ex parte Applicant's case that the 2nd and 3rd Respondent's were duly served with the Application for leave together with the court's Ruling on 31st May,2022 and again on 6th June,2022, with a mention notice, the Application for leave and court's Ruling. The Ex parte Applicant also contended that the alleged contract signed between the 2nd & 3rd Respondents and the Interested Party has not been produced before the Honourable Court for scrutiny and consideration. Further that any



- contract signed after the issuance and service on 31st May,2022 of the Court Ruling which granted stay of the procurement proceedings was illegal.
19. A search conducted by the Ex parte Applicant indicated that as at 6th June,2022 the Interested Party did not have NCA and EPRA certifications that were required prior to contract signing, the alleged contract is illegal as it violates the express legal provisions of the Tender Document and should be nullified by the Court.
 20. The Ex parte Applicant also contended that Section 175 (4) of the Public Procurement Act provides for the right to seek administrative review and further right of appeal to challenge any breaches in the procurement process, with clearly stipulated statutory timelines. The Act did not envisage a situation where bidders challenging procurement processes towards the end of a financial year are left without relief because their cases are rendered nugatory by the lapse of the financial year. Further that parties should be granted or denied reliefs based on the merits of their case and not due to factors such as the time when their case is filed.
 21. According to the Ex Parte Applicant, the court has extensive authority, including the ability to order a rollover of funds to the following fiscal year or freezing the return of funds budgeted for the procurement process, pending the proper conclusion of the procurement proceedings in accordance with the Act's provisions.
 22. The Ex parte Applicant contended that it has not in any way invited this Honourable Court to look into any evidence and determine this matter afresh but to review the decision of the Board and peruse the summary of the Ex Parte Applicant's case before the Board including the material that was placed before the Board and the process to establish whether or not the Board's decision is tainted with illegality, irrationality and procedural impropriety. That since the Constitution of Kenya, 2010 and the enactment of the Fair Administrative Action Act to give effect to Article 47 of the Constitution, there has been an implicit shift in Judicial Review which allows for merit review.
 23. The Ex-Parte Applicant states that the Replying Affidavit of the Interested Party should be struck out as it is not properly before this Court. The Interested Party is also accused of not entering appearance before the Board and neither filing any documents before the Board. The allegations of late service were never raised by the Interested Party before the Board and the same are being raised before this Court for the first time and without supporting evidence. It is the Ex parte Applicant's contention that the court ought not to consider these issues as a Judicial Review court cannot sit in review of new issues that were not before the Board.
 24. The Ex-Parte Applicant contended that all the bidders were served by the Board at the latest on 11th May,2022, as it received a request for information on PPARB Application No. 38 of 2022 from Southern Engineering Company Limited (SECO), which was a bidder in the procurement process. SECO thereafter filed before the Board its pleadings dated 13th May,2022 on 16th May 2022.
 25. The Board, it is urged, could not have served SECO and failed to serve the Interested Party which was a named party to the Request for Review from the beginning and being the intended successful bidder with an even higher stake in the matter. The Interested Party is guilty of laches for failure to file its response before the Board in good time. The Interested Party it was argued cannot on the one hand support the Board's Ruling which upholds the decision of the 2nd Respondent and on the other hand disagree with the Board's failure to consider its pleadings, despite the fact that it never pleaded or protested the issue of late service before the Board.
 26. The Ex parte Applicant also filed a Supplementary Affidavit dated 23rd June,2022 in response to the Interested Party's Further Affidavit. The Applicant contended that the Further Affidavit ought to be



struck off the Court's record as the party did not seek this court's leave before filing. Further that the party did not initially serve the said Affidavit and the Ex parte Applicant only learnt about the same from the Interested Party's submissions and sought to get a copy from the Judiciary E-filing system and requested for service.

