



Republic v Public Procurement Administrative Review Board; Peesam Limited & another (Exparte Applicants); Accounting Officer Kenya Revenue Authority & another (Interested Parties) (Judicial Review Miscellaneous Application E003 of 2025) [2025] KEHC 1866 (KLR) (Judicial Review) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1866 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E003 OF 2025
JM CHIGITI, J
FEBRUARY 21, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD RESPONDENT

AND

PEESAM LIMITED EXPARTE APPLICANT

COLNET LIMITED EXPARTE APPLICANT

AND

THE ACCOUNTING OFFICER KENYA REVENUE AUTHORITY INTERESTED PARTY

KENYA REVENUE AUTHORITY INTERESTED PARTY

JUDGMENT

1. The application before this Court is Notice of Motion dated 13th January, 2025. The application is brought Pursuant to Article 47, 50(1) & 227 of *the Constitution*, Section 175 of the Public Procurement & Asset Disposal Act, 2015, and Order 53 of the Civil Procedure Rules, 2010.
2. It seeks the following orders: -



1. Order of Certiorari be and is hereby issued to call the decision of the Respondent dated 31st December 2024 into this Honorable Court for purpose of it being quashed, and by the same order the decision subsequently be Quashed
 2. Order of Mandamus and is hereby issued compelling the Respondent to reconsider the matter, taking into account the issues addressed by the High Court and the findings in Judicial Review Misc. Application E143 of 2024 and the decision dated 20th December 2024.
 3. Order of Mandamus be and is hereby issued compelling the Respondent to order the 1st and 2nd Interested Party to award the tender to the lowest evaluated bidders as per the initial recommendation of the evaluation committee.
 4. The Costs of this application be provided for.
 5. Any such orders that this Honourable Court may find just and fit to issue.
3. The application is supported by a Statutory statement dated 10th January, 2025, a Verifying Affidavit by Samuel Mburu Nganga sworn even date and a further affidavit by Samuel Mburu Nganga sworn on 30th January, 2025.
 4. The instant suit according to the Applicants is predicated on the Respondent's decision dated 31st December 2024 that failed to address the critical issues raised by this honourable court in its judgment dated 20th December 2024 in the lead file Judicial Review Miscellaneous Application E143 of 2024 as consolidated with Judicial Review Miscellaneous Applications No. E144 of 2024, E146 of 2024 and E262 of 2024.
 5. It is the Applicants' case that the 2nd Interested Party advertised/floated a Tender on 30th January 2024; Tender No. KRAIHQS/NCB-034/2023-2024- for Provision of Cleaning and Garbage Collection Services for KRA Offices and Residential Houses for a period of Two (2) years with eight (8) different Lots and indicated to be closing/opening on the 16th day of February 2024 at 11.00 Hrs.
 6. The Applicants proceeded to submit their bids in response to the invitation to tender for LOT 3, 5, 7 & 8 and the 1st Applicant received a letter dated 2nd July 2024 via an email indicating that the Procurement Proceedings in the Tender with respect to LOT 7 & 8 of the Tender to the effect that the Procurement Entity had terminated procurement proceedings due to inadequate budgetary provision for Lot 7 and Tender non-responsiveness for Lot 8.
 7. This resulted in the Applicants to file applications for review; Review No. 68 and 69 of 2024 seeking to review the Interested Parties' decision to disqualify it and to terminate the tender altogether.
 8. The Respondent through its decision dated 9th August 2024 found that the 2nd Interested Party's Head of Procurement acted beyond his powers by directing the Evaluation Committee to conduct a re-evaluation and ordered the 1st Interested Party to reconvene the evaluation committee for the purpose of forwarding evaluation report dated March 15th 2024 for a professional opinion and logical conclusion of the procurement process.
 9. According to Applicants, the 2nd Interested party's Head of Procurement was in breach of Section 84 (2) of the Public Procurement and Asset Disposal Act (hereinafter referred to as the Act) and Regulation 78 of the Public Procurement and Asset Disposal Regulations (hereinafter referred to as the Regulations) for failing to adhere to the Orders and directions given by the Respondent in PPARB Application No. 68 and 69/2024 of 19 July 2024, and also failing to consider the recommendations made in the Tender Evaluation Committee's Due Diligence Report dated 22nd April 2024.



