



Republic v Nzai & 2 others; Auto Terminal Japan Limited (Exparte Applicant) (Judicial Review Application E054 of 2025) [2025] KEHC 4586 (KLR) (Judicial Review) (9 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E054 OF 2025**

**RE ABURILI, J
APRIL 9, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

CHARLES NZAI 1ST RESPONDENT

PUBLIC PROCUREMENT REGULATORY BOARD 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

AUTO TERMINAL JAPAN LIMITED EXPARTE APPLICANT

JUDGMENT

1. The application before this court is dated 7th March 2025 and it seeks the following orders;
 1. An order of certiorari to remove into this Honourable Court and quash the entire decision of the 2nd Respondent herein in Debarment Application Number 10 of 2024, dated 17th February 2025 which was delivered on 18th February 2025;
 2. An order of Prohibition to prohibit and/or restrain the Respondents and/or their agents and any other persons from implementing the decision delivered in Debarment Application Number 10 of 2024, dated 17th February 2025 which was delivered on 18th February 2025;
 3. Spent;
 4. Such other, further order and/or incidental orders or directions as this Honorable Court shall deem just and expedient;



5. Costs of this Application be borne by the Respondents.
2. The application is supported by the affidavit of Dr. Isaac Kalua sworn on 7th March 2025.
3. The ex parte applicant before this court challenges the 2nd respondent's decision dated 17th February 2025 debarring it from participating in tender proceedings.
4. A brief background of the matter before this court is that 2nd respondent received a Request for debarment of the applicant from the 1st respondent on 28th October 2024. The 1st respondent had accused the ex parte applicant of using forged documentation during a tendering process. Upon analysis the 2nd respondent found that there was a prima facie case and issued a Notice of Intended Debarment to the applicant dated 18th November 2024 together with directions on filing, and more specifically granting the applicant herein fourteen (14) days to file and serve its written response. The applicant served its reply on 6th December 2024.
5. Upon receiving the response, the 2nd respondent went ahead to fix the matter for hearing on 30th January 2025 and a hearing notice was communicated to the parties. The application was heard on 30th January 2025 and a decision made in favour of the 1st respondent's application.
6. The ex parte applicant challenges this decision first on grounds of non-compliance with the [Public Procurement and Asset Disposal Act](#), [Public Procurement and Asset Disposal Act](#) and the [Public Procurement and Asset Disposal Act](#) Debarment Proceedings Manual, 2022.
7. According to the applicant, the 2nd respondent ought to have conducted the hearing within 21 days after response had been filed and not 60 days as was done. It is urged that the 2nd respondent did not have jurisdiction to entertain the matter.
8. The ex parte applicant also states that the 2nd respondent also received a defective notice of intended debarment and request for debarment as the same made reference to EAA Company Limited and not the applicant.
9. It is also the ex parte applicant's case that the debarment proceedings were res judicata as it had already been subjected to disciplinary proceedings on merit and received penalties vide the decision dated 25th March 2022.
10. Further that the 2nd respondent violated its rights under Article 47(1) and 50 of [the Constitution](#). The ex parte applicant's case is also that the 1st respondent failed to disclose to the 2nd respondent that there were no orders of debarment against it during Tender No.KEBS/RT/011/2021-2024 as the Court in HC Petition No.E191 OF 2021 had issued conservatory orders suspending the debarment proceedings.
11. The ex parte applicant also urges that on the issue of the forged documents the DCI vide its letter dated 19th December 2024 had indicated that the investigations were still ongoing.
12. In response the 1st respondent filed a replying affidavit sworn by Charles Nzai (1st respondent) on 13th March 2025. In the affidavit Mr. Nzai contends that the application for debarment was based on Tender No.KEBS/RT/011/2021/2024. It is also his case that the applicant was also a beneficiary of the 2nd respondent's purposive interpretation as it filed its response on 6th December 2024 and not 4th December 2024.
13. The 1st respondent in his affidavit acknowledges that he mistakenly referred to EAA Company Limited instead of the ex parte applicant and that he corrected the same in his further affidavit filed before the



2nd respondent clarifying that the reference was inadvertent. This mistake was also alluded to during the oral hearing of the application for debarment.

14. On the issue of res judicata the 1st respondent's case is that the applicant was debarred for 3 years vide Debarment Application No.4 of 2021 and No.5 of 2021 (consolidated) vide Final Decision dated 2nd June 2021. The proceedings are said to have been pursuant to the applicant submitting falsified documents in Tender numbers/T057/2014-2015, KEBS/T019/2017-202 and KEBS/T010/2019-2021.
15. The Board in arriving at its final decision is said to have relied on reports from the Auditor General and a parliamentary report which found that indeed the ex parte applicant had submitted falsified documents. It is the 1st respondent's case that the cause of action is different but the offender is the same.