27. The Interested Party is accused of having included annexures in the said affidavit that were not on the Judiciary E-filing system at the time the Ex parte Applicant was filing its Supplementary Affidavit. It is the Ex parte Applicant's case that it has the right of last reply and that this right will be extinguished if the said Affidavit is considered by the Court. The Affidavit is also said to have been filed on 22nd June, 2022 at 17.47 PM which was after the lapse of the period given by the court. The Ex parte Applicant argued that no new issues were introduced in its Replying Affidavit in response to the Replying Affidavit by the Interested Party.
28. The 2nd and 3rd Respondents in opposition to the application dated 3rd June, 2022 filed a Notice of Preliminary Objection dated 6th June, 2022 and a Replying Affidavit sworn by Maureen Mwenje on even date. In the Notice the Respondents argue that the Applicant's entire suit is hopelessly misconceived, frivolous, totally devoid of merit and mala fides for the reason, that it has failed to comply with the mandatory provisions of Section 175(2) of the Public Procurement and Assets Disposal Act 2015 as read together with Regulation 222 of the Public Procurement and Asset Disposal Regulations, 2020.
29. The Respondents argued that without the Ex parte Applicant furnishing ample security, they stand to suffer irreparable harm as the entire procurement process will have to be terminated due to lack of budgetary allocation. The Respondents contend that pursuant to section 45 of the Public Finance Management Act 2012, an appropriation that has not been spent at the end of the financial year for which it was appropriated shall lapse immediately at the end of the said financial year and in line with this in the unlikely event that this Judicial Review succeeds, the same will be of no effect or benefit to the Ex parte Applicant. The financial year would have come to an end before the procurement process is concluded and therefore the same will stand as terminated due to lack of budgetary allocation.
30. The said termination according to the Respondents will mean that the entire country and themselves will have lost an investment worth over 1 Billion Shillings that would have ensured the quick and efficient transportation of oil and gas throughout the country. The Respondents also contended that the procurement process had been finalized and a contract entered into.
31. It is contended that the 1st Respondent gave due consideration of all the facts in issue and materials adduced before it in reaching its determination and that the instant Judicial Review Application seeks to challenge the merits of the decision of the board which falls outside the purview of Judicial Review. The Ex parte Applicant was also faulted for failing to produce evidence of illegality or breach of the provisions of the PPADA Act, 2015 or of any irrelevant issue considered or relevant issue ignored in arriving at its determination.
32. The Respondents contended that the entire procurement process was done in an open and fair manner and the Interested Party's bid was found to be the most responsive bid with the lowest evaluated bid price. The Ex parte Applicant, it is urged, was well aware that no preference was going to be applied in the tender when submitting their bid and further that the technical evaluation criteria under the subject tender was not score based, and therefore it was not possible to apply the provisions of section 86(2)h of the Act. According to the Respondents applying the said section at the financial stage would defeat the entire purpose of financial evaluation which is to ensure that the lowest quoted bid is awarded to ensure prudent utilization of public resources.



33. According to the Respondents section 157 (4) of the Act outlines the categories of persons or groups that are eligible for reservations or preferences, the same are not applicable in procurements where amounts are above the prescribed threshold of Kshs. 500,000,000/= . There being a mandatory requirement for any margin of preference to be indicated on the Tender document pursuant to section 77 of the Act the fact that the same was not indicated in the subject Tender means that the same cannot be applied.
34. The 2nd Respondent is said to have changed the tender from "open international tender" to "open national tender" to restrict the tender to national firms and stop international firms from bidding to promote the local industry and to accommodate more bidders so as to obtain value in the procurement. It was also contended that there was no requirement under the Tender for the Tenderers to be registered with the NCA nor the EPRA during evaluation but the certifications were to be provided before contract signing. Any loss incurred by the Applicant, it was urged is not the 2nd and 3rd Respondents responsibility as is provided under clause 11.1 of the Tender Document.
35. The Interested Party in its affidavit sworn by Francis Koome Njogu on 10th June,2022 contended that Gulf Energy is a locally registered company as Company No. C.116718 with the ultimate legal and beneficial owners being Kenyan citizens and Comacon the lead partner being wholly owned by Kenyan citizens. In any event it was argued the Interested party's standing as a joint venture presupposes that the tender requirements are evaluated against it in terms of their aggregate and combined responsiveness as a joint venture unless expressly stated otherwise.
36. The Interested Party's case is that Auron Energy, the majority shareholder although registered in Mauritius is wholly owned by Lacroix Capital Limited wholly owned by Francis Koome Njogu and Moset Limited also wholly owned by Paul Kiprotich Limo.
37. On the nature of Business undertaken by Gulf Energy, it was stated that the tender document submitted by the Interested party contained information confirming that Gulf Energy Limited's nature of business includes oil marketing, power generation development and oil industry Infrastructure development. It is averred that oil infrastructure encompasses a myriad of assets, facilities and structures in the nature of pipelines, drilling platforms, refineries, terminals, processing plants, storage and transport infrastructures.
38. It was contended that the subject tender document submitted by the Interested Party was clear evidence of its qualification to handle the Tender including having a total construction turnover of Kshs.1 Billion and its ability and experience in construction methodology and management. The Interested Party contended that Gulf Energy Limited was not a tenderer as of itself exclusively but as a partner of a joint venture. Further, that clause 4.1 under Section I of the Tender document was categorically clear that in the case of a joint venture, all members would be jointly and severally liable for the execution of the entire contract.
39. It is urged that the Ex parte Applicant cannot purport to issue a report or speak on behalf of EPRA an independent legal entity mandated by law to act in its own capacity. The Interested Party argued that the 1st Respondent correctly interpreted the pertinent PPADA provisions in reaching its conclusion and exercised its right to legally express itself on the issue of the applicability of the margin of preference. According to section 89 of the PPADA, the subject tender was correctly identified as an open national tender and was not an international tender and that contrary to the Ex parte Applicant's assertions an international tender goes beyond participation by a foreign tenderer.
40. According to the Interested Party a reading of the section 157 (8) (b) and Regulation 164, leads to the inevitable conclusion that the prescribed graduated scale mandatorily applies to International



