Minet Kenya Insurance Brokers Limited v Public Procurement Administrative Review Board & 2 others; Liaison Healthcare Limited (Interested Party) (Judicial Review Application E092 of 2025) [2025] KEHC 6478 (KLR) (Judicial Review) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6478 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E092 OF 2025

RE ABURILI, J

MAY 16, 2025

BETWEEN

MINET KENYA INSURANCE BROKERS LIMITED ..... APPLICANT

AND

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... 1ST RESPONDENT

THE ACCOUNTING OFFICER, KENYA REVENUE AUTHORITY .... 2ND RESPONDENT

KENYA REVENUE AUTHORITY ..... 3RD RESPONDENT

AND

LIAISON HEALTHCARE LIMITED ..... INTERESTED PARTY

JUDGMENT

1. The Applicant Minet Kenya Insurance Brokers Limited filed an Originating Motion dated 8th April 2025 pursuant to Articles 10, 22, 23(3)(f) 47, 48, 50 (1) and 227 of *the Constitution* of Kenya 2010, Section 175 (1) of the *Public Procurement and Asset Disposal Act* Cap 412C of the Laws of Kenya, Sections 7, 9 and 11 of the Fair Administrative Actions Act Cap 7L of the Laws of Kenya and Rule 11(2) and 13 of the Fair Administrative Action Rules, 2024.

2. The Originating Motion seeks the following order:

    1. That this Honorable Court be pleased to issue an order of CERTIORARI, to call and quash and/or set aside the decision of the Public Procurement Administrative Review Board (the

1st Respondent) dated 1st April 2025 in Public Procurement Administrative Review Board Application No. 25 of 2025, Minet Kenya Insurance Brokers Limited Vs. The accounting Officer, Kenya Revenue Authority and Kenya Revenue Authority and Liaison Healthcare Limited, in respect of Tender No. KRA/HQS/RFP-016/2024-2025 for Provision of Self-Funded Administration and Care Management Services for Kenya Revenue Authority Staff for a period of three (3) years, and to remit the matter for reconsideration by the 1st Respondent and issuance of appropriate and effective relief(s) on merit, taking into consideration the Judgment of this Honourable Court.

2. That this Honorable Court be pleased to issue an order of PROHIBITION, directed at the 2nd and 3rd Respondents, prohibiting them from implementation of the Decision of the Public Procurement Administrative Review Board (the 1st Respondent) issued on 1st April 2025 in Public Procurement Administrative Review Board Application No. 25 of 2025, with Respect to Tender No. KRA/HQS/RFP-016/2024-2025 for Provision of Self-Funded Administration and Care Management Services for Kenya Revenue Authority Staff for a period of three (3) years.

3. Spent.

4. Spent.

3. The Originating Motion is supported by the Affidavit sworn by Joseph Gituma on 8th April 2025. Mr. Gituma, the Applicant's head of procurement.

4. A brief background of this matter as set out by the Applicant is that on the 21st November 2024, the 3rd Respondent Kenya Revenue Authority who was the procuring entity floated a Tender For Provision Of Self-funded Administration And Care Management Services For Kenya Revenue Authority Staff For A Period Of Three Years, Tender NO.KRA/HQS/RFP-016/2024-2025 by way of advertisement in the local dailies on 12th November 2024 inviting interested bidders to participate in the bidding process.

5. That the Applicant upon confirming that it had met all requirements of the tender, completed the tender document and submitted it at a tender price of Kshs.162,899,096/=.

6. That in a letter dated 14th February 2025, the Applicant was notified of the decision of the 2nd and 3rd Respondents to award the tender to the Interested Party Liaison Healthcare Limited at their bid sum of Kenya Shillings One Hundred and Seventy-Eight Million, Seven Hundred and Sixty Two Thousand, One Hundred and Sixty-Four.

7. The letter further disclosed that the reason the Applicant's bid was unsuccessful was that the submitted proposal did not attain the highest combined technical and financial score and was therefore not the highest evaluated proposal. The procuring entity also invited the bidders to participate in a debrief session within 3 days from the date of receipt of the said letter.

8. That on 7th March 2025, the Applicant participated in the first debrief meeting held at the 3rd Respondent's offices, at the Times Towers and according to the Applicant, at the debrief, it was established that the applicant had lost several marks under the technical evaluation stage on each category that required the bidders to provide a valid registration with a regulatory body.

9. That the Applicant was then requested by the debrief committee to put down in writing the issues raised, discussed and agreed upon in the debrief for their further action and/or response and that in its letter dated 10th March 2025, the applicant did the same, highlighting that the Procuring entity failed

to award marks totaling to 8.1 marks in every category that required the bidders to provide a valid registration with a regulatory body for the specific personnel.

10. The 3rd Respondent is said to have, on receipt of the said post debrief letter, invited the Applicant to yet another debrief meeting held on 12th March 2025 where the debrief committee stated that what they required bidders to provide under the requirement of valid registration from a relevant regulatory body was a current practicing certificate.

11. The Applicant was not satisfied with the reason offered by the 3rd Respondent that bidders were to provide a license/ practicing certificate for various personnel, whereas the tender documents required bidders to provide a valid registration with the relevant regulatory body. The applicant therefore filed a Request for Review Application No. 25 of 2025 before the 1st Respondent Public Procurement Administrative Review Board-The Review Board, who, upon hearing the request for review, rendered its decision on 1st April 2025 dismissing the Request for Review and directing the Respondents before the Board to proceed and conclude the tender process to its logical conclusion. It is this decision of the Review Board that the Applicant before this court was aggrieved by and now seeks for judicial review orders or certiorari and prohibition.

12. The Applicant's assertion is that the impugned decision of the Review Board is tainted with illegalities and/or irregularities and that it was arrived at in total disregard of the provisions of Section 80 (2) and (3) of the *Public Procurement and Asset Disposal Act*. It is also argued that by defining the technical requirement to provide valid registration with a regulatory body to include possession of a current practicing license/ certificate, the 1st Respondent amended the tender documents.

13. The 1st Respondent it is averred, also erroneously failed to consider Sections 70 (3) of the *Public Procurement and Asset Disposal Act*, which requires that the tender documents should have sufficient information to allow fair competition among the bidders. According to the Applicant, the 1st Respondent had no mandate to introduce new requirements during the evaluation process of the tender documents.

14. The Applicant further states that the 1st Respondent illegally and irrationally dismissed the applicant's submissions to the effect that where the tender documents required bidders to provide a licence/a practicing certificate for the year, the said tender documents specifically and expressly asked for the same, as was evidenced in the requirements provided for under the amended technical requirement 3C for the medical doctor.

15. The Applicant also states that the 1st Respondent's failure to take into account the applicant's further affidavit evidence violates the applicant's right to fair hearing and to access justice and fair administrative action.

