



**Republic v Public Procurement Administrative Review Board & 2 others; CPF
Financial Services Limited (Exparte) (Judicial Review Miscellaneous Application
E086 of 2022) [2022] KEHC 12684 (KLR) (Judicial Review) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12684 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E086 OF 2022
AK NDUNG'U, J
JULY 29, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

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

**ACTING CHIEF EXECUTIVE OFFICER, THE PUBLIC SERVICE
SUPERANNUATION FUND BOARD OF TRUSTEES 2ND RESPONDENT**

**BOARD OF TRUTEES, THE PUBLIC SERVICE SUPERANNUATION
FUND 3RD RESPONDENT**

AND

CPF FINANCIAL SERVICES LIMITED EXPARTE

JUDGMENT

1. On May 6, 2022 this court upon finding that the 1st respondent's decision dated March 17, 2022 in Public Procurement Administrative Board application No 16 of 2022: CPF Financial Services Limited v the Accounting Officer; Public Service Superannuation Scheme was marred with illegality, irrationality and unfairness directed the 1st respondent herein to rehear/reconsider application No 16 of 2022 taking into account the findings that this honourable court had made. The applicant states that upon rehearing the matter the board reached a decision that is identical to the one that this court quashed.



2. Consequently, the *ex parte* applicant herein has now filed a notice of motion application dated June 16, 2022 seeking the following orders;
- i. An order of *certiorari* to bring into this honourable court, to be quashed, the 1st respondent’s decision delivered on June 3, 2022 in Public Procurement Administrative Review Board application No 16 of 2022: CPF Financial Services Limited v the Accounting Officer, Public Service Superannuation Scheme (“the impugned decision”).
 - ii. An order of *mandamus* compelling the 2nd and 3rd respondents to award tender No PSS/003/2020-2021 procurement of fund administrator for the public service superannuation fund (“the tender”) to the applicant;
 - iii. An order of prohibition precluding the 2nd and 3rd respondents and their officers, subordinates, servants and agents from terminating, re-advertising or awarding the tender to any external administrator other than the applicant;
 - iv. An order of prohibition precluding the 2nd and 3rd respondents and their officers, servants and agents from resorting to the internal administration of the public service superannuation fund.
 - v. Alternatively, and without prejudice to the preceding, an order of *mandamus* compelling the 1st respondent to re-admit Public Procurement Administrative Review Board Application No 16 of 2022: CPF Financial Services Limited v The Accounting Officer, Public Service Superannuation Scheme for the limited purpose of issuing appropriate and effective relief(s) taking into consideration the judgment delivered by this honourable court on May 6, 2022 in judicial review application No E037 of 2022: Republic v Public Procurement Administrative Review Board and 2 others ex-part CPF Financial Services Limited (“the first judicial review proceedings”).
 - vi. An order directing the 2nd respondent to show cause why she should not be—
 - a. punished for contempt of court, for refusing to comply with the orders issued by the 1st respondent on December 28, 2021 in application No 148 of 2021: CPF Financial Services Limited v the Accounting Officer, Public Service Superannuation Scheme; and
 - b. declared as having breached article 10 and chapter six of the Constitution and thus unfit to hold public office for refusing to comply with the orders issued by the 1st respondent on December 28, 2021 in application No 148 of 2021: CPF Financial Services Limited v the Accounting Officer, Public Service Superannuation Scheme.
 - vii. An order directing the relevant members of the 1st respondent (i.e, Faith Waigwa, Steven Oudo, Rahab Chacha and Ambrose Ogeto) to show cause why each of them should not be—
 - a. punished for contempt of court, for refusing to comply with the judgment delivered and the orders issued by this honourable court (Ndungu J) on May 6, 2022 in judicial review application No E037 of 2022: Republic v Public Procurement Administrative Review Board & 2 others ex-parte CPF Financial Services Limited; and;
 - b. declared as having breached article 10 and chapter six of the Constitution and thus unfit to hold public office for refusing to comply with the judgment delivered and the orders issued by this honourable court (Ndungu J) on May 6, 2022 in the first judicial review proceedings.



- viii The 2nd and 3rd respondents shall reimburse the applicant, on an indemnity basis, the costs of and incidental to—
- a. the Public Procurement Administrative Review Board application No 148 of 2021: CPF Financial Services Limited v the Accounting Officer, Public Service Superannuation Scheme; and;
 - b. the Public Procurement Administrative Review Board application No 16 of 2022: CPF Financial Services Limited v the Accounting Officer, Public Service Superannuation Scheme.
- ix. Such other, incidental or alternative relief(s) as this honourable court may deem fair and just given the 1st and 2nd respondents’ apparent scheme of frustrating the applicant through contempt of court, dilatory tactics and unending litigation.
3. The motion is supported by a statutory statement dated June 14, 2022 and verified by the affidavit of Hosea Kili sworn on the same date.
 4. The *ex parte* applicant contends that the 1st respondent’s decision of June 3, 2022 hereinafter ‘the impugned decision’ encourages and rewards wrong doing by public officials in public procurement. Further, that it faces an imminent risk of suffering irreversible harm and damage.
 5. The *ex parte* applicant also urges that the impugned decision is tainted with fundamental errors of law and fact as the 1st respondent has failed to obey this court’s orders; it has also failed to follow binding precedents on a procuring entity’s interference with the tender validity period. Additionally, that the decision does not take into account the provisions of section 167(1) of the [Procurement Act](#) on computation of time.
 6. The impugned decision is faulted for failing to find that the applicant’s letter dated January 7, 2022 was based on the 1st respondent’s ruling and orders of December 28, 2021 the applicant’s letter was necessitated by the 2nd respondent’s pattern of dilatory conduct and that the applicant’s cause of action accrued at midnight on February 11, 2022 and therefore the request for review was filed within fourteen days as provided by statute.
 7. The 1st respondent is also faulted for failing to award the tender to the *ex parte* applicant based on the matter set out by this court at paragraph 12-15 and 31-42 in its judgment and the replying affidavit filed by the 3rd respondent’s chairperson in the initial judicial review proceedings.
 8. The impugned decision it is contended does not give effect to section 175(6) of the [Public Procurement Act](#) neither does it consider the 1st respondent’s ruling and orders as an illusory or ineffective remedy given the provisions of section 40(1) of the Act.
 9. The *ex parte* applicant contends that this court’s order directing the 1st respondent to rehear/reconsider the second request for review was not an order permitting it to admit additional parties or issues or to reaffirm, restate or reiterate the findings, conclusions and orders that this court’s first judgment quashed.
 10. On the preliminary objection, the *ex parte* applicant contends that it does not meet the threshold as set out in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 as it is indisputable that this court has jurisdiction to determine the Application competently as provided under article 165(6) of the [Constitution](#), section 175 of the [Public Procurement and Asset Disposal Act](#) and section 11 of the [Fair Administrative Action Act](#). The *ex parte* applicant urged that determination