- tendering and Competition pursuant to section 89 of PPADA and which is not the case herein. The decisions of the PPARB cited by the Ex parte Applicant were also criticized for having been made in reliance to the repealed Regulation under the Act No.3 of 2005.
41. Further, that wherea procuring entity opts to apply the graduated margin of preference in an open national tender, it does so as a matter of discretion in the manner stated in the applicable tender document and in compliance with section 80(2) of PPADA. The Ex Parte Applicant is accused of having failed to demonstrate how its right to fair administrative action has been violated by the 1st Respondent's decision.
 42. The Interested Party also filed a Further Affidavit sworn on 22nd June, 2022 in which it contended the averments by the Ex parte Applicant that its Replying Affidavit dated 10th June, 2022 was not properly before this court. It was the Interested Party's case that the depositions and annexures in the said Affidavit were made in response to the Ex parte Applicant's allegations and the same cannot be said to be new issues. Further that as much as the annexures were not considered by the Board in reaching its decision, the same were dutifully revealed to the Ex parte Applicant prior to the filing of the Judicial Review Application.
 43. The 2nd and 3rd Respondent's PO and the Ex parte Applicant's Application were canvassed by way of written and oral submissions. The Ex parte Applicant filed written submissions in respect to the PO on 18th June, 2022 and in respect to the application on 20th June, 2022 respectively.
 44. In response to the PO the Ex parte Applicant submitted that the constitutionality of section 175 (2) of the Act and regulation 222 of the Regulations was challenged in Nairobi H.C. Petition No. E226 of 2020, Roads & Civil Engineering Contractors Association & Energy Sector Contractors Association vs The Attorney General & Public Procurement Administrative Review Board & another, before Justice Korir where a conservatory order was issued staying the implementation and/or operation of any Regulation of the *Public Procurement and Asset Disposal Regulation* 2020, requiring the deposit of 15% of the Applicant's tender sum or 3% of the Applicant tender sum before the commencement of Judicial Review Proceedings in respect of the Public Procurement.
 45. The case of *Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Revenue Authority & another (Interested Parties) Skaga Limited & another (Ex-parte Applicants)* [2020] eKLR was also cited where the Court declined to allow the prayers sought in a PO on grounds that the payment of security is subject to the discretion of the court and therefore the same cannot be the subject of a PO. Further that a regulation cannot confer jurisdiction neither can it override constitutional and statutory provisions that expressly confer jurisdiction to the court to hear and determine the applications brought before it. Finally, that the operation of Regulation 222 of the *Public Procurement and Asset Disposal Regulations*, had been suspended by Korir J.
 46. On the application the Ex parte Applicant submitted that 4 issues fall for determination as follows; Whether the contract entered into between the 3rd Respondent and the Interested Party is lawful, whether the Board's decision was unreasonable, whether the Board's decision was tainted with illegality and irrationality and whether the Board's decision was tainted with procedural impropriety and unfairness.
 47. On the 1st issue the case of *Root Capital Incorporated v Tekangu Farmers' Co-Operative Society Ltd & Another* [2016] eKLR where the court held that a contract that is illegal is not enforceable and it is nullity or void ab initio was cited. Similarly, the case of *Republic vs Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) Ex-parte Emcure Pharmaceuticals Limited* [2019] eKLR was also cited.