Responses

16. In response to the Originating Motion, the 1st Respondent filed a Replying Affidavit sworn by James Kilaka on 14th April 2025. In the said affidavit, Mr. Kilaka deposes that contrary to the Applicant's assertions, the Review Board in its Decision considered all the parties' pleadings, documents, written and oral submissions, the list and bundle of authorities together with the confidential documents submitted to the Review Board pursuant to Section 67(3) (e) of the Act together with previous holdings by the High Court.

17. Further, that in determining whether the Applicant's tender bid was fairly evaluated by the procuring entity's evaluation committee, the Review Board observed that for purposes of evaluation, the committee was to be guided by the criteria outlined in the Addendum of 27th November 2024.

18. According to the 1st Respondent, the main contention in the Request for Review was the manner in which the Committee had evaluated the aspect of valid registration with a regulatory body with respect to the various categories of professionals required to provide services as per the service tender.

19. Mr. Kilaka deposes that the 1st Respondent with the benefit of having the 3rd Respondent's Combined Technical and Evaluation Report dated 20th December 2024 as supplied to it for its reference, systematically noted the Applicant's evaluated scores as per the technical evaluation criteria at paragraphs 108-120 of its Decision.

20. The 1st Respondent, it was argued, at paragraph 121 of its decision, reproduced a table indicating the final evaluation scores, where in it emerged that the Applicant's bid attained the 3rd highest score of 86.9 while the Interested Party had the highest bid.

21. Further, that in an effort to establish whether the Applicant had understood the Addendum of 27th November 2024, the 1st Respondent sought to establish whether the Applicant had requested clarification from the 3rd Respondent on the terms of the tender documents and that the Applicant's response was that the tender document was clear and as such, it was not necessary for it to seek clarification on the same.

22. The 1st Respondent also states that it noted that no official minutes of the said debrief meeting were availed to it as a proper account of events of the same thus in the face of contrasting accounts of the debrief meeting, the 1st respondent was unable to ascertain whether indeed the 3rd Respondent had failed to clarify the issue of valid registration when put to task on the same by the Applicant.

23. It is argued that the 1st Respondent as seen at paragraph 88 of its decision sought clarification from the Applicant and parties participating in Review No. 25 of 2025 whether it being in a professional field and given that the subject tender revolved around provision of professional services rendered, whether it had specifically raised that query with the 3rd Respondent given that a number of certifications and registrations could have been contemplated by the bid document and for which it was therefore necessary for parties to seek clarifications on.

24. The 1st Respondent contend that, in its decision, it relied on the fact that the tender concerned the provision of regulated professional services. The Board it is argued, took judicial notice that mere membership in a regulatory body does not, by itself, entitle an individual to legally and validly offer such services without additional authority from the regulatory body in the form of certifications.

25. The 1st Respondent it further contended, held the view that the 3rd Respondent, as the Procuring Entity, was best placed to define the requirements of the tender and to determine the appropriate approach to its execution, which it did during the bid evaluation process. That at paragraphs 145 and 146 of its decision, the Board further noted that the Evaluation Committee of the 3rd Respondent had conducted the evaluation process in a consistent, fair, and unbiased manner. That it docked points from bidders who did not meet the criterion of valid registration, interpreting this to mean both proper enrollment with the relevant regulatory body and ongoing recognition through possession of valid annual practising licenses.

26. The 1st Respondent's further case is that its decision took into account all the parties pleadings, submissions, oral arguments and confidential documents. Also, that the same was made within the confines of the law. It is further contended that the Applicant has failed to prove any elements of illogicalness, illegality, irrationality, procedural impropriety and/or unfairness in the manner in which the 1st Respondent considered and interrogated the evidence, documents, pleadings and information before it in arriving at its Decision in Request for Review No.25 of 2025.

27. The 2nd and 3rd Respondents filed a Replying Affidavit dated 17th April 2025 sworn by Titus Mwele. Mr. Mwele deposes that judicial review jurisdiction is confined to reviewing the actions and decisions of public bodies and tribunals and not participants in the process and that as such the 2nd and 3rd Respondents are improperly listed as Respondents rather than Interested Parties. It is further urged that the instant application is an appeal disguised as a judicial review application seeking the court's intervention to substitute its preferred interpretation of "Valid registration" for that which was lawfully adopted by the Procuring Entity and confirmed by the Board in its decision dated 1st April 2025.

28. It is the 2nd and 3rd Respondents' case that a pre-bid meeting was convened on 21st November 2024, where representatives of the prospective bidders were present. The meeting is said to have provided an open forum for bidders to seek clarification but the Applicant failed to do so.

29. According to the 2nd and 3rd Respondents, at the technical evaluation stage, the bidders were required to submit proof of valid registration for key personnel with relevant regulatory bodies which had been expressly stated in the tender document. That the phrase valid registration is said to have been interpreted by the Evaluation Committee to mean current and active registration status, typically demonstrated by up-to-date practicing licenses, particularly in regulated industries such as healthcare and insurance.

30. This interpretation, according to the 2nd and 3rd Respondents, is not only correct but consistent with the industry practice and the regulatory framework governing the professionals referenced in the tender such as nursing and insurance where renewal of licenses is the accepted form of verifying valid, active and lawful standing. As such that the Applicant's failure to submit current licenses of the proposed personnel resulted in the award of lower technical marks, an outcome that was not unique to the Applicant but was also applied to other bidders.

31. That upon completion, the final scores were Liaison Healthcare Limited 94.50%; Minet Kenya Insurance Brokers Limited 89.04% and Zamara Risk and Insurance Brokers Limited 92.2%. that a debrief session was granted to the Applicant on 7th March 2025 but dissatisfied with the explanation given by the Respondents, the Applicant opted to file a Request for Review before the Review Board.

32. The Interested Party filed a Replying Affidavit sworn by Julius Kitheka Ndungu the General Manager of the Interested Party LIAISON HEALTHCARE LIMITED together with a Notice of Preliminary Objection dated 22nd April 2025.

33. It is the Interested Party's case that the Oxford Learners Dictionary defines the word valid as "that which is legally of officially acceptable"; The BIack's Law Dictionary 8th Edition on the other hand, is said to define valid as "of binding force". Further that the dictionary proceeds to qualify this definition by stating that the word "valid" is used to signify that something is legally adequate and sufficient, as opposed to merely regular or compliant.

34. The Interested party contends that from the above definition, the one-off registration certificate admittedly provided by the Applicant in its bid, is regular as it shows the personnel provided are indeed registered with a regulatory body, but it is neither legally adequate nor sufficient to demonstrate that the personnel have the requisite licenses from the regulatory body to perform the work required in the tender.

35. According to the Interested Party, the 1st Respondent was categorically clear in its decision dated 1st April 2025, that the Applicant did not satisfactorily demonstrate its allegations that the Procuring Entity failed in carrying out its mandate as regards the present tender and further, that it is trite for whoever alleges something to prove it.