10. It is their case that the 2nd Interested Party's Head of Procurement was not authorized to undertake an evaluation of the bids by Section 84 (2) of the Act and Regulation 78 of the Regulations, when there were no dissenting opinions between tender evaluation and award recommendations.
11. It is posited that on 26th September 2024, the 1st Interested Party sent a Letter of Notification dated 23rd September 2024 where the Procuring Entity purported to terminate the subject tender on the basis of inadequate budgetary provisions and aggrieved by this decision, the Applicants lodged fresh review No. 98 and 99 of 2024 dated 7th October 2024 with the Respondent which sought to set aside the 2nd Interested Parties' decision to disqualify it from the tender and in any case to terminate the tender on the basis inadequate budgetary provision.
12. The Respondent in its decision dated and delivered on 29th October 2024 which prompted the Applicants to move to court vide Misc. Application E146 and E262 of 2024, to challenge the Respondent's decision.
13. The court in its decision dated 20th December, 2024 stated the following inter alia:
 - i. The Respondent failed to consider the fact that the 1st and 2nd Interested Parties Head of Procurement acted in ultra vires or in excess of the power conferred upon it under Section 84(2) of the Act and Regulation 78 of the Public Procurement and Asset Disposal Regulations, (hereinafter referred to as Regulations) when it recommended that the Tender Evaluation Committee re-evaluates all bids from the preliminary stage. (see paragraph 186 of the judgment)
 - ii. The 1st and 2nd Interested Parties acted illegally in failing to comply with section 63 of the Act to the extent that it did not give sound reasons why the procurement process was terminated and directed that all the administrative reviews to be reheard within 10 days from the date of the judgement. (see paragraph 200 of the judgment)
 - iii. The 1st and 2nd Interested Parties contravened Section 3 and 53(8) of the Act by commencing a procurement process without satisfying themselves as to whether there was an adequate budget for the subject procurement process and can only happen where there is an ulterior motive which in the end offends the Fair Administrative Action guarantee under Article 47 of *the Constitution*, thereby rendering the termination illegal. (see paragraph 189 of the judgment)
14. They Applicants contend that the Respondent conducted a rehearing and delivered its decision on the 31st December 2024 where it ordered inter alia, that the letters of notification dated 23rd September 2024 issued to the Applicants and all other bidders in respect to the tender be and are hereby cancelled and set aside, and that the 1st and 2nd Interested parties oversees the tender to its logical and lawful conclusion taking into consideration the Board's findings.
15. It is their case that the Respondent failed to consider and address the substantive issues raised against the 2nd Interested Party's head of procurement acting in excess of the powers and that the termination of the tender was not in accordance with the provision of Section 63(2) of the Act.
16. The Applicants posit that Regulation 215 of the Regulations of the Public Procurement and Asset Disposal Regulations foresees the circumstance where requests are consolidated which arise from the same tender or procurement proceedings being heard as if they were one and therefore the parties may file one judicial review application arising from the decision.
17. The Applicants aver that it is in the public domain through the Public Procurement Information Portal (hereinafter referred to as PPIP) that the 2nd Interested Party has proceeded and procured



- through direct procurement the services of Kamtix Cleaners for six months who were awarded Lot 1 at Kenya Shillings Seventeen Million, Nine Hundred Thousand (Kshs. 17, 900,000) for six months. This amount surpasses the purported budget of Kenya Shillings Twenty-Six Million (Kshs. 26, 000,000) per year by a big margin.
18. Colnet Limited has been contracted through direct procurement for lot 3 for a period of six months for Kenya Shillings Thirty Million (Kshs. 30,000,000), despite indicating that their budget is only Kenya Shillings Thirty-Six Million (Kshs. 36, 000, 000) for a whole year.
 19. The Applicants are seeking to invoke this court's supervisory jurisdiction over and compel the Respondent to direct the 1st and 2nd Interested parties to award the tenders to the lowest evaluated bidders as per the recommendation of the evaluation committee, based on the decision of this Court dated 20th December 2024 that the Applicants bid fell within the interested Parties budgetary allocation for the period 2024/2025 and that the subject tender was illegally terminated.
 20. They argue that Respondent's decision dated 31st December 2024 was marred with illegality, on account that the 1st Respondent failed to address the critical issues raised by this court.
 21. The Applicants canvassed their application by way of written submissions dated 4th February, 2025.
 22. It is submitted that illegality relates to whether the authority exercised its discretion properly or whether they failed to take into account the relevant facts. The Respondent did not give sound reasons why the procurement process was terminated and that the issue of termination was handled in a manner and timing that does not accord with Article 227 of *the Constitution*.
 23. They place reliance in the cases of Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300 and Republic vs. Public Procurement Administrative Review Board & 3 Others ex-parte Olive Telecommunication PVT Limited [2014] eKLR , it was held that the failure to consider relevant matters is a ground for granting judicial review orders and that a public body has a duty to take reasonable steps to acquaint itself with the relevant material.
 24. They Applicants argue that the Respondent failed to exercise the jurisdiction conferred upon it by the Act in arriving at its decision accorded manifestly excessive weight to irrelevant considerations.
 25. Reliance is also placed in the case of Republic v Public Procurement Administrative Review Board & 2 others, Ex Parte Kenya Power and Lighting Company Limited (2017) Justice G V Odunga in deciding a procurement matter remitted the matter back to the Public Procurement Administrative Review Board to give appropriate directions to the Applicant on how to proceed with the tender.
 26. They contend that they had a legitimate expectation that it would benefit from a fair and transparent process which the Respondent failed to avail.
 27. The Applicants invoke Article 165 (6) on *the Constitution* which vests this Court with Supervisory jurisdiction over subordinate court and other judicial or quasi-judicial function. It provides;
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.
 28. Further Article 165 (7) grants this Court the authority to make appropriate orders to ensure fair administration of justice. It provides that;
(7) For 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 make any order or give any direction it considers appropriate to ensure the fair administration of justice".



29. They urge this honourable court to refer the matter back to the Respondent for issuance of appropriate orders to the 1st and 2nd Interested Parties on how to proceed with the tender by invoking this Court's supervisory jurisdiction.
30. It is their submission that they have demonstrated that the Respondent's decision dated 31st December 2024 was marred with illegality, on account that the 1st Respondent failed to address the critical issues raised by this court in its judgment dated 20th December 2024 in the lead file Judicial Review Miscellaneous Application E143 of 2024 as consolidated with Judicial Review Miscellaneous Applications No. E144 of 2024, E146 of 2024 and E262 of 2024.

