



Republic v Public Procurement Administrative Review Board; Tramex Mediquip Limited (Ex parte Applicant); Chief Executive Officer, Kenya Medical Supplies Authority & 3 others (Interested Parties) (Judicial Review E166 of 2025) [2025] KEHC 11171 (KLR) (Judicial Review) (28 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11171 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E166 OF 2025
JM CHIGITI, J
JULY 28, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD RESPONDENT

AND

TRAMEX MEDIQUIP LIMITED EX PARTE APPLICANT

AND

CHIEF EXECUTIVE OFFICER, KENYA MEDICAL SUPPLIES AUTHORITY INTERESTED PARTY

KENYA MEDICAL SUPPLIES AUTHORITY INTERESTED PARTY

SUKEN INTERNATIONAL LIMITED INTERESTED PARTY

QUEST PHARMACEUTICALS LTD INTERESTED PARTY

JUDGMENT

1. Through the application dated 19th June 2025 the Applicant is seeking the following orders;
 1. An order of certiorari directed at the Respondent, quashing the Respondent’s decision dated 4th June 2025 in Review Application No. 59 of 2025, dismissing the Applicant’s Request for Review concerning Tender No. KEMSA/GOK/MOH-OIT03/2024-2025.



2. An order of mandamus directed at the 1st and 2nd Interested Parties, compelling them to re-evaluate the Applicant's bid for Item No. 2 (Ready-to-Use Therapeutic Food) on the financial evaluation in strict compliance with the evaluation criteria set out in the Tender Document and Section 80 of the *Public Procurement and Asset Disposal Act*, 2015.
3. An order of prohibition directed at the 1st and 2nd Interested Parties, prohibiting them from awarding or executing any contract under Tender No. KEMSA/GOK/MOH-OIT03/2024-2025.
4. Such other, further order and/or incidental orders or directions as this Honorable Court shall deem just and expedient;
5. The costs of this application to provide for.

The Applicant's Case;

2. On or about 4th January 2025, the 2nd Interested Party invited bids through an open tender (TENDER NO. KEMSA/GOK/MOH-OIT03/2024-2025) for the supply of Nutrition Health Products, comprising two lots: Item No. 1 (Fortified Blended Flour) and Item No. 2 (Ready-to-Use Therapeutic Food).
3. It is its case that it submitted a bid for Item No. 2 complying with all mandatory requirements, including a Manufacturer's Authorization, a current Quality Certificate, and a valid product listing with QR codes from the Pharmacy and Poisons Board (PPB) issued by its manufacturer, Nuflower Foods & Nutrition Private Ltd.
4. On 2nd May 2025, the Applicant received a Notification of Intention to Award from the 2nd Interested Party's stating that its bid was disqualified for not being listed as a distributor by PPB, a requirement not specified in the Tender Document.
5. On 16th May 2025, the Applicant filed a Request for Review (Application No. 59 of 2025) with the Respondent, challenging the disqualification as unlawful, arguing that the evaluation relied on an extraneous criterion in violation of Section 80 of the Act and Clause 1.1 of the Tender Document.
6. On 4th June 2025, the Respondent dismissed the Applicant's Request for Review.
7. The Applicant is aggrieved by the Respondent's decision, which it considers irrational, procedurally unfair and tainted by illegality as it endorses an evaluation process that deviated from the Tender Document and violated the Applicant's right to fair administrative action and legitimate expectation.

Ex Parte Applicant's Written Submissions

8. It submits that on 4th June 2025, the Respondent dismissed the Applicant's Request for Review, upholding the disqualification on the grounds that the Applicant failed to submit a product listing in its own name, a requirement the Applicant contends was not stipulated in the Tender Document.
9. The Applicant is aggrieved by the Respondent's decision, which it considers irrational, procedurally unfair and tainted by illegality as it endorses an evaluation process that deviated from the Tender Document and violated the Applicant's right to fair administrative action and legitimate expectation.
10. In response to the Preliminary Objection dated 24th June 2025 it submits that a preliminary objection can only be raised on a pure point of law and must not be blurred with factual details that can be subjected to contest in any way that can be proved by way of evidence.



11. The Applicant submits that the issues raised in the Preliminary Objection dated 24th June 2025, call for a factual inquiry into the adequacy and sufficiency of the pleadings and supporting affidavits. These are matters that go to the substance and merits of the Notice of Motion and do not constitute pure points of law capable of disposal by way of a preliminary objection.
12. The 1st and 2nd Interested Parties raise the same grounds at paragraph 4 of the Replying Affidavit of Moses Sudi, sworn on 26th June 2025.
13. In the case of Republic v Public Procurement Administrative Review Board; Nairobi City County & Erdermann Property Limited (Interested Parties); Exparte Lordship Africa Limited [2020] eKLR, that:
 - “20. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of Oraro -vs- Mbaja (2005)1KLR 141, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in Mukisa Biscuit Company -vs- West End Distributors Ltd(supra) that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.” [Emphasis supplied]
14. Further at paragraph 30, the Court in that decision held:
 - “30. It is thus my finding that the grounds raised by the 1st Interested Party cannot therefore be effectively and legally decided in a preliminary objection, as they entail the calling of evidence, arguments thereon by the parties and exercise of this Court’s discretion, and can therefore only be addressed in the context of a full hearing on merits.” [Emphasis supplied]
15. The Applicant submits that the Respondent’s decision dated 4th June 2025 and the 1st and 2nd Interested Parties’ did not adhere to the principles set out in Article 47 of *the Constitution* and therefore the impugned decision by the Respondent was unreasonable.
16. Article 47 of *the Constitution* provides that:
 - “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”
17. Reliance is placed in the case of Republic v Public Procurement Administrative Review Board & 2 others Exparte Pelt Security Services Limited [2018] eKLR, where Mativo J Held that:
 - “83. Reasonableness, as a ground for the review of an administrative action is dealt with in Section 7 (2) (k) of the *Fair Administrative Action Act*. 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. In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others O’Regan J approved the reasonableness test