36. In the Notice of Preliminary Objection, the Interested Party challenges the Applicant's Originating Motion on grounds that it is fatally defective as it offends the mandatory provisions of Order 53 Rule 1of the Civil Procedure Rules 2010, which requires parties to seek leave of this Honourable Court prior to applying for an order of Mandamus, Prohibition or Certiorari.

37. The Interested Party further states that the application is misconceived as it is anchored on the provisions of *the Constitution* as well as the *Fair Administrative Action Act* and Rules whereas the subject matter is a procurement dispute whose review process is provided for under section 175(1) of the *Public Procurement and Asset Disposal Act*.

Written submissions

38. The parties filed written submissions. The Applicant filed submissions dated 24th April 2025.it relied on the case of Mwangi & 2 others v Managing Director, Nairobi city Water & Sewerage Company Limited & another (Judicial Review Application E010 of 2025) [2025] KEHC 325 (KLR) where the court is said to have held in regard to the manner of filing of an application under the Fair Administrative Action Rules, 2024 that it is the duty of the court and legal practitioners to embrace the changes in law that make access to justice easier and convenient. The Applicant submits that the Rules do not require parties to seek leave by way of chamber summons before filing of the substantive motion as alleged by the Interested Party.

39. The Applicant also relies on the case of JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises v Public Procurement Administrative Review Board & 2 others [2015] KEHC 7511 (KLR)where the court held that the Review Board had exceeded its authority by purporting to read its own words in the Tender document.

40. The Applicant submits that the terms valid registration and license/practicing certificate have different meanings and one cannot be used in any situation to refer to another. It is submitted that the term valid registration simply means to enter into a register or enroll while a license means a permit from an authority to do a particular thing. That the Black's Law dictionary 9th Edition defines registration as the "act of recording or enrolling" while license is defined as a "permission to commit some act that would otherwise be unlawful".

41. According to the Applicant, "valid registration" with a regulatory body refers to a one-time certificate issued upon initial qualification, while a practicing license is an annually renewable document that permits professional practice. The Applicant criticizes the 1st Respondent's decision of 1st April 2025 (paragraphs 147–150), which upheld the 3rd Respondent's evaluation committee's interpretation equating valid registration with both enrollment certificates and annual practicing licenses.

42. The Applicant further submits that this interpretation by the procuring entity and the Review Board introduced an unfounded standard that deviates from the set evaluation criteria. The Applicant gives an example of the legal profession where according to the Applicant, an advocate's certificate of admission which is issued upon admission to the bar is distinct from the annual practicing certificate, and therefore one cannot substitute one for the other.

43. The Applicant also submits that the 1st Respondent could only proceed to say that the certificate of registration provided by the Applicant for various personnel were not valid where there was proof of de-registration or where the said personnel had been struck off the roll or register of their respective regulatory body. Further, that the 3rd Respondent was not sure on what they required bidders to provide as on one hand, it required the bidders to provide a license for some personnel and at another instance, the tender document required the bidder to provide valid registration.

44. The 1st Respondent in its submissions dated 25th April 2025 reiterates the contents of its Replying Affidavit, emphasizing that in reaching its decision, it took judicial notice of the fact that mere membership to a regulatory body did not signify that an individual could legally and validly offer the said regulated professional services without some form of authority to do so from the regulatory body in the form of certifications.

45. The 1st Respondent also submitted that its decision was fair, reasonable, rational and lawful and within its mandate and jurisdiction and that neither the 3rd Respondent's Evaluation Committee nor the 1st Respondent introduced a new evaluation criterion at the technical evaluation stage. It is also submitted that the Applicant has failed to show how the 1st Respondent's decision was tainted with illegality or irrationality.

46. The 2nd and 3rd Respondents filed written submissions dated 25th April 2025 in which they argue that the distinction between registration and licensing is fundamental in the regulation of professional practice, particularly within the health sector. Further, that initial registration is essentially the gateway into the profession and it is the point at which an individual is formally enrolled in a regulatory body's register upon fulfilling the minimum academic and professional qualifications. It is also submitted that this registration is typically a onetime act, evidenced by the issuance of a certificate of registration, and it signifies that the individual is recognized by the relevant professional body.

47. Further submission was that registration alone does not confer the right to practice. The Respondents also submit that licensing, usually in the form of a practicing certificate, is what grants the individual the legal authority to engage in the day-to-day activities of their profession. Further, that indeed, licensing serves as a continuing affirmation of the professional's readiness and fitness and/or validity to practice.

48. It is their submission that in the context of the health sector, this distinction has been codified in legislation, particularly the *Health Act*, which defines a "healthcare professional" as one who is licensed by the relevant regulatory body.

49. This statutory definition according to the 2nd and 3rd Respondents, underscores the critical point that registration alone is insufficient for lawful professional practice. It is submitted that the same creates a legal presumption that only individuals holding a valid, current license are permitted to deliver healthcare services. They also submit that when a public institution, such as the 3rd Respondent seeks to procure professional services, the requirement for "valid registration" must be interpreted in a functional and legal sense to mean that the professional is duly authorized to practice at the time the services are rendered.

50. The 2nd and 3rd Respondents rely on the case of M/S Agmatel India Private Limited v. M/S Resoursys Telecom (Supreme Court of India, 2022) where the court is said to have emphasised that the author of a tender document is best placed to interpret its requirements, and if such interpretation aligns with the language and purpose of the tender, the Court should exercise restraint. It further emphasized that courts should not engage in technical evaluations or comparisons, and even if the procuring entity's interpretation is not entirely acceptable to the Court, that alone does not justify judicial interference.

51. Further reliance was placed on Jagdish Mandal v. State of Orissa (2007), as reaffirmed in Tejas Constructions & Infrastructure Pvt. Ltd. v. Municipal Council, Sendhwa (2012) and a submission made that the Court held a similar view that judicial review in tender matters is limited to assessing whether the administrative action was lawful, and not whether it was correct or sound.

52. The 2nd and 3rd Respondents submit that the procuring entity correctly prioritized the public interest as healthcare services implicate fundamental concerns such as patient safety, professional accountability

and the welfare of the 3rd Respondent's employees. It is their submission that allowing professionals to participate without current licenses would jeopardize the quality and legality of service delivery.

53. They further submit that the Applicant's belated protest despite attending the Pre-bid meeting and not seeking clarification is an afterthought and reliance is placed in the case of Delidakis Construction Co. v. City of New York (2005) where the court held that where a bidder fails to seek clarification on ambiguous terms it is bound by the procuring entity's reasonable interpretation.

54. The Interested Party in its submissions dated 25th April 2025 submits that questions as to violation of the Applicant's constitutional rights and more so Article 47 rights have only been introduced at the High Court level and thus cannot be said to be the basis for which the Applicant is seeking Judicial Review Orders against the decision of 1st Respondent Board, because such issues were never pleaded for determination at the Board level.