The Respondent's case;

31. The 1st and 2nd Respondents oppose the Application through a Replying affidavit dated 27th January, 2025 sworn James Kilaka and written submissions dated 13th February, 2025.
32. It is the Respondent's case that Tender No KRA/HQS/NCB-034/2023-2024 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years (herein "the subject tender") has been the subject of a prolonged litigation process both before this Board, the High Court and the Court of Appeal.
33. According to them, through Requests for Review Nos 68 & 69 of 2024 the Applicants challenged their disqualification from the subject tender. The Board through various Decisions delivered on 9th August 2024 allowed both Requests for Review and directed the Accounting Officer to reconvene the Evaluation Committee for purposes of forwarding their Evaluation Report to the Head of Procurement for the rendering of Professional Opinion to the Accounting Officer.
34. Further, the Interested Parties presented before the Respondent documents indicating that when the Evaluation Committee forwarded their Evaluation Report, the Head of Procurement prepared a Professional Opinion to the Accounting Officer recommending the re-evaluation of the bids in the subject tender. The Accounting Officer approved this recommendation opening way for a re-evaluation exercise that eventually culminated in the termination of the subject tender on account of inadequate budgetary allocation.
35. The Applicants then through Requests for Review Nos 98 & 99 of 2024 challenged the Accounting Officer's decision to terminate the subject tender.
36. It is posited that through its decision delivered they on 29th October 2024, it partially allowed the Request for Review noting that though the Procuring Entity had demonstrated that they had an inadequate budgetary allocation to justify the termination, they failed to submit a report on the termination with the Public Procurement Regulatory Authority.
37. This resulted in the Applicants and the Interested Parties in the instant suit to file Nairobi Judicial Review Application Nos. E143, E144, E146 & E262 of 2024, which matters were consolidated and heard together and on 20th December 2024, this court issued orders for Requests for Review Nos. 99 & 98 of 2024 to be reheard before the Board.
38. The Interested Party's filed an appeal against this judgment at the Court of Appeal in Nairobi Court of Appeal Civil Appeal No. E1011 of 2024, which appeal is still pending determination by the appellate court.
39. It is the Respondent's case that on 20th December, 2024 they issued a notice for virtual hearing of the request for review on 27th December 2024 at 11:00 a.m and on the day of hearing both the Applicants



and Interested Parties were represented by their advocates who were given an opportunity to present their respective Client's case and reserved the Request for Review for determination or before 31st December 2024.

40. The Respondent delivered its decision on 31st December 2024 wherein it partially allowed the Request for Review, re-affirming that though the Procuring Entity did not have an adequate budget for the subject tender, they had failed to submit a report on the termination of the tender and issued the following identical final orders in exercise of its powers under section 173 of the Act:
1. The Respondents' Preliminary Objection dated 14th October 2024 be and is hereby dismissed.
 2. The Letter of Notification dated 23rd September, 2024 issued to the Applicant and all the other bidders in respect of Tender No. KRA/HQS/NCB-034/2023-2024 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be and are hereby cancelled and set aside;
 3. The 1st Respondent be and is hereby directed to oversee Tender No. KRA/HQS/NCB-034/2023-2024 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years to its logical and lawful conclusion taking into consideration the Board's findings in this Decision.
 4. Given that each party has partially succeeded in this Request for Review, each party shall bear its own costs of the Review.
41. It is the Respondents' case that in arriving at its final orders it considered the following issues for determination which emanated from parties' cases, documents, pleadings as follows:
- I. Whether the Board has jurisdiction over the instant Request for Review in view of the termination of the subject tender?
Depending on the Board's finding on the first issue above:
 - II. Whether the Procuring Entity failed to observe the provisions of Section 63 of the Act in the termination of the subject tender?
 - III. What orders should the Board issue in the circumstance?
42. The Respondent argues that Notice of Motion dated 13th January 2025, and Verifying Affidavit thereof is an appeal against its Decision dated 31st December 2024 with respect to the findings of the Respondent and is being disguised as a judicial review application.
43. It is deponed that the Respondent is not aware of any evaluation process undertaken by the Procuring Entity's Head of Procurement in respect of the subject tender and that contrary to the Applicants' allegation, Requests for Review Nos 98 & 99 of 2024 challenged the termination of the subject tender and not their disqualification from the subject tender.
44. It is its case that it did not err in finding that the all the lowest evaluated bids in the 7 Lots under the subject tender exceeded the budgeted amounts for the individual Lots by 25%. Paragraph 82 and 83 of the Decision highlights the following:
- i. Kamtix Cleaners Limited, the lowest evaluated bidder under Lot 1 quoted an annual tender price of Kshs. 36,489,000.36 against the annual budgeted amount of Kshs. 26,728,192.76. Therefore, the bidder's tender price exceeded the available budget by 26.6%.