which was stated as follows by Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.*

“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... as ‘conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt’. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. ... Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him.”

84. 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[56] and that the impugned decision had to be “verging on absurdity” in order for it to be vitiated. In *Prasad v Minister for Immigration*, the Federal Court of Australia 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... so devoid of any plausible justification that no reasonable body of persons could have reached them”.
85. A decision which fails to give proper weight to a relevant factors may also be challenged as being unreasonable. It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.”
18. Further reliance is in the case of *Republic v Public Procurement Administrative Review Board Ex parte Applicant Kenya Rural Roads Authority & another* [2017].
19. It is submitted that the Respondent, when adjudicating procurement disputes and making a decision, has a constitutional duty to adhere to Article 47(1) of *the Constitution*. In particular:
- i. The evaluation process must not rely on criteria not disclosed in the Tender Document, as this undermines transparency and fairness.
 - ii. The review process must not uphold unlawful decisions that prejudice bidders without just cause.
 - iii. Administrative actions that deviate from statutory requirements ought to be quashed.
20. It is further submitted that Section 7 (2) (k) of the *Fair Administrative Action Act*, 2015 provides that a court may review an administrative action or decision if the administrative action or decision is irrational or unreasonable.



21. In Republic v Public Procurement Administrative Review Board Exparte Trippex Construction Company Limited & another, J.R no. 605 of 2015, Mativo J stated that:

“Rationality, as a ground for the Review of an administrative action is dealt with in Section 7(2) (i) of Fair Administrative Action [50] which provides that: -

“A court or tribunal under subsection (1) may review an administrative action or decision, if-

- i. the administrative action or decision is not rationally connected to-
 - a) the purpose for which it was taken;
 - b) the purpose of the empowering provision;
 - c) the information before the administrator; or
 - d) the reasons given for it by the administrator.”

22. It relies on the case of Chaskalson P, in Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (4) SA 674 (CC) at page 708; paragraph 86 where it was stated that :“The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.”

23. From the above, in applying the test of rationality, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the materials made available and the conclusion arrived at?

24. The Applicant submits that it is irrational for the Respondent to make a finding that the Applicant’s bid was non-responsive for failing to provide a product listing in its own name, when the Tender Document only required a valid product listing from PPB or KEBS, which the Applicant provided through its manufacturer.

25. The Respondent’s finding that the Applicant’s disqualification was lawful is irrational, as it contradicts the Tender Document’s express criteria, which did not require the bidder to hold the product listing in its own name. The tender document allowed non-manufacturers to rely on manufacturer authorization.

26. It is argued that it offered a lower bid price of Kshs. 104,650,000 compared to the awarded bid of Kshs.110, 170,000 to the 3rd Interested Party, resulting in potential cost saving of Kshs. 5,529,000.

27. The decision by the Respondent to prioritize technicality over value for money contradicts the constitutional and statutory objectives of public procurement under Article 10(2) and section 3(h) of the Act.

28. The Respondents’ decision is Wednesbury irrational and unreasonable.

29. It submits that the Respondent’s decision was materially influenced by an error of law and the Respondent committed an illegality its finding since The Respondent erroneously upheld the Procuring Entity’s disqualification of the Applicant based on a requirement not disclosed in the Tender



