



**Republic v Public Procurement Administrative Review Board & another; Rentco Africa Limited (Exparte) (Judicial Review Miscellaneous Application E100 of 2022) [2022] KEHC 12978 (KLR) (Judicial Review) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 12978 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E100 OF 2022  
AK NDUNG'U, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

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

**ACCOUNTING OFFICER, KENYA ELECTRICITY TRANSMISSION  
COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**RENTCO AFRICA LIMITED ..... EXPARTE**

**JUDGMENT**

1. The brief facts of this case are that the Kenya Electricity Transmission Company Limited (“Procuring Entity”) vide an open international Tender issued an invite for expression of interest inviting bids for KETRACO-ST-009-2021 for Request for proposals for design, construction and commercial operation of Tier IV Data Centre on a revenue sharing model. A total of 5 bids were submitted including that of the *ex parte* Applicant.
2. Out of the 5 only 2 bids were found responsive and these were those submitted by El Sewedy Technology- Egypt and Rentco Africa Limited in Partnership with China Mobile Limited, China Communication Services and ixAfrica Data Centre. The two firms were subsequently issued with Request for Proposals (RFP) and it is deponed that only the *ex parte* Applicant’s consortium



- responded to the RFP. Having successfully concluded its internal tender process, the 2<sup>nd</sup> Respondent contacted the *ex parte* Applicant for purposes of conducting post qualification due diligence.
3. The tender validity period was scheduled to lapse on 28<sup>th</sup> April, 2022, however the same being a request for proposal the same was unique as to its needs to enable the contract award. The 2<sup>nd</sup> Respondent vide a letter dated 26<sup>th</sup> April, 2022 extended the tender validity period to enable the conduct of due diligence. The *ex parte* Applicant was aware and agreeable to the terms of the bid as requested by the 2<sup>nd</sup> Respondent vide its letter dated 14<sup>th</sup> March, 2022.
  4. In the said letter the 2<sup>nd</sup> Respondent had listed the names of the persons from the 2<sup>nd</sup> Respondent's corporation who were to attend a site visit to Singapore at the *ex parte* Applicant's cost. The letter also detailed the itinerary for the site visit and agenda of the same. The *ex parte* Applicant went ahead to purchase tickets for all the said persons at an aggregate cost of Kshs 1,076,430/=. A further Kshs 4,031,838/= was also paid as per diem being Kshs 671,973/= per staff member.
  5. The *ex parte* applicant in making the payments was under the legitimate expectation that it was participating in the post qualification due diligence and verification exercise and in full light of the nature of the tender as represented by the 2<sup>nd</sup> Respondent which terms the 2<sup>nd</sup> Respondent is bound by.
  6. There being a likelihood of the tender validity period lapsing due to the 2<sup>nd</sup> Respondent's failure to act or respond, the *ex parte* applicant in a letter dated 24<sup>th</sup> May, 2022 sought for a further extension of the contract validity period as the due diligence was being concluded. This was granted vide the 2<sup>nd</sup> Respondent's letter dated 25<sup>th</sup> May, 2022 extending the contract for a further period of 30 days ending 29<sup>th</sup> June, 2022.
  7. This extension and acceptance gave rise to a legitimate expectation on the part of the *ex parte* applicant that the 2<sup>nd</sup> Respondent would proceed with the next stage of the procurement process and prepare a notification of award and contract as stipulated under section 86, 87 and 134 of the [Public Procurement and Disposal Act \(PPADA\)](#) which imposed a mandatory obligation on the 2<sup>nd</sup> Respondent to conclude the evaluation process and award a tender to the successful bidder.
  8. It is alleged that the 2<sup>nd</sup> Respondent failed to award the said tender to the *ex parte* applicant but instead watched as the extended tender validity period lapsed. Aggrieved by this the *ex parte* Applicant herein lodged a Request for Review No 55 of 2022 before the 1<sup>st</sup> Respondent alleging that the 2<sup>nd</sup> Respondent had acted in breach of the duties imposed by the [PPADA](#) by failing to extend the tender validity period. Further that as a result of the said breach, the *ex parte* Applicant had suffered loss and damage as contemplated under Section 167 (I) of the [PPADA](#).
  9. The 1<sup>st</sup> Respondent in its decision dated 20<sup>th</sup> July, 2022 dismissed the said Request for Review on the basis that the *ex parte* applicant ought to have moved it before the lapse of the tender validity period.
  10. It is the *ex parte* Applicant's case that the decision of the 1<sup>st</sup> Respondent is unlawful, illegal and was issued in total disregard of the principles and objectives of procurement as provided under Articles 10 and 227 of the [Constitution](#) as read together with Section 3, 86, 87 and 173 of the [PPADA](#) which include compliance with the rule of law, transparency, accountability, fairness, competition and good governance.
  11. The *ex parte* Applicant being unhappy with the decision of the 1<sup>st</sup> Respondent filed a substantive motion seeking the following orders;
    - “ 1. That this Honourable Court be pleased to grant the Applicant Judicial Review Orders, to wit:-