48. Learned counsel for the Ex parte Applicant submitted that it had demonstrated to the court that the 1st Respondent had failed to consider several relevant issues and these are whether or not Gulf Energy Limited was a foreign bidder for purposes of applying a margin of preference, the relevant laws relating to application of a margin of preference in the subject tender and whether the Interested Party, as a joint venture with a foreign bidder, was rightly deserving of the subject Tender based on the averments that it had not met certain mandatory requirements.
49. To support this argument learned counsel referred the court to the cases of Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex parte Roben Aberdare (K) Limited [2019] e KLR, Republic v The Public Procurement and Administrative Review Board, National Industrial Training Authority and Coretech Solutions & Systems Limited Ex parte Microhouse Technologies Ltd [2016] e KLR, Kenya Revenue Authority & 2 others v Darasa Investment Limited [2018] eKLR.
50. It was urged that the definition of a foreign contractor can be found under Section 2 of the Act and to buttress this submission the case of Republic v Public Procurement Administrative Review Board & 2 others Ex Parte Transcend Media Group Limited [2018] e KLR (hereinafter, “the Transcend Case”) was cited where the court addressed its mind on the said provision at length. On the need to promote local industry the case of Republic v Public Procurement Administrative Review Board and 2 others Ex parte Coast Water Services Board & another [2016] e KLR was cited.
51. Learned counsel also submitted that Article 227 of the Constitution of Kenya, 2010 is the anchor of all procurement processes, the breach of which would render the decision of the 2nd Respondent, the Procuring Entity and the Board null and void. The case of Republic v Public Procurement Administrative Review Board & another Ex parte: Athi Water Service Board & another [2017] eKLR was referred to in this regard.
52. Counsel urges that the participation by foreign tenderers whose shareholding was not within the thresholds of citizen/local contractors as defined by the Act and the Regulations, negated the national nature of such a Tender. The bidders being allowed to quote for the tender price in international currencies also meets the requirements of section 89 (e) of the Act.
53. Further, that the Technical standards and specifications were to meet the standards of the American Petroleum Institute, American Society of Mechanical Engineers (ASME), BS EN [British and European Standard Specifications] standards and quality assurance/ quality control was to be done as per American Society for Nondestructive Testing, which are standards used internationally within the subject tender’s industry. The same was in accordance with section 89 (d) of the Act.
54. The Ex parte Applicant also argued that as the Tender Document could be obtained from the Procuring Entity’s website (www.kpc.co.ke) or the government Tender Portal the same aligned with the provisions of section 94 of the Act on advertising.
55. On whether the Board’s decision was tainted with illegality and irrationality learned counsel submitted that that the Board committed an error of law that goes into its jurisdiction by failing to check the confidential documents submitted. Further that the 1st Respondent failed to exercise its jurisdiction and wide powers as the primary superintendent of public procurement and disposal processes, as was held in the Court of Appeal decision of Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR.
56. Further that pursuant to section 67 of the Act on confidentiality and various decisions by court one of such being Republic v Public Procurement Administrative Review Board; Nairobi City Waters &



- Sewage Company Limited & Another (Interested Parties) Ex Parte Fourway Construction Company Limited* [2018] eKLR the 1st Respondent erred in finding that reviewing the confidential documents submitted by the Ex parte Applicant would be aiding a party in a review.
57. The Board is faulted for failing to apply the correct standard of proof that is on a balance of probabilities. Learned counsel cited the case of *Asset Recovery Agency v Ali Abdi Ibrahim* [2022] eKLR to support this argument. On merit review by the judicial review court the case of *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] eKLR was cited. On what constituted grounds for judicial review the case of *Republic v Zacharia Kabuthu & another (Sued as Trustees and on Behalf of and as Officials of the Kenya Evangelical Lutheran Church); Johanness Kutuk Ole Meliyio & 2 others (Interested Parties) Ex parte Benjamin Kamala & another* [2020] eKLR was referred to.
58. The 2nd and 3rd Respondents also filed their submissions on 22nd June, 2022 and in the submissions it is urged that until and when the court issues final orders on the unconstitutionality of section 175(2) and regulation 222 are issued by the court the same continue to apply. Further that the PO filed herein is on a pure point of law as the factual issues of whether or not a security deposit has been paid is not in issue. Learned counsel also contended that the orders have been issued by a court of concurrent jurisdiction and therefore not binding upon this court.
59. It was the 2nd and 3rd Respondents' that although preferences are provided for under statute and the same is mandatory the same was not applicable in the instant tender as the same was not score based yet section 86(2) only provides for the 20% to be applied to the Total Score and that scores are apportioned at the Technical and not financial stage. According to learned counsel at the financial stage, tenders are ranked according to the evaluated price and not according to any score.
60. In addition, that the drafters of Regulations 77, 148 and 164 intended a preference margin to be applied to the evaluated price and that section 86(2) does not talk of evaluated price but talks of total score and hence the same should be interpreted as such. The cases of *County Government of Nyeri & Anor vs. Cecilia Wangechi Ndungu* [2015] eKLR and *Council of County Governors v Attorney General & Another* [2017] eKLR were cited on analysis of the intention of a statute.
61. On preference and reservations, the case of *Republic v Public Procurement Administrative Review Board & 2 Others Ex parte Niavana Agencies Limited/S Five Blocks Enterprises Ltd (Interested Party)* [2021] eKLR was cited. According to the Respondents, an acceptable tender must be construed against the background envisaged by Article 227(1) of *the Constitution, 2010*.
62. The Respondents also contended that the NCA and EPRA licenses were formalities that can be taken care of post contract award. Also, that if one of the parties to the joint venture was deemed to have satisfied the requirement for a construction turnover then the same is deemed to have been satisfied.
63. According to the Respondents nothing prevented the 3rd Respondent from entering into a contract with the Interested Party as section 175 of the Act only provides timelines as to when a Judicial Review should be filed and does not indicate that within the 14 days a procuring entity cannot enter into a contract. Section 171 of the Act was also cited on completion of review. The validity of the said contract it was argued was not a subject before the Board and therefore this court has no jurisdiction to make a finding on the same. On jurisdiction of judicial review, the case of *Republic v Magistrates Court, Mombasa; Absin Synergy Limited (Interested Party)* (Judicial Review E033 OF 2021) [2022] KEHC 10 KLR was cited.
64. The Interested Party also filed written submissions dated 22nd June, 2022 in which 2 issues were identified for determination and these are whether it is a foreign bidder and whether the Ex parte



Applicant is entitled to the Orders sought. On the 1st issue learned counsel submitted that the Ex parte Applicant has failed to produce before this court evidence showing that Auron Energy is wholly owned and controlled by persons who are not citizens of Kenya in light of the provisions of section 107(1) of the *Evidence Act*.