- Document, namely that the bidder must be listed as a distributor by the Pharmacy and Poisons Board (PPB).
30. This it is submitted contradicts the clear provisions of Clause 1.1 of Section III of the Tender Document and Section 80(2) of the *Public Procurement and Asset Disposal Act*, 2015 (PPADA), both of which prohibit the use of undisclosed or extraneous evaluation criteria.
 31. It is believed that The Respondent misapprehended the law by treating Item No. 1 (Fortified Blended Flour) and Item No. 2 (Ready-to-Use Therapeutic Food) as divisible procurement lots capable of separate legal outcomes, yet the Tender Document presented the procurement as a unified process under a single Tender Number, with one approval and budgeting framework. The artificial severance of the tender process in the adjudication resulted in inconsistent treatment of related procurement items and violates the requirement for procedural integrity and consistency in public procurement.
 32. It is its submission that The Respondent further committed an error of law by admitting and relying on documents filed out of time by the Procuring Entity.
 33. This violated Regulation 205 of the Public Procurement and Asset Disposal Regulations, 2020, and undermined the Applicant's right to fair administrative action under Article 47 of *the Constitution* and Section 4(3) of the *Fair Administrative Action Act*, 2015.
 34. Section 80(2) of the *Public Procurement and Asset Disposal Act*, 2015, mandates that tender evaluations be conducted using the criteria set out in the Tender Document. Clause 1.1 of Section III of the Tender Document prohibits the use of any other criteria.
 35. The disqualification of the Applicant's bid based on an unstated requirement (listing as a distributor by PPB) is ultra vires and contravenes Section 80(2) of the Act and Article 227 of *the Constitution*, which mandates fair, equitable, and transparent procurement processes.
 36. The Respondent erred by misinterpreting the technical evaluation criteria to wit that the Applicant, a non-manufacturer was required to be listed as a distributor by the Pharmacy and Poisons Board (PPB) with current product listing in its own name.
 37. It is submitted that the tender only required a "current and valid product listing with QR codes from Kenya Bureau of Standards (Mandatory)" without mandating that the listing be in the bidder's name, especially when a Manufacturer's Authorization (MAF) was already provided.
 38. The introduction of an extraneous criterion during evaluation suggests an attempt to unfairly exclude the Applicant, undermining the competitive fairness required under Article 227 of *the Constitution*.
 39. The evaluation process was manipulated to favor the 3rd Interested Party according to the Applicant.
 40. Reliance is placed in the case of Republic v Public Procurement Administrative Review Board & 3 others; Astronea Construction Limited (Exparte Applicant) (Miscellaneous Civil Application E143 of 2023) [2024] KEHC 1429 (KLR) (Judicial Review) (14 February 2024) (Judgment), J.Chigiti (SC) stated that:

“95. Judicial review jurisdiction was discussed in the Ugandan case of Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300, that: “In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu



and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision.

It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

The Respondent’s case;

41. It is its case that on 16th May 2025, the Applicant herein, filed Request for Review Application No. 59 of 2025 before the Respondent seeking the following orders:
- a. The Respondents ‘decision in the tender as communicated to the Applicant in the Notification of Intention to Award letter dated 2nd May 2025 in the matter of Tender for Supply of Nutrition Health Products, Tender No. KEMSA/GOK-MOH-OIT03/2024-2025(hereinafter referred to as the “Tender”) be annulled.
 - b. The procurement proceedings leading to the decision by the Respondents to award the Interested Parties the tender in the matter of Tender for Supply of Nutrition Health Products, Tender No. KEMSA/GOK-MOH-OIT03/2024-2025 (hereinafter referred to as the “Tender”) be reviewed and this Honourable Board be pleased to direct the Respondents to re-admit and re-evaluate the Applicants’ bid in the financial stage and proceed to make an award in a manner that strictly complies with the provisions of the law.
 - c. The Respondents be ordered to pay the costs of and incidental to these proceedings.
 - d. Any other relief that the Honourable Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board’s orders.
42. On 4th June 2025, the Respondent, made the following final orders:
- a. The Request for Review dated 15th May 2025 is hereby dismissed;
 - b. The Accounting Officer of the Kenya Medical Supplies Authority is hereby directed to oversee the tender proceedings for TENDER NO. KEMSA/GOK/MOH- OIT03/2024-2025 – Supply of Nutrition Health Products to their logical and lawful conclusion; and
 - c. Each party shall bear its own costs of the proceedings.



43. In arriving at the impugned decision, the Respondent argues that it identified the key issue which was whether the Applicant was disqualified based on a criteria not listed in the tender document.
44. According to the Procuring Entity, the Applicant was disqualified due to its failure to provide a valid product listing with QR codes from the Pharmacy and Poisons Board, as well as approval confirming safety for human consumption from the Kenya Bureau of Standards.
45. It argues that upon reviewing the Applicant's bid documents, the Board noted that the Applicant submitted documents belonging to a different entity, Nuflower Foods & Nutrition Private Ltd.
46. The Respondent, believes that in its decision, it considered all the parties' pleadings, submissions, oral arguments, and confidential documents.
47. The Respondent argues that it acted within the confines of *the Constitution*, the Act, the Regulations, 2020, the Fair Administrative Actions Act, and the rule of law in its findings in the hearing of Request for Review No. 59 of 2025.
48. It further argues that it took into account the provisions of Article 227 of *the Constitution*, the Act, and the Public Procurement and Asset Disposal (Amendment) Regulations, 2020 and that the Decision was well-reasoned and was neither unreasonable, ultra vires, unlawful, misconceived, erroneous, irrational, nor illogical, contrary to the allegations made by the Applicant.
49. On the Finding of Non-Responsiveness, the Tender Document expressly required bidders to submit: "A current and valid product listing with QR codes from the Kenya Pharmacy and Poisons Board (PPB) or approval for human consumption by the Kenya Bureau of Standards (KEBS)."
50. The Board noted that the Applicant submitted listings issued to a different legal entity, namely Nuflower Foods & Nutrition Pvt Ltd.
51. Reliance on documents issued to another party was not permissible under the established criteria.
52. Reliance is placed in Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR where it was held:
 - “38. A proper construction of the above provision shows that the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid documents. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. Bid documents may provide for provision of security. Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities, which bidders often overlook at their peril.”
53. It submits that the Applicant's failure to submit a valid product listing in its name rendered its bid materially non-compliant with the Tender requirements and justified its exclusion.
54. On the Divisibility of the Tender into Independent Lots, the Respondent submits that the Tender was correctly interpreted as comprising two separate and divisible lots, namely:



