Republic v Public Procurement Regulatory Debarment Committee & 2 others; Judiciary (Interested Party); Cocopan Construction Kenya Ltd (Ex parte Applicant) (Judicial Review Application E155 of 2025) [2025] KEHC 10899 (KLR) (Judicial Review) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10899 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E155 OF 2025

RE ABURILI, J

JULY 23, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC PROCUREMENT REGULATORY DEBARMENT COMMITTEE .... 1ST RESPONDENT

PUBLIC PROCUREMENT REGULATORY BOARD ..... 2ND RESPONDENT

PUBLIC PROCUREMENT REGULATORY AUTHORITY .... 3RD RESPONDENT

AND

THE JUDICIARY ..... INTERESTED PARTY

AND

COCOPAN CONSTRUCTION KENYA LTD ..... EX PARTE APPLICANT

JUDGMENT

1. Before this Court for determination is the ex parte applicant's notice of motion dated 13th June 2025. The application is brought pursuant to Section 3A of the *Civil Procedure Act*, Order 53 Rules 1,3 and 4 of the Civil Procedure Rules and Sections 8 and 9 of the *Law Reform Act*.

2. The application seeks an order of Certiorari quashing the 1st respondent's decision made on 29th May 2025 debarring it from undertaking procurement services for a period of three [3] years from the date of the decision. It also seeks an order of Prohibition prohibiting the respondents from implementing

the impugned decision through publishing and forwarding to the Cabinet Secretary the details of the applicant and the corresponding period of debarment for gazettement. The applicant also seeks costs of the application.

3. The application is verified by the affidavit of Martin Gitonga Mbae sworn on 13th June 2025 and a statutory statement of even date.

4. The exparte applicant's case is that the interested party filed a request for the debarment of the exparte applicant before the 1st respondent claiming that the exparte applicant had falsified documents whilst participating in the tender by the interested party, being Tender No. JUD/OT/031/2023-2024 for the Partitioning and Refurbishment of the Judiciary Office in Upperhill. That in its decision rendered on 29th May 2025, the Debarment Committee found that the exparte applicant had indeed falsified information on its qualifications to participate in the said tender and the exparte applicant was debarred for a period of three [3] years.

5. 1st respondent is said to have refused to grant an adjournment of the oral hearing of the request for debarment filed vide Application No. 3 of 2025 by the interested party herein, the Judiciary, which said interested party was not present at the said hearing though notified of the directions to attend the Debarment Committee for hearing. The exparte applicant asserts that the decision to proceed with the hearing was made by the Debarment Committee without any legal justification whatsoever and even after the 1st respondent made enquiries and satisfied themselves that the interested party herein had been duly served with the hearing notice dated 16th April 2025.

6. Further, it is asserted that while the Committee relied on Regulation 22[5][e] of the Public Procurement and Asset Disposal Regulations 2022 to reach the decision to proceed with the hearing the 21 days stipulated under the said regulation would have lapsed on the 1st May 2025 since the response was received on 10th April 2025.

7. The exparte applicant also contends that the 1st respondent failed to consider relevant facts being that the alleged falsified documents and participation in the tender process was done without its knowledge, consent and/or participation. Additionally, that the same had been reported to the police and was pending investigation as at the time of the oral hearing and as such the 1st respondent ought to have held the hearing in abeyance and waited the results of the investigation as had been requested by it.

8. According to the exparte applicant, the 1st respondent's decision was made in bad faith and was devoid of any plausible reasons as the 1st respondent failed to consider relevant facts being that the alleged falsified documents and participation in the tender process was done without its involvement.

9. The 1st respondent is also faulted for shifting the burden of proof of the allegations from the interested party to the exparte applicant.

10. In its written submissions dated 17th June 2025 the exparte applicant relies on the case of Meixuer & Another v Attorney General [2005] KLR 189 where the court is said to have held that the role of judicial review is to consider the decision-making process. The applicant also relies on the Court of Appeal decision Municipal Council of Mombasa v Republic, Umoja Consultants Ltd Nairobi Civil Appeal No.185 of 2007 [2002] eKLR where the court is said to have similarly observed that a judicial review court is only concerned with the process leading to the making of the decision and not the merits of the decision itself.

