Peesam Limited v Public Procurement Administrative Review Board & 2 others; Hannaneli Suppliers Limited (Interested Party) (Judicial Review Application E096 of 2025) [2025] KEHC 7277 (KLR) (Judicial Review) (26 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7277 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E096 OF 2025

RE ABURILI, J

MAY 26, 2025

BETWEEN

PEESAM LIMITED .... APPLICANT

AND

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

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

KENYA AIRPORTS AUTHORITY .... 3RD RESPONDENT

AND

HANNANELI SUPPLIERS LIMITED .... INTERESTED PARTY

JUDGMENT

1. This Judgment determines the Originating Motion dated 15th April 2025 filed by Peesam Limited, who is the applicant. The application is supported by the affidavit of Samuel Mburu Nganga. It is brought pursuant to the provisions of 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 application seeks 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 9th April 2025 in Public Procurement Administrative Review Board Application No. 32 of 2025 Peesam Limited Vs. The accounting Officer, Kenya Airports Authority and Kenya Airports Authority and Hannaneli Suppliers Limited, in respect of Tender No. KAA/OT/MIA/0043/2024-2025–Provision of Cleaning Services for Washrooms at Moi International Airport.

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 9th April 2025 in Public Procurement Administrative Review Board Application No. 32 of 2025, with Respect to Tender No. KAA/OT/MIA/0043/2024-2025–Provision of Cleaning Services for Washrooms at Moi International Airport.

c. That pending the hearing of the substantive Originating Motion, that this Honorable Court be pleased to issue An Interim Order For Stay, to stay the Execution and/or implementation of the Decision of the Public Procurement Administrative Review Board (the 1st Respondent) issued on 9th April 2025 in Public Procurement Administrative Review Board Application No. 32 of 2025, with Respect to Tender No. KAA/OT/MIA/0043/2024 2025–Provision of Cleaning Services for Washrooms at Moi International Airport.

d. Spent.

e. That the costs of these proceedings to be provided for.

f. Such other, Incidental or alternative relief(s) as this Honourable Court may deem fair and just.

3. The circumstances leading to these proceedings as narrated by the applicant are that the 3rd Respondent, Kenya Airports Authority Floated Tender No. KAA/OT/MIA/0043/2024-2025–Provision of Cleaning Services for Washrooms at Moi International Airport, by inviting interested bidders to participate in the bidding process.

4. Desirous to participate in the tender, the Applicant duly collected the tender document, perused the same and having found that it met all the requirements therein, it filled and completed the tender document and submitted a responsive bid at a tender price of Kshs. 94,377,889.80).

5. That vide letter of notification dated 4th March 2025, and emailed to it on 5th March 2025, the Applicant was notified of the decision of the 2nd and 3rd Respondents to award the tender to the Interested Party Hannaneli Suppliers Limited at their bid sum of Kshs. 91, 767,323.40.

6. It is the Applicant's case that upon receipt of the notification letter, it noted the trend of alternating the award of tenders for the subject services in the last four (4) years between the Interested Party and Joymacx Enterprises one of the bidders who is the current contract holder for the cleaning services for the 3rd Respondent.

7. The Applicant asserts that upon undertaking a company search of the Interested Party, it established that one of the directors and shareholder of the Interested Party was Ann Wambui Ngugi. It is also the Applicant's case that it was a party together with Joymacx Enterprises in Nairobi High Court Judicial Review No. HCJR/E283/2024 Joymacx Enterprises v The Accounting Officer Kenya Electricity Generating Company & 6 others and that upon the perusal of the Joymacx Enterprises response, the Applicant came across the Garbage Lease Agreement for Joymacx Enterprises wherein one, Ann

Ngugi, the Interested Party's director had witnessed the signing of the agreement on behalf of Joymacx Enterprises.

8. It is the Applicant's further case that it has known both the Interested Party and Joymacx Enterprises over the years and that it has always been aware that Ann Wambui Ngugi was an employee of Joymacx Enterprises and as such, learning that she was also a director and shareholder came as a surprise.