- a. An Order of certiorari to bring to the Honourable Court for purposes of being quashed the decision of the 1<sup>st</sup> Respondent dated July 20, 2022 and issued on 2<sup>nd</sup> August 2022 dismissing the Applicant's Request for Review in No 55 Of 2022.
  - b. An Order of *mandamus* to compel the 1<sup>st</sup> Respondent to exercise its powers under Section 173 (b) to extend the tender validity period of the subject tender for a period of 60 days or such period that it deems necessary for the 2<sup>nd</sup> Respondent herein to conclude the subject tender process.
  - c. In the alternative, an Order of *mandamus* to compel the 2<sup>nd</sup> Respondent to issue the Applicant with a letter of award and a procurement contract in respect of Tender No KETRACO-ST 009-2-21 for Request for Proposals for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model within 30 days.
  - d. An Order of prohibition restraining the 2<sup>nd</sup> Respondent from retendering, advertising or inviting fresh tenders or undertaking any further procurement in respect of the subject matter of KETRACO-ST 009-2-21 for Request for Proposals for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model including termination of the same.
  - e. A declaration that the 2<sup>nd</sup> Respondent's failure to conclude the due diligence and award the contract is an abuse of the procurement process and their power thus in contravention of the provisions of Article 227 (1) of the Constitution and Public Procurement and Asset Disposal Act No 33 of 2015 (PPADA).
2. That this Honourable Court be pleased to issue such other or further relief as this Honourable Court may deem just and expedient to grant.
  3. That the costs of and incidental to this application be provided for."

12. The 1<sup>st</sup> Respondent in reply to the *ex parte* applicant's application filed a Replying Affidavit sworn by Mr. Philip Okumu the Acting Secretary on 15<sup>th</sup> August, 2022 and in the affidavit Mr. Okumu swears that in arriving at its final orders the Board had framed several issues for determination and that it carefully studied the confidential documents that were submitted to it pursuant to section 67(3) (e) of the Act.
13. Mr. Okumu also deponed that in determining the issue of termination the 1<sup>st</sup> Respondent had noted that the Respondent in the Request for Review had indicated that the procurement proceedings were terminated vide a letter dated 27<sup>th</sup> June, 2022 addressed to the *ex parte* Applicant and further letter dated 28<sup>th</sup> June, 2022 addressed to the Director General Public Procurement Regulatory Authority in accordance to the provisions of Section 63 of the Act.
14. It also noted that the reasons advanced by the Procuring Entity to the *ex parte* Applicant for termination of the subject tender was that the Procuring Entity had realized that the project concerning