- ii. Village Masters Limited, the lowest evaluated bidder under Lot 2 quoted an annual tender price of Kshs. 124,935,304.70 against the annual budgeted amount of Kshs. 62,086,257.57. Therefore, the bidder's tender price exceeded the available budget by 101%
 - iii. Saham Cleaning Services Limited the lowest evaluated bidder under Lot 3 quoted an annual tender price of Kshs. 78,331,680.96 against the annual budgeted amount of Kshs. 36,607,465.27. Therefore, the bidder's tender price exceeded the available budget by 113%.
 - iv. Kamtix Cleaners Limited, the lowest evaluated bidder under Lot 4 quoted an annual tender price of Kshs. 13,346,842.48 against the annual budgeted amount of Kshs. 9,776,562.11. Therefore, the bidder's tender price exceeded the available budget by 36.5%.
 - v. Kotaa East Africa Limited, the lowest evaluated bidder under Lot 5 quoted an annual tender price of Kshs. 80,096,192.64 against the annual budgeted amount of Kshs. 40,048,096.32. Therefore, the bidder's tender price exceeded the available budget by 97.7%.
 - vi. Kamtix Cleaners Limited, the lowest evaluated bidder under Lot 6 quoted an annual tender price of Kshs. 12,194,915.85 against the annual budgeted amount of Kshs. 8,932,775.86. Therefore, the bidder's tender price exceeded the available budget by 36.52%.
 - vii. Hanaleli Supplies Limited, the lowest evaluated bidder under Lot 7 quoted an annual tender price of Kshs. 66,632,803.20 against the budgeted amount of Kshs. 27,375,167.85 Therefore the bidder's tender price exceeded the available budget by 143.3%.
45. The Respondent posits that there was no evidence tendered before the Respondent to demonstrate that the Head of Procurement directed any re- evaluation of bids and that it was convinced that the Procuring Entity gave inadequate budgetary allocation as the reason for termination of the subject tender and this ground is expressed as a ground for termination of a procurement process under Section 63 of the Act.
46. It is the Respondent's case that the re-evaluation was conducted at the direction of the Accounting Officer as per Regulation 79 of the Regulations 2020. It further stated that:
- i. A Procuring Entity's Annual procurement plan outlines the procurement items of the Procuring Entity while setting out the approved budget amount for each item.
 - ii. The Annual Procurement Plan forms part of the Confidential Documents under Section 67 of the Act.
 - iii. In the present case, one could only tell the budgeted amount for the different lots under subject tender if they had sight of the Procuring Entity's procurement plan. The Respondent had the benefit of perusing the Confidential File, including the procurement plan and was satisfied that there was an inadequate budget to service the subject tender as the lowest bids under each lot exceeded the budgeted amounts for the specific lot.
47. According to them, this court directed them to rehear the matters and did NOT direct them to make certain specific orders in respect of the matter as doing so would be usurping the jurisdiction of the Board in determining tender related disputes.
48. The Respondent contends that it has observed the rules of natural justice in the exercise of its statutory mandate and powers under Section 28 and Section 173 of Act and ensured that all parties to the Request for Review application were granted an opportunity to be heard on all issues that emerged from parties pleadings, cases, and confidential documents submitted pursuant to section 67 of the Act



through their arguments and by considering and interrogating all the documentation and information before it that was material to the Request for Review applications before completing and determining the Request for Review applications.

49. It argues that Applicants have failed to demonstrate any elements of illegality, irrationality, procedural impropriety and/or unfairness in the manner in which the Respondent considered and interrogated the evidence, documents, pleadings, and information before it in arriving at its Decision of 31st December 2024.
50. It is submitted that the High Court’s jurisdiction in judicial review is circumscribed by the provisions of the [Law Reform Act](#) which confers to the court the jurisdiction to issue any of the three judicial review orders; section 8 of the Act provides that the High court shall not issue any of the orders in the exercise of its civil or criminal jurisdiction, it goes further to state that the orders will be issued in any case where the High Court in England is by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous provisions) Act, 1938, of the United Kingdom empowered to make an order of Mandamus, Prohibition or Certiorari the High Court shall have power to make like order.
51. Reliance is placed in the case of *Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43* and *Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300*.
52. In *Republic vs. Kenya Revenue Authority Exparte 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.”
53. The Respondent urges this Honourable court to be persuaded by the findings by the High Court; in *Republic v Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited* where Majanja J. quoting with approval the decision of Githua J in *Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012[2012] eKLR* as follows;

“It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.”
54. They further submit that for an applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the applicant must demonstrate that there is indeed a mistake



that goes to the jurisdiction of the tribunal. Misinterpretation of the law is not sufficient to move a judicial review application.

55. They also rely on the case of Republic Vs Kenya Power & Lighting Company Limited & Another [2013] eKLR the learned Judge quoting a decision of the Court of Appeal stated:

“The Board considering all the arguments of the Applicant and made findings on each of these issues. The Board may have been wrong in its decision but this Court would be usurping the statutory function of the Board were it to substitute its own views for those of the Board”

56. The Respondent submit that the application before this court does not meet the basic tenets of judicial review application and should be dismissed and this Honourable Court is inclined to uphold the applicant’s prayers, then it should not be condemned to pay costs. In any case section 175(7) of the *Public Procurement and Asset Disposal Act* forbids award of costs to any party in the event the Board’s decision is quashed by the High Court.