65. Learned counsel submitted that the Ex parte Applicant had full knowledge of the requirements of the subject Tender and in submitting its bid it meant that it had acceded to the Procuring Entity's expectation that the Ex parte Applicant like other bidders, intended to be evaluated as per the terms of the subject tender. To buttress this argument counsel cited the cases of *Behan & Okero vs. National Bank of Kenya [2007] eKLR* and *Republic vs. Institute of Certified Public Secretaries of Kenya Ex parte Mundia Njeru Geteria [2010] eKLR*.
66. On this court's jurisdiction, the cases of *Republic v Public Procurement Administrative Review Board & others Ex parte Liason Healthcare Limited Misc. Application No. E204 OF 2021* and *Republic vs. Public Procurement Administrative Review Board, Principal Secretary State Department of Interior Ex parte CMC Motors Group Limited [2020] eKLR* were cited. The case of *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others supra* was cited on the 1st Respondent's decisional freedom.
67. At the time of writing this judgement, there was no response and /or submissions by the 1st Respondent.
68. I have considered the application, the responses and preliminary objection as well as learned submission by counsel. I have had due regard to the record of the proceedings before the Board and the decision arrived at. The issues that crystalize for determination are;
 - 1) whether the application herein offends the provision of section 175(2) of the PPADA and Regulation 222 of the Public Procurement and Asset Disposal Regulations, 2020 for failure by the applicant to provide security thus divesting this court of jurisdiction.
 - 2) Whether a contract has been entered into between the procuring entity and the Interested Party, and if so, whether the same is illegal.
 - 3) Whether the Board's decision met the applicable threshold of legality, rationality and reasonableness.
 - 4) What orders should issue.
 - I. whether the application herein offends the provision of section 175(2) of the PPADA and Regulation 222 of the Public Procurement and Asset Disposal Regulations, 2020 for failure by the applicant to provide security thus divesting this court of jurisdiction.
69. The ideal take off point would be on issue number one for the obvious reason that if the court was divested of jurisdiction, it would not move a single step further in the matter. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1* where Justice Nyarangi of the Court of Appeal held as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."



70. In interrogating the preliminary objection (hereinafter, PO) raised, the court has to be satisfied that the PO as raised is a proper one within the definition in *Mukisa Biscuit Manufacturing co. ltd -v- West-End Distributors Limited* – (1969) EA 696 in which Sir Charles Newbold P observed as follows:-

“..... The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

71. The gist of the 2nd and 3rd Respondents PO is that the Applicant has not furnished security in compliance with Section 175(2) of the PPADA. Payment or otherwise of security is a fact to be confirmed through evidence and renders the PO unsustainable. I agree with the finding of this court (Nyamweya J, as she then was) and which I find necessary to quote in extenso in *Republic v Public Procurement Administrative Review Board; Accounting Officer Kenya Revenue Authority & another (Interested Parties) Skaga Limited & another (Ex-Parte Applicant)* [2020] eKLR where it was held:

“I will dispose of the preliminary objection by proffering three reasons why it is not merited and cannot lie. Firstly, the payment or non-payment of security by an applicant is a question of fact, and under Regulation 222 Public Procurement & Assets Disposal Regulations of 2020, its manner of enforcement is subject to the discretion of this Court. The issue of the payment of security cannot therefore be the subject of a preliminary objection. The circumstances in which a preliminary objection may be raised, as explained by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, are as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

38. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of *Oraro vs Mbaja*, (2005) 1 KLR 141, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in *Mukisa Biscuit Company -vs- West End Distributors Ltd* (supra) that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

39. A determination of the issues raised in the preliminary objections will require evidence to be called on the payment or otherwise of the security, and for this Court to give further directions thereon, and the issue of such security cannot therefore be raised as a preliminary objection.



40. Secondly, a regulation cannot confer jurisdiction, neither can it override constitutional and statutory provisions that expressly confer jurisdiction to this Court to hear and determine of the applications brought by the 1st and 2nd ex parte Applicants. A Court's jurisdiction flows from either *the Constitution* or statute or both, or and by principles laid out in judicial precedent as explained by the Court of Appeal in the case of Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1. The Court of Appeal proceeded to define jurisdiction and its source as follows:

"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

41. It is a general principal of statutory interpretation that unless the enabling Act so provides, delegated legislation cannot override any Act or any rule of general law (see Bennion on Statutory Interpretation, Fifth Edition at section 50). Even if Regulation 222 of the Public Procurement & Assets Disposal Regulations of 2020 were to be interpreted as detailing out how section Section 175 of the Public Procurement & Assets Disposal Act was to be implemented when applications for judicial review in the High Court from decisions made by the Respondent are being made, it certainly cannot affect or limit the supervisory jurisdiction of this Court granted by Article 165 (6) of *the Constitution*. This is for the reason that the said regulation does not and cannot purport to implement the provisions of *the Constitution*, and also in light of the provisions of section 174 of of the Public Procurement & Assets Disposal Act that the right to request for a review under section 175 is in addition to any other legal remedy a person may have.