2nd respondent's case

16. The 2nd respondent also filed a replying affidavit sworn by Raphael Muia Ngalatu, the Acting Secretary of the Debarment Committee of the 2nd respondent.
17. In his affidavit Mr. Ngalatu submits that the ex parte did not raise any objection as to the date of the hearing. On res judicata he depones that the current proceedings are based on a new cause of action, involving a different tender, KEBS/RT/011/2021 24.
18. It is also the 2nd respondent's case that it is independent in making its decisions on how to proceed with disposition of the different matters before it depending on the facts presented before it and the circumstance of each case.
19. Further that the applicant has filed these Judicial Review proceedings in bad faith and with material non-disclosure to the Honourable Court in that, the applicant before filing these proceedings filed Constitutional Petition no. E072/2025 dated 14th December 2025 together with an interim application on 16th February 2025.
20. The Petition is said to have been placed before Honourable Justice Mwamuye on 17th February 2025 who subsequently issued orders that the Petition and the application be served on the parties for the matter to be heard on 18th March 2025. On noticing that the orders had not been granted, the applicant herein is said to have filed a notice of withdrawal dated 18th February 2025 only to file this application on 20th February 2025.
21. It is urged that the applicant herein is abusing the court process by filing multiple suits ostensibly to forum shop for orders. Further that failing to disclose to this Honourable Court that it had already filed the Petition, and orders were not granted in the same is tantamount to material non-disclosure and an abuse of the court process.

Further Affidavit

22. In its further affidavit sworn by Dr. Isaac Kalua on 19th March 2025 the ex parte applicant's case is that Rule 5 (3) of the Fair Administrative Actions Rules provides that where the administrative action is required to be undertaken within a period specified under any written law, the applicant shall not issue the notice of intention to sue unless the specified period has elapsed.
23. Additionally, that neither the 1st respondent or 2nd respondent have denied the fact that they made the determination in Debarment Application Number 10 of 2024 outside statutory timelines.



24. The deponent further states that Constitutional Petition Number E072 of 2025 was filed on 16th February 2025 before the decision of the 2nd Respondent was delivered. As a result, the said Petition was filed in the course of the debarment proceedings and this court's jurisdiction over the matter had not yet crystallized.
25. It is further deponed that, no conservatory orders were granted and on 18th February 2025 at 1:39 p.m. the decision in Debarment Application Number 10 of 2024 was delivered. As a result, the said Application and Petition were rendered moot. Consequently, the Applicant filed a notice of withdrawal dated 18th February 2025 noting that the application and petition were overtaken by events. The court, Judge Bahati Mwamuye, said to have noted that the orders had been overtaken by events and marked the petition as withdrawn pursuant to the notice of withdrawal.

Submissions

26. The application was canvassed through both written and oral submissions with only the ex parte applicant filing both written submissions dated 19th March 2025 and submitting orally together with counsel for the parties before the court on 20th March 2025.
27. It is the applicant's submissions that the courts have in many instances insisted on the importance of adherence to timelines and in supporting this position reliance is placed in the case of Gichuhi & 2 others v Data Protection Commissioner; Mathenge & another (Interested Parties) [2023] KEHC 17321 (KLR) where the court emphasised that a court's jurisdiction flows from *the Constitution* or statute and that in our instant case the 2nd respondent's jurisdiction in debarment proceedings flows from the *Public Procurement and Asset Disposal Act*, its regulations and the Debarment Manual.
28. According to the applicant as was held by the court in Gichuhi & 2 others v Data Protection Commissioner (supra), Civil Appeal E039 of 2021 Aprim Consultants v Parliamentary Service Commission & another [2021] KECA 1090 (KLR) and Nairobi High Court E281 of 2019 Public Procurement Administrative Review Board; Ex parte Lordship Africa Ltd; Nairobi City County & another (Interested Party/Applicant) where the timelines provided under the law within which a matter is to be determined have lapsed the court is divested of jurisdiction.
29. On the issue of res judicata the applicant relies on the case of John Florence Maritime Services Limited and Another vs Cabinet Secretary, Transport and Infrastructure and 3 others (2021) eKLR where the court is said to have observed that once a matter is heard and determined, the decision issued acts as an estoppel to the same facts and issues being raised again. This was also the position in the case of Anne Delorie vs Aga Khan Health Service limited [2009] eKLR.
30. The applicant's submission is that any documents filed outside the timelines of the ruling dated 4th March 2025 ought to be expunged and in support of this position reliance is placed in the case of Isiolo Stage View Enterprises v Isiolo County Government & 2 others [2018] KEELC 1481 (KLR) where the court observed that the main purpose of imposing timelines is so as to achieve the overriding objectives set out in the *Civil Procedure Act*.
31. The applicant also submits that in line with subsection 5(3) of the *Fair Administrative Action Act* Rules, the administrative action to be undertaken per paragraph 12 (1)(j) of the Debarment Manual, the gazettelement of the ex parte applicant after twenty one (21) days, had not lapsed by the time it filed its application dated 20th February 2025 in Court on 3rd March 2025. Consequently, it did not need to issue a notice of intention to sue.