- a. Item 1: Fortified Blended Flour
 - b. Item 2: Ready-to-Use Therapeutic Food
55. The structure of the Tender allowed bidders to submit bids for either or both items. Some bidders submitted bids for only one item.
56. The Board correctly found that the Applicant did not submit a bid for Item 1, and therefore lacked legal standing to challenge the award thereof. This is consistent with the principle that a party must demonstrate sufficient interest or prejudice to challenge a procurement decision on Admission of Late-Filed Documents by the Procuring Entity.
57. In responding to the allegation by The Applicant that the Respondent committed an error in admitting documents filed out of time by the Procuring Entity the Respondent, argues that the documents in issue were admitted in the interest of substantive justice, and that all parties were accorded a fair hearing. It ensured that the Applicant was made aware of the documents, was given an opportunity to respond, and no prejudice was demonstrated. The requirements of a fair hearing under Article 50 and 47 of *the Constitution* were fully met.

The 1st and 2nd Interested Parties' case:

58. It is their case that the Exparte Applicant tendered for the supply of Nutrition Health Products under Tender No. KEMSA/GOK-MOH-01T03/2024-25(hereinafter called “the Tender”).
59. The Exparte Applicant’s application did not meet the mandatory requirements and it was knocked out at the preliminary stage.
60. It is its case that the process was open and transparent and was guided by the known Constitutional and legal framework and procurement policies.
61. It is further its case that the manufacturing, transportation, storage and distribution/dispensing of food and medicine is highly regulated due to the potential detrimental effect this might cause to the general public.
62. They argue that the Kenya Pharmacy and Poisons Board (KPPB) and Kenya Bureau of Standards (KEBS) are the statutory bodies whose function and mandate are to ensure certification and listing of entities that can handle medicine and food in the manufacturing, distribution and supply matrix.
63. It is its case that the Technical Evaluation of the Tender document made the following mandatory requirements at page 36 (B): -
- i. Manufacturers Authorization which must be on a manufacturer’s letterhead and addressed to KEMSA that is both tender and item specific and signed by an authorized signatory (Applicable to bidders who are not manufacturers) (MANDATORY).
 - ii. Current quality certificate as specified in the technical specifications (MANDATORY).
 - iii. Current and valid product listing with QR codes from the Kenya Pharmacy and Poisons Board or Approved as safe for human consumption by Kenya Beau of Standards (MANDATORY) (emphasis added) per the Tender Document NO. KEMSA/GOK/MOH-01T03/2024-2025).
64. It is their case that these terms were clear and had no ambiguous terms as to what constitute mandatory requirement. The Exparte Applicant has not demonstrated that it is listed as a distributor by the Pharmacy and Poisons Board (KPPB) according to them.



65. The fact that the Applicant produced the listing of the manufacturer does not make it certified to transport and distribute and/or dispense food and medicine.
66. It is their case that the Public Procurement Administrative Review Board (hereinafter called “the Review Board”) acted within the law and arrived at a reasonable and cogent decision.

1st and 2nd Interested Parties’ written submissions

67. In its submissions, they urge the Court to consider uphold the preliminary objection dated 24th June 2025 regarding the contents of the Notice of Motion.
68. They draw the attention of this Court to 2 issues that render the Notice of Motion unsustainable and fatal. It is drawn in the following terms: -

“An order of prohibition directed at the 1st and 2nd Interested Parties, prohibiting them from awarding or executing any contract under Tender No. KEMSA/GOK/MOH-OITO3/2024-2025.”

69. The natural and ordinary meaning of the above prayer (for prohibition) suggest that the First and Second Interested Parties ought to be permanently barred and/or prohibited by this Honorable Court from having any dealing with the aforesaid Tender processes. Such an order will effectively bring the tender processes to an end.
70. This will affect all the entities including the Exparte Applicant itself. The Exparte Applicant does not need an order of prohibition from the court to keep it away from the tender processes. Its bid was dismissed due to its failure to comply with mandatory requirement. The Review Board also declined its application for review.
71. The grant of order of prohibition defeats the need for the prayer of mandamus which is contained in prayer 2 of the Notice of Motion. If the two payers are granted the net effect is to cancel each other. The Honorable Court is being asked to give an order of mandamus (to compel performance) on one hand and on the other hand, proceed to issue an order of prohibition (to estoppe), which effectively stops the order of mandamus. This is akin to asking the court to act in vain. They urge the court to decline such an invitation.
72. In submitting that the Notice of Motion herein does not comply with the mandatory requirements of Order 51 Rule 4, reliance is placed in the case of National Bank of Kenya Limited versus Ndungu Njau Nairobi CA Case Number 211 of 1996 the Court of Appeal held:

“.....we are of the view that the appellant’s notice of motion did not comply with the mandatory requirements of Order L r 3 (now Oder 51 Rule 4) of the Civil Procedure Rules according to which every Notice of Motion is grounded on grounds or evidence contained in the said affidavits. It is also not enough to say that the notice of motion is grounded on the grounds of opposition which had been filed in opposition of the said earlier application of the respondent.