9. The Applicant also avers that the Interested Party and Joymacx Enterprises having been affiliated to each other, were not required to participate in the same subject tender pursuant to section 66 of PPDA and ITT4.3 of the Tender documents. It is for this reason (challenging the alleged affiliation between the two bidding companies by Ann Wambui Ngugi) that the Applicant filed a request for review on 19th March 2025 being Public Procurement Administrative Review Board Application No. 32 of 2025.

10. Following the request for review, the 1st Respondent Review Board rendered its decision on 9th April 2025 and this decision according to the Applicant, is tainted with illegalities and/or irregularities, and was arrived at in total disregard to the provisions of Sections 66 of the Public Procurement and Asset Disposal Cap 412C of the Laws of Kenya, (hereinafter referred to as "The PPADA").

11. According to the Applicant, the decision was arrived at in total disregard to the critical issues that were raised by it. Also, that the 1st respondent did not address all the prayers by the Applicant including its prayer that the Interested Party and Joymacx Enterprises' bid documents in the confidential file be compared and re-evaluated as there was a lot of information in the bid documents showing their affiliation.

12. The 1st Respondent it is alleged, also failed to consider the weighty evidence where the Interested Party had intentionally failed to appear before it and failed to avail evidence to contravene the Applicant's evidence. The Applicant also states that 1st Respondent's decision violates its fundamental right to fair hearing, access to justice and fair administrative action.

13. According to the Applicant, the statutory interpretation/construction adopted by the 1st Respondent establishes a very dangerous precedent that vitiates legislative intent, encourages irregularities and impunity effectively defeating the very essence of the *Public Procurement and Asset Disposal Act*. Further, that the same enables procuring entities to rely on their deliberate breaches of the *Public Procurement and Asset Disposal Act* to defeat bona fide requests for review.

14. The Applicant also filed written submissions dated 8th May 2025. It submitted that Section 66 (1) of the *Public Procurement and Asset Disposal Act* provides that a person to whom this Act applies shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding. The Applicant further refers to sub section 8 which is said to further provide that a person has a conflict of interest in a procurement if they or their relative have a financial interest in a bidder or any private interest that conflicts with their official duties regarding the procurement.

15. The Applicant also submits that Clause 4.3 under Instructions To Tenderers in the Tender (ITT) Document prohibits conflict of interest and categorizes a tenderer to be conflicted if they are affiliated with another tenderer through control, subsidies, shared legal representation, or relationships that could influence each other's tenders or the procuring entity's decisions.

16. The Applicant reiterates that the Director of the Interested Party is related to and manages both the Interested Party and Joymacx Enterprises, an alternating tender winner for four years indicating a conflict of interest due to shared management, common premises and repeated contract awards. The Applicant submits that the Interested Party did not appear before the 1st Respondent to controvert

these allegations that were raised in the application for review despite being served with Notices to do so.

17. It is also submitted that had the 1st Respondent examined the two entities' bid document, it would realize that the two tenderers had a similar bid format and that the two entities shared many things in common including their location, office space, the same bank and branch being KCB bank, Mashariki branch.

18. Further, that the two entities also shared the same insurance company and the same insurance agent. The Applicant submits that ITT 4.3(c) disqualifies tenderers who had the same legal representative yet the two entities in question had the same Insurance agent. According to the Applicant, all these things shared by the two entities cannot be just a mere coincidence.

19. It is also submitted that the procurement process and decision-making must comply with the constitutional principles of transparency and accountability which have also been imported to the PPDA. Similarly, that the failure to address material allegations and the apparent bias in favour of the Interested Party undermine these constitutional principles.

20. Reliance is placed on the case of Republic v Public Procurement Administrative Review Board; Principles Styles Limited & another (Interested Parties) Ex Parte Accounting Officer, Kenya Water Towers Agency & another [2020] KEHC 9278 (KLR) where the court observed that in determining the legality of a decision, courts interpret the statute, regulations, or tender terms conferring power on the decision-maker to ensure that administrative bodies act strictly within their lawful mandate and in line with the intent of Parliament.

21. The Applicant submits that the Respondents deviated from the statutory provisions especially Section 66 of the Act and the requirements set in the tender document and this court has the powers to review the decision of the 1st Respondent and allow the instant Originating Motion as prayed.

Reponses

22. In response to the Notice of Motion, the 1st Respondent filed a Replying Affidavit sworn on 6th May 2025 by James Kilaka.