32. It is submitted that this court is conferred with powers to issue the Orders of Certiorari and Prohibition per Order 53 Rule 1(1) and (2), and Rule 3 (1) and (2) of the Civil Procedure Rules. On the circumstances under which a court can issue the said orders reliance is placed in the case of *Republic v Chairman, Rent Restriction Tribunal; Nzaro (Interested Party); Wambua (Exparte)* [2023] KEELC 17988 (KLR). Reliance is also placed in the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2019] KEHC 9688 (KLR) where the court is said to have quashed the Public Procurement Administrative Review Board's decision on grounds that it was tainted with unreasonableness.
33. In his submissions counsel for the 1st respondent submitted that debarment proceedings are governed by section 40 of the *Public Procurement and Asset Disposal Act*, 2015 and that the applicant had previously been debarred for submitting falsified documents.
34. It was urged that the 2nd respondent found the applicant as a repeat offender and this was a different cause of action dealing with impeached documents in a subsequent tender. It was also Mr. Madowo's submission that the Debarment Manual Guidelines provide guiding principles, however they do not set statutory timelines. He further urged that the Board was mandated to extend timelines and to support this position he relied on the case of *Esther Chepkemei vs. Sally Chemutai* [2022] eKLR.
35. He further submitted the 2nd respondent enlarged time for the applicant to file additional documents and that each party was given sufficient time to argue their respective case. According to submissions by counsel the applicant's debarment was owing to its own infractions.
36. Mr. Ngalatu representing the 2nd respondent reiterated that none of the parties before the 2nd respondent objected to the notice giving timelines for hearing. On *res judicata* he submitted that the applicant was debarred in 2021 and in 2024 it used the same falsified documents in the subsequent tender.
37. On the issue of complying with the court's ruling on timeline Mr. Ngalatu submitted that the 2nd respondents replying affidavit was filed pursuant to leave granted by the court on 17th March 2025. In conclusion he submitted that the 2nd respondent's decision was made in accordance with the law.
38. In response to submissions by counsel for the respondents Mr. Oketch submitted that the applicant was not aware of the debarment as no communication had been made to it and that it had conservatory orders from the High Court given by W. Korir J. These orders according to counsel were in force until the fresh tender was advertised and the applicant participated.
39. Mr Oketch also submitted that this court cannot countenance the statute and decision of the Court of Appeal. Further that the Committee cannot assume jurisdiction because the parties consented before it. It was his submissions that it either had or did not have jurisdiction to determine the matter.
40. Analysis and determination
41. I have considered the judicial review application, the opposition thereto and the parties' respective written submissions. Parties have submitted and argued on the merits and demerits of the application for judicial review orders. In my view, the main issue for determination is whether the applicant has made a case for grant of the judicial review orders sought.
42. The Court has considered the respondent's contention that the Applicant acted in bad faith and failed to make material disclosure by failing to mention the existence of Constitutional Petition No. E072 of 2025. It is not disputed that the said petition had been marked as settled shortly before the filing of the present Judicial Review proceedings.