The Interested Parties’ case;

57. The 1st and 2nd Interested Parties in rebuttal of the instant application filed a Preliminary Objection dated 14th February 2025 on the ground that the Application is fatally and incurably defective as it offends the provisions of section 175(1) of the public Procurement & Assets Disposals Act 2015.
58. They also filed a Replying Affidavit dated 23rd January, 2025 sworn by one Titus Mwele.
59. It is their case that the 2nd interested party advertised and invited bids for tender No. KRA/HQS/ NCB-034/2023-2024 for provision of cleaning services and garbage collection in KRA's offices and residential houses described as Lot -1(Times Tower), Lot-2(Nairobi Region), Lot-3(Southern Region), Lot-4(Central Region), Lot-5(North Rift), Lot-6(South Rift}, Lot-7(Northern Region) and Lot-8(Western Region has been the subject matter of several disputes before this Court.
60. The Applicant and the interested parties contested the decision of the Respondent pursuant to section 175 of PPADA culminating in the Court's decision dated 20th December 2024, wherein the court directed the Respondent to rehear the dispute in Applications for review No. 98 and 99 of 2024 within 10 days the Respondent on 27th December 2024, in compliance with the Order of the Court heard Applications for reviews Nos 98 and 99 as filed before it.
61. According to them, the Respondent in its Decision dated 31st December 2024 concluded that based on the Applicants’ Evaluation Committee Report as contained in the Confidential File, the Professional Opinion thereto and the Annual Procurement Plan (hereinafter referred to as APP), there was indeed inadequate budget allocation to necessitate the termination of the Tender since the least evaluated bidders were beyond the scope of the financial threshold indicated in the Annual Procurement Plan.
62. They contend that no bidder quoted an amount that was within the scope of the budget as per the APP as the least evaluated bidders were all outside the scope of the budget indicated in the APP and accordingly, the Respondent concluded that the interested parties had satisfied the substantive requirements necessary for the termination of the Tender pursuant to section 63 of the Act.
63. It is posited that section 175 of the PPADA, jurisdiction of this Court is only invoked by individual recipient of the decision of the Respondent and not as a class action thus the 1st and 2nd Applicants’ decision to institute one consolidated suit herein against two separate decisions issued by the



Respondent to each of them individually makes the suit fatally defective and inconsistent with section 175 of the Act.

64. The Interested Parties aver that by dint of section 175 of the Act the Respondent is mandated to interrogate facts and make a merit-based finding on the decisions of the interested parties as presented and pleaded before it.
65. They argue that the Applicants' position is based on a gross misapprehension and misapplication of the law in so far as jurisdiction of this Court giving rise to its Decision dated 20th December 2024 in the Consolidated Application No. E143 / 2024.
66. It is their case that this Court neither sits on appeal nor does it make a merit based factual finding on the decisions of the Respondent or that of the interested parties since such jurisdiction solely lies upon the shoulders of the Respondent under section 167 read together with section 173 of the Act.
67. The interested parties posit that the Respondent's decision dated 25th September 2024 validating decisions of the interested parties were never subjected to any challenge before this court in exercise of the Applicants right under section 175 of the Act thus this court cannot validate an erroneous position and exercise powers beyond the remit of its jurisdiction.
68. It is submitted that this Court's jurisdiction cannot be invoked through class action as purportedly done by the Applicants as this is inconsistent with the provision of section 175(1) of the Act. Reliance is placed in the case of Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425, where it held that;

“Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”
69. It is their submission that section 215 regulation 215 is not available to the Applicants to justify their defective application and it cannot rely on it to justify class action on applications contemplated under section 175(1) of the Act. The section provides:

215. Where two or more requests for review are instituted arising from the same tender or procurement proceeding, the Review Board may consolidate the requests and hear them as if they were one request for review.
70. It is further submitted that prosecution of procurement disputes is dictated solely by the provisions of the Act or the attendant Regulations. No provision exists under the Act or the Regulations permitting this court to apply the provisions of Civil Procedure Rules in the manner the Applicant pleads thus the application before this court is fatally defective and liable to be struck out as the 1st and 2nd interested party's Notice of Preliminary objection is merited.
71. The Interested Parties urge the Court to look at the grounds set out in the Applicants application for review in No. 98 and 99 which is annexed to the 1st and 2nd interested party's replying affidavit to determine the veracity of the Applicant assertions in the instant suit before it.
72. The Interested Parties contend it was the accounting officer and not the head of procurement of the interested party that eventually directed the evaluation committee to conduct fresh evaluation as per the law consequently it is the recommendation of the evaluation committee and subsequently the



decision of the accounting officer terminating the procurement proceedings under section 63 of the PPADA that were the subject matters of review applications no. 98 and 99 of 2024.

73. It is their case that the applicants misguided this Court in the disputes that were subject matters in applications no. 68 and 69 of 2024 and misrepresented facts and continues to do so that the conduct of the procurement entity (head of procurement) can be challenged before this court even though they were never raised first before the respondent.
74. Reliance is placed in Republic v Public Procurement & Administrative Review Board & 2 others; Peesam Limited (Exparte) [2023] KEHC 23398 (KLR) when it stated as follows: -