- the subject tender was of a public private partnership nature, this however, was different from what had been communicated to the Director General of the PPRRA as the reasons for termination in the letter to the Director General were pegged on material governance issues pursuant to Section 63(1)(e) of the Act.
15. The Board is said to have also noted that the termination was done during the pendency of the Request for Review contrary to section 168 of the Act which has the effect of staying any procurement proceedings once a request has been lodged.
  16. In its decision the Board held that the substantive and procedural statutory pre-conditions under Section 63(1) (e), (3) and (4) of the Act were not satisfied by the Procuring Entity in terminating the subject tender. Hence the Board's jurisdiction was not ousted by dint of Section 167(4)(b) of the Act and it could entertain the Request for Review.
  17. Further, on whether the *ex parte* Applicant herein had locus to file the Request for Review having submitted its Tender in a partnership, it noted that the *ex parte* Applicant had authority from members of the Consortium of Rentco Africa Limited as per the Teaming Agreement to file the Request for Review and that the Procuring Entity's Preliminary Objection was not supported and hence failed.
  18. The Board also observed that as the tender validity period had already lapsed as the subject tender was valid for 120 days which ran up to 28<sup>th</sup> April,2022 and a further extension of 30 days made by the Accounting Officer of the Procuring Entity up to 28<sup>th</sup> May, 2022, the Accounting Officer's right to extend the validity period had already been extinguished as per section 88 of the Act. The Ex parte Applicant therefore instead of requesting for a further extension by the Accounting Officer vide its letter dated 24<sup>th</sup> May,2022 ought to have approached the 1<sup>st</sup> Respondent instead.
  19. It is the 1<sup>st</sup> Respondent's case that as was held in the case of *Republic v Public Procurement Administrative Review Board, Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S (interested party) & National Irrigation Board* [2020] eKLR an order of extension cannot breathe life into a tender that has already lapsed as there is no tender for the Board to extend.
  20. The 2<sup>nd</sup> Respondent in its Replying Affidavit sworn on 16<sup>th</sup> August,2022 by Eng. (CPA)Anthony Wamukota contends that the *ex parte* applicant has not attached any authority to act on behalf of China Mobile Limited, China Communications Service or for ixAfrica Data Centre. Further, that this court lacks jurisdiction to grant the orders sought as no security has been deposited by the *ex parte* applicant as is required under section 175(2) of the Act and that prayers (c) and (e) raise novel issues.
  21. The *ex parte* applicant is also accused of having failed to prove that it has suffered loss or damage. The 2<sup>nd</sup> Respondent also alleges that the claims that the cost of due diligence ought to be reimbursed hold no water as Clause 1.1.4(a) as read together with Clause 2.10 of the Invitation to Tender clearly stipulate that the said costs shall be met by the Bidder and are not reimbursable.
  22. The *ex parte* applicant is also accused of having relied on confidential information (The Procuring Entity's Due Diligence Report held between 20<sup>th</sup> April to 24<sup>th</sup> April 2022 in China Mobile International Data Centers in Singapore and The Procuring Entity's internal memo dated 25<sup>th</sup> May,2022.) that was obtained through corrupt, coercive or fraudulent practices contrary to the provisions of section 66 of the Act.