Although this in our view was fatal omission.....” (Emphasis added).



73. In Republic versus Ouko and 11 Others; Mutuia and 2 Others (Ex Parte Applicants) (Judicial Review Application E 176 OF 2025) KEHC 7446 (KLR) (Judicial Review) ruling, Hon Justice R.E. Aburili, J. had the following to say:

“The first ground for dismissing the Notice of Motion was that the application as presented by the Exparte applicant did not plead with precision, the grounds upon which the judicial review orders were sought, and that it was therefore rather difficult to tell the grounds upon which the judicial review application was based. That what were presented as grounds were largely depositions in the verifying affidavit substantiating the facts relied upon. Further, that it was not for the court to speculate the grounds upon which relief is sought. That the burden was on the applicant to set out grounds for judicial review with clarity and not to throw everything at the court. The learned judge concluded that the applicant had not discharged that burden to the court’s satisfaction”.

The Honorable judge went on to state as she advised and caution litigants and their advocates: -

- i. Before I pen off, I wish to urge counsel preparing pleadings for judicial review that these are the simplest of all pleadings and when they do so, let them consult the statutes under which they are filing the applications on the requirements before embarking on a long winding verbose journey.
 39. This case illustrates a recurring procedural deficiency in judicial review litigation where applicants file lengthy affidavits or factual narratives without identifying with clarity the legal grounds upon which relief is sought.
 40. Judicial review is a specialized public law remedy, not a forum for general complaints. The applicant must clearly identify and plead grounds such as illegality, irrationality, or procedural impropriety, among other known grounds under the *Fair Administrative Action Act*. The grounds must be brief, specific and distinctly numbered. They must be supported by legal authority or constitutional/statutory provisions and be linked to the decision-making process, not merely the outcome.
 41. As highlighted in Republic v Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati [2008] eKLR, submissions and facts cannot be substitutes for properly framed grounds. The failure to do so risks the summary dismissal of the application.
 42. Counsel and litigants are therefore urged to approach judicial review with discipline, precision, and adherence to public law principles, failing which their applications may be declared fatally defective.
 43. Judicial review is a constitutional remedy and just like in constitutional petitions, pleading with precision is key.
74. The Notice of Motion herein presupposes that that the grounds relied on was to be adduced at the hearing hereof (see the last sentence) in the said application.
75. The Respondent and the Interested Parties were left to speculate as to the grounds in which the Notice of Motion is grounded. By stating that the same was to be adduced at the hearing, it meant the same are the written submission.
76. This is highly prejudicial to the parties who are on the other side of the Exparte Applicant.



77. This denied them the right to proper notice which is an essential component of fair trial, a right that is absolute by dint of Article 25 of *the Constitution* of Kenya.
78. They are troubled that The Exparte Applicant appears to be claiming that it can handle food without this requirement, simply by claiming that it procures the tendered items from a manufacturer which had been listed.
79. It is also asserting that it is exempted from the requirement because it is sourcing the procurement items from the such manufacturer and distributor.
80. The bid term does not require the tenderers to act for the manufacturers. Nuflower Foods and Nutrition Private Limited's letter of 11th February 2025 suggests that it was a tenderer acting through the Exparte Applicant herein.
81. It was for the Exparte Applicant to demonstrate compliance with KPP/KEBS, the two statutory bodies whose inputs were made condition precedents to an award which it didnt.
82. Bidders were required to submit the following documents: -
- i. Manufacturers Authorization which must be on a manufacturer's letter head and addressed to KEMSA that is both tender and item specific and signed by an authorized signatory (Applicable to bidders who are not manufacturers (Mandatory)).
 - ii. Current quality certificate as specified in the technical specifications (Mandatory).
 - iii. Current and valid product listing with QR codes from the Kenya Pharmacy and poisons Board or Approved as safe for human consumption by Kenya Bureau of Standards (Mandatory).
83. The Exparte Applicant did not comply with the above.
84. In *Nomads Construction Company Limited Versus Kenya National Highways Authority*, Review Application Number 01 of 2017 page 24 this Appeal Board stated:
- “A mandatory requirement set out in the tender document cannot be waived and once a bidder fails to comply with it, then its tender must be declared non responsive at the preliminary evaluation stage and cannot proceed for further evaluation.
- ...
- In view of several failures by the Applicant to comply with mandatory requirements, the Board's hands are tied since requirements cannot be treated as minor deviations and cannot also be waived. The applicant had no option other than to comply with them and failure to comply with the requirements could only have one ultimate result, namely to have the Applicant's bid disqualified at Preliminary evaluation stage as the Procuring Entity did.”
85. In *Ex Parte Kingways Systems Limited versus National Government Constituencies Fund Board Nairobi (Milimani Law Courts)* Application Number E 155 of 2024 Hon Mr. Justice Ngaah Jairus stated in paragraph 37 that:
- “...the Applicant has conceded in unambiguous terms that its bid for the tender fell short of certain mandatory requirements. That being the case, its hands are soiled and, in all likelihood, what would have been its request for review under section 167 (1) of the Act may not have gone far. As far as this application is concerned all I can say on this particular



issue is that it has neither moral or legal basis upon which to question the procuring entity's decision.”