- “36. In interrogating the grounds upon which relief is sought in the statement, one thing that comes out clearly in this application is that the applicant has effectively escalated to this forum its grievances against the procuring entity before the 1st respondent. Its attack is mainly targeted at the procuring entity for terminating the procurement process.
37. Little wonder that in the motion before court, the 2nd and 3rd prayers are targeted at the 2nd and 3rd respondents
- ...
39. The course adopted by the applicant is obviously contrary to section 175 of the Act according to which it is only the decision of the 1st respondent that may be subject to judicial review of this Honourable Court. The section reads as follows: 175. Right to judicial review to procurement (1)A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.
40. The court cannot proceed as if it is interrogating the decision of the procuring entity and overturn the decision of the Review Board as if this latter decision has been brought before this court on a second appeal.
41. And even assuming that that this court was entitled to address the decision of the procuring entity, it is trite that in exercise of its judicial review jurisdiction, the court will not assume appellate jurisdiction. It would not, therefore, seek to evaluate afresh the evidence presented before the procuring entity and substitute its decision with the court's decision. Neither can it fault the Review Board on its findings on facts and interpretation of the law unless the findings are clearly inconsistent with evidence. Or the purported interpretation of the law clearly shows that the decision maker did not understand the law that regulates its decision-making power and, further, the decision maker did not give effect to it. A decision tainted in such circumstances will be quashed not necessarily because the judicial review court would have reached different conclusions or interpreted the law differently but because no tribunal, given similar facts, would have reached similar conclusions on the facts or the law. In short, in judicial review circles, the decision would fall on the judicial review grounds of irrationality and illegality.”



75. The Interested Parties submit that the Respondent’s finding in in review applications No. 98 and 99 of 2024 was lawful within its powers under section 173 of the Act and judicial review jurisdiction should not act like an appeal as was held in the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR, the Court of Appeal reiterated thus:

“Judicial review is concerned with the decision making process, not with the merit 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 the 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”.

76. It is their submission that the Application before this honourable court is unmerited and ought to be dismissed with costs.

77. The Applicants filed supplementary submissions dated 14th February, 2025 in response to the Interested Parties’ Preliminary Objection dated 14th February, 2025 where they submitted that the word “person” as provided for under the section of Interpretation in Part I of the *Public Procurement and Asset Disposal Act*. The Act at page 3 defines person as follows: “person has the meaning assigned to it in Article 260 of *the Constitution* and includes sole proprietorship”

78. Further, Article 260 of *the Constitution* of Kenya 2010 defines “person” as follows: “Person includes a company, association or other body of persons whether incorporate or unincorporated.”

79. It is also their submission that the word person in the Act includes the Plural form of the word and we are in this case guided by the provisions of the Order 1 Rule 1 of the *Civil Procedure Act* which provides as follows:

“ All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.”

80. The Applicants argue that the Interested Parties have not showed any relevant ground in law in their Preliminary Objection and the same has been brought as a result of misinterpretation of the law and therefore lacks merit.

81. They rely on the case of *Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd* (1968) EA696 where Law J.A and Newbold P (both with whom Duffus V.P agreed) respectively at 700 and 701 held as follows:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which is argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or plea of Limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

“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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

Analysis and Determination

82. The issues for determination;
 - i. whether or not the notice of preliminary objection should be upheld
 - ii. whether or not the applicant has made out a case for the grant of the order sought.

On the first issue whether or not the notice of preliminary objection dated 14th day of February 2025 as raised by the 1st and 2nd Interested Parties should be upheld.

83. In the Preliminary Objection the Interested Parties raise the ground that the Application is fatally and incurably defective as it offends the provisions of section 175(1) of the public Procurement & Assets Disposals Act 2015.

84. According to them Section 175(1) of the PPADA provides as follows:

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

85. They are concerned that the Applicants have approached this Court through a class action (Peesam and Colnet as joint applicants).

86. It is their case that only a singular identifiable person(“a person”) is capable of invoking the provisions of section 175(1) of the PPADA and not a class of persons jointly or severally.

87. The decisions of the Respondent were distinct and delivered separately to each person (Colnet and Peesam).

88. The parties themselves were distinct being Peesam Ltd with respect to review application No. 98 of 2024 and Colnet Limited.

89. It is their case that this Court’s jurisdiction cannot be invoked through a class action since this is in contradiction with section 175(1) of the PPADA.

90. They rely on Court of Appeal in Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425, where it held that;

“Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

91. It is their case that contrary to the Applicant’s submissions, Regulation 215 cannot assist the Applicants.

92. They argue that the regulation does not offer any help to the Applicant for the following reasons;



- i. The said provision(Regulation 215) purely relates to the proceedings before the Review Board(respondent) with respect to review applications once they are filed before the Board in line with section 167 of the PPADA. Several applications for review may be filed before the Respondent by various tenderers or candidates to a tender in line with section 167 of the PPADA and the respondent may, by dint of that provision consolidate them solely for the purposes of hearing the applications together
 - ii. Even so, the said Regulation only provides for consolidation of the requests for review for the purposes of hearing them as one once they are filed individually by each tender.
 - iii. It does not provide that parties institutes their applications for review by way of class action. Each individual tenderer is required to lodge their respective application for reviews separately in line with section 167 of the PPADA. consequently, it is the review Board that in exercise of its powers and discretion may consolidate the application for the purposes of hearing them together.
 - iv. Indeed, it is for this reason that Colnet and Peesam both individually filed their application for review before the Respondent in Review applications No. 98 and 99 of 2024.
93. It is their case that the Civil Procedure Rules and Act have no place in the disposition of procurement disputes which are dictated solely by the provisions of the PPADA or the attendant Regulations.
94. They argue that it is only this court, upon being moved appropriately or by consent by parties who can determine whether matters can be consolidated and heard so as one.
95. The Applicant cannot purport to be creative by instituting actions contrary to what is provided for in law (section 175(1) of the PPADA) on a misguided basis that it desires to ensure expeditious disposal of disputes.
96. The Law on preliminary objection is well settled in the case of Mukisa Biscuit Manufacturing Co. Limited vs. West End Distributors Limited [1969]EA696,Newbold,V.P,observed as follows;
- “ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase cost and, on occasion, confuse issues. This improper practice should stop.”
97. In the case of Samuel Kamau Macharia& Another v. Kenya commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR, the supreme court pronounced itself on jurisdiction thus:
- “(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which Is conferred upon it by law. We agree with counsel for the first and second Jurisdiction to entertain a matter before it, is not one of mere procedural Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, Commission (Applicant), Constitutional Application Number 2 of 2011. Where they cannot expand its jurisdiction must operate within the constitutional limits. It confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, court or