55. It is also submitted that the Applicant is attempting to cloth its grievances as constitutional questions to hoodwink this Honourable Court into the realm of merit review, so that they may re-litigate issues already heard and determined by the 1st Respondent Board. The Interested Party refers to the Supreme Court case of Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) where the court is said to have observed that there is indeed a dual approach to judicial review, being the traditional approach codified in Order 53 and a Constitutional approach. That the Court further observed thus: "...the dual approach to judicial review does exist... but that approach must be determined based on the pleadings and procedures adopted by parties at the inception of proceedings."

56. The Interested Party urges this court to find merit in the Notice of Preliminary Objection and return a verdict that since the present Originating Motion seeks review of the 1st Respondent's decision dated 1st April 2025 that was commenced through a civil process under the Public Procurement & Asset Disposal Act, it is prudent that these proceedings continue with the civil process governed under Order 53 of the *Civil Procedure Act*. Further, that the court should find that allowing the constitutional approach under the Fair Administrative Action Rules 2024 would be tantamount to changing goal posts, which only serves to prejudice the Respondents and Interested Parties herein.

57. The Interested Party also submits that in order for the Applicant's motion to succeed, it has to demonstrate that their case falls within the principles highlighted in the case of Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300.

58. Citing 9A of the *Pharmacy and Poisons Act*, it is submitted that the one-off registration certificate admittedly provided by the Applicant in its bid, is regular as it shows the personnel provided are indeed registered with a regulatory body, but that, it is neither legally adequate nor sufficient to demonstrate that the personnel have the requisite licenses from the regulatory body to perform the work required in the tender.

59. The Interested Party also submits that as is evidenced by page 49 of the 1st Respondent's decision, the procuring entity subjected all responsive bids to the same evaluation process such that all bids that did not conform to the interpretation of the evaluation committee as to the meaning of 'valid registration with a regulatory body'; were deducted marks and those that did were awarded 5 of 8 marks.

60. It is the Interested Party's submissions that the Applicant has failed to establish that the 1st Respondent's decision was tainted with illegality, irrationality and procedural impropriety to warrant the intervention of this Honourable Court by way of Judicial Review and that instead, the Applicant is seeking to have this Court sit on appeal of the 1st Respondent's decision, and interpret the terms of tender in their favour. The Interested Party relies on the case of Republic vs Public Procurement

Administrative Review Board & 2 Others; Ex Parte Niavana Agenies Limited (2024) KEHC 1595 (KLR) where (Ngaah J) stated that the court must not cross that boundary between administration whether good or bad which is lawful and what is unlawful performance of a statutory duty.

Analysis and Determination

61. I have considered the Originating Motion, the opposition thereto and the parties' respective written submissions. In my view, the main issue for determination is whether the applicant has made a case for grant of the judicial review orders sought. There are many questions to be resolved alongside this main issue.

62. The Judicial review application has been challenged by the interested party vide a Notice of Preliminary Objection dated 22nd April 2025. The first question therefore, is, whether the application as filed is competently before this court.

63. The Originating Motion dated 8th April 2025 is expressly brought under the Fair Administrative Action FAA (Judicial Review Procedure) Rules, 2024, among other provisions of the Law. These Rules were published via *Legal Notice No. 165 of 2024* and took effect on 11th October 2024. As the Applicant's application was filed approximately five months thereafter, the Rules are applicable to these proceedings.

64. Rule 11 of the said FAA Rules provides as follows:

> 11. Originating motion
>
> (1) An application for judicial review shall be by way of an originating motion accompanied by a supporting affidavit
>
> (2) The Originating Motion shall substantially be in Form JR 2 as set out in the Schedule.
>
> (3) The claim shall—
>
> (a) set out the name and description of the applicant;
>
> (b) state the relief sought and the grounds on which it is sought;
>
> (c) contain a statement that internal mechanisms for appeal or review and any remedy available under any other written law have been exhausted;
>
> (d) state the administrative action or decision complained of or the date it was taken;
>
> (e) state the person who took the administrative action or decision;
>
> (f) state the reason for the administrative action or decision, if any; and
>
> (g) state the reason the applicant thinks the administrative action or decision was not in accordance with the Act.
>
> (4) In judicial review proceedings, any claim for damages shall be specifically pleaded and the particulars provided in the originating motion.
>
> (5) A party in judicial review proceedings shall give that party's details in the claim which shall include an email address, telephone number and postal address for purposes of service.

(6) A party in judicial review proceedings shall notify the court and other parties in the proceedings of any change of address and contact information.

65. The above Rule notwithstanding, this Court takes judicial notice that in his ruling in Katiba Institute v. State Law Office & The Commission on Administrative Justice (Office of the Ombudsman) & 1 Other (HCCHRPET E168 of 2025), Mwamuye J. suspended the implementation of several portions of the FAA Rules including Rule 11(4). However, this rule does not address the issue of leave. Rule 11(4) clearly provides that in judicial review proceedings, any claim for damages shall be specifically pleaded and the particulars provided in the originating motion.

66. Rule 11 above as a whole set out the procedure for instituting judicial review proceedings under the *Fair Administrative Action Act*. Notably, there is no requirement under the said provision mandating a party to seek leave of the Court prior to instituting such proceedings.

67. It is important to clarify that the requirement for leave to apply for judicial review orders of mandamus, certiorari and prohibition is where the application is brought under Order 53 (1) of the Civil Procedure Rules which provides that:

53

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

68. Worth noting is that there is a shift from Order 53 of the Civil procedure Rules to the *Fair Administrative Action Act* in Judicial Review Proceedings, since the enactment of Article 47 of *the Constitution* and the *FAIR Administrative Action Act* and now the Rules made thereunder.

69. Historically, judicial review proceedings in Kenya were governed by Order 53 of the Civil Procedure Rules, which mandated that leave be obtained before filing a substantive application for certiorari, mandamus and prohibition. However, the enactment of the *Fair Administrative Action Act*, 2015 (FAA), a statutory implementation of Article 47 of *the Constitution* has introduced a new, self-contained procedural regime for challenging administrative actions.

70. The FAA was enacted to give effect to Article 47 of *the Constitution*, which guarantees every person the right to administrative action that is lawful, reasonable, and procedurally fair. Section 3(1) of the FAA makes it explicit that the Act applies to all administrative actions and decisions. The Rules made under the Act, particularly the Fair Administrative Action Rules, 2024, establish a framework that is distinct from the Civil Procedure Rules.

71. Unlike Order 53, the FAA Rules,2024 do not require applicants to seek leave before instituting proceedings. Instead, they allow an aggrieved party to commence judicial review by way of Originating Motion, supported by a statement of grounds and affidavit.