42. Lastly, the implementation and operation of Regulation 222 of the Public Procurement & Assets Disposal Regulations of 2020 was suspended by interim conservatory orders given by Korir J on 27th July 2020 in Roads and Civil Engineering Contractors Association and Energy Sector Contractors Association vs The Attorney General and the Public Procurement Administrative Review Board and Another, Nairobi H.C. Petition No.E226 of 2020, which Petition is inter alia challenging the Constitutionality of the said regulation.



43. The 1st and 2nd ex parte Applicants' applications are therefore found to be properly before this Court, which is seized of jurisdiction to hear and determine the same. I will therefore proceed with a determination of the substantive issues raised in the said applications in the succeeding sections of this judgement."

72. In view of the foregoing, the PO raised in this matter is unsustainable. I proceed to consider the issues raised on their merit.

II. Whether a contract has been entered into between the procuring entity and the Interested Party, and if so, whether the same is illegal.

73. The 2nd and 3rd Respondents have averred in their replying affidavit that the judicial review application herein has been overtaken by events, the orders sought are impractical and the decision on the same shall be nugatory as the 3rd respondent has already concluded the subject matter procurement process and entered into a contract over the same. It is stated that the judicial review application was filed and served upon the 2nd and 3rd Respondents after it had already concluded the procurement process and therefore this court lacks jurisdiction to entertain the same.

74. On its part, the Applicant takes the position that the court's jurisdiction is not ousted where the contract entered into is illegal and where the existence of the contract has not been proved. It is urged that the Respondents ought to await the lapse of the 14 days allowed in law for the filing of a judicial review application before entering into a contract.

75. I have applied my mind to the rival positions taken by the parties. To begin with, there is no evidence tendered by the procuring entity or the Interested Party by way of annexure or otherwise to show the existence of the alleged contract. Section 175 of the Act provides as follows;

" 175. Right to judicial review to procurement

(1) 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."

76. A plain reading of this proviso clearly shows that the decision of the Review Board becomes final and binding to both parties only upon the lapse of 14 days from the date of the Review Board's decision. Though the law does not expressly state that a contract cannot be signed before the lapse of the 14 days, there is a clear implication from the law that a contract should not be signed before the lapse of the 14 days. A procuring entity must be alive to the dangers of entering into a contract before the lapse of the 14 days since, if a judicial review application were to be made and becomes successful, the entity would be exposed to damages for breach of contract. In such an eventuality, my view is that such damages should lie personally against an accounting officer who authorises such a contract.

77. Our superior courts have been confronted with this issue before and the question is thus not novel. In *Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited* [2019] eKLR the court stated;

"In the same vein, after the decision of the Review Board, an aggrieved party is granted 14 days within which to apply for Review in the High Court. Our courts have consistently held that the decision remains frozen for 14 days from the date of the decision. Transparency, which



is at the core of public procurement law and Regulations, demands that the procurement procedure or the decision or action involved shall be subject to scrutiny and liable to challenge. The question whether any procurement is valid must be answered with reference to *the Constitution*, the governing legislation and Regulations. The enabling statute grants an aggrieved party the right to approach the High Court. The fairness contemplated under Article 227 of *the Constitution* cannot be realized where a procuring entity purports to sign a contract before the expiry of the 14 days.

83. Differently put, the procuring entity cannot enter into a valid contract before the expiry of the 14 days after the decision of the Review Board. It follows that the purported signing of a contract between the Interested Party and the successful bidder, namely Myland Laboratories Limited is illegal. The ensuing contract is therefore legally frail.”

(See also Republic v Public Procurement Administrative Review Board & 2 Others ex parte Adan Osman Godana t/a Eldoret Standard Butchery)

78. In our instant suit, apart from the averments by the 2nd and 3rd Respondents in the replying affidavit, I have not come across any evidence of such a contract by way of an annexure or otherwise and therefore its existence is not proven. In the circumstances I make no orders in respect thereof but based on the final findings in this matter, should such a contract exist, it would certainly be nullified.

III. Whether the Board’s decision met the applicable threshold of legality, rationality and reasonableness.

79. I find it necessary to restate the legal principles applicable in an application for judicial review like the instant one. The traditional scope of judicial review has always been a narrow one and as put by Mativo J in *Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University* [2018] eKLR;

“There is a long-established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in Judicial Review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

16. 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.”