23. The 1st Respondent's case is that on 19th March 2025, Peesam Limited, the Applicant herein, filed Request for Review Application No. 32 of 2025 and on 9th April 2025, in exercise of the powers conferred upon it under the *Public Procurement and Asset Disposal Act* (hereinafter referred to as "the Act"), made the following final orders with respect to Request for Review No. 32 of 2025:

    a) The Request for Review dated 18th March 2025 is hereby dismissed;

    b) The Accounting Officer of the Kenya Airports Authority is hereby directed to oversee the tender proceedings for TENDER NO. KAA/OT/MIA/0043/2024-2025 – Provision of Cleaning Services for Washrooms at Moi International Airport to their logical and lawful conclusion; and

    c) Each party shall bear its own costs of the proceedings.

24. The 1st Respondent contends that contrary to the averments made by the Applicant herein, the 1st Respondent, in its Decision, duly considered all the parties' pleadings, documents, written and oral submissions, the list and bundle of authorities, as well as the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act and in light of this, and in accordance with previous

holdings by the High Court in regard to this matter, the 1st Respondent found that the following issues called for determination:

a. Whether there is sufficient evidence to establish the existence of collusion or any other practice prohibited under Section 66 of Act, between Joymacx Enterprises and the Interested Party.

b. What orders should the Board issue in the circumstance?

25. Further, that in determining the issue of whether there was sufficient evidence to establish the existence of collusion or any other practice prohibited under Section 66 of the Act between Joymacx Enterprises and the Interested Party, the 1st Respondent observed that the Applicant produced a lease agreement for a garbage truck between Joymacx Enterprises and Gledix Limited, which was witnessed by an individual named Ann Ngugi. That the Applicant contended that Ann Ngugi is a director of the Interested Party. To support this claim, the Applicant submitted the Interested Party's CR-12, which listed Ann Wambui Ngugi as one of its directors.

26. The 1st Respondent states that it also noted that the Applicant further asserted that the Interested Party and Joymacx Enterprises share an office, where Ann Ngugi serves as the office manager for both entities.

27. That upon carefully examining the garbage truck lease agreement between Joymacx Enterprises and Gledix Limited, the 1st Respondent states that it observed that the same had been witnessed by an individual named Ann Ngugi. Additionally, the 1st Respondent reviewed the Interested Party's CR-12, which listed Anna Wambui Chege and Ann Wambui Ngugi as its directors. The 1st Respondent also perused the Search Certificate for Joymacx Enterprises and noted that the proprietor of the entity was Joyce Moraa Oyaro.

28. It also asserted that it was undisputed that the ownership of Joymacx Enterprises was not in any way connected to the ownership of the Interested Party. Further, that during the hearing, the Applicant's counsel confirmed that, legally, there is no nexus between the ownership of the two entities.

29. According to the 1st Respondent, it noted in its decision that no evidence had been presented to establish that Ann Ngugi is the same person as Ann Wambui Ngugi. It further observed that the allegations regarding Ann Ngugi being an employee of Joymacx Enterprises while simultaneously serving as a director of the Interested Party were not sufficiently substantiated as no evidence such as an employment contract or any other relevant document, were provided. The Applicant, it is stated, also failed to provide any evidence of the claim that the Interested Party and Joymacx Enterprises share an office.

30. The 1st Respondent contends that it has consistently upheld procurement procedures as required by law, promoting the integrity and fairness of these procedures and processes and it has neither flouted any law nor acted in excess of its powers.

31. It is the 1st Respondent's defence that the Applicant has failed to demonstrate any elements of illogicality, illegality, irrationality, procedural impropriety, 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. 32 of 2025.

32. In its submissions dated 9th May 2025, the 1st Respondent submits that the Applicant's motion is essentially a review of the merits of the decision of the Respondent and for all intents and purposes and that although it is framed as a judicial review application, it is seeking to improperly invoke an appellate jurisdiction of the High Court.

33. It is equally submitted that the Review Board in granting the orders herein impugned remained faithful to its powers and mandate as envisaged under section 173 of the Act. Further, that judicial review aims to ensure fair treatment by public bodies, not to assess the correctness of their decisions on the merits; thus, in this case, the Court's role is limited to examining the lawfulness of the Review Board's decision, not substituting its own judgment for that of the Board.