43. However, the Court is not persuaded that the prior existence of the constitutional petition materially affects the present case. The two matters are distinguishable both in substance and in the nature of reliefs sought. Whereas the constitutional petition primarily sought interim conservatory orders, the present proceedings are grounded in administrative law, seeking judicial review remedies specifically, orders of certiorari to quash an impugned decision.
44. In the Court's view, the mere fact that the applicant previously pursued a different legal route, which was settled, does not in itself amount to bad faith or an abuse of court process. Nor can it be said that the non-disclosure of a settled petition, whose subject matter was not identical, rises to the level of material non-disclosure sufficient to defeat these proceedings.
45. The applicant in its application is challenging the 2nd respondent's decision in Debarment Application No.10 2024 dated 17th February 2025. It has raised the issue of the 1st respondent's notice and request for debarment being defective as it makes reference to EAA Company Limited and also on the issue of jurisdiction.
46. On the issue of the request for debarment being defective this court observed that the 2nd respondent addressed the issue in its decision at paragraphs 54 to 64 and it noted that the same was a minor error that could be amended on the face of the record. Rightly so it also observed that the Request for debarment was based on various breaches committed by M/s ATJ Japan Limited while only a single clause referred to M/s EAA Company Limited. The rest of the information is said to have related to and mentioned the applicant throughout.
47. While this is an issue that is potentially very significant especially as debarment proceedings, have serious legal and commercial consequences the applicant has not alluded to any breach of the rules of natural justice particularly its right to be heard being violated. If anything, there is a response to the application for debarment filed by it.
48. On to the next issue the applicant also urges that the 2nd respondent did not have the jurisdiction to hear and determine the debarment application owing to the effluxion of statutory timelines.
49. In response both the respondents urge that none of the parties before the committee raised the issue of timelines and even the applicant benefited from the enlargement of time by the 2nd respondent as it was allowed to file further documents out of time. According to counsel for the 1st respondent the 2nd respondent has the mandate to extend timelines in the Guidelines.
50. The 2nd respondent's mandate to debar a person from participating in procurement or asset disposal proceedings is provided for under section 41 of the *Public Procurement and Asset Disposal Act*. The Act provides for the grounds upon which the 2nd respondent may debar a person and under subsection 4 it provides that such person shall be debarred for a period not less than three years. Key to these proceedings is section 41(5) which states as follows;

“The procedure for debarment shall be prescribed by Regulations.”
51. The regulations envisaged under this sub section are the Public Procurement and Asset Disposal Regulations, 2020. The Public Procurement and Asset Disposal Debarment Proceedings Manual, 2022 also provides guidelines on how debarment ought to be undertaken by the Board.
52. Of relevance to the instant case is Regulation 22(5) of the Public Procurement and Asset Disposal Regulations which I will proceed to reproduce below;



5. For purposes of section 41(5) of the Act and this regulation, debarment procedures shall be as follows—
 - a. upon receipt of a request for debarment, the Board shall analyze the case within thirty days to determine whether there is a prima facie case for debarment;
 - b. if the analysis establishes a prima facie case for debarment, the Board shall issue a notice of intended debarment to the party, who shall be the subject of the debarment proceedings requiring him or her to file a written response with the Board;
 - c. the notice of intended debarment issued under paragraph (b) shall contain the grounds of debarment, a brief statement of the facts in support of debarment and the consequences that may arise from the debarment;
 - d. the respondent shall within fourteen days of receipt of a notice of intended debarment, file a written response with the Board;
 - e. where the facts of the intended debarment are contested, the debarment committee shall within twenty-one days of receipt of the response in paragraph (d) hold a debarment hearing to determine the disputed facts;
 - f. a seven (7) days' notice shall be given to the parties to appear before the debarment committee;
 - g. the debarment committee shall prepare a report of its findings and recommendations, and make a determination on the request for debarment within thirty days from the date of hearing;
 - h. where the request for debarment is approved, such debarment shall be for a period of not less than three years;
 - i. the decision to debar a person shall promptly be communicated to the parties involved in the debarment proceedings;
 - j. after the expiry of twenty-one days from the date of the debarment decision, the Authority shall publish the details of the person debarred and the corresponding period of debarment;
 - k. the Authority shall forward the details of the debarred person to the Cabinet Secretary for gazettelement.

53. Similarly, Regulation 12 of The Public Procurement and Asset Disposal Debarment Proceedings Manual, 2022 states as follows, replicating the above cited Regulation under the Act;
 12. Procedure for conducting the business of the Debarment Committee
 1. The Debarment Committee shall utilize the following procedure;
 - a. On receipt of a Request for Debarment, the Committee shall analyse the case within thirty days to determine whether there is a prima facie case for debarment;
 - b. If the analysis establishes a prima facie case for debarment, the Committee shall issue a notice of intended debarment as provided in Appendix III to



the Respondent, who shall be the subject of the 17 debarment proceedings requiring them to file a written response with the Committee;