The 3rd Interested Parties case;

86. The 3rd Interested party supports the preliminary objection.
87. It is its case that the Exparte Applicant tendered for the supply of Nutrition Health Products under Tender No. KEMSA/GOK/MOH-OIT03/2024-25 that did not meet the mandatory requirements and hence was knocked out at the Preliminary stages.
88. It is its case that the process adopted by the 2nd Interested party, was open and transparent and was guided by the known constitutional and legal framework and procurement policies and guidelines.
89. The manufacturing, transportation, storage and distribution/ dispensing of food and medicine is highly regulated due to the potential detrimental effect this might cause to the general public.
90. The tender process which forms the subject of this litigation has stringent measures aimed at not only guarding the integrity of the process but also in ensuring that goods procured and distributed to the members of the Public are fit for human use and consumption, a process that can only be undertaken by entities who met the legal requirements.
91. The Kenya Pharmacy and Poisons Board (KPPB) and Kenya Bureau of Standards (KEBS) are the statutory bodies whose function and mandate are to ensure Certification and listing of entities that can handle medicine and food in the manufacturing, distribution and supply matrix.
92. It is in agreement with the Respondent that the Technical Evaluation of the Tender document made mandatory requirements and to date, the Exparte Applicant has not demonstrated that it is listed as a distributor by the Kenya Pharmacy and Poisons Board (KPPB).
93. It is its case that fact that the Applicant produced the listing of the manufacturer does not make it certified to transport and distribute and /or dispense food and medicine.
94. It argues that based on all the information and documents on record the Review Board could not arrive at any other conclusion but that the Exparte Applicant herein did not comply with the mandatory requirement to produce a current and valid product listing with QR codes from the KPPB.

The 4th Interested Parties case;

95. It is its case that the 2nd Interested Party invited bidders to bid through an open Tender (Tender No. KEMSA/GOK/MOH – 01703/2024 – 2025 for Supply of Nutrition Health Products, comprising two lots being items:
 - i) Fortified Blended Flour.
 - ii) Ready to-use – Therapeutic Food.
96. It argues that whereas the said products were bid under one tender, the specifications for the two classifications and specs were different.
97. While the 4th Interested Party bid for provision for the Two products, it is crucial to note that the Exparte Applicant herein did only bid for one product being Ready to use Therapeutic Food.
98. The 4th Interested Party was issued with a notification dated 2nd May 2025 (Ref: KEMSA/GOK-MOH-OIT03/2024-2025) as the successful tenderer for Fortified Blended Flour having submitted the lowest



evaluated responsive tender as per the terms of Section 80 and 87 of the Public Procurement and Assessment Disposal Act (PPADA).

99. The Technical Evaluation provided documents that were mandatory and further stated that failure to comply with the mandatory requirement would lead to disqualification and that only bidders who were successful at the Technical Evaluation stage would proceed to the next stage of evaluation.
100. It confirms and agrees with the Respondent that there were mandatory requirements which the Applicant didn't fulfil.
101. The letter dated 2nd May 2025 (Ref: KEMSA/GOK-MOH-OIT03/2024-2025) disclosed that the Exparte Applicant was not listed as a distributor by the Pharmacy and Poisons Board (PPB) as required. The PPB/KEBS they provided was for the manufacturer Nuflower Foods and Nutrition Private Ltd.
102. The PPB Listing Certificate attached by the Exparte Applicant discloses that the same was issued to Local Technical Representative (LTR); Nutflower Foods & Nutrition Private Ltd and not the Ex Parte Applicant herein.
103. Nuflower Foods & Nutrition Private Ltd is a company registered in India under Certificate IN16/818842817 and resident on Plot No 303 Sector 7-II, IMT Manesar Gurugram, 122052, Haryana India.
104. Whereas the Manufacturer's Authorization granted to the Applicant is from Nuflower Foods and Nutrition Private Limited; a company registered in India, and as described in the preceding paragraph herein above, the PPB Listing Certificate specifies the LTR as a Company known as Nutflower Foods & Nutrition Pvt. Ltd.
105. It is its submission that the entire procurement process was founded in law and no breach or deviation was shown by the Applicant and that the court cannot interfere with a process or award on account of generalities. Any breaches must be succinctly detailed in this instance none is detailed to warrant this court's intervention.
106. The Respondent's ruling in issue confirms that the award by the 1st and 2nd Interested Party was founded on the tender document and Section 80 of the PPADA.
107. The impugned decision is not only legal, the same is rational and reasonable, what is irrational is the Application herein which is an express abuse of the court process.
108. The Exparte Applicant instituted the Request for Review, was given leave to file all requisite documents, filed submissions and even participated in the hearing at the Respondent. Failure to comply with express terms of a tender cannot be constituted as a breach of the Fair Administrative Actions Act.
109. The Exparte Applicant is on record as having admitted to;
 - a. Having read the tender documents;
 - b. Participated in it;
 - c. Admittedly failed to comply with a mandatory requirement of the tender document;
 - d. Confirmed before the Board that they were not complaint with the terms of the tender document.