34. The 1st Respondent relies on the case of Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa LTD & Another [2012] eKLR where the court is said to have set out the established reach of judicial review in Kenya.

35. The 1st Respondent also cites Section 107 of the *Evidence Act* and further submits that the matter before it was civil in nature, and thus judgement arrived at was dependent on the existence of facts asserted by the Applicant and the burden of proof was upon the Applicant. To support this submission, reliance is placed in the case of Fondo v Mutiso & another [2025] KEHC 5568 (KLR).

36. The 1st respondent maintained that it has at all times upheld procurement procedures as required by law, promoting integrity and fairness of these procedures.

37. On the issue of merit review by this court, the 1st Respondent relies on the case of Republic v Commissioner Of Customs Services Ex-Parte Africa K-Link International Limited [2012] eKLR where the court reiterated that a judicial review court is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself.

38. On the grounds of judicial review, the 1st Respondent relies on the well-known Ugandan case of Pastoli v Kabale District Local Government Council & Others, [2008] 2 EA 300.

39. N costs, the 1st Respondent submits that it is a well-established principle that costs follow the event and to support this position, reliance is placed in the case of Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] KEHC 5939 (KLR). It is also submitted that section 175(7) of the *Public Procurement and Asset Disposal Act* bars issuance of costs in the event the decision of the Board has been quashed.

40. Accordingly, the 1st Respondent submits that it acted in good faith and in the event this Honourable Court is inclined to uphold the Applicant's prayers, then the Respondent should not be condemned to pay costs.

Interested Party

41. The Interested Party filed a Replying Affidavit sworn on 21st May 2025, deposing that the Motion is legally unsustainable and that the Motion is not anchored in any admissible evidence but relies on speculative associations and recycled narratives. It is also the Interested Party's case that the Motion falls below the basic legal threshold of a judicial review as set out in Republic v Law Society of Kenya Disciplinary Tribunal & another Ex Parte Muema Kitulu [2018] eKLR.

42. The Interested Party also states that the allegation of an "award pattern" alternating between the Interested Party and Joymacx Enterprises is mere conjecture without an evidential backbone. It is also its contention that the allegations that Ann Wambui Ngugi, a director of the Interested Party, had once witnessed a Lease Agreement for Joymacx Enterprises constitutes a bald allegation as reliance on a prior unrelated judicial review case and an incidental witnessing of a lease agreement does not establish a legal relationship between the Interested Party and Joymacx Enterprises within the meaning of "collusion" under section 66 of the Act and ITT4.3 of the Tender Document.

43. Similarly, that collusion and/or affiliation must entail direct and present control or shared beneficial ownership, not conjecture. It is further urged that in any event, there is a significant difference in names between Ann Wambui Ngugi and Ann Ngugi; these being two different people.

44. The Interested Party also states that the Applicant's allegation that Ann Wambui Ngugi, a director of the Interested Party was a former employee of Joymacx Enterprises and linking the two firms, alleging that their bidding was improper and in violation of section 66 of the Act and ITT4.3 of the Tender Document, also constitutes a bald allegation because no employment contract, payslip has been presented to demonstrate the employer employee relationship between Ann Wambui Ngugi and Joymacx Enterprises; the Interested Party and Joymacx Enterprises submitted separate, independently assessed bids; and the law requires proof of actual or potential collusion between them.

45. It is also deposed that the impugned Decision was not only rational and lawful but was the product of a tribunal acting squarely within its statutory mandate under Section 171 of the Act. Also, that the Board thoroughly analyzed the bids and clearly addressed the affiliation allegation and the Interested Party's silence did not transform unproven claims into facts. The Interested Party also states that the Board evaluates actual evidence, not mere assertions. Further, that the Applicant was given a fair hearing, their submissions considered, and a reasoned decision rendered.

46. This court while writing this Judgement noted from the Case Tracking System that the Interested Party had filed its written submissions and list and bundle of authorities on 23rd May 2025 at 13.56 p.m. and 2.03 p.m. respectively.

47. This Court in its directions of 7th May 2025 stated as follows:

> " The Respondents and Interested Party will then have until close of business on 9th May 2025 to file and serve written submissions and if need be, a Supplementary Affidavit.
>
> Owing to strict statutory timelines for determination of this matter I hereby fix a judgment date which shall be on 26th May 2025."