- c. The notice of intended debarment shall contain the grounds for debarment, a brief statement of the facts in support of debarment and the consequences that may arise from the debarment;
- d. The Respondent shall within fourteen days of receipt of a notice of intended debarment, file a written response with the Committee;
- e. Where the facts of the intended debarment are contested, the Committee shall within twenty-one days of receipt of the response from the Respondent hold a debarment hearing to determine the disputed facts;
- f. A seven (7) days' notice shall be given to the parties to appear before the Debarment Committee for hearing;
- g. The Debarment Committee shall prepare a report of its findings and recommendations, and make determination on the request for debarment within thirty days from the date of hearing;
- h. The Committee shall make a finding on the request for debarment. Where the Committee allows the request for debarment, such debarment shall be for a period of not less than three (3) years;
- i. The decision of the Committee shall be promptly communicated to the parties involved in the debarment proceedings;
- j. After expiry of twenty-one days from the date of the debarment decision, the Authority shall publish and publicize the details of the person debarred and the corresponding period of debarment;
- k. The Authority shall forward the details of the debarred person to the CS for gazettelement.

54. In this case, the 2nd respondent received a Request for Debarment of the applicant from the 1st respondent on 28th October 2024 and upon analysis found that there was a prima facie case and issued a Notice of Intended Debarment to the applicant dated 18th November 2024 together with directions on filing, and more specifically granting the applicant herein fourteen (14) days to file and serve its written response as is provided under the law.
55. The applicant served its reply on 6th December 2024. This was already a violation of Regulation 22(5) (d) of the Public Procurement and Asset Disposal Regulations and Regulation 12(1)(d) of the Public Procurement and Asset Disposal Debarment Proceedings Manual, 2022 which provide in mandatory terms that within fourteen days of receipt of a notice of intended debarment, the respondent shall file a written response with the Committee. In this case the applicant filed its response 19 days later.
56. Ignoring this fact, the 2nd respondent went ahead to fix the matter for hearing on 30th January 2025 and a hearing notice communicated to the parties. This court has counted the number of days between when the applicant's response was received that is 6th December 2024 and the date set for hearing by the 2nd respondent that is 30th January 2025 and it has even gone ahead to exclude 21st December to 13th January of the following year where as provided under Order 50 rule 4 of the Civil Procedure Rules when time stops running and the number of days totals to 30 days.



57. This again contravened Regulation 22(5)(e) of the Public Procurement and Asset Disposal Regulations and Regulation 12(1)(e) of the Public Procurement and Asset Disposal Debarment Proceedings Manual, 2022.
58. Section 41 (5) of the *Public Procurement and Asset Disposal Act* clearly provides for regulations that set out the procedure for debarment. These regulations are designed to also set statutory timelines within which certain steps during the procedure ought to be complied with.
59. As succinctly put by the Court of Appeal in *Aprim Consultants v Parliamentary Service Commission & another* [2021] KECA 1090 (KLR) any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law. The court went ahead to observe as follows;

“That legal conclusion remains irrespective of the avowed reasons, no matter how logical, sound, reasonable or persuasive they may be. No amount of policy, wisdom or practicality can invest a decision made without jurisdiction with any legal authority. In the words of the Supreme Court in *Samuel Macharia & Anor v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR.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 respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within the authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

27. It seems clear to us that the jurisdiction of the High Court in public procurement judicial review proceedings is expressly limited in terms of time and is not open to expansion by that court. To step out of time is to step out of jurisdiction and any act or decision outside jurisdiction is, by application of first principles a nullity.”

60. In *Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd* [1989] KLR 1, the Court of Appeal held that jurisdiction is everything, and without it, a court has no authority to make any further steps in a case.
61. This court in the case of *Sino Hydro Corporation Limited v Tumbo t/a Dominion Yards Auctioneers* [2022] KEHC 15545 (KLR) also observed as follows:

“Where a proceeding or appeal like this particular one is filed out of the stipulated statutory timelines the court is deprived of jurisdiction to hear and determine the appeal on its merits. The appeal is stale. It is incompetent before this court and without jurisdiction, a



court of law cannot make any one more step as its decision amounts to a nullity. (see R. Wendo J in *Transmara Sugar Co Ltd v J.N Marwa Ikimwanya Auctioneers limited and another* [2022]eKLR (March 31, 2022).

See also the decision by Ogola J (December 20, 2021) at Eldoret High Court in *Jafred Wamukoya & Gideon Osundwa v Kennedy Shikuku T/A Eshikhoni Auctioneers & Ibrahim Muhamed* [2021]eKLR where the learned judge struck out with costs an application filed by way of a reference to challenge assessment of auctioneers costs, which application was filed outside the 7-day period prescribed under rule 55(5) of the Auctioneers Rules.