80. In the advent of *the constitution* of Kenya, 2010, and specifically the proviso in Article 47, there has been a notable shift towards merit review in the court’s exercise of the judicial review jurisdiction. The



court of Appeal in *Judicial Service Commission & another vs. Lucy Muthoni Njora* [2021] eKLR had this to say:

“We emphatically find and hold that there is nothing doctrinally or jurisprudentially amiss or erroneous in a judge’s adoption of a merit review in judicial review proceedings. To the contrary, the error would lie in a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process while strenuously and artificially avoiding merit. That path only leads to intolerable superficiality.”

81. In my view the expanded scope of judicial review accommodating merit review requires great circumspection lest the lines between judicial review and appeal become blurred or completely obliterated bringing with it unwelcome confusion in litigation before our courts.
82. On the captioned issue, the emerging facts in controversy are whether the Board failed to consider that the Interested Party was a foreign bidder for purpose of considering margin of preference and further failing to consider the relevant law applicable thereto. The question arises, too, whether the Board failed to consider whether the Interested Party as a joint venture with a foreign bidder was rightly deserving of the subject tender based on the averments that it had not met certain mandatory requirements.
83. On its part, the applicant’s case is that the Board failed to consider these relevant issues that were material to the case. It is submitted that the applicant in its pleadings before the Board invited it to fault the procurement entity’s intention to award the tender to the Interested Party without applying a margin of preference since one of the Interested Party’s joint venture Partner GEL was a foreign bidder. It is urged that the applicant averred backed by relevant proof, that GEL was a foreign bidder by virtue of being fully acquired by Auron Energy Limited, a company incorporated in Mauritius. The Applicant had attached a C12 form from the Companies Registry to the application. The applicant urges that it clearly laid out the fact that based on records available, even if GEL was registered in Kenya, it was a foreign contractor by being 100% owned and controlled by foreign entity.
84. The Applicant’s contention is vehemently denied by the Interested Party whose counsel submits that no evidence was produced by the Applicant to demonstrate that Auron Energy Limited, albeit having its address in Mauritius, was wholly controlled by or owned by foreign nationals. The CR12 form produced as evidence by the applicant just shows that the postal address of Auron Energy is in Mauritius but it does not demonstrate that its controlling shareholders are citizens of Mauritius or better yet, are not citizens of Kenya.
85. The 2nd and 3rd Respondents too, maintain that the Interested Party is not a foreign bidder as both companies are registered in Kenya.
86. The issue whether the Interested Party is a foreign bidder was central to the Board’s finding in respect of the applicability of margin of preference in respect of the subject tender in conformity with the law as provided in sections 2, 86(2) and 157 of the Act and Regulations 147 and 148 of the Regulations. Did the Board fail to consider this relevant matter? A distinction needs to be drawn between a decision making Body’s failure to consider a relevant matter and a Body’s decision on a matter which decision a party disagrees with. As a judicial review court, it is within my province to consider whether the Board failed to consider the material presented in respect of the question whether the Interested Party was a foreign bidder. As alluded to earlier, it is also permissible with necessary restraint to venture into a merit review of the decision reached.
87. I have had recourse to the proceedings before the Board. The issue whether the Interested Party was a foreign bidder was raised by the Applicant before the Board. It was upon the applicant to produce satisfactory evidence before the Board to prove that the 2nd Interested Party was a foreign bidder. There



was no evidence before the Board that, even though Auron Energy Limited has its address at Mauritius as seen in the form CR 12 shown, it was controlled by foreign Nationals or that the shareholders are not Kenyan citizens.

88. Evidence before Board on the allegations on ownership of Auron was crucial as section 2 of the PPADA defines a ‘citizen contractor’ as a person or firm wholly owned and wholly controlled by persons who are citizens of Kenya. Broaching on the import of this provision the court in *Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Transcend Media Group Limited* [2018] EKLK stated;

“Section 2 of the Public Procurement and Disposal of Assets Act defines a “citizen contractor” to mean a person or a firm wholly owned and controlled by persons who are citizens of Kenya. The relevant factors that determine citizenship according to the section and for purposes of the application of section 86(2) and 157(8) of the Act is therefore the ownership and control of a firm or company, and not its registration in Kenya. In addition, no distinction is between a parent firm and subsidiary firms in section 2 of the Act, and therefore all firms must be subjected to the same threshold in determining Kenyan citizenship.....Therefore, section 2 of the Public Procurement Act specifically requires a piercing of the corporate veil to determine who the shareholders of a firm are; their citizenship; and the ownership and control that the said shareholders exert; as a company is a separate legal entity which is independent and distinct from its shareholders.....”