48. The need for parties to comply with the directions of the court was emphasised by the Supreme Court in the case of Okoiti & 3 others *v Cabinet Secretary for the National Treasury and Planning & 10 others (Application E029 of 2023*) [2023] KESC 69 (KLR) (8 September 2023) (Ruling) where the court struck out the applicants' submissions for failing to comply with what the court had directed. In the same breath, this court finds that the Interested Party having filed its submissions, list and bundle of authorities 14 days past the date directed by the court and without finding it necessary to seek out the court to admit the said submissions out of time, the same are struck out and expunged from the court's record.

Analysis and Determination

48. This Court has carefully considered the pleadings, affidavits, written submissions, authorities cited by the parties, and the applicable legal framework. The main issues for determination are:

    1. Whether the 1st Respondent erred in law by failing to find a conflict of interest or collusion between the Interested Party and Joymacx Enterprises in violation of Section 66 of the PPADA and ITT Clause 4.3;

    2. Whether the 1st Respondent's decision was illegal, irrational, procedurally unfair or otherwise amenable to judicial review;

    3. Whether the Applicant is entitled to the reliefs sought.

49. The Applicant's primary assertion is that the Interested Party and Joymacx Enterprises are affiliated entities by reason of shared management and business infrastructure, allegedly contravening Section 66 of the *Public Procurement and Asset Disposal Act* (PPADA) and ITT Clause 4.3. In support of this allegation, the Applicant relied on the CR12 of the Interested Party listing Ann Wambui Ngugi as a director, and a garbage truck lease agreement witnessed by one "Ann Ngugi" on behalf of Joymacx Enterprises.

50. The interested party and the 1st respondent deny these allegations with the 1st respondent contending that it exhaustively considered the allegation against the evidence available and did not find evidence linking the two entities to the procurement process. The interested party further asserted that the allegation by the applicant is speculative and bald, devoid of any proof.

51. This Court has had an opportunity to examine the 1st Respondent's decision dated 18th March 2025. It notes that after the Applicant and the Respondents before the Review Board had completed stating their respective cases, the Review Board sought for clarifications on several issues one of which was the issue of how Joymacx Enterprises Limited and the Interested Party herein were legally related.

52. At paragraph 37 of its decision which is impugned herein, the Review Board states that counsel for the Applicant stated that Joymacx Enterprises was a sole proprietorship, with its proprietor being Joyce Oyaro, while the directors of the Interested Party were Anna Wambui Chege and Ann Wambui Ngugi.

53. The Review Board went ahead at paragraph 38 of its decision to state that counsel for the Applicant had clarified that legally, the two entities were not related However, that affiliation through third parties could create a conflict of interest.

54. The Review Board went further to seek a clarification on how third parties could create a conflict of interest and Counsel for the applicant responded that the two entities share the same staff, as Ann Ngugi served as the office manager for both. Counsel further argued that two affiliated entities ought not have tendered separately for the same tender.

55. A clarification was also sought from the Respondent procuring entity on this issue with the Review Board seeking to know if the Procuring Entity had noted any concerns regarding the Interested Party and Joymacx Enterprises sharing the same staff. Mr Mulili advocate for the Respondents responded by stating that both evaluation and due diligence had been conducted, and nothing was noted regarding collusion.

56. The Review Board also observed at paragraphs 43 and 44 of its decision that it had sought clarification from counsel for the Applicant on whether or not the Applicant was aware that the two firms were affiliated with each other by the tender opening time, considering that the garbage truck lease agreement was already in place.

57. In response, counsel for the applicant stated that they were not aware of any affiliation between the two firms at the time the tenders were opened. Further, that their suspicions arose only after receiving the notification letter, at which point, they decided to conduct a search and subsequently obtained the CR-12.

58. At paragraph 45 of its decision, it is evident that the Review Board also sought clarification from the Applicant's Counsel on how the CR-12 and CR-13 demonstrated that the two entities were affiliated. It also further inquired whether the Applicant wanted the Board to infer collusion based solely on the fact that a person named Ann Ngugi witnessed the garbage truck lease agreement and was also listed as Ann Wambui Ngugi on the CR-12. The Board also specifically sought clarification on whether the

Applicant had any evidence to justify this inference. In response, the Applicant's Counsel stated that the documents annexed were the only ones the Applicant sought to rely on.