of a preliminary objection ought to dispose of the suit or entire case and not object to the grant of only some of the reliefs sought in a case.

11. It is the *ex parte* applicant's case that it is not open, in a hierarchical common law judicial system, for a lower court to ignore decisions of a higher court. The cases of *Republic v Public Procurement Administrative Review Board & another* judicial review application No 60 of 2020 and *Advanced Gaming Limited v Betting Control and Licensing Board & 2 others* judicial review application No 271 of 2019 are cited in this regard.
12. It is further urged that learned counsel for the 1st respondent deliberately disobeyed the binding nature of the court's decision despite having had proper notice, and any action by the 1st respondent that was contrary to this honourable court is null and void. In support of this argument counsel cites the case of *Katsuri Limited v Kapurchand Depar Sha* [2016] eKLR.
13. The *ex parte* applicant contends that the interested party failed at the preliminary evaluation stage for want of a responsive tender and thus had no stake in the tender and the application. Further that the interested party was not a party in either of the two requests for review and according to section 170 of the Act the mere fact that one submitted for a tender does not constitute one being a party in an application for review.
14. The case of *Attorney General v David Ndi & 73 others* [2021] KESC 17 [eKLR] is cited in this regard. It is the *ex parte* applicant's submission that this court is obligated to confine its decision to the issues that are raised by the principal parties' pleadings. To buttress this argument, the case of *Francis Kariuki Muruatetu & another v Republic & 5 others*, petition Nos 15 and 16 of 2015 is cited.
15. The interested party is accused of failing to pursue its right as envisaged under the procurement process where an unhappy bidder has the option of lodging a request for review within fourteen (14) days.
16. The 1st respondent in response to the application herein filed a preliminary objection on grounds reproduced herein below;
 - i. That this court lacks jurisdiction to grant prayer 7 as pursuant to section 178 of the Act members of the board are granted immunity from personal liability in civil or criminal proceedings in respect of any act or omissions done in good faith in the performance of their duties.
 - ii. That this honourable court sitting in this cause lacks jurisdiction to hear and determine contempt proceedings as moved *vide* prayer number 7 in the notice of motion application as read with prayer number 5 in the statutory statement dated June 14, 2022 filed herein.
 - iii. That there is no order from this honourable court in the instant cause (i.e Judicial Review Miscellaneous civil application No E086 of 2022) that warrants contempt proceedings as moved *vide* prayer number 7 in the notice of motion application as read with prayer number 5 in the statutory statement dated June 14, 2022 filed herein.
 - iv. That the notice of motion application is in any event fatally defective, bad in law and should be struck out with costs to the 1st respondent in so far as the same relates to contempt proceedings as moved *vide* prayer number 7 in the notice of motion application as read with prayer number 5 in the statutory statement dated June 14, 2022 filed herein."
17. The 1st respondent also argues in its replying affidavit that there is no order from this honourable court in the instant case that warrants contempt proceedings and that Faith Waigwa, Steven Oudo, Rahab



Chacha and Ambrose Ogeto cannot be cited for contempt as they are not parties in the judicial review application.

18. It is the 1st respondent's case that pursuant to the order of *mandamus* by the judicial review court, the board re-heard/re-considered review No 16 of 2022 while taking into account the findings contained in the JR judgment dated May 6, 2022 within 30 days, expressly holding as much in its determination in the board's decision of June 3, 2022 at pages 35, 42, 50 and 70 thereof.
19. Further, that in arriving at the board's decision dated June 3, 2022, the board quoted paragraphs 53, 54, 35, 41, 39, 36, 37,38, 39, 41 and 42 of the JR judgment dated May 6, 2022 at pages 39, 40, 42, 50, 51, 67, 68, 69 and 70 respectively.
20. The 1st respondent in its decision observed that its decision dated December 28, 2021 in review No 148 of 2021 was final and binding to the parties as none sought judicial review by the High Court. Further that it would only determine new issues raised in review No 16 of 2022 whose occurrence took place after the board's decision dated December 28, 2021 in review No 148 of 2021.
21. It is the 1st respondent's submission that the first issue the board addressed was whether the 2nd respondent, being the accounting officer of the procuring entity, complied with the orders of the board as contained in the board's decision dated December 28, 2021 pursuant to the findings of this court in JR E037 of 2022 to which it came to the conclusion that the 2nd respondent had failed comply with its orders as contained in the decision dated December 28, 2021. This court according to the 1st respondent did not find its decision illegal in regards to the first issue.
22. The second issue considered by the board was whether the tender validity period of the subject tender had expired. Similarly, it is urged that the board took into account the findings of this court as contained at paragraph 41 and it held that the 2nd respondent, in breach of section 88 of the Act and contrary to the second order (order No 2) of the board purported to extend the tender validity period of the subject tender twice for 30 days each, instead of once and restricted to not more than 30 days as provided under section 88(3) of the Act.
23. This court again is said to have never found in its decision that the board's determination on this issue was illegal, irrational or arrived at through procedural impropriety instead, the judicial review court faulted the board for blaming the applicant for the expiry of the tender validity period.
24. The respondent's submission is that the third issue the board addressed was whether it can extend an already expired tender validity period and while observing the doctrine of precedent the board held that the tender validity period of the subject tender having expired, the same was incapable of being extended and neither the 2nd respondent nor the board could extend the tender validity period of the subject tender after it expired on January 11, 2022. In making a determination on this third issue, the board observed that the judicial review court never addressed this, presumably because the same was not an issue framed for determination in the board's decision of March 17, 2022.
25. The 1st respondent also submitted that the fourth issue determined by the board was the appropriate orders it could grant in the circumstances of review No 16 of 2022. The 1st respondent held that its hands were tied because the tender proceedings of the subject tender died a natural death on January 11, 2022 and that following the expiry of the tender validity period and no order with respect to a dead tender or non-existent procurement proceedings was capable of being enforced and that doing otherwise would be an exercise in futility.
26. The board's decision dated June 3, 2022 was furnished to the director general of the public procurement regulatory authority for purposes of taking any necessary action in law with respect to