### **Parties Submissions**

23. The application was canvassed by both oral and written submissions.



24. The *ex parte* applicant submits that the 2<sup>nd</sup> Respondent's allegations that the *ex parte* applicant's Managing Director does not have the authority to act on behalf of the consortium partners are frivolous as neither of the partners has challenged this authority nor has the 2<sup>nd</sup> Respondent adduced any evidence in this regard.
25. It is also the *ex parte* applicant's contention that Rule 13 only applies to cases where there are more plaintiffs than one. It is contended that this very issue was also addressed by the 1<sup>st</sup> Respondent vide the 2<sup>nd</sup> Respondent's Preliminary Objection filed before the 1<sup>st</sup> Respondent which was dismissed on grounds that no evidence had been adduced to support the same.
26. Further it was argued that the requirement for a deposit as security was suspended by the court in *Roads & Civil Engineering Contractors Association and Energy Sector Contractors Association v Attorney General, Public Procurement Administrative Review Board & another* Nairobi; High Court Petition Number E226 of 2020.
27. The *ex parte* Applicant also urged that the two documents stated by the 2<sup>nd</sup> Respondent do not meet the statutory threshold and particulars of documents that ought to be protected under section 67 (1) of PPADA. Further, that the Board failed to understand or give effect to section 173 of the Act and its power to extend a tender validity period as ruled by this very Court in Judicial Review Misc. Application No E037 of 2022: R v Public Procurement Administrative Review Board others Ex Parte CPF Financial Services Limited. The Board is also faulted for having failed to appreciate its functions and powers and instead reverting the blame to the *Exparte*.
28. It is contended has in previous decisions, the 1<sup>st</sup> Respondent extended the tender validity period as was the case in Public Procurement Administrative Review Board Application No 33 of 2018; *NGM Company Limited v Kenya Rural Road Authority* and therefore according to the *ex parte* applicant it was being biased by declining to do so in the instant case.
29. On the grant of the Order of *mandamus* the *ex parte* Applicant cited the case of Geonet Technologies Limited v The Ministry Of ICT, Innovation and Youth Affairs; State Department of ICT & Innovation & 3 others where it is submitted that similar to the position herein the tenderer had sought orders against a procuring entity which had unfairly refused to award it a tender despite undergoing a successful tender evaluation.
30. The *ex parte* applicant also submitted that as was held in the Court of Appeal case of Total Kenya Limited v Kenya Revenue Authority (2013) eKLR even in instances where there are express provisions on specific reliefs, a Court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties.
31. Learned counsel for the 1<sup>st</sup> Respondent while citing the cases of R v Kenya Revenue Authority Ex Parte Yaya Towers Limited [2008] and Republic v Public Procurement Administrative Review Board another Ex-Parte Accounting Officer, KEMSA & another (2022) eKLR submitted that judicial review is concerned with the process rather than with the merits of the decision.
32. Further that as was held in the case of Pastoli v Kabale District Local Government Council and others [2008] 2 EA 300 the 1<sup>st</sup> Respondent only dismissed the subject matter after carefully studying the documentation and duly hearing both parties and determining the underlying issues and consequently upholding procedures as required by law and promoting the integrity and fairness of these procedures and processes and therefore there was no flouting of any law.
33. Learned counsel reiterated the 1<sup>st</sup> Respondent's position that an Accounting Officer can only extend the tender validity period once for a period of 30 days as is stipulated under section 88 as was held



- by the Court of Appeal in the case of Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex Parte Kenya Ports Authority & another [2021] eKLR.
34. It was submitted that although the 1<sup>st</sup> Respondent had powers to extend the tender validity period even after the 2<sup>nd</sup> Respondent had rendered its decision not to extend the same, this power could only be exercised during the subsistence of the tender. Any exercise of such power to extend the validity period of a tender whose validity had lapsed would amount to committing a jurisdictional error, as the court pronounced in the case of Republic v Public Procurement Administrative Review Board; Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S (interested party); National Irrigation Board Ex Parte [2020] eKLR.
35. According to the 2<sup>nd</sup> Respondent the *ex parte* Applicant has relied on authorities which are not applicable to its case which include Constitutional Petition No E392 of 2021 Geonet Technologies Limited v Ministry of ICT, Innovation and Youth Affairs; State Department of ICT and Innovation and others, Total Kenya Limited v Kenya Revenue Authority [2013] eKLR, Republic v Principal Secretary Ministry of Defence Ex-parte George Kariuki Waithaka [2018] eKLR, Republic v PPARB: Rhombus Construction Company Limited Ex-parte Kenya Ports Authority & another [2021] eKLR and PPARB No 33 of 2018 NMG Company Limited v Kenya Rural Roads Authority.
36. Learned counsel for the 2<sup>nd</sup> Respondent submitted that the Ex parte Applicant is yet to demonstrate that it has a responsibility of filing or instituting the appeal on behalf of the Consortium pursuant to the said agreement which is binding upon it and that the same should be dismissed as was done in the case of Republic v Public Procurement Administrative Review Board Ex parte ADK Technologies Limited in Consortium with Transnational Computer Technologies Limited; Principal Secretary National Treasury and Planning & 2 others (Interested Parties) [2021] eKLR.
37. It was also submitted that as was held in the cases of Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR and Total Kenya Limited v Kenya Revenue Authority [2018] eKLR parties are bound by their pleadings and issues, or prayers not sought in the trial court cannot be raised or sought in the Appellate Court for the first time.
38. The 2<sup>nd</sup> Respondent also contended that there is no legitimate expectation created by extension of the tender validity period which was for the purpose of concluding the procurement process which would result in either termination or execution of the contract. The claim for legitimate expectation according to the Accounting Officer is premature and has no basis. The decision in James Oyondi t/a Betooyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR was cited in this regard.
39. The 2<sup>nd</sup> Respondent also contends that the commissioner's signature appearing on the verifying affidavit supporting the *ex parte* Applicant's application is different from the one used on the annexures "RN1" to "RN11" and that the said annexures have not been securely sealed with the attesting commissioner's seal and that they should therefore be struck off the record. To buttress this argument learned counsel cited the case of Jason Edward Matus & another v Summit Gehlot & another; National Environment Authority & 2 others (Interested Parties) [2021] eKLR.
40. In conclusion learned counsel submitted that the *ex parte* applicant has failed to demonstrate how irrational, unreasonable or illogical the decision of the 1<sup>st</sup> Respondent is. It has also failed to show that the 1<sup>st</sup> Respondent in making its decision considered irrelevant facts or misapprehended the law. Further, that in the absence of any evidence, the decision of the 1<sup>st</sup> Respondent is sound and should not be disturbed.