59. In its findings on this issue, the Board as from paragraph 62 of its decision held that it had noted that it is undisputed that the ownership of Joymacx Enterprises is not connected in any way to the ownership of the Interested Party. It also observed that during the hearing, the Applicant's Counsel confirmed that, legally, there was no nexus between the ownership of the two entities.

60. The Review Board proceeded to determine whether or not Ann Ngugi is the same person as Ann Wambui Ngugi. It held that it found it difficult to accept that Ann Ngugi and Ann Wambui Ngugi are one and the same person as the Applicant provided little to no evidence to substantiate the claim that Ann Ngugi and Ann Wambui Ngugi were indeed one and the same individual.

61. The Review Board relied on Section 107(1) of the *Evidence Act* on the Burden of Proof. The Review Board observed that as is provided under the law, he who alleges must prove. It also stated that counsel for the Applicant had acknowledged that the evidence presented was limited and that he had urged the Review Board to infer collusion based on the available information.

62. At paragraphs 74 of its decision, the Board observed that the allegations regarding Ann Ngugi being an employee of Joymacx Enterprises and simultaneously serving as a director of the Interested Party were not substantiated. Further, that the Applicant had failed to present any supporting evidence, such as an employment contract, or any other relevant document, to demonstrate the existence of an employment relationship between Ann Ngugi and Joymacx Enterprises.

63. On the allegation of a shared office, the Review Board at paragraph 75 held that this assertion was unsubstantiated, as the Applicant had failed to provide any evidence to support it.

64. In concluding, the Review Board at paragraph 77 concluded that there is insufficient evidence to establish that collusion occurred between the Interested Party and Joymacx Enterprises, as prohibited under Section 66 of the Act.

65. Having carefully considered the respective parties' positions and arguments, I agree with the 1st Respondent that the burden of proof lies on he who alleges and that in this case, the burden of proof lay on the applicant to proof that there was nexus between the Joymax and the interested party, for the Review Board to find that there was therefore direct or indirect conflict of interest in their engagement with the procuring entity's tendering processes, both past and current. In my view, the Review Board's finding that no cogent evidence was presented to establish that Ann Wambui Ngugi is the same person as Ann Ngugi who witnessed the lease, or that she is an employee of Joymacx Enterprises was not a farfetched finding.

66. Having examined the evidence adduced before the review Board, this Court notes that no employment records, correspondence, or corporate filings were tendered to establish a legal, managerial or financial association or relationship between the two entities as envisaged under Section 66(8) of the PPADA or ITT clause 4.3.

67. Besides, while the Applicant alleged shared premises, insurance agent and bank branch, these assertions, without documentary evidence or sworn depositions from persons with actual knowledge, remain speculative. Mere similarities in bid formats, service providers or incidental overlaps do not automatically amount to evidence of collusion or conflict of interest without more.

68. The Review Board's conclusion that the Applicant had not discharged its burden of proof under Section 107 of the *Evidence Act* to establish the alleged affiliation or conflict of interest was well founded and within its mandate. Collusion under procurement law must be proved with credible and specific

evidence, not conjecture or associations loosely drawn from circumstantial coincidences. How many people in Kenya have the name Ann Ngugi or Ann Wambui Ngugi, for example? Do the people that go by that same name not have unique identifiers like national Identity cards or passport numbers or other features?

69. The Court in the case of Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rays Stima Services Limited; Contralinks Solutions & Services Limited (Interested Party) [2022] KEHC 26879 (KLR) observed thus;