- the board's finding that the 2nd respondent failed to comply with its orders as contained in the board's decision dated December 28, 2021.
27. It is further argued that the board was under the impression that this court did not place an obligation on it to hold a different decision from its decision dated March 17, 2022 but instead, it was required to consider its jurisdiction and inherent powers by exercising its powers under section 173. Further that the court had left the discretion of arriving at a decision to the board.
 28. The 2nd respondent in its affidavit sworn by Alice K Nyariki on June 29, 2022 contends that the 1st respondent complied with this court's judgment and reheard the matter and issued a decision on June 6, 2022.
 29. The 2nd respondent's case is that the scheme did not breach the orders of the board as due diligence could not be logically concluded within the stipulated period because of background checks being conducted, the scheme extended the tender validity from January 20, 2022 for a further 30 days which lapsed on February 19, 2022. Further, that as at the time the request for review No 16 of 2022 filed on February 24, 2022 was heard, the tender validity period had expired.
 30. It was also argued that the tender award could not happen by dint of section 87 of the Act and therefore the contract could not be entered into by either of the parties pursuant to section 135(3) of the Act. The ex parte applicant is accused of trying to coerce the scheme to award the tender to it contrary to section 66(1) of the Act yet the procurement process has not been completed. The 2nd respondent denies being in contempt of any orders and contends that this court can only punish for contempt for orders issued by it and that the orders in question are those issued by the 1st respondent and thus this court is devoid of jurisdiction.
 31. The 1st respondent is also said to have dealt with the issue of costs and therefore prayer 8 cannot issue. The application before this court is said to seek to challenge the merit of the 1st respondent's decision which falls outside the jurisdiction of this court.
 32. The 3rd respondent on the other hand reiterated the contents of its replying affidavit filed before this court in JR No E037 of 2022; Republic v Public Procurement Board & 2 others ex parte CPF Financial Services Limited.
 33. The interested party also filed a replying affidavit sworn by Anthony Wambua Kilavi on June 29, 2022 in which it is contended that, contrary to practice they only became aware of the re-hearing proceedings in application No 16 of 2022 and the applications that preceded the same, being the application number 148 of 2021 lodged with the 1st respondent by the ex-parte applicant, through this court's judgment in E037 of 2022.
 34. It is the interested party's case that there is no evidence of any wilful and deliberate disobedience of the orders of this honourable court and that the courts have found that the only alternative when a tender validity period has lapsed and the same hasn't been extended before its expiry is to commence a fresh procurement process. This according to the interested party is the route that this particular tender ought to take considering the time that has lapsed since the same was advertised.
 35. The Attorney General filed written submissions dated July 12, 2022 on behalf of the 1st and 2nd respondents herein. On the scope of judicial review learned counsel cited the cases of *Pastoli v Kabale District Local Government Council and others* [2008] 2 EA 300, *Republic v Public Procurement Administrative Review Board ex parte Giant Forex Bureau De' Change Limited & 2 others* [2017] eKLR, *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR and



