



Republic v General Manager, the East African Portland Plc; Spenomatic Kenya Limited (Ex parte) (Judicial Review Application E196 of 2024) [2025] KEHC 5864 (KLR) (Judicial Review) (7 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5864 (KLR)

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

JUDICIAL REVIEW APPLICATION E196 OF 2024

RE ABURILI, J

MAY 7, 2025

BETWEEN

REPUBLIC APPLICANT

AND

**THE GENERAL MANAGER, THE EAST AFRICAN PORTLAND
PLC RESPONDENT**

AND

SPENOMATIC KENYA LIMITED EX PARTE

JUDGMENT

1. The Ex parte Applicant was granted leave to apply for judicial review orders by the court on 3rd September 2024.
2. It is pursuant to this leave that the Applicant filed the instant Notice of Motion dated 3rd September 2024 seeking an Order of Mandamus compelling the Respondent to complete the procurement process and issue it with a letter of notification of award and signing of a contract for Tender Number RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid Tied Solar PV as ordered by the Public Procurement Administrative REVIEW Board through its decision in Review Application Number 61 of 2024.
3. The application also seeks an Order of Prohibition restraining the Respondent by itself, its agents or persons acting on its behalf from re-advertising Tender Number RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid Tied Solar PV.



4. A brief background of the events leading up to the filing of the instant judicial review application is that in November 2022 the Respondent through an advertisement in The Daily Nation invited bids from the public for development of the Captive Solar Generation.
5. Upon completion of the tendering process the Respondent is said to have on 11th September 2023 notified the Applicant that it was the successful bidder. Subsequently one of the unsuccessful tenderers challenged this decision and this was followed by several proceedings and events the last of which was the Respondent's action of terminating the tender and this led the Ex parte Applicant before the Court to file Request for Review Number 61 of 2024 seeking the cancellation of notification of termination of the tender.
6. It is the Applicant's case that upon hearing both parties the Board made the following decision;
 - a. The Tender Termination Notice dated 24th June 2024 issued by the Respondent with respect to RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid Tied Solar PV Plant to tenderers including the Applicant herein be and is hereby cancelled and set aside.
 - b. The Respondent is hereby ordered to issue the Applicant with a letter of Notification Intention to Award RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid Tied Solar PV Plant within 7 days from The date hereof.
 - c. Further to order (b) above the Respondent be and is hereby ordered to complete the procurement process in favour of the Applicant taking into consideration the Board's findings herein and the provisions of the Act, the Constitution and Regulations 2020.
 - d. The Tender validity period of RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid Tied Solar PV Plant be and is hereby extended for a further period of 30 days from 29th July 2024 to enable the Procuring Entity complete the procurement process as directed herein.
 - e. In view of the Board's findings & orders above, we order that the Procuring Entity shall pay to the Applicant costs of this Request for Review assessed by the Board of Kshs. 250,000/- (Kenya Shillings Two Hundred & Fifty Thousand) only within 21 days of the date of this decision.
7. The Applicant is now before this court seeking for an order of *Mandamus* to compel the Respondent to comply with the order for completion of the said Tender.
8. The Applicant made oral submissions before the Court on 17th March 2025. During the hearing counsel for the Applicant Mr. Mwaura submitted that the orders of the Review Board of 29th July 2024 are final as contemplated in section 175(1) of the Public Procurement and Asset Disposal Act. He also submitted that the orders have not been challenged.
9. Mr Mwaura also submitted that the law bars advertisement of tenders unless there is a budget for the same. He also urged that it was unreasonable for the Respondent to go quiet after subjecting his client to heavy costs. Further that in all the proceedings challenging the decision to award the Tender to the Applicant the Respondent at all times defended its decision and it is therefore puzzling that the he has failed to implement the award.
10. According to Mr. Mwaura the failure to complete the procurement process violates Article 10 on National values and principles of good governance. He also submitted that the total estimated cost of the project is Kshs.600m which money the Ex parte Applicant has tied with the same not earning interest on contractor's performance word.



Analysis and Determination.