> " But even if it was open to this Court to interrogate these issues afresh, there is no evidence, for instance, that, first, the interested party did not meet the technical qualifications outlined in the tender document. I would agree with the 2nd and 3rd respondents together with the interested party that what the applicant has presented as evidence in support of its allegations is no more than insinuations and speculations. A sample of the applicant's depositions or contentions show this to be the case; it has stated as follows:
>
> a) "...by virtue of the applicant's practical experiment and market knowledge spanning over 12 years, it is the applicant averment that the 3rd respondent could not have complied with the above requirements..."
>
> b) "Knowing its market share and competitors, the applicant strongly believes the 3rd respondents (sic) is yet to have carried out and/or participated in at least three (3) electrical medium voltage electrical installations and cable terminations contracts within the abovementioned years.
>
> c) "...it is industry knowledge that only 2 entities in the country own, operate and/or have the equipment listed in "b" above, which entities the 3rd Respondents (sic) is not amongst."
>
> These broad and rather hollow statements cannot be said to be proof that the winning bidder did not meet the technical requirements or any other requirement in the tender document for that matter.
>
> To be precise, and turning back to the grounds for judicial review, assuming the applicant had spelt out any, I am not satisfied that the 1st respondent's decision was illegal because there is no evidence that the 1st respondent did not understand correctly the law that regulates its decision-making power and failed give effect to it."

53. A bidder who alleges collusion under section 66 of the *Public Procurement and Asset Disposal Act* (PPADA) bears the burden of proving such collusion through cogent and credible evidence. Mere allegations, suspicion or conjecture are insufficient to meet the threshold required under the Act, considering that under section 66(12) of the Act, any person who contravenes the provisions of section 66 commits an offence. Accordingly, in the instant case, the mere similarity in the names of persons alleged to be affiliated with the two companies that have done business with the procuring entity by being awarded tenders without more, does not amount to conclusive evidence of a conflict of interest or collusion. In other words, there was no proof of collusion as alleged by the exparte applicant.

54. On whether the 1st Respondent's decision is amenable to judicial review, as submitted by the Respondents, judicial review is concerned with the decision-making process, not the merits of the decision itself. The traditional grounds upon which a judicial review court may intervene to disturb decisions by administrative bodies, tribunals or subordinate courts were enunciated in Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In this case Lord Diplock

outlined three heads which he referred to as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety which the learned judge defined as follows:

> " My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
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> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

53. Courts have indeed acknowledged that the traditional grounds for judicial review are not exhaustive. Lord Diplock himself noted that these grounds could be expanded through judicial development on a case-by-case basis. One such development is the recognition of the principle of proportionality as an additional ground for judicial review. Over time, this principle has gained significant acceptance and is now firmly established as a basis upon which judicial review may be sought. At the local level, this principle has been expressly incorporated under section 7(2)(l) of the *Fair Administrative Action Act*, No. 4 of 2015, as one of the statutory grounds for challenging administrative actions.

54. From the record, it is evident that the 1st Respondent considered the Applicant's pleadings, submissions, annexures, and the confidential procurement documents.

55. At paragraph 18 of its decision, the Review Board observed that on 28th March 2025, the Acting Review Board Secretary issued a Hearing Notice to the parties, notifying them that the hearing of the Request for Review would be held virtually on 2nd April 2025 at 14:00 PM via the provided link. However, on 31st March 2025 the Review Board informed the parties that due to unavoidable circumstances, the hearing had been rescheduled from 2nd April 2025 to 3rd April 2025 at 2:00 P.M.

56. The review Board goes ahead to state that on 3rd March 2025, when it convened for the hearing, the Secretariat informed the Review Board that the Interested Party had been notified of the Request for Review only about an hour before the hearing and as such it issued directions to adjourn the hearing to 7th April 2025 at 3:00 pm to allow the Interested Party to file any necessary documents. The review Board also granted leave to the Applicant and the Respondent to file responses, if necessary, to the documents that were to be filed by the Interested Party.

57. As evidenced at paragraph 23 of the 1st Respondent's decision on 7th April 2025, the Applicant filed a Further Affidavit sworn by Samuel Mburu Nganga, the Applicant's Director, on the same date. On the other hand, the Interested Party did not file any documents, despite being informed of the Request for Review and being given time to submit a response.

58. The 1st Respondent at paragraph *para_24 24* states that when the Board convened for the hearing on 7th April 2025 at 3:00 pm, the Applicant was represented by Mr. Karugu Mbugua, while the Respondents were jointly represented by Mr. Chris Mulili. The Board read out the pleadings filed by the parties, who confirmed that the documents had been duly filed and exchanged. The Secretariat also informed the Board that the Interested Party had not filed any documents, despite being notified about the Request for Review.