110. It argues that the admission by the Exparte Applicant before the Respondent that they were not compliant with the mandatory terms of the tender document has not been retracted and is therefore binding on the said Exparte Applicant.

Analysis and determination:

Upon perusing the Application, the Statutory Statement and the responses by way of a Notice of Preliminary Objection, Replying Affidavits and Rival Submissions their Respondent and the Interested Parties.

The court finds the following to be the issues for determination.

- i. Whether or not the Preliminary Objection dated 24, June 2025 have merit.
- ii. Whether or not the application has merit.

Whether or not the Preliminary Objection dated 24, June 2025 has merit.

111. In the case of Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd. [1969] E.A. 696, cited with approval in the case of Bamato Distributors Limited v Mohamedali (Environment & Land Case E003 of 2022) [2022] KEELC 15456 (KLR) (9 December 2022) (Ruling) where Lord Charles Newbold P. held that a proper Preliminary Objection constitutes a pure point of law. The Learned Judge then held that: -

“The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop” [Emphasis supplied.]

112. It is this court's view that the notice of Preliminary Objection as drafted does not speak to any clear points of law. The notice of Preliminary Objection is very general and broad in nature and it does not fit into the definition of a Preliminary Objection.
113. In any event I am of the view that the Notice of Motion is accompanied by the Statutory Statement of fact in support of the Chamber Summons as well as the Verifying Affidavit of Evalyne Chepkirui, both dated 16th June 2025 which set out the grounds that the suit is predicated upon.
114. The Respondent and the Interested Parties have responded to these grounds adequately through a Replying Affidavit. Failure to include them in the face of the application cannot form the basis of dismissing the application.
115. In the circumstance the same is dismissed for lack of merit.

The 2nd issue is whether or not the application has merit.

116. In order to succeed in the application before this court, the Applicant has to satisfy the principles as announced by Lord Diplock's classic dictum in Council of Civil Service Unions versus Minister for



the Civil Service (1985) 1 AC 374 which provides a useful guide on what an unlawful decision entail. The learned judge spoke of these grounds as follows:

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

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

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

117. Tenderers should comply with all aspects of the invitation to tender and meet all the prescribed requirements as laid down by the procuring entity in its tender documents. Procuring entities should consider only conforming, compliant or responsive tenders. This is intended to ensure that the tender contest and completion is legal, fair and quality inspired.
118. 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 injustice if some bidders were allowed to bypass tender conditions.
119. It is imperative for bidders to compete on an equal footing with the most qualified securing the contract. All tenderers have a legitimate expectation that the procuring entity will on its part comply with [the Constitution](#) and The [Public Procurement and Asset Disposal Act](#), Regulations and its own tender conditions.



120. This was the finding in *Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others (Civil Appeal E012 of 2024)* [2024] KECA 184 (KLR) (23 February 2024) (Judgment).
121. Strict compliance with tender requirements is a cornerstone of procurement law. As held in *Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Exparte Tuv Austria Turk* [2020] eKLR:
- “38. A proper construction of the above provision shows that the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid documents. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.”
122. In the instant suit, The Tender Document expressly required bidders to submit: “A current and valid product listing with QR codes from the Kenya Pharmacy and Poisons Board (PPB) or approval for human consumption by the Kenya Bureau of Standards (KEBS).”
123. In the instant suit the Board noted that the Applicant submitted documents belonging to a different entity, Nuflower Foods & Nutrition Private Ltd Upon review of the Applicant’s bid documents.
124. This court is satisfied that the Respondent, in its Decision, considered all the parties' pleadings, submissions, oral arguments, and confidential documents.
125. The Respondent acted within the confines of *the Constitution*, the Act, the Regulations, 2020, the Fair Administrative Actions Act, and the rule of law in arriving at its findings in the hearing of Request for Review No. 59 of 2025. It took into account the provisions of Article 227 of *the Constitution*.
126. A party who fails to comply with the required conditions as set out in the tender are usually dropped from the procurement competitive processes nonconforming.
127. In the instant case, tender document was categorical that interested bidders like the Applicant were supposed to submit the following documents: -
- i. Manufacturers Authorization which must be on a manufacturer’s letter head and addressed to KEMSA that is both tender and item specific and signed by an authorized signatory (Applicable to bidders who are not manufacturers (Mandatory)).
 - ii. Current quality certificate as specified in the technical specifications (Mandatory).
 - iii. Current and valid product listing with QR codes from the Kenya Pharmacy and poisons Board or Approved as safe for human consumption by Kenya Bureau of Standards (Mandatory).
128. The Applicant submitted a document of new flower foods and nutrition Private Limited letter dated 11th February 2025 in a bid to comply with the documentation required by the procuring entity.
129. In *Nomads Construction Company Limited Versus Kenya National Highways Authority*, Review Application Number 01 of 2017 page 24 this Appeal Board stated:
- “A mandatory requirement set out in the tender document cannot be waived and once a bidder fails to comply with it, then its tender must be declared non responsive at the preliminary evaluation stage and cannot proceed for further evaluation.