41. I have carefully considered the Notice of motion dated 8<sup>th</sup> August 2022, the statutory statement and the verifying affidavit upon which it is anchored as well as the responses by the Respondents. I have had due regard to the learned submissions by counsels. Five (5) issues crystalize for determination.
1. Whether the Applicant has capacity to plead and act on behalf of the Consortium Partners.
  2. Whether the court lacks jurisdiction to entertain the matter by virtue of Section 175(2) of the [PPADA](#).
  3. Whether the Applicant has established the legal threshold for the grant of the judicial review orders sought.
  4. If in the affirmative, what orders should issue.
  5. Who bears the costs of this suit?

**1. Whether the Applicant has capacity to plead and act on behalf of the Consortium Partners.**

42. I have perused the record of proceedings at the Board. This issue was raised in a preliminary objection which was dismissed. It is not a live matter in these proceedings as the 2<sup>nd</sup> Respondent has not challenged the finding of the Board on the matter in these proceedings. In any event the Applicant has in the verifying affidavit confirmed the authority and no tangible evidence is presented to rebut the position. This objection is dismissed.

**2. Whether the court lacks jurisdiction to entertain the matter by virtue of Section 175(2) of the [PPADA](#).**

43. The application of Section 175(2) of the [PPADA](#) and the Regulations made thereunder was suspended vide conservatory orders issued by this court (Korir J) in Nairobi High Court Petition Number E 226 of 2020, *Roads Civil Engineering Contractors and Energy Contractors Association v Attorney General, Public Administrative Review Board and another*. Those orders are still in force and the objection raised herein does not lie.

**3. Whether the Applicant has established the legal threshold for the grant of the judicial review orders sought**

44. At this stage it is important to revisit the parameters of judicial review jurisdiction. The said parameters were set out by the *Court of Appeal in Municipal Council of Mombasa v Republic & Umoja Consultants Ltd Civil Appeal No 185 of 2001* in which it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision.”

45. In *Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual



is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60.

46. It is now trite that in the post 2010 constitutional dispensation, the scope of judicial review has been expanded to encompass elements of merit review of decisions or administrative Actions. In *Suchan Investments Limited v Minister of National Heritage & Culture & 3 others* [2016] eKLR the Court of Appeal stated;

“ 56. Analysis of Article 47 of the *Constitution* as read with the *Fair Administrative Action Act* reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223* on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the *Fair Administrative Action Act*.