59. On the preliminary objection filed by the Respondents challenging the Board's jurisdiction on grounds that the Request for Review had been filed out of time, the Review Board observed that Mr. Mulili counsel for the Respondents had withdrawn the same after confirming that the same had indeed been filed within the required time. This court notes that paragraphs *para_26 26* to *para_35 35* show oral submissions made by counsel for the Applicant and 2nd and 3rd Respondents before this Court.

60. Accordingly, this court is satisfied that in reaching the decision that it did, the 1st Respondent considered all the pleadings, evidence and submissions by the parties that were before it other than the Interested Party, which party despite being aware of the proceedings before the Board, opted not to file any documents. This Court cannot therefore interfere merely because it might have reached a different conclusion on the facts.

61. It is this Court's finding that the Review Board did not ignore the Applicant's claims, nor did it misapprehend the law. The record does not support allegations of bias, failure to consider material evidence, or breach of fair hearing. The Board's mandate under Section 173 of the PPADA was lawfully exercised and its decision does not meet the threshold for intervention under the established judicial review principles articulated in Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300.

62. The 1st Respondent and the Interested Party have also urged that the Applicant is seeking a review of the merits of the 1st Respondent's decision yet this Court is only concerned with the procedure followed in reaching the decision and not the merits of the decision.

63. In Republic v Public Procurement Administrative Review Board & 2 others; H Young & Company (East Africa) Limited (Exparte); Comacon Limited JV Gulf Energy Limited (Interested Party) [2022] KEHC 10201 (KLR) it was observed that:

> "I find it necessary to restate the legal principles applicable in an application for judicial review like the instant one. The traditional scope of judicial review has always been a narrow one and as put by Mativo J in Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR; "There is a long-established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in Judicial Review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.
>
> 16. Judicial Review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised."
>
> 80. In the advent of *the constitution* of Kenya, 2010, and specifically the proviso in Article 47, there has been a notable shift towards merit review in the court's exercise of the judicial review jurisdiction. The court of Appeal in Judicial Service Commission & another vs. Lucy Muthoni Njora [2021] eKLR had this to say:
>
> "We emphatically find and hold that there is nothing doctrinally or jurisprudentially amiss or erroneous in a judge's adoption of a merit review in judicial review proceedings. To the contrary, the error would lie in a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process while strenuously and artificially avoiding merit. That path only leads to intolerable superficiality."
>
> 81. In my view the expanded scope of judicial review accommodating merit review requires great circumspection lest the lines between judicial review and appeal become blurred or completely obliterated bringing with it unwelcome confusion in litigation before our courts."

53. As the Applicant has not demonstrated that the 1st Respondent acted ultra vires, irrationally, illegally, or in breach of *the Constitution* or fair administrative action principles, no basis exists for this Court to quash the impugned decision or to grant the reliefs sought.

54. This Court finds that the present case does not warrant a merit-based review. To do so would violate the well-established legal position that judicial review is primarily concerned with the legality of the decision-making process rather than the actual merits of the decision itself, as emphasized in Republic

v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University [2018] eKLR.

55. While acknowledging the evolving jurisprudence particularly following Article 47 of *the Constitution* of Kenya, 2010 which allows courts in appropriate cases to consider the merits of administrative decisions, as affirmed by the Court of Appeal in Judicial Service Commission & Another v Lucy Muthoni Njora [2021] eKLR and by the Supreme Court in Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) [2023] KESC 6 (KLR), this Court cautions against blurring the distinction between review and appeal. It concludes that the instant case does not meet the threshold for such an expanded inquiry, since the applicant could as well have gone the appeal route.

56. On interference with decisions of the 1st Respondent by the Courts, the Court of Appeal in the case of Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] KECA 104 (KLR) observed thus:

> " The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. From the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with."

53. Having carefully analyzed evaluated the material placed before this court by all the parties, and for the reasons given, I find and hold that the application dated 15th April 2025 lacks merit and it is hereby dismissed.

54. Costs are in the discretion of the court. Having considered this matter as a whole, I find that it is in the interest of justice that each party bear their own costs of these proceedings and I so order

55. This file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26 TH DAY OF MAY, 2025

R.E. ABURILI

JUDGE