89. On the question whether the Interested Party had met the mandatory requirement for the award of the tender, it is the Applicants case that the Board committed an error of law that goes into its jurisdiction by failing to check the confidential documents submitted to it by the procuring entity under section 67(3) of the Act to confirm whether the Interested party had met the mandatory requirements on page 48 of the Tender Document. In rejoinder, the Interested Party submits that, as constituted, the judicial review application seeks to have the court exercise its appellate jurisdiction. The confidential documents said to have not been considered by the Board are not specified.
90. It is submitted for the 2nd and 3rd Respondents that the Applicant did not disclose any breach committed by the procurement entity throughout the procurement process before the board but instead sought to have the Board go on a fact finding expedition to look for errors or misgivings which did not exist. It is urged that all bids were fairly and objectively evaluated by the respondents. The Board, therefore was right in holding that it cannot be turned into an evaluation committee.
91. From the record of the proceedings before the Board, I note that the Applicant gave a myriad of reasons why the interested party did not meet the evaluation criteria set under the Tender Document. The Board considered the invite to re evaluate the Interested Party’s bid to check if it met the required criterion. The Board acknowledged receipt of the evaluation report which is part of the documents submitted to the Board pursuant to section 67(3) of the Act. The Board expressed itself as follows:

“The Board observes that the tender evaluation report and other confidential documents submitted to it are for the purposes of confirming the allegations of the parties’ respective cases. The Board observes further that the confidential documents in its possession are not used for the purposes of aiding any party to the review.

In the instant ground for review the applicant has alleged breach of the Act by the procuring entity for issuing the letter of notification of award to the Interested Party who did not , according to the Applicant, meet the evaluation criteria set out in the Tender Document.



The Applicant has gone further and invited the Board to scrutinize the Interested Party's tender to affirm the disqualifying marks.

The Board wishes to restate the cardinal rule of justice that he who alleges proves. The Applicant herein made serious allegations against the Interested Party. For those allegations to carry weight, the Applicant needed to go further and provide the Board with evidence which it did not. In the absence of such evidence the Applicant's assertions against the Interested Party are merely speculative. The Board finds that the allegations are unproven and this ground of review therefore fails noting that the Board cannot convert itself into an evaluation committee to conduct evaluation of the Applicant's tender."

92. It is clear from the foregoing that the board properly addressed itself to the evidence availed to it, analysed it and reached a finding as it did. This court, having been moved in its judicial review jurisdiction, cannot sit on appeal on this issue to determine the sufficiency of the evidence or otherwise.
93. The holding by the Board finds support in the recent Court of appeal decision in Civil Appeal No. E270 of 2022 where the court stated:

"In his judgment, the learned Judge concluded that... the contestations by the 1st and second interested parties [the Procuring Entity and the appellant] that it is the [respondent] who bore the burden to prove the [appellant's] responsiveness to the tender are devoid of any merit and the Board fell into great error in walking along with them and reaching the decision it did." The learned Judge's decisive dictum suggests that, once the respondent alleged that they did not comply with certain mandatory requirements in the tender document, the burden shifted to the appellant to prove otherwise.

22. Contrary to the learned Judge's conclusion, section 107(1) of the Evidence Act, Revised 2014 (1963) provides in no uncertain terms:

"107 Burden of proof

- (1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

23. On our part, we find nothing to suggest that the burden of proof shifted to the appellant in the absence of any statutory prescription as contemplated in section 109, which reads:

"109 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."

94. In this case therefore the Board thus cannot be faulted for reaching the decision it did after according all the parties a hearing and correctly applying the law evidence.



95. There is no demonstration of illegality, irrationality or unreasonableness in the decision made by the Board. The parameters within which the court determines whether a decision is tainted with illegality, irrationality or unreasonableness are well settled in law and for clarity I will broach the same here. Having reviewed the decision by the Board and in so far as the legality of the decision is concerned, I have no doubt that the decision is firmly grounded on the law. Put differently, the ex parte applicant has not demonstrated that the Board acted ultra vires its statutory mandate or that it misinterpreted the law. I have addressed my mind on the issues framed by the Board, while addressing the same issues raised in this case and the Board’s analysis and findings thereon. The ex parte applicant has not demonstrated illegality. The impugned decision has not been shown to be ultra vires or outside the Board’s functions.

96. The ex parte applicant invites this court to annul the impugned decision on grounds of unreasonableness and irrationality. 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. Irrationality as defined in *Pastoli vs. Kabale District Local Government Council and Others* [2008] 2 EA 300 is “Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards....”

Certainly the decision of the Board does not fall on any of the ambits of irrationality and unreasonableness.

97. Where no cogent foundation is laid for grant of judicial review orders vitiating the decision of the Board, courts ought to be slow in interfering with its statutory mandate. The reasons were well captured by the court of Appeal in *Kenya Pipeline Ltd v Hyosung Ebara Company Ltd* where the court stated:

“The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. 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.”

98. From the foregoing and for reasons above stated, the applicant has not established a proper case warranting the grant of the judicial review orders sought. The application is without merit and is hereby dismissed. It is ordered that each party is to bear its own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF JUNE 2022

.....

A.K. NDUNGU

JUDGE