72. Rule 11(1) of the FAA Rules provides:

11. Originating motion

(1) An application for judicial review shall be by way of an originating motion accompanied by a supporting affidavit

73. There is no mention of a leave requirement, signaling a deliberate departure from the Order 53 regime.

74. Indeed, Kenyan courts have increasingly recognized the FAA and its rules as the primary legal framework for judicial review in matters involving administrative action:

75. Before the enactment of the FAA Rules, 2024, the procedure for invoking judicial review jurisdiction remained Order 53 of the Civil Procedure Rules, since the FAAA did not provide the procedure for filing of Judicial review under the Act. However, section 11 of the FAA Rules 2024 clearly sets out that procedure and even the format. Accordingly, judicial review having acquired a constitutional and statutory footing, the courts are no longer rigidly bound to the technical requirements of Order 53 of the Civil procedure Rules where the application is specifically brought under the FAAA and Rules.

76. This court has previously pronounced itself on this issue in Mwangi & 2 others v Managing Director, Nairobi city Water & Sewerage Company Limited & another [2025] KEHC 325 (KLR).

77. Consequently, the Interested Party's preliminary objection, insofar as it is premised on the alleged failure to obtain leave, is devoid of merit and untenable in law.

66. The second ground raised by the Interested Party in the preliminary objection is that the Originating Motion is premised on provisions of *the Constitution* and the *Fair Administrative Action Act* (FAAA), despite the fact that the subject matter is a procurement dispute whose review mechanism is expressly provided for under Section 175(1) of the *Public Procurement and Asset Disposal Act* (PPADA).

67. This Court, in its directions issued on 11th April 2025, made the following observation:

> "I observe that this is a Public Procurement matter and that the statute under which the impugned decision was made provides for strict timelines within which the judicial review application must be heard and determined, upon filing thereof. I am therefore satisfied that the Originating Motion having been filed within 14 days from the date of the impugned decision on 2nd April 2025..."

68. I have perused the pleadings by the applicant and I am satisfied that in the instant case, the application for judicial review arising from the procurement dispute was properly instituted under Section 175(1) of the PPADA by way of an Originating Motion, filed within the statutory timeframe.

69. Article 159(2)(d) of *the Constitution* of Kenya mandates that justice shall be administered without undue regard to procedural technicalities. This constitutional imperative has transformed how courts assess pleadings and procedural compliance, particularly in public law disputes such as judicial review of procurement decisions.

70. More importantly, is that Judicial review proceedings are no longer confined to the rigid confines of common law writs; rather, they are a mechanism for enforcing constitutional and statutory rights, particularly under Article 47 (right to fair administrative action) and Article 227 (procurement in accordance with fairness, equity, transparency, and cost-effectiveness).

71. Thus, citing Article 47 and the *Fair Administrative Action Act* or the Constitutional provisions in a procurement dispute does not disqualify the proceedings from being considered a proper judicial review action. What matters is the nature and substance of the grievance, not the labels used.

72. Again, where a litigant invokes constitutional or FAAA provisions in a procurement dispute, particularly where the complaint touches on fairness, legality, or procedural regularity, such a pleading still qualifies as a judicial review claim. A judicial review cause of action may straddle multiple sources of law, including *the Constitution*, statutes, and common law principles and therefore invoking constitutional provisions does not transform the judicial review nature of the proceedings into a constitutional petition. The substantive issue of lawfulness of administrative action remains within judicial review.

73. Additionally, the *Fair Administrative Action Act*, 2015, being the statutory mechanism for enforcing Article 47 rights, complements rather than displaces judicial review under the *Law Reform Act* or Order 53. The invocation of FAAA provisions in procurement matters is therefore procedurally proper and does not, in itself, render proceedings incompetent. Furthermore, procurement decisions are administrative in nature and subject to constitutional and statutory scrutiny.

74. A court of law would therefore not strike out proceedings merely because of how they are framed, provided the respondent is properly served, the cause of action is clear, and the relief sought falls within the scope of judicial review.

75. Therefore, the mere citation of Articles of *the Constitution* or Sections of the *Fair Administrative Action Act* is not fatal. Such references being typically intended to bolster the Applicant's claims regarding procedural fairness, legality, and due process, all of which are relevant and permissible considerations in judicial review proceedings.

76. The critical issue for consideration on merit is whether the application adheres to the statutory framework, falls within the Court's jurisdiction and or has been properly and timeously presented. Unless it is shown that the Applicant deliberately sought to bypass the procurement dispute resolution framework, such references to constitutional or statutory provisions on fair administrative action, in conjunction with the applicable provisions of the PPADA, do not, in themselves, render the application defective. Accordingly, this ground of objection is hereby dismissed.

77. The next question which, in this Court's view, constitutes the gravamen of the present proceedings, and was similarly identified as such by the 1st Respondent is whether the 1st Respondent acted unlawfully, irrationally, or ultra vires in interpreting the requirement for "valid registration with a regulatory body" to include the possession of a current practicing certificate or licence.

78. The Applicant has asserted quite strongly that the requirement for "valid registration with a regulatory body" as set out in the tender documents did not extend to possession of current practicing certificates/ licenses. It argues that by interpreting the term to include a license, the 1st Respondent effectively amended the tender document.

78. The 1st Respondent, supported by the 2nd, and 3rd Respondents and the Interested Party, maintain that the term "valid registration" in the context of regulated professional services includes an active, current practicing license. It is further argued that such interpretation is consistent with industry norms, especially in sectors such as health and insurance.

79. Before this Court can determine whether the 1st Respondent acted unlawfully, irrationally, or ultra vires in its interpretation of the requirement for "valid registration," it must first establish the ordinary or literal meaning of the term "valid registration" as defined in authoritative sources.

80. The 2nd Edition of the Black Law Dictionary defines validity as follows:

> " Of binding force. A deed, will, or other instrument, which has received all the formalities required by law, is said to be valid."

81. The Oxford Dictionary defines the word valid as:

> " That is legally or officially acceptable"

82. The Cambridge dictionary defines the term valid as follows;

> " based on truth or reason; able to be accepted: having legal force."

83. From the above definitions, it is obvious that the term validity generally means something that is legally binding and accepted.

84. What about the term "registration"? The Black Law Dictionary defines registration as follows:

> " Recording; inserting in an official register; the act of making a list, catalogue, schedule, or register, particularly of an official character, or of making entries therein"

85. The Oxford Dictionary defines the term registration to mean:

> " The act of making an official record of something/somebody.

86. From the above definitions, the ordinary or literal meaning of valid registration is the official and legally recognized recording of an individual in a register.

87. The 1st Respondent in its decision from paragraph *124* states as follows on the term "valid registration". That two considerations are imperative, one is whether the prospective tenderers were entitled to seek clarification and two whether the interpretation of the term "valid registration" was fair, just and equitable in the circumstances.