I can't agree more that where proceedings are filed outside the timelines stipulated in law, the court is deprived of jurisdiction to determine such proceeding which is incompetent and a nonstarter.”

62. A similar position was also held in the case of *Gichuhi & 2 others v. Data Protection Commissioner; Mathenge & another (Interested Parties)* [2023] eKLR, where the court held that the Office of the Data Protection Commissioner (ODPC) acted beyond its jurisdiction by making a determination beyond the statutory 90-day period prescribed under Section 56(5) of the Data Protection Act. The court emphasized that the ODPC's jurisdiction was inherently linked to this timeframe, and any decision rendered outside this period was a nullity.

63. These cases reinforce the principle that statutory timelines are mandatory and jurisdictional. Noncompliance with such timelines deprives the relevant tribunal or court of jurisdiction to hear and determine the matter.

64. Clearly, the 2nd respondent in hearing and determining the 1st respondent's debarment application acted outside its statutory mandate when it flouted the prescribed timelines of filing of the response and hearing of the application and as such, its decision was void. As observed by Lord Denning in the case of *Benjamin Leonard Mcfoy United African Company Limited (UK)* [1962] AC 152:

“...If an act is void it is in law a nullity...And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

65. Judicial review is a critical mechanism that ensures that public bodies act within their legal mandate. In judicial review, courts examine whether a decision-maker has acted within their mandate and jurisdiction, or beyond their powers, whether they have adhered to the principles of natural justice, and whether the decision is reasonable and within the boundaries set by law.

66. In the case of *Republic v Director of Pensions, the Pensions Department, the National Treasury of the Republic of Kenya; Gewa & another (Exparte); Ouma (Interested Party)* [2024] KEHC 7652 (KLR) it was held as follows:

“When the challenge is over an infringement arising from an administrative action, such a claim falls under the purview of judicial review as a right recognized under Article 47(1) of *the Constitution* and given effect by the *Fair Administrative Action Act*. This jurisdiction is also to be invoked under the Supervisory powers of this court under Article 165(6) and (7) of *the Constitution*.



“It is important to restate the scope of judicial review and this can be found in the words of the Judges of the Court of appeal in *Kapa Oil Refineries v Kenya Revenue Authority* [2019] eKLR where the court stated that:

“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the *Commissioner of Lands –versus Hotel Kunste* [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See *David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR)*. JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See *Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others* [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See *Zakayo Michubu Kibwange case (Supra)*. The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature. See *Prabhulal Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR)*. Following the promulgation of the Kenya Constitution, 2010, judicial review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in *the Constitution* of Kenya 2010. See *Child Welfare Society of Kenya –versus- Republic and 2 others, Exparte Child in Family Forces Kenya* [2017] eKLR.”

“24.What Judicial Review Orders entail was elaborated in the case of *Kenya National Examination Council v Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996*, where the Court held that: -“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules or natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4th Edition vol.1 at Pg.37 paragraph 128.”

67. In the present case, the 2nd respondent acted beyond its jurisdiction by allowing the 1st respondent’s response to be filed out of time and by hearing the debarment application outside the period stipulated under the law. As a result, the decision is subject to judicial review for being unlawful and ultra vires. Judicial review in this instance is necessary to preserve the sanctity of statutory timelines, which are fundamental to ensuring that legal processes are orderly and timely.
68. Article 47 of *the Constitution* of Kenya, 2010 guarantees the right to administrative action that is lawful, reasonable, and procedurally fair. By allowing conduct of the debarment proceedings as it did the 2nd respondent violated this constitutional guarantee, as the action was not lawful.



69. The *Fair Administrative Action Act*, 2015 provides the framework for reviewing administrative actions. It mandates that all administrative decisions be made within the confines of the law. By acting in contravention of what is provided by the Act, Regulations and Manual it acted in contravention of the requirements under the Act granting it jurisdiction.
70. Having made the findings outlined above, the Court is satisfied that the ex parte applicant has established sufficient grounds for the issuance of an order of certiorari quashing the entire decision of the 2nd respondent in Debarment Application No. 10 of 2024, dated 17th February 2025 and delivered on 18th February 2025. Accordingly, the decision as impugned is hereby quashed.
71. As a result, an order of prohibition is rendered unnecessary. Each party shall bear its own costs.
72. The file is closed. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF APRIL 2025

R.E ABURILI

JUDGE