tribunal by statute law." (Emphasis provided) where it quoted with approval the oft cited case of Owners of Motor Vessel 'Lillian S' v Caltex In Re The Matter of the Interim Independent Electoral Commission where the Court stated:-

"[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."(underlining supplied)

[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*."

98. This court is satisfied that the Preliminary objection is on a point of law that goes to the jurisdiction of this court.
99. Article 260 of *the Constitution* defines a "person" includes a company, association or other body of persons whether incorporated or unincorporated.
100. Section 2 of The Public Procurement and Assets Disposal Act defines a person by referring to Article 260 of *The Constitution*.
101. Article 159(2) of *The Constitution* provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - (a) justice shall be done to all, irrespective of status;
 - (d) justice shall be administered without undue regard to procedural technicalities.
102. Section 175(1) of the PPADA provides as follows:
 - (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.(underlined for emphasis)
103. This court is of the opinion that there is nothing wrong with the applicants suing the way they have done. The Applicants were parties to the suit that informs the cause of action herein.



104. The Interested Parties and Respondent do not show any prejudice that they will suffer if they proceed as is.
105. Section 175(1) of the PPADA does not translate nor mean what the Interested Parties are advancing. It simply opens doors to all persons who are involved in public procurement to access the procurement redress as provided for under Article 48 of *The Constitution*. The Section has nothing to do with class action or such suits.
106. Section 5 (1) of the PPAD Act provides that;
- “This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.”
- The PPAD Act is a self-propelling piece of legislation which is not subject to the provisions around class action.
107. The preliminary objection lacks merit.

Whether or not the applicant has made out a case for the grant of the order sought;

108. On 20th December 2024 this court in its judgment directed as follows;
1. An Order of Certiorari to quash the decision and orders of the Respondent dated 29th October 2024 is hereby issued.
 2. All the administrative reviews shall be reheard within 10 days of today’s date.
 3. There shall be no orders as to costs.
109. This prompted the Respondent to conduct a rehearing which culminated in the impugned ruling that is dated 31st December 2024.
110. The Applicants are dissatisfied with this determination thus precipitating the filing of the instant suit.
111. The case of Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa LTD & Another [2012] eKLR sets out the established reach of judicial review in Kenya thus;
- “The reach of judicial review is now well established. In the case of Council Of Civil Service Unions V Minister For The Civil Service [1984] 3 All Er 935 Lord Diplock summarized the scope of judicial review thus:-
- “Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action are subject to control by judicial review.
- The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety.".....
- By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the



event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"

(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means least he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals.

The Court of Appeal in *Grain Bulk Handlers Limited V J. B. Maina & Co. Ltd & 2 Others* [2006] eKLR summarized the purpose of judicial review by stating that:-

"Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions."

112. This court cautions itself that it is not sitting on appeal and that it is exercising its judicial review jurisdiction in determining the application before it under Article 165 of *The Constitution*.
113. In the judgment of this court that is dated 20th December 2024, I made a finding that the Respondent in its decision dated 29th October 2024 had erred by finding that the Interested Parties had satisfied the substantive requirement to terminate the tender in line with Section 63(1) of the *Public Procurement and Asset Disposal Act*.
114. At paragraph 186 of the said judgment, the court found that the Respondent failed to consider the fact that the 1st and 2nd Interested Parties Head of Procurement acted in ultra vires or in excess of the power conferred upon it under Section 84(2) of the Act and Regulation 78 of the Public Procurement and Asset Disposal Regulations, (hereinafter referred to as Regulations) when it recommended that the Tender Evaluation Committee re-evaluates all bids from the preliminary stage.
115. In paragraph 187 of the decision, the court observed that the Respondent failed to consider the fact that the Applicants having initially passed the mandatory and financial requirements of the tender, it was not open for the 1st and 2nd Interested Party's Head of Procurement or Tender Evaluation Committee to go back and re- evaluate whether the Applicants bids complied with the mandatory



evaluation criteria when there was no dissenting opinions between tender evaluation and award recommendations.