- Republic v Public Procurement Administrative Review Board & another ex parte Selex Sistemi Integrati Nairobi HCMA No 1260 of 2007 [2008] KLR 728.
36. The respondents contend that the 1st respondent discharged its function properly and made a determination of the issues in request for review No 148 of 2022 in the manner required by the Act and guided by the principles enshrined under articles 10 and 227 of the *Constitution*. The cases of *Kenya Pipeline Ltd v Hyosung Ebara Company Ltd* [2012] eKLR and *Republic v Public Procurement Review Board & 2 others ex parte Numerical Machining Company Limited* [2016] eKLR are cited to buttress this argument.
 37. It is learned counsel's contention that as was held in the case of *Republic v Public Procurement Administrative Review Board ex parte Giant Forex Bureau De' Change Limited & 2 others* [2017] eKLR these being judicial review proceedings the court ought not interrogate the merits of the decision.
 38. In opposition to the order of *mandamus* the respondents urge that *mandamus* is an equitable remedy that serves to compel a public authority to perform its legal duty and it is a remedy that controls procedural delays and further that the 1st respondent reheard and issued a considered ruling while complying with the judgment of this court and therefore orders 6,7 and 8 of the notice of motion must fail.
 39. Further that there is no application for contempt filed before this court and or served to any of the 1st respondent's board members to warrant issuance of contempt of court orders as framed in the notice of motion. The cases of *Mwangi H C Wang'ondu v Nairobi City Commission* (UR) Court of Appeal Civil Appeal No 95/1988, *Nyamodi Ochieng Nyamogo & another v Kenya Posts & Telecommunications Corporation* [1994] eKLR, *Republic v Attorney General ex parte Evalyene Khamasi Amboyi* [2021] eKLR and *Jim Choge v Chief Land Registrar & 2 others; Amusement Garden Limited (interested party)* [2019] eKLR are cited in this regard.
 40. According to the interested party there are 3 issues for determination as follows (i) whether the interested party has *locus standi* in these proceedings; ii) whether the 1st respondent complied with the judgement as delivered by this honourable court in judicial review application number E037 of 2022 on May 6, 2022; iii) whether the ex-parte applicant has made out a case for grant of judicial review orders.
 41. On the 1st issue, learned counsel for the interested party urged that pursuant to section 170 (d) of the Act the 1st respondent has the discretion to allow any other person who it deems fit to participate in the review proceedings before it. Further, that the *ex parte* applicant consented to the interested party's joinder to these proceedings.
 42. Learned counsel for the interested party on re-hearing of a matter submitted that a court or tribunal re-hearing a matter is obligated to look at and consider all the facts, evidence and circumstances surrounding the subject matter. Further that the 1st respondent has the requisite powers to extend the validity of a tender as many times as it deems fit to guarantee a fair, equitable, transparent and competitive process. However, according to the interested party the extensions must be done before the lapse of the tender validity period.
 43. The 2nd respondent it is urged having failed to extend the tender validity period by the January 11, 2022 rendered the subject tender extinguished and no extension after its expiry can be made. It is counsel's submission that one cannot breathe life to an expired tender. To buttress this argument, the cases of judicial review number 50 of 2017; *Higawa Enterprises Limited v Kenya Ports Authority & 6 others* [2018] eKLR, *Telkom SA Limited v Merid Training (pty) Limited & others, Bilhati Solutions*



(pty) Limited v Telkom SA Limited (2011) ZAPPHCI and Jourbert Galpin Searle Inc & others v Road Accident Fund (2014) ZAECPEHC 19 are cited.

44. Learned counsel for the interested party submitted that as was held in the case of Republic v Public Procurement Administrative Review Board & 2 others ex-parte Pelt Security Services Limited (2018) eKLR it is not the role of a judicial review court to be involved in merit review.

Analysis And Determination

45. Having considered the notice of motion, statutory statement and verifying affidavit, the responses by way of grounds of opposition and replying affidavits as well as submissions by counsel the issues for determination are;
1. Whether the preliminary objection raised in this matter is sustainable in law.
 2. Whether the interested party has *locus standi* in these proceedings.
 3. Whether the 1st respondent complied with the judgement as delivered by this honourable court in judicial review application number E037 of 2022 on May 6, 2022
 4. Whether the 2nd respondent is guilty of contempt of the orders of the 1st respondent dated December 28, 2021 and whether the board members of the 1st respondent are guilty of contempt of the orders of court contained in the judgement dated May 6, 2022
 5. Whether the ex-parte applicant has made out a case for grant of judicial review orders sought.

1. Whether the preliminary objection raised in this matter is sustainable in law.

46. This issue touches on the jurisdiction of the court to punish for contempt. Following the dictum in the Owners of Motor Vessel Mv "Lilian S" v Caltex Oil (Kenya) Ltd 1989 KLR 1 jurisdiction is everything and once a court finds that it is not seized of the requisite jurisdiction, it must not make any further step in the matter but to down its tools.
47. This question of jurisdiction has been raised in a preliminary objection. The first port of call is to determine whether the objection meets the legal threshold of a proper preliminary objection. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696, had the following to say on circumstances when a preliminary objection may be raised;
- “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.”
48. The 1st respondent in its preliminary objection challenges this court’s jurisdiction to hear and determine prayer 7 of the *ex parte* applicant’s application on grounds that it offends the provisions of section 178(1) of the Public Procurement and Asset Disposal Act, 2015.
49. Prayer 7 of the *ex parte* applicant’s application reads as follows;
- viii. An order directing the relevant members of the 1st respondent (i.e, Faith Waigwa, Steven Oudo, Rahab Chacha and Ambrose Ogeto) to show cause why each of them should not be—
 - i. punished for contempt of court, for refusing to comply with the judgment delivered and the orders issued by this honourable court (Ndungu J) on May 6, 2022 in judicial



review application No E037 of 2022: Republic v Public Procurement Administrative Review Board & 2 others ex-parte CPF Financial Services Limited; and;

- ii. declared as having breached article 10 and chapter Six of the Constitution and thus unfit to hold public office for refusing to comply with the judgment delivered and the orders issued by this honourable court (Ndungu J) on May 6, 2022 in the first judicial review proceedings.

50. As stated above, a preliminary objection must consist of a pure point of law. It is not in contention that section 178(1) of the Public Procurement and Disposal Act, 2015 provides for the protection from personal liability and indemnity of board members. The section provides as follows;

“Protection from personal liability and indemnity

1. A person shall not, in his personal capacity, be liable in civil or criminal proceedings in respect of any act or omissions done in good faith in the performance of his duties under this Act.”

51. However, a person is only protected under this section if he/she in doing the act or omission was acting in good faith. The court in the case of Republic v Principal Secretary, Ministry of Interior and Coordination of Government & another ex-parte Lucy Nduta Ng'ang'a [2021] eKLR held as follows;

“The operative word in those provisions is good faith. The Supreme Court in Bellevue Development Company Ltd v Francis Gikonyo & 3 others [2020] eKLR, while discussing immunity of judicial officers, stated the following:

article 160(5) grants judicial officers’ immunity if they act in “good faith”. What therefore, is ‘good faith’?