...

In view of several failures by the Applicant to comply with mandatory requirements, the Board's hands are tied since requirements cannot be treated as minor deviations and cannot also be waived. The Applicant had no option other than to comply with them and failure to comply with the requirements could only have one ultimate result, namely to have the Applicant's bid disqualified at Preliminary evaluation stage as the Procuring Entity did."

130. The *Pharmacy and Poisons Act* (The Pharmacy and Poisons (Registration of Health Products and Technologies) Rules) provides at section 4 that:

- (1) A person who intends to import, manufacture or sell a health product or technology shall apply to the Board for the registration of the health product or health technology in Form 1 set out in the first schedule.
- (2) An Applicant sub rule (1) shall:
 - a) Specify the particulars of the person with appropriate knowledge of all aspects of the health product or health technology who shall be responsible for all communication between the Applicant and the Board in the declaration page of the application form; and
 - b) Where the Applicant is not a citizen of Kenya or is a company incorporated outside Kenya appoint a local representative who shall be citizen of Kenya, a person who is has permanent resident or a company incorporated in Kenya.
- (3) The application made under sub rule (1) shall be accompanied by:
 - i) A proposed label for use on the health product;
 - ii) A copy of the manufacturing licence of the health product, where applicable.
 - iii) That the provision of Section 4 (2) are therefore specific that where the Applicant is not a citizen of Kenya or company incorporated outside Kenya, it must appoint a local representative who shall be a citizen of Kenya or who has a permanent residence or a company incorporated in Kenya.

131. Nuflower Foods & Nutrition Private Ltd is a company registered in India under Certificate IN16/818842817 and resident on Plot No 303 Sector 7-II, IMT Manesar Gurugram, 122052, Haryana India.

132. The Exparte Applicant did not have the mandate provided under Section 4 (1) and (2) to import manufacturer or sell health products as they are not qualified to so do, the certificate in issue having been issued to the manufacturer and not the Applicant.

133. This court is of the view that the Exparte Applicant's none compliance with the tender conditions is fatal. In so holding this court is guided by the case of Nomads Construction Company Limited Versus Kenya National Highways Authority, Review Application Number 01 of 2017 page 24 this Appeal Board stated:

"A mandatory requirement set out in the tender document cannot be waived and once a bidder fails to comply with it, then its tender must be declared non responsive at the preliminary evaluation stage and cannot proceed for further evaluation.

...



In view of several failures by the Applicant to comply with mandatory requirements, the Board's hands are tied since requirements cannot be treated as minor deviations and cannot also be waived. The Applicant had no option other than to comply with them and failure to comply with the requirements could only have one ultimate result, namely to have the Applicant's bid disqualified at Preliminary evaluation stage as the Procuring Entity did."

134. Allowing third party document to form the qualification entries would amount to condoning an illegality. Such a procurement process would yield an unfair procurement process that would be contrary to the law.
135. The court is in agreement with the 3rd interested party to the extent that the Exparte Applicant has not demonstrated that it is listed as a distributor by the Kenya Pharmacy and Poisons Board (KPPB)
136. The Exparte Applicant has failed to demonstrate or prove that an extraneous criterion was invoked or that an unlawful decision was arrived at so as to warrant interference by this Honourable court.
137. It is this court's finding and I so hold that the award by the 1st and 2nd Interested Party was founded on the tender document and Section 80 of the PPADA and that the procurement entity did not act illegally in disqualifying the experte Applicant on that account.

On Admission of late-filed documents by the Procuring Entity.

138. On another front, the Applicant's argument that the Respondent committed an error in admitting documents filed out of time by the Procuring Entity is not persuasive enough to form the basis of granting the prayers as sought.
139. The court is satisfied that in allowing the documents out of time the Respondent did not act in an unprocedural or in an unfair manner. I say so because the Board ensured that the Applicant was made aware of the documents and was given an opportunity to respond.
140. In my view, The Applicant did not protest nor raise a concern that it would suffer any prejudice. The documents were admitted in the interest of substantive justice, and all parties were accorded a fair hearing.
141. This court is satisfied that the proceedings upheld the Applicant's right fair hearing under Article 50 and 47 of *the Constitution*.
142. The Supreme Court in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (2020) KLR held as follows:

“(49)[49] Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
143. The Applicant did not prove that the impugned decision was either unreasonable, ultra vires, unlawful, misconceived, erroneous, irrational, or illogical.
144. The Applicants have not proven their case within the principles as enunciated in the case of *Council of Civil Service Unions versus Minister for the Civil Service* (1985) 1 AC 374(Supra).



Disposition:

145. It is this court's finding that the application before me is devoid of merit.

Order:

The Application is dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2025.

.....

J. CHIGITI (SC)

JUDGE