88. In resolving the question, the 1st Respondent held that as was held in M/s Agmatel India Private Limited vs M/s Resoursys Telecom, the Procuring Entity did not only have the benefit of the inspiration behind inclusion of the terms but also justification of the same and as such, the first port of call for the Applicant on further clarification on specifics of the Tender Documents was the procuring entity.

89. Upon perusal of the tender documents, the 1st Respondent further observed that the procuring entity had provided an opportunity for parties to seek clarification under Clause 13 of Section 2 on: Instructions to Consultants and Data Sheet under the sub-headings Clarification and Amendment of RFP at pages 10 and 11 of the blank tender document.

90. It was established by the 1st Respondent that the Kenya Revenue Authority had held a pre-bid meeting on 21st November 2024 where parties were expected to raise any queries regarding the subject tender, a fact that was not controverted by any party before the Board.

91. While there were conflicting accounts of what happened during the pre-bid meeting, as noted by the Review Board, the 1st Respondent observed at paragraph 136 of its decision that the onus of proving the chain of events around the meeting lay with the Applicant who had alleged that the Respondents had failed in carrying out their mandate.

92. The 1st respondent also observed that no evidence had been adduced before it supporting this assertion by the Applicant. The 1st respondent therefore held that the reasonable interpretation of the tender document was in consonance with the overall objective of the professional service for which the entity had sought bids.

93. The 1st respondent also held that the Applicant had an opportunity to seek clarification during the pre-bid meeting or even after. The 1st Respondent at paragraph 138 further held that it was a matter of public notoriety that the nature of the services sought by the Respondent required continuing

validation by registered professional bodies and that as such, the Applicant's assumption that it only required a valid registration for this purpose was not only absurd but also contra the law. The Board also held that it would be irresponsible for it to allow the Applicant's interpretation given the sensitivity of the services for which the tender was issued.

94. The second limb of the contest over the interpretation of the term valid registration with a regulatory body was addressed from paragraph 139 of the decision where the Board while reiterating the position in M/s Agmatel India Private Limited vs M/s Resoursys Telecom held that by the time the Procuring Entity was putting out the subject tender, it had a picture in mind of what was required of the successful bidder towards executing the contract in a lawful and satisfactory manner to it. Further, that the Procuring Entity put out requirements it deemed fit for purposes to ensure that the successful bidder would be one capable of offering the services sought.

95. At paragraph 145 of the impugned decision, the 1st Respondent upon reviewing the confidential documents submitted to it by the 2nd Respondent herein, it established that there was consistency in the application of the criteria for evaluation where, to the Evaluation Committee, valid registration meant enrollment into the regulatory board as well as subsequent continuing recognition to carry out the said services in the form of annual practicing licenses.

96. The 1st respondent Review Board also went ahead to state that it had also noted that any tenderer who did not conform to the above requirement was docked points while the ones who conformed were awarded marks. It therefore found the evaluation criteria to be uniform and unbiased across-board.

97. The 1st Respondent also observed that it was not in dispute that the scope of services premised in the tender document and forming the basis of the subject tender revolved around provision of professional services in regulated sectors. It also observed that the parties were in agreement that the services sought had approvals from several regulatory authorities that required enrollment and subsequent recognition to carry out the said services in the form of renewable practicing licenses. However, that the point of departure by parties is whether the same, being renewable practicing licenses, formed the scope of "valid registration".

98. The Board went ahead to find that in applying the criteria that it did, the Evaluation Committee was aware of the requirements it took for one to lawfully provide the said services. Additionally, that the interpretation by the 2nd Respondent's Evaluation Committee of the term "valid registration" was in line with what the best responsive bidder was expected to display and was also in line with the needs of the procuring entity.

99. In interpreting the legality of this position, this Court is guided by well-established principles of procurement law. Section 80(2) of the *Public Procurement and Asset Disposal Act*, 2015 (PPADA) mandates that the evaluation of tenders must strictly adhere to the criteria and procedures set out in the tender documents. A procuring entity, and by extension, the Review Board, may not introduce or apply new unstated criteria during the evaluation process. The section states as follows:

> 80. Evaluation of tenders
>
> (1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.
>
> (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to

the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations.

(6) The evaluation shall be carried out within a maximum period of thirty days.

(7) The evaluation report shall be signed by each member of evaluation committee.

100. In JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises v Public Procurement Administrative Review Board & 2 others [2015] KEHC 7511 (KLR) the Court observed that:

> " The PPADA and the Regulations bequeath the onus of amending a Tender Document on a procuring entity. When the Review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and, in such circumstances, it is said that it has acted outside jurisdiction. Those who approach the Review Board must be sure of its parameters. The power bestowed upon the Review Board does not include authority to act outside the law. Such power can only be valid if it is exercised for legitimate purposes. In the instant case, the Review Board exceeded its authority by purporting to read its own words in the Tender Document. If the Tender Document was defective, then the only order that was available to the Board was to direct the PE to commence the tender process afresh."

101. In Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR, the Court found that the Review Board's introduction of a definition not contained in the Tender Document amounted to an alteration of the bid document. The Court stated:

> " The Board further found that the ex parte applicant was not an Original Equipment Manufacturer. From the decision of the Board, it is clear that this term which became so crucial in the Board's determination was defined by the PE in the Tender Document. However, the Board in its decision adopted a definition other than the one in the bid document. The Board therefore provided its own definition based on the submissions of one of the parties. Whereas we appreciate that the Board's latitude in applications for review is wide, such latitude ought not to be expanded to such an extent that it renders the idea conceived by the PE totally useless. In providing its own definition of what an OEM is, the

Board in essence altered the bid documents which can only be done as provided by the Act and by the PE.

"The Board may have indeed found a shortcoming in the definition of an OEM provided by the PE. We are of the view, that in order to achieve a transparent system of procurement as required under Article 227 of *the Constitution*, it is important that procuring entities should set out to achieve a certain measure of precision in their language in the tender documents and not leave important matters for speculation and conjecture as was the case in this matter."

102. From the above decision which I agree with fully, a plain and ordinary meaning of "valid registration" does not, in and of itself, connote possession of a current practicing license.

103. In its impugned decision, the 1st Respondent justified its interpretation by citing the sensitive nature of the services sought and arguing that any bidder lacking a current license could not legally or competently perform the contract. However, this court notes that under requirements for a medical doctor, the tender document states as follows:

"c. Medical Doctor

Must be a qualified medical doctor with MBCHB or a related field. With a minimum experience of 5 years.

i. Bachelor's Degree qualification or higher-1 marks

ii. Above 5 years of experience-2 marks;

Between 2-5 years' of experience-1 mark;

Below 2 years of experience-0 mark

ii. Valid KMPDC license-1 mark

104. In the above instance, the requirement for a valid licence is explicitly stated, unlike the other positions where the Procuring Entity merely required "valid registration with a regulatory body."