57. In *Mbogo & another -v- Shah* (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in *Mbogo -v- Shah* (supra) and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the Fair Administrative Actions Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11 (1) (e) and (h) of the



Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.”

47. In the instant suit, the Applicant lodged a Request for Review Application No 55 of 2022. Principally in the application, the Applicant sought to have the Board exercise its powers under Section 173 of the PPADA and extend the tender validity period to allow completion of the subject tender process.
48. Notably, the Applicant had been subjected to all requisite tender evaluation processes and vide a letter dated 14<sup>th</sup> March 2022, the 2<sup>nd</sup> respondent had contacted the Applicant for purposes of conducting post qualification due diligence as provided for in Section 83 of the PPADA. The due diligence was subsequently conducted in Singapore with the Applicant meeting the cost of the 2<sup>nd</sup> Respondents staff who carried out the exercise at a cost of Ksh 5,108,248. This included flight, accommodation and per diem allowances costs.
49. The award was never made to the Applicant despite several extensions of the tender and despite there being no communication of any negative finding in the due diligence exercise. The 2<sup>nd</sup> Respondent terminated the tender in a letter dated 27<sup>th</sup> June 2022 which letter was issued to the Applicant on 5<sup>th</sup> July 2022. This communication was made when request for Review No 55 Of 2022 was already filed.
50. The Board set out the issues for determination, in my view correctly as follows;
  1. Whether the Respondent terminated the subject tender’s procurement proceedings in accordance with Section 63 of the Act on account that material governance issues were detected to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;
  2. Whether the Board can extend the tender validity period.
  3. Whether the Applicant has locus to file the instant Request for Review having submitted its tender in a partnership.  
Depending on the determination of the first issue;
  4. Whether the tender validity period of the subject tender has expired; and
  5. What are the appropriate orders the Board should grant in the circumstances?
51. The Board proceeded to make a correct finding that the termination of the tender was improper stating that substantive and procedural statutory pre-conditions set under Section 63(1) (e), (3) and (4) of the Act were not satisfied when terminating the procurement proceedings of the subject tender. The Board’s jurisdiction was thus not ousted by dint of Section 167(4) (b) of the Act. My view is that had the Board applied its mind to the relevant fact of the propriety of the termination letter, it would have found for a fact that the procuring entity was on a deliberate mission to frustrate the tender and the termination did not only fail to meet the requirements of the law but was a fraudulent Act on the part of the procuring entity. The inconsistency in the letters of termination to the Applicant and to the Director General Public Procurement Regulatory Authority and the termination of the tender when Request for Review Application was already filed is a smack in the face of the Constitutional ethos of fairness, equity, transparency, competitiveness and cost effectiveness enshrined in Article 227 of the Constitution and the guiding principles set out in Section 3 of the PPADA. Which leads me to the pertinent issue of extension of the tender validity period.



52. The Board made a finding that;

“From the foregoing provisions of Section 88 of the Act, an accounting officer of a procuring entity has only one chance to extend a tender validity period for a maximum of 30 days. In the circumstances of this Request for Review the Procuring entity and the Applicant exhausted that right on the 25<sup>th</sup> May 2022. The Applicant did not approach the Board before that period (28<sup>th</sup> May 2022) to request for extension of the tender validity period. It follows therefore that the tender validity period for the subject tender lapsed on 28<sup>th</sup> May 2022 and any subsequent extension is null and void.”

53. I have in the preceding paragraphs broached the question of the 2<sup>nd</sup> Respondent’s bona fides in the subject tender process. This factor is key and relevant when addressing the powers of the Board to extend the tender validity period. The finding of the Board as set out in paragraph 50 above ignores the wide powers bestowed on it by Sections 28 and 173 of the Act.