116. Further, in paragraph 193 the Court held that the Respondent failed to consider the fact that the Applicants bids fell within the 1st and 2nd Interested Parties budgetary allocation for the period 2024/2025.
117. Consequently, the 1st and 2nd Interested Parties did not give justification or offer satisfactory explanations within acceptable economic standards around the issue of budgetary constraints and that the issue of the budgetary constraints was handled in a manner and timing that does not accord with article 227 of *the Constitution*.
118. In paragraph 200 of the judgment, the court further observed that the 1st and 2nd Interested Parties acted illegally in failing to comply with section 63 of the Act to the extent that it did not give sound reasons why the procurement process was terminated and directed that all the administrative reviews be reheard within 10 days from the date of the judgement.
119. The Respondent failed to consider and address the substantive issues raised against the 2nd Interested Party's head of procurement acting in excess of the powers and that the termination of the tender was not in accordance with the provision of Section 63(2) of the Act.
120. In paragraph 189 the court held that the 1st and 2nd Interested Parties contravened Section 3 and 53(8) of the Act by commencing a procurement process without satisfying themselves as to whether there was an adequate budget for the subject procurement process and can only happen where there is an ulterior motive which in the end offends the Fair Administrative Action guarantee under Article 47 of *the Constitution*, thereby rendering the termination illegal.
121. In paragraph 193 this court had noted that the 1st Applicants bids fell within the 1st and 2nd Interested Parties budgetary allocation for the period of 2024/2025. Therefore, the termination and the re-evaluation having been found illegal the appropriate orders by the Respondent should have been to order the 1st and 2nd Interested Parties to award the tenders to the lowest evaluated bidders as initially recommended by the 2nd Interested Party's evaluation committee.
122. When this court directed the rehearing, it expected that the Respondent captures and takes into consideration the sentiments aforementioned.
123. In the judgment at Paragraph 196 of this court it was held that;

“It is my finding that indeed, the 1st Respondent did not give justification or offer satisfactory explanations within acceptable economic standards around the issue of budgetary constraints”.

124. The Board at Paragraph 87 of the judgment went on to state that;

Flowing from the above, the Board is satisfied that the Respondents satisfied the substantive requirements under Section 63 of the Act as it is apparent they did not have an adequate budget to satisfy the tender prices as quoted by the lowest evaluated bidders.

In sum, it is the Board's view that the Respondents satisfied the substantive requirements but failed to fully satisfy the procedural requirements of termination of the tender under Section 63 of the Act.

The said provision contemplates that both the substantive and procedural requirements must be complied with before the termination of a public procurement or asset disposal



proceeding can be deemed lawful. In the present circumstance the non-compliance with a procedural requirement renders the termination of the tender irregular.

In view of all of the foregoing, the Board finds that the Procuring Entity did not terminate the subject tender in accordance with the provisions of Section 63 of the Act. The Board therefore holds that the tender subject of this Request for Review is not terminated and hence deemed to be alive. Accordingly, this ground of review succeeds and is allowed.

125. In exercise of the powers conferred upon it by Section 173 of the *Public Procurement and Asset Disposal Act*, No. 33 of 2015, the Board made the following orders in this Request for Review:
 1. The Respondents' Notice of Preliminary Objection dated 14th October 2024 in respect of the instant Request for Review be and is hereby dismissed.
 2. The Letters of Notification dated 23rd September, 2024 issued to the Applicant and all the other bidders in respect of Tender No. KRA/HQS/NCB-034/2023-2024 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be and are hereby cancelled and set aside.
 3. The 1st Respondent is hereby directed to oversee Tender No. KRA/HQS/NCB-034/2023-2024 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years to its logical and lawful conclusion taking into consideration the Board's findings in this Decision.
126. From the foregoing excerpts from the board's decision it is clear to this court that the board acknowledged and even went ahead to make a finding that the Respondent was facing budgetary constraints.
127. Logically this should then mean that the procurement cannot go on in the light of the budgetary deficit. Curiously.
128. The 9th Edition of Black's Law Dictionary defines an unreasonable decision as one that is "so obviously wrong that there can be no difference of opinion among reasonable minds". It also defines irrational decisions as those "not guided by reason or by a fair consideration of the facts".
129. Lord Diplock's classic dictum in *Council of Civil Service Unions versus Minister for the Civil Service* (1985) 1 AC 374 provides a useful guide on what an unlawful decision entails. The learned judge spoke of these grounds as follows:

"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.



By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury’s unreasonableness” (Associated Provincial Picture Houses Ltd. v. Wednesbury’s Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court’s exercise of this role, resort I think is today no longer needed to Viscount Radcliffe’s ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court’s reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. “Irrationality” by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.”

130. The respondent decision and the procurement cannot logically be completed without an adequate budget.
131. It is this court’s finding that the board’s finding is self-defeatist and incapable of implementation.
132. The decision of the Respondent is illogical and it fails the Wednesbury test. It has created an illegality that it has to undo.
133. The decision is irregular and must be quashed through an order of certiorari which i hereby grant.
134. This court is satisfied that the applicants have made out a case within the principles as enunciated in the Republic V Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR case.

Determination:

135. The applicants have made out a case for the grant of the orders sought.

Order:

- A. The Notice of Preliminary Objection dated 14th February 2025 is dismissed.
- B. Order of Certiorari is hereby issued to call the decision of the Respondent dated 31st December 2024 into this Honorable Court for purpose of it being quashed, and the same is hereby quashed.



- C. An Order of Mandamus is hereby issued compelling the Respondent to reconsider the matter, taking into account the issues addressed by the High Court and the findings in Judicial Review Misc. Application E143 of 2024 and the decision dated 20th December 2024.
- D. The prayer for an Order of Mandamus to issue compelling the Respondent to order the 1st and 2nd Interested Party to award the tender to the lowest evaluated bidders as per the initial recommendation of the evaluation committee is declined.
- E. The rehearing shall be conducted within 7 days of today's date.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

J.M. CHIGITI (SC)

JUDGE