105. In this Court's view, if the Procuring Entity found it necessary to specifically require a valid licence from KMPDC for one position, there was nothing to prevent it from doing the same for the other positions, had that been its intention when it send out bids to prospective tenderers.

106. The interpretation of "valid registration" to encompass a practising licence, or certificate in the most considered view of this Court, amounted to an unlawful expansion of the tender requirements, contrary to the *Public Procurement and Asset Disposal Act*. Tender documents bind both the procuring entity and bidders.

107. Once issued, the terms or conditions of the tender form the basis of legitimate expectations for all other bidders. The Procurement law requires equal treatment and fair competition, such that expanding interpretation would disadvantage some bidders.

108. It is also the responsibility of the procuring entity not the bidder or the Review Board to clarify the meaning of tender terms. The Applicant was entitled to rely on the tender document as issued, and the 1st Respondent's introduction of additional requirements lacked legal basis. The 1st Respondent's assertion that the Applicant ought to have sought clarification is equally untenable, given the Applicant's reasonable position that the tender requirements were clear.

109. I hasten to add that the role of the Review Board is to interpret, not to legislate. It is not within the Review Board's mandate to rewrite or infuse additional meanings into tender requirements. Its role is to determine whether the process was conducted lawfully, not to redefine the criteria.

110. Bidders are legitimately entitled to rely on the plain wording of the tender and therefore, if terms are later interpreted more broadly or narrowly than what was originally stated, it breaches procedural fairness. When a procuring entity omits critical particulars in the bid documents, and leaves requirements open to interpretation, it compromises fairness, transparency and objectivity in the tender evaluation process, rendering the procurement process flawed.

111. In this case, the Applicant had a legitimate expectation that the procuring entity had drafted the tender in an unambiguous and precise manner and was not under any obligation to second-guess or interpret beyond what was expressly stated.

112. It follows therefore, that the Review Board must not interpret or expand the terms in a tender document beyond their clear, ordinary meaning. Doing so risks unlawfully altering the procurement framework and violating the principles of fairness and transparency.

113. In Republic v. Public Procurement Administrative Review Board & Another ex parte Gibb Africa Ltd [2016] eKLR, it was held that:

> " It is trite law that a procuring entity is bound to comply with the evaluation criteria expressly stated in the tender documents. Any deviation or addition thereto is illegal and invalid."

114. Thus, by interpreting the requirement of "valid registration" to mean possession of a practicing certificate, the Review Board introduced a requirement not stated in the tender document, thereby unfairly disqualifying compliant bidders.

115. I reiterate that the Review Board is an administrative body whose authority is limited to reviewing the procurement process for compliance with the law and the tender documents. It does not have power to amend, reinterpret, or impose additional conditions not originally included.

116. In Pinewood Healthcare Kenya Ltd v. Ministry of Health & Another [2017] eKLR, it was held that:

> " A procuring entity must evaluate tenders on the basis of the criteria set out in the tender documents. To do otherwise is to act unfairly and unlawfully."

117. The Court emphasized that evaluation criteria must be applied as stated and not modified during evaluation or review.

118. This same position was appreciated elsewhere in the United Kingdom case of Harmon CFEM Facades (UK) Ltd v. Corporate Officer of the House of Commons [1999] where the court stated that contracting authorities must act transparently and cannot change criteria mid-process.

119. Fundamental Principles of Public Procurement under Article 227(1) of *the Constitution* of Kenya are that public procurement shall be carried out in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective. These principles are echoed and operationalized in Sections 3 and Section 60 of the *Public Procurement and Asset Disposal Act*, 2015 (PPADA), which require procurement processes to be conducted in a fair, transparent, and accountable manner. By the Review Board interpreting "valid registration with a regulatory body" to mean "must have a current practicing certificate", when that is not stated or implied in the tender document, then, that in itself has the net effect of adding a new condition, which is not permitted; it disadvantages bidders who relied

on the plain meaning; and finally, such an interpretation is outrightly ultra vires (beyond power) and procedurally unfair.

120. Furthermore, even in situations where clarifications are necessary, section 81 of the PPADA provides that:

> 81. Clarifications
>
> (1) A procuring entity may, in writing request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders.
>
> (2) A clarification shall not change the terms of the tender.

121. In Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019] KEHC 2976 (KLR) the Court observed that:

> " 52. First, in public procurement regulation, it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. Second, it is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Third, requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions. Fourth, fairness must be decided on the circumstances of each case. Whatever is done may not cause the process to lose the attribute of fairness or, in the constitutional sphere, the attributes of transparency, competitiveness and cost-effectiveness.
>
> 53. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout was whether the decision in question was one, which a reasonable authority could reach. The converse was described by Lord Diplock[31] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.' Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.[32]
>
> 54. The test of Wednesbury unreasonableness has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it[33] and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated.[34]This stringent test has been applied in Australia[35] where the Court

held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them."

55. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes, which are defensible with respect to the facts and law. Put differently, whether the decision falls outside the range of possible acceptable outcomes applying the same set of facts and the law.

56. The following propositions can offer guidance on what constitutes unreasonableness. First, wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably. Second, this ground of review will be made out when the court concludes that the decision fell outside the area of decisional freedom, which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ. Third, the test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it.

57. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

58. Legal unreasonableness comprises of any or all of the following, namely- specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[36]

59. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to

overturn the decision simply on the basis that it would have decided the matter differently.

60. In Council of Civil Service Unions v. Minister for the Civil Service[37] Lord Diplock enumerated a threefold classification of grounds for the court to intervene, any one of which would render an administrative decision and/or action ultra vires. These grounds are; illegality, irrationality and procedural impropriety. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; proportionality.[38]What Lord Diplock meant by "Illegality" as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term "Irrationality" by succinctly referring it as "unreasonableness" in Wednesbury Case.[39] By "Procedural Impropriety" His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

61. The role of the court in such cases was well stated in Republic vs National Water Conservation & Pipeline Corporation & 11 Others[40]where it was held that once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was prima facie performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament. In such a case, a court will not interfere with the decision. A decision, which falls outside that area, can therefore be described, interchangeably, as: - a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances.

62. When a tender is passed over or regarded as non-responsive, the reasons for passing over such tender must be defendable in any court of law. When a tender is declared to be responsive, the reasons for so declaring must with equal force be defendable in law. To be considered for award, a bid must comply in all material respects with the invitation for bids. An assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process. In other words, what is important is not who won the tender, but the nature and extent of the alleged irregularity, and its materiality.

122. I have read the decision from the Supreme Court of India in AGMATEL India Pvt Ltd v. ResourSys Teleco relied on by the Interested party which addresses critical issues surrounding the interpretation of tender documents and the extent of judicial intervention in such matters. The core issue revolved around whether supplying "smartphones" could be considered as fulfilling the "same or similar category products" criterion required for the tender to supply "tablets." The Supreme Court, upon thorough analysis, concluded that the High Court had overstepped its bounds by second-guessing the tendering authority's interpretation of its own tender document.