54. The Court of Appeal in Civil Appeal No 510 of 2022 stated:

“36. The overriding argument by the appellant is that upon the lapse of the tender period on 11<sup>th</sup> January, 2022, the subject tender was dead and could not be resuscitated, hence the justification for the 2<sup>nd</sup> respondent’s finding in its decision dated 6<sup>th</sup> June 2022 that ‘the Applicant, the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent could not extend the tender validity period after 11<sup>th</sup> January 2022.’ On the other hand, the germane argument by the 1<sup>st</sup> respondent is that the appellant, who was acting on behalf of the procuring entity, was hellbent on frustrating the award of the tender to it. The High Court made a finding that “the procuring entity had deliberately ran (sic) down the clock with a view to achieving expiry of the tender validity period.” The learned judge held, and rightly so in our view, that “a rogue procuring entity cannot be allowed to hide behind the law to sanitize its injurious conduct, conduct that is inimical to the constitutional principles on accountable procurement processes in public procurement.” The 1<sup>st</sup> respondent’s contention was that in appropriate cases the 2<sup>nd</sup> respondent is bestowed with powers under the PPAD Act to rein in rogue procuring entities, such as the appellant, and bring finality to the procurement process.

37. This leads us to consider the powers of the 2<sup>nd</sup> respondent in such instances. Section 173 of the PPAD Act states as follows:

‘173. 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.”

55. Addressing the powers of the Board to direct the 2<sup>nd</sup> Respondent to extend the validity period, the court proceeded to state;

“Did the 2<sup>nd</sup> Respondent have power to direct the appellant to extend the validity period of the tender in question? The answer to this question was, in our view, aptly provided by Onyiego, J in *Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & another* [2021] eKLR. The learned judge found as follows:

- "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 (PPDA) provides for the extension of the tender validity period...
- 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 (sic). 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.
- 41. Therefore, the foregoing provision permits extension of a tender validity period by an accounting officer only once and that extension must be made before the expiry of the already stipulated tender validity period. It is common knowledge that one cannot extend time that has already lapsed...
- 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 for 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...
- 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."

The above findings by Onyiego, J. were upheld by this Court in Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others [2021] eKLR.

56. From the material presented before the Board, it is quite clear that the 2<sup>nd</sup> Respondent herein acted mala fides in the subject procurement process. Such conduct must be deprecated and must not be left unchecked. The Public Procurement Regulatory Authority must in such circumstances flex its legal muscle to monitor and enforce standards in public procurement and to weed out malfeasance in the processes. It must be borne in mind that any conduct that tends to defeat a fair, equitable, transparent, competitive and cost effective public procurement process is an attempt to overthrow the constitutional order espoused in Article 227 (1) of the Constitution. Any officer responsible for such conduct risks sanctions including but not limited to a declaration that they are unfit to hold public office.
57. A review of the decision by the Board shows that the same is laced with illegality arising from a glaring misapprehension of the law on extension of the tender validity period by the Board. From the disclosed facts the decision was also unreasonable as it tended to reward the 2<sup>nd</sup> Respondent for their fraudulent act of commission and omission.
58. The resultant effect is that the Applicant has established the threshold for the grant of the judicial review orders sought and the Notice of Motion dated 8<sup>th</sup> September 2022 is wholly successful. I allow the same and make the following orders;
  1. An Order of certiorari be and is hereby issued to bring to the Honourable court for purposes of quashing the decision of the 1<sup>st</sup> Respondent dated 20<sup>th</sup> July 2022 and issued on 2<sup>nd</sup> August 2022 dismissing the Applicant's Request for Review in PPARB NO. 55 of 2022.
  2. An Order of *mandamus* to compel the 1<sup>st</sup> Respondent to exercise its powers under Section 173(b) to extend the tender validity period of the subject tender for a period of 60 days or such period that it deems necessary for the 2<sup>nd</sup> Respondent to conclude the subject tender process.
  3. A declaration be and is hereby issued that the 2<sup>nd</sup> Respondent's failure to conclude the due diligence and award the contract is an abuse of the procurement process and their power thus in contravention of the provisions of Article 227(1) of the Constitution and the Public Procurement and Asset Disposal Act No 33 of 2015.
  4. Each party to bear their own costs.

**DATED SIGNED AND DELIVERED THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2022**

.....

**A.K. NDUNGU**

**JUDGE**