11. I have considered the application for mandamus and the oral submissions. The issue is whether the orders sought are available to the Ex parte Applicant.
12. The record reflects that the Respondent has not filed any response to the application. At the time of instituting the matter, the Respondent was represented by Mr. Kiprotich, who was holding brief for Mr. Ochola. However, on 4th February 2025, Mr. Kiprotich informed the Court that Mr. Ochola would no longer be acting for the Respondent.
13. This court granted counsel leave to cease acting and further directed the Applicant to serve the Respondent with a hearing notice to canvas the application dated 3rd September 2024 orally. The Applicant filed before this court an affidavit of service sworn on 7th March 2025 evidencing service through the Respondent's official email address info@eapcc.co.ke.
14. The Court notes from the record that the Applicant also served the Respondent through the above email address with a copy of the Chamber Summons Application, annexures and Substantive Notice of Motion on 3rd September 2024. This is evidenced by the Affidavit of Service sworn on 22nd October 2024.
15. The scope of judicial review remedy of mandamus was stated by the Court of Appeal in the *KNEC v Republic Exparte Geoffrey Gathenji Njoroge & Others* CA 266 of 1996 [1997] eKLR wherein the court, while setting out the whole scope of Judicial Review remedies of certiorari, prohibition and mandamus stated that inter alia:

“.....The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office, and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.....these principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty, has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply because, like an order of prohibition, an order of mandamus cannot quash what has already been done.....”



16. 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.”

17. The Public Procurement Administrative Review Board is a quasi-judicial body established under Section 27 of the [Public Procurement and Asset Disposal Act 2015](#), with the statutory mandate to review, hear and determine procurement and asset disposal disputes arising from decisions made by procuring entities.

18. The Board’s power are provided for under section 173 of the [Public Procurement and Asset Disposal Act](#) to include the following;

“

“ 173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

- a. annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
- b. give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
- c. substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
- d. order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
- e. order termination of the procurement process and commencement of a new procurement process.

19. It is clear from the foregoing that the Board acted within the scope of its jurisdiction in issuing the impugned orders. Further, under Section 175(1) of the [Public Procurement and Asset Disposal Act](#), a decision of the Board becomes final and binding unless it is challenged by way of judicial review before the High Court within fourteen days. This court has reiterated this position on several occasions see



Republic v Public Procurement Administrative Review Board & 2 others Ex parte Adan Osman Godana t/a Eldoret Standard Butchery [2017] KEHC 6142 (KLR) and *Republic v Cabinet Secretary, Ministry of Transport, Infrastructure, Housing & Urban Development & 3 others Ex parte Global Agro Logistics Limited* [2018] KEHC 3863 (KLR)

20. In the present matter, there is no evidence before this Court indicating that the Board's decision dated 29th July 2024 was subjected to such a challenge.
21. From the foregoing, it is evident that the Respondent has failed to comply with the express and binding decision of the Public Procurement Administrative Review Board rendered on 29th July 2024 in Review Application No. 61 of 2024. That decision directed the Respondent to issue the Applicant with a notification of intention to award within 7 days and to complete the procurement process in favour of the Applicant.
22. The Respondent has neither challenged the said decision in accordance with Section 175(1) and (2) of the *Public Procurement and Asset Disposal Act* nor provided any explanation for its inaction, despite being duly served with all relevant pleadings and notices.
23. In this court's opinion the Applicant has established a clear legal right to the performance of the duty imposed upon the Respondent by the Review Board's order which he has unjustifiably failed to perform.
24. This Court finds that the requirements for the grant of an order of mandamus have been satisfied. The continued delay in implementing the award not only undermines the procurement regulatory framework but also offends the principles of good governance, accountability, and the rule of law as enshrined under Article 10 of the *Constitution*.
25. In the circumstances, the Court is persuaded that the Applicant is entitled to the relief sought. Accordingly, the Notice of Motion dated 3rd September 2024 is allowed. The Respondent is hereby directed to issue the Applicant with a letter of Notification of to Award Tender Number RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid Tied Solar PV Plant within 7 days from today's date.
26. The Respondent is also directed to complete the procurement process for Tender Number RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid Tied Solar PV in favour of the Applicant within 60 days of today's date. In the event that the Respondent fails to comply with this court's orders the Applicant is at liberty to apply for appropriate penal orders as provided for in the law.
27. As the Respondent did not participate in these proceedings, I make no orders as to costs. It is so ordered.
28. Decree to issue.
29. This file is closed save for enforcement of the decree.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF MAY 2025

R.E ABURILI

JUDGE