According to the Black’s Law Dictionary, ninth edition at pg 713, ‘good faith’ is defined as “A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligations, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.”

52. It follows then that the question whether the board members acted in good faith would of necessity invite interrogation and ascertainment of facts. The court in Junction Apartments Limited and C.M Construction (E.A) LTD & Steve Oundo [2021] KEHC 429 (KLR) expressed itself in a similar circumstance as follows;

“This court therefore finds that although the arbitrator enjoys immunity ascribed by section 16B of the Arbitration Act, the claims/allegations made against the arbitrator are subject to proof of whether the arbitrator acted in good faith or not and to buttress setting aside the arbitral award. This calls for evidence and cannot be curtailed at the preliminary objection stage.”

53. A similar position was taken by Meoli J in James Gacheru Kariuki & 69 others v William Gitau Kabogo & 104 others where she stated;

“It is my view that, notwithstanding the omnibus nature of the averments in the petition, the question whether or not the respondents acted mala fides is one of fact and requires ascertainment as it is disputed by the respondents. Therefore, the limb of the preliminary objection based on immunity derived from sections 206 of the Public Finance Management



Act and the section 133(1) of the County Governments Act is in this instance not a pure point of law. The court will consider the special immunity accorded to county assemblies under section 17 of the County Governments Act as read with section 12 of the National Assembly (Powers and Privileges) Act within the next question.”

54. The preliminary objection raised herein cannot, in light of the foregoing be sustainable.

2. Whether the Interested Party has locus standi in these proceedings

55. Vide a notice of motion dated February 22, 2022, the interested party herein moved this court for orders to be enjoined in these proceedings. In view of the strict timelines governing the disposal of this matter, it was agreed that the interested party be admitted as a party without responses being filed to its application with the parties addressing the issue at the main trial. The question whether the interested party is a proper party in these proceedings is live.

56. The interested party’s case is that it never participated in the request for review 16 of 2022 as they were never notified of the existence of the various review applications lodged with the 1st respondent by the applicant herein contrary to procedure on conduct of proceedings before the 1st respondent. They only learnt of the reviews after the judgement of this court dated May 6, 2022. It is their case that the decision in this matter would impact them as they were a tenderer in the subject tender.

57. On notification of review, section 168 of the Public Procurement and Assets Disposal Act (PPAD) provides as follows;

“Upon receiving a request for a review under section 167, the secretary to the review board shall notify the accounting officer of a procuring entity of the pending review from the review board and the suspension of the procurement proceedings in such manner as may be prescribed.”

58. On who are parties to a review, section 170 of the PPAD Act provides;

“The parties to a review shall be—

- (a) the person who requested the review;
- (b) the accounting officer of a procuring entity;
- (c) the tenderer notified as successful by the procuring entity; and
- (d) such other persons as the review board may determine.”

59. Rule 205 of the Public procurement and Asset Disposal Rules provides;

“(1) The secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.

- (2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the review board secretary.
- (3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the secretary in a particular case, submit to the secretary a written memorandum of response to the request for review together with such documents as may be specified.



- (4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.
- (5) The review board secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3).”
60. The law as stipulated above is clear on who is to be notified of the filing of a request for review, what action is to be taken by the respective players and the mandatory parties to a review. In the instant case the interested party was not the tenderer pronounced as the successful by the procuring entity. The interested party did not lodge a request for review with the 1st respondent. A proper reading of section 170 of the PPAD Act readily shows that the fact of submitting a tender does not necessary make a tenderer a party in a request for review lodged under section 167 of the PPAD Act.
61. I agree with the submission by counsel for the applicant that the Act envisages that any party unhappy with the outcome of a procurement process shall promptly lodge a request for review with the 1st respondent within 14 days of the act or omission complained of. The interested party did not lodge a request for review to ventilate the issues that it belatedly wishes to canvass being illegal extension of the tender validity, failure of notification of the 2nd request for review as well as the 1st request for review.
62. Lastly on this question, this court in its judgement dated May 6, 2022 gave directions which were specific to the parties then before it. The board was directed to re hear the matter based on the material that had been presented before it, material that was presented to this court in the judicial review application and applying directions given to it by this court in its supervisory role. The board had no mandate at all to overturn the orders of this court and proceed to enjoin other parties in the proceedings and entertain new issues that had not been placed before this court. The joinder of the interested party in those re hearing proceedings was irregular. Consequently, for this and other reasons stated above the interested party is not a proper party before this court and is struck out.

3. Whether the 1st respondent in its decision dated June 3, 2022 complied with the judgement as delivered by this honourable court in judicial review application number E037 of 2022 on May 6, 2022.

63. This issue in essence seeks to answer the question surrounding the propriety of the board’s decision dated June 3, 2022. It calls for an examination whether the board in the impugned decision herein followed the directions of the court as espoused in the judgement dated May 6, 2022. A cursory look at the impugned decision shows that the findings therein reaffirm, reiterate and restate the findings that this court had quashed in the judgement dated May 6, 2022.
64. The 1st respondent has pleaded its decisional independence in the matter. It is apposite at this stage to acknowledge the board’s jurisdiction donated by section 28(1) as read with section 167 of the Act. This court is alive to the caveat that this court should not usurp the mandate of the bodies or tribunals falling under its supervision. The supervisory powers are constitutional and i find it necessary to set out the relevant articles;
 article 165;
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.



- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
65. The extent of that jurisdiction was well expounded in *Republic v Public Procurement Administrative Review Board & 3 others ex parte Techno Relief Services Limited* [2021] eKLR where the court stated;

“Judicial review has now also been entrenched as a constitutional principle pursuant to the provisions of article 47 of the *Constitution*, which provides for the right to fair administrative action, and section 7 of the *Fair Administrative Action Act* in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. In addition, it was emphasized by the Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others*, (2016) KLR that article 47 of the *Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act*, reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.

23. The standards of merit review set out in section 7 (2) of the Act are as follows:

- (2) A court or tribunal under subsection (1) may review an administrative action or decision, if-
- (a) the person who made the decision-
 - (i) was not authorized to do so by the empowering provision;
 - (ii) acted in excess of jurisdiction or power conferred under any written law;
 - (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
 - (iv) was biased or may reasonably be suspected of bias; or
 - (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action or decision was procedurally unfair;
 - (d) the action or decision was materially influenced by an error of law;



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

24. It is evident from this provisions that this court has jurisdiction to review the decisions of subordinate courts and quasi-judicial bodies, of which the 1st respondent is one. It is also inaccurate and one-dimensional to classify this court's review jurisdiction as being limited to the decision making process of an administrative body or subordinate court, as it is evident that the court can also review the merits of a decision in judicial review. The applicable restraints in the exercise of its judicial review jurisdiction are that the court must be careful not to usurp and interfere with the matters entrusted to an administrative



body or subordinate court to decide in the first instance, as its jurisdiction is supervisory. In addition, the court cannot substitute its decision or preferred outcome with that of the said bodies or courts, hence the restrictions on the extent of merit review that can be undertaken in judicial review.

25. Coming to the permissible merit review, firstly, as shown by the applicable standards of review in section 7 of the *Fair Administrative Action Act*, the legality of decision making extends beyond merely the process, and include aspects of reasonableness, proportionality and fairness of the decision. Secondly, the merit review by a judicial review court may extend to correcting any errors made by a decision making body as to the existence of precedent facts, and in the application and interpretation of the law, in reviewing the legality of the decisions, and if the bodies have acted within their powers. Hence the remedies available to a judicial review court in this regard of quashing illegal decisions and requiring public bodies to apply the correct law and procedure.” (emphasis added).
66. This long passage is important and relevant in these proceedings as it lays bare the extent of this court’s supervisory jurisdiction over the board. In the exercise of this jurisdiction there is no conflict of roles neither are there turf wars. The common calling and duty at both levels is to ensure that the aspirations of “we the people” to have all state organs or any public entity contracting for goods or services do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective as decreed by article 227 of the *constitution* and in accordance with the guiding principles set out at section 3 of the Act.
67. In the execution of that solemn duty, and as the hierarchical order dictates, the board’s action are subject to the supervision of this court. The import then is that the board is bound by the decisions and directions of this court and I do not think for a moment that the board has any wriggle room from such decisions or directions. The doctrine of precedence and hierarchy of courts militates against any thinking to the contrary.
68. The applicant has in its submissions ably captured the import of the court’s judgement dated May 6, 2022. I reproduce the relevant paragraphs for their full meaning and effect;
- “ 35. There is evidence from the record that the applicant was found to have submitted the lowest evaluated responsive tender. That is affirmed by the due diligence exercise initiated by the 2nd respondent on the applicant. As observed by the board above, the delay allegedly occasioned by the due diligence is not substantiated. In the board’s own words “..... neither has the respondent furnished the board with evidence of the particulars of the background checks the respondent alleges to be conducting on the applicant.”
36. Suffice it to note that compliance with the board’s orders was not subject to conditions. The fact that the delay is not explained introduces opaqueness in the tendering process. Public procurement is a matter of great public interest. No wonder the people in the making of their Constitution 2010 found a place for it in article 227 in which it is provided that when any state organ or any other public entity contracts for goods and services, it shall do so in a system that is fair, equitable, transparent, competitive and cost effective. No procuring entity should get away with any malfeasance in a public procurement. Neither should a tenderer be exposed to unfair process.



37. As held in *IEBC v National Super Alliance Kenya & 6 Others* [2017] eKLR, procuring entities are bound by articles 10, 47, and 227 of the Constitution. I hasten to add that in the same breadth, the Board is no exception. It is the first line of defence when threats of breach or actual breach of these constitutional values and principles occur. The board must rise to the occasion and rein in any entity inclined to breach the principles of procurement provided in the constitution and the law. Any dereliction of this duty must be checked by this court under the judicial review powers donated by section 175 (1) of the Act. The powers and jurisdiction of the Board are wide. In the case of *Kenya Pipeline co Ltd v Hyosung Ebara Co Ltd and Others* [2012] eKLR the Court of Appeal described the board as follows;

“The review board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. 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.”

38. The powers are wide and enormous. Section 173 provides;

“Upon completing the review, the review board may do any one of the following:

- a) Annul anything the accounting officer of a procuring entity has done in the procurement of disposal proceedings in their entirety;
- b) Give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
- c) Substitute the decision of the review board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
- d) Order the payment of costs as between parties to the review in accordance with the scale as prescribed and
- e) Order termination of the procurement process and commencement of a new procurement process.

39. Faced with the circumstances in this case, the board shirked its duty to supervise public procurement. It proceeded to lament helplessly yet had it taken into account its powers and jurisdiction and considered the options provided by section 173 of the Act, it may have reached a different finding. The board ended up throwing the baby with the bath water blaming the



applicant whose only fault was submitting a responsive tender and who had a legitimate expectation that the procuring entity would observe the constitutional and legal principles governing public procurement and that in default the board would be a safe refuge for redress. This is demonstrated by the applicant's unrelenting approach to the board twice for a remedy. In my view, once there was default by the 2nd respondent and the board gave orders and directions on the completion of the procurement process, the onus was on the board to ensure compliance in the completion process and in the absence of compliance apply its jurisdiction and powers fully to guarantee a fair, equitable, transparent and competitive process. The board should not be held at ransom by a rogue procurement entity who deliberately runs the clock to ensure that the validity of a tender expires. It retains the power to order as many extensions of the validity to achieve a procurement that is compliant to the *constitution* and the law. Notably, under section 88 of the Act, there is no limit on extensions by the board.