123. The Supreme Court also relied on Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd. (2007) 8 SCC 1 which emphasized that tender documents must be clear and free from vagueness to ensure a level playing field.

124. It is however important to note that the terms that were being interpreted were 'Same or Similar Category Products' as opposed to what is before this court. In that case, "tablets" and "smartphones" were scrutinized to determine if they could be categorized similarly for the purpose of meeting the tender criteria. Additionally, the Supreme Court found that the terms of the tender were clear, ascertainable with specificity and available on the very portal on which the Tender was issued. It was not a case of post facto interpretations by the tender inviting authority as was in the instant case.

125. Accordingly, the Indian case cited is distinguishable from the facts of this case.

126. In light of the foregoing analysis, this Court finds that the 1st Respondent's interpretation of the term "valid registration" to include a current practicing license was not only inconsistent with the plain and ordinary meaning of the term "valid registration" as used in the tender documents, but also amounted to the unlawful introduction of an unstated evaluation criterion.

127. Further, the duty to draft clear, unambiguous and comprehensive tender documents lies with the Procuring Entity, and where the procuring entity fails to expressly stipulate specific requirements, bidders are entitled to rely on the document as framed. To hold otherwise would be to sanction retrospective and subjective interpretations that undermine the principles of fairness, transparency and accountability in public procurement processes.

128. Accordingly, I find and hold that the decision to fail to award to the Applicant the required marks during technical evaluation on the basis of an unstated requirement namely, a current practicing license was unlawful, irrational and ultra vires. It offended the principles of legality, procedural fairness and legitimate expectation and violated the Applicant's right to fair administrative action under Article 47 of *the Constitution* under Article 47 of *the Constitution* and the statutory safeguards under the *Public Procurement and Asset Disposal Act*.

129. I hasten to add that the integrity of public procurement demands strict adherence to published criteria. The Review Board's expansion of the term "valid registration" undermines this principle and should be corrected, the interpretation having been a post facto interpretation by the tender procuring entity. This case demonstrates the absolute need for the Review Board to always affirm the primacy of the tender document and uphold procurement fairness and legality. Therefore, on whether the applicant is entitled to the orders sought, the applicant sought the following orders:

    a. That this Honorable Court be pleased to issue an order of CERTIORARI, to call and quash and/or set aside the decision of the Public Procurement Administrative Review Board (the 1st Respondent) dated 1st April 2025 in Public Procurement Administrative Review Board Application No. 25 of 2025, Minet Kenya Insurance Brokers Limited Vs. The accounting Officer, Kenya Revenue Authority and Kenya Revenue Authority and Liaison Healthcare Limited, in respect of Tender No. KRA/HQS/RFP-016/2024-2025 for Provision of Self-Funded Administration and Care Management Services for Kenya Revenue Authority Staff for a period of three (3) years, and to remit the matter for reconsideration by the 1st Respondent and issuance of appropriate and effective relief(s) on merit, taking into consideration the Judgment of this Honourable Court.

    b. That this Honorable Court be pleased to issue an order of PROHIBITION, directed at the 2nd and 3rd Respondents, prohibiting them from implementation of the Decision of the Public Procurement Administrative Review Board (the 1st Respondent) issued on 1st April 2025 in Public Procurement Administrative Review Board Application No. 25 of 2025, with Respect to Tender No. KRA/HQS/RFP-016/2024-2025 for Provision of Self-Funded

Administration and Care Management Services for Kenya Revenue Authority Staff for a period of three (3) years.

130. In the case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] KECA 58 (KLR) the Court observed as follows on the order of certiorari:

> "Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

131. On the order of prohibition, the Court observed as follows:

> "Prohibition looks at the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice, the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.... Prohibition 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 of natural justice. it does not lie, however, to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings.....like an order of prohibition, mandamus cannot quash what has already been done.....only an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons."

132. Before I make the final pronouncement on whether the orders sought should be granted, having made the findings above, I must tackle the contentions by the 2nd and 3rd Respondents that they are not decision-makers and therefore ought to have been joined as Interested Parties rather than Respondents. However, it is evident that they played a substantive role in the evaluation and award process, and their conduct formed part of the subject matter of the complaint both before the Board and before this Court.

133. In this Court's considered view, judicial review is not limited to final decision-makers but may also extend to administrative bodies and public officers who were actively involved in the impugned process.

134. Accordingly, this Court finds no procedural impropriety in their joinder as Respondents. In any event, the misjoinder or non-joinder of a party is not, by itself, a ground for the dismissal of a suit.

135. The Court of Appeal in the case of Trust Bank Limited v Ajay Shah & 3 others [2019] KECA 353 (KLR) Observed as follows:

> "Order 1 Rule 3 of the Civil Procedure Rules provides that:
>
> (3). All persons may be joined as defendants against 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 separate suits were brought against such persons any common question of law or fact would arise".

Rules 9 and 10, however remind us that a suit cannot be defeated merely by reason of the misjoinder or non-joinder of parties, and that the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it; and that the court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any person whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

136. Taking all the foregoing reasons into account, this Court is persuaded that there is good reason to allow the Originating Motion dated 8th April, 2025 and grant the orders sought by the Applicant in the following terms and extent:

a. An order of Certiorari is hereby issued removing into this court for purposes of quashing and quashing the decision of the 1st Respondent the Public Procurement Administrative Review Board, dated 1st April 2025 in Public Procurement Administrative Review Board Application No. 25 of 2025, Minet Kenya Insurance Brokers Limited vs. The Accounting Officer, Kenya Revenue Authority and Kenya Revenue Authority and Liaison Healthcare Limited, in respect of Tender No. KRA/HQS/RFP-016/2024-2025 for Provision of Self-Funded Administration and Care Management Services for Kenya Revenue Authority Staff for a period of three (3) years; which decision unlawfully interpreted the term 'valid registration' to include a practicing certificate, thereby disqualifying the Applicant, contrary to the provisions of the tender document and the *Public Procurement and Asset Disposal Act*.

b. The matter is hereby remitted to the 1st Respondent for reconsideration and issuance of appropriate and effective relief(s) on merit, taking into consideration the Judgment of this Honourable Court.

c. Having quashed the decision of the 1st respondent Public Procurement Administrative Review Board as a whole, nothing remains to be prohibited. Accordingly, the prayer of prohibition is unnecessary and superfluous.

d. In accordance with section 175 of the *Public procurement and Asset Disposal Act* which prohibits award of costs where the decision of the Review Board is quashed, I make no orders as to costs.

e. This judgment shall be forthwith uploaded in the CTS and published.

f. It is so ordered.

g. This file is hereby closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF MAY, 2025

R.E. ABURILI

JUDGE