40. It is not lost on this court that the power of the court to review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. [See *Gauteng Gambling Board v Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29].

41. In this case, the blame heaped on the applicant, a hapless tenderer whose legitimate expectation and fair treatment were already breached by the 2nd respondent is not only unfair but unreasonable and irrational. The attempt to blame the applicant for the expiry of the validity period of the tender stands out as a sore thumb. The failure to exercise the jurisdiction and powers under section 173, was, in my view based on a misapprehension of the law. In this context therefore, the decision of the board is amenable to judicial review. In so holding, am guided by the decision in *Republic v Public Procurement Administrative Review Board; Leeds Equipments & Systems Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute* [2018] eKLR, where Nyamweya J (as she then was) held as follows...

“It is now an established principle of law that the decision of a public body will be unlawful if it is irrational or unreasonable, in the sense of being a decision which no public body acting reasonably would have reached. This was principle was settled by the decisions in *Associated Provincial Picture Houses v Wednesbury Corporation*(1948)1KB 223 and *Council of Civil Service Unions v The Minister for the Civil Service* (1985) 1 AC 374. This ground was also explained in *Pastoli v Kabale District Local Government Council & others*, (supra) as follows:

“...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...”



69. It is clear beyond peradventure that these excerpts from the judgement of the court dated May 6, 2022 required the board to re seize request for review application No 16 of 2022 as initially filed. There was no room for new parties or pleadings. The game changer was that the court had now directed the board on the correct interpretation and the application of the law and on the legality of the board's decision. The court addressed in great detail the question of the tender validity period and its relevance in this matter. The court made a finding of fact that the procuring entity had deliberately ran down the clock with a view to achieving expiry of the tender validity period. The court's finding was that such a rogue procuring entity cannot be allowed to hind behind the law to sanitize its injurious conduct, conduct that is inimical to the constitutional principles on accountable procurement processes in public procurement.

70. A comment on section 88(3) of the Act is opportune. The section provides;

“88. (1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period. Extension of tender validity period.

(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.

(3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.

(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).”

71. The extension envisaged by this section is by an accounting officer of a procuring entity. In my view, the section is not a bar to the board to extend the validity period if for good reasons proffered in a request for review it is necessary to extend the validity period to achieve a public procurement of goods and services that is fair, equitable, transparent, competitive and cost effective to meet constitutional ethos. Am in agreement with Onyiego J, in *Republic v Public Procurement Review Board; Rhombus Construction Company (Interested Party) Ex Parte Kenya Ports Authority* [2021] EKLK where he stated;

“39. The crux of the issue in controversy is whether the respondent (review board) has powers in law to order or direct the accounting officer of the ex-parte applicant as a procuring entity to extend the validity period of the subject tender more than once. Section 88 of the Act (PPADA) provides for the extension of the tender validity period. The provision stipulates that;

(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.

(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted attender

(3) An extension under subsection (1) shall be restricted to not more than 30days and may only be done once

40. What was the intention of the drafters of this legislation and in particular the inclusion of section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers



especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes. Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.

47. Counsel for the i/party contends that, section 88(3) of the act only limits the accounting officer and not the review board who have wide inherent powers under section 173 of the Act. The question begging for an answer is; whether the review board is bound by section 88(3). Section 88(1) & (2) expressly refers to the powers of the accounting officer in extending time but not the review board. Sub-section (3) refers to the accounting officer's powers of extension of validity period once and not beyond 30days pursuant to subsection (1).
48. From the plain reading of that section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than the legislators to include or provide the review board's mandate under that section. To that extent, I do agree with counsel for the i/party that section 88(3) of the Act does not bar the review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice. These residual powers can be derived from section 173 of the Act which provides;
"Upon completing a review, the review board may do any one or more of the following;
 - a. annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
 - b. give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
 - c. substitute the decision of the review board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
 - d. order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
 - e. order termination of the procurement process and commencement of a new procurement process"
49. Under section 173(a)(b) & (c) of the Act, the board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer. Although the Act does not expressly limit the powers of the board from extending tender validity period more than once, one can imply that the powers conferred upon the review board includes powers to extend validity period to avert situations where the accounting



officer can misuse powers under section 88 to frustrate tenderers or bidders not considered favourable.”

72. I have carefully considered the decision by the board in the re-hearing proceedings. In a nutshell, the board made findings that;
- a. the tender validity expired on January 11, 2022
 - b. the applicant, the 1st respondent and the 2nd respondent could not extend the tender validity period after January 11, 2022;
 - c. the appropriate relief for the 2nd respondent’s contempt of court, intransigence and deliberate refusal to obey the 1st respondent’s decision of December 28, 2021 lay in referring the matter to the director general of the Public Procurement Regulatory Authority; and
 - d. each party should bear its costs.
73. These findings fly directly on the face of this courts orders and directions contained in its judgement at paragraphs 35 to 41. They are tantamount to asking the court to re hear the earlier judicial review proceedings and rehash its judgement. The failure by the board to follow the orders must be deprecated. It goes against the decision of the House of Lords in *Cassel & Company Ltd v Broome and Another* [1972] AC 1072 where the court held that it is not open, in a hierarchical common law judicial system, for a lower court to ignore decisions of a higher court. This trend, if allowed to thrive, would render this courts supervisory powers enshrined in the constitution impotent and render the judicial review jurisdiction useless and ineffective as a remedy.
74. Counsel for the applicant has attempted to explain the unusual courage of the 1st respondent in its deviation from this court’s judgement. He has raised issues relating to where the 1st respondent is domiciled, (national treasury), the appointing authority of the members, the position and role of the ag chief executive officer, the appointment of the members of the 3rd respondent as well as the appointment of the director general of the public procurement regulatory authority. This court is reluctant to delve into these allegations for the reasons that they touch on persons who are not party to this litigation and who obviously have no chance to be heard.
75. What is clear in the mind of this court is that the 1st respondent has trodden the same path it did in the first hearing and determination of request for review No 16 of 2022 suffering the same legal and procedural infractions. The decision made is thus not sustainable in law.
- Whether the 2nd respondent is guilty of contempt of the orders of the 1st respondent dated December 28, 2021 and whether the board members of the 1st respondent are guilty of contempt of the orders of court contained in the judgement dated May 6, 2022
76. Contempt of orders of the review board and of the judicial review court at the high court is a serious matter like contempt of any other orders of court. Explaining the duty to obey court orders, the court in the case of *Hadkinson v Hadkinson* (1952) 2 ALL ER56 held as follows;
- “It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”



77. The Supreme Court in the case of *Republic v Ahmad Abolfathi Mohammed & Another* [2018] eKLR held as follows;

“(23) Authorities on the necessity to punish for contempt are legion. We have considered those provided by the respondent, and also cite the following, in affirmation of the principle.

(24) In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in *Gulabchand Popatlal Shah & another* civil application No 39 of 1990 (unreported), where the Court of Appeal stated as follows:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In *Hadkinson v Hadkinson* (1952) 2 All ER 567, it was held that: It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

(25) In *AttGen v Times Newspapers Ltd* [1974] AC 273, Lord Diplock stated:

“... There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity.”

78. I would add that contempt by public officers involved in public procurement arising from orders in procurement proceedings before the board or before the High Court acquires a more alarming and disconcerting nature in that it is an affront to the constitutional aspirations of the people to have accountability in public procurement and is a breach of the national values and principles under article 10 of the *constitution*. If found guilty, the court should readily declare such a person unfit to hold public office. This is true even where a member of the board is the culprit or the entire board as the case may be. It is worthy of note that the immunity granted under section 178 of the Act is not absolute.

79. Section 5 of the *Judicature Act* provides for punishment for contempt of Court. It states;

“(1). The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of justice in England, and that power shall extend to upholding the authority and dignity of the subordinate courts.”

80. It is now trite that for a party to succeed in an application for contempt the applicant has to prove the terms of order, knowledge of the terms by the respondent and failure by the respondent to comply with the terms of the order. The decision in *Samuel M.N Mweru v National Land Commission & 2 others* (supra) summarized the conditions aptly as follows:

- i. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;



- ii. the defendant had knowledge of or proper notice of the terms of the order;
- iii. the defendant has acted in breach of the terms of the order; and
- iv. the defendant's conduct was deliberate.”

81. The orders that are said to warrant contempt of court are not issued in this matter. Contempt of court are special proceedings governed by special procedure. They attract penal consequences. They demand personal service. In *Republic v Attorney General Ex Parte Evalyene Khamasi Amboyi [2021] EKLR* the court stated;

“These procedural requirements are not mundane as one may think; indeed, they do not fall under those procedures which article 159(2) (d) of the *Constitution* describes as ‘procedural technicalities’ that courts are reminded to overlook in the administration of justice while exercising their judicial authority. Where liberty of an individual is threatened, what one may regard as ‘a procedural technicality’ is as much important as the substantive law itself. The *Constitution* itself protects this right to liberty and therefore what may appear as a ‘procedural technicality’ in matters contempt cannot be ignored where ones constitutional right to freedom is likely to be curtailed or is threatened.

And on this point I would reiterate the words of the Court of Appeal in *Woburn Estate Limited v Margaret Bashforth* (supra) where it stated as follows:

“We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning *In Re Bramblevale Ltd* [1970] 1 CH 128 at page 137 that;

“A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”

82. In light of the above, I take the view that the prayers relating to contempt of court as raised in this application are unsustainable. The same ought to have been raised in the relevant matters where the orders were issued, served personally and specifically responded to.

5. Whether the ex-parte applicant has made out a case for grant of judicial review orders sought.

83. From the foregoing analysis and for reasons expounded hereinabove I find the notice of motion dated June 16, 2022 partially successful. The appropriate orders and which I make are as follows;

- i. An order of certiorari be and is hereby issued to bring into this honourable court, to be quashed, the 1st respondent’s decision delivered on June 3, 2022 in public procurement administrative review board application No 16 of 2022: CPF Financial Services Limited v The Accounting Officer, Public Service Superannuation Scheme.
- ii. An order of mandamus be and is hereby issued compelling the 1st respondent to re-admit public procurement administrative review board application No 16 of 2022: CPF Financial Services Limited v The Accounting Officer, Public Service Superannuation Scheme for the limited purpose of issuing appropriate and effective relief(s) taking into consideration the judgment delivered by this honourable court on May 6, 2022 in judicial review application No E037 of 2022: Republic v Public Procurement Administrative Review Board and 2 others ex-part CPF Financial Services Limited and the findings in this judgement within 30 days hereof.



- iii. An order of prohibition be and is hereby issued precluding the 2nd and 3rd respondents and their officers, subordinates, servants and agents from terminating, re-advertising or and/or awarding the tender for the administration of the public service superannuation fund to any external administrator other than the applicant pending determination of the re hearing as per order (ii) above.
- iv. An order of prohibition precluding the 2nd and 3rd respondents and their officers, servants and agents from resulting to the internal administration of the public service superannuation fund pending determination as in (ii) above.
- v. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2022

.....

A. K. NDUNG’U

JUDGE