11. The applicant further relies on the case *Republic v Chairman, Rent Restriction Tribunal; Nzaro [Interested Party];Wambua [Ex parte] [Judicial Review Application No.1 of 2021*][2023] KEELC 17988 [KLR] [23 May 2023] [Judgment] where the court is said to have observed that judicial review

is the means by which the Court scrutinizes public law functions intervening as a matter of discretion to quash,prevent,require and/or classify not because they disagree with the judgment but so as to right a recognizable public law wrong.

12. On the circumstances under which orders of judicial review may issue, the applicant relies on the cases of Pastoli v Kabale District Local Government Canal & others [2008] 2 EA 300 and Republic v Public Procurement Regulatory Authority & Another; Auto Terminal Japan Limited [Ex parte Applicant]; Auditor General & another [Interested Parties].

13. It is also submitted that by proceeding with the hearing the 1st respondent violated section 9[h] of the *Public Procurement and Asset Disposal Act* which prohibits the 3rd Respondent from investigating and acting on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are subject of administrative review.

14. Further reliance is placed on the case of Premier Verification Quality Services [PVQS] Ltd v Public Procurement Regulatory Authority; Kenya Bureau of Standards [Interested Party] [2021] eKLR where the Court is said to have found that the respondents in the said case had acted unlawfully in undertaking investigations into, and a report on a Pre-Export Verification of Conformity [PVOC] to Standards Services Tender No. KEBS T009/2019-2021 which was the subject of review proceedings.

15. The applicant further submits that it provided a copy of the OB Number as evidence that the matter was reported and was under investigations by the DCI and also provided an email extract to evidence that it dismissed the said agent, Martin Munene who had participated in the tender without authorization.

16. It is also submitted that by proceeding to first analyse the applicant's response and making a determination that it had not provided sufficient evidence to exonerate itself without first going through the allegations presented against the response of the Applicant is an error apparent on the face of the record and an analysis that goes against the provision of section 107[2] of the *Evidence Act*.

17. The 1st respondent it is submitted violated the applicant's legitimate expectation to cross-examine the interested party on the facts alleged. Further that the failure to hold an oral hearing violated the applicant's right to fair administrative action and fair hearing under Articles 47 and 50 of *the Constitution*. The court in the case of Edward R. Ouko v Speaker of the National Assembly & 4 others [2017] eKLR is said to have held that the right to cross examine is now a component of fair administrative action.

18. The applicant also submits that as was held by the court in the case of Republic v Public Procurement Regulatory Debarment Committee and 2 others; Kisii Teaching and Referral Hospital [Interested Party]; Babs Security Services Limited [Ex parte] [Application E130 of 2021] [2023] KEHC 22525 [KLR] [Judicial Review] [25 September 2023] [Judgment] the term "hearing" in regulation 22 [5][e] means oral hearing.

19. It is submitted that rationality as a ground for the review on an administrative action is dealt with under section 7[2] [i] of the *Fair Administrative Action Act*. The applicant also relies on the case of Pharmaceutical Manufacturers Association of SA & Another; In re Ex parte President of the Republic of South Africa & Others 2000 [4] SA 674 [CC] where the court is said to have defined what constitutes irrationality.

The Respondents' Case

20. In response, the respondents filed a replying affidavit sworn on 13th June 2025 by Raphael M. Ngalatu and they also filed written submissions dated 18th June 2025.

21. The respondents' case is that the 3rd respondent is a regulatory authority established under Section 8 of the *Public Procurement and Asset Disposal Act*, 2015, with the statutory mandate to ensure compliance with procurement procedures under the Act. That in executing this mandate through its Debarment Committee, the 2nd Respondent is empowered under Section 41 of the Act, read with Regulation 22 of the Public Procurement and Asset Disposal Regulations, 2020, to debar persons who commit specified breaches of the Act.

22. That the 1st respondent received a Request for Debarment of the applicant from the interested party herein on 21st February 2025 and the same was considered in accordance with Regulations 22 [5] [a] and [b] which provides that upon receipt of a request for debarment, the Board shall analyze the case within thirty days to determine whether there is a prima facie case for debarment and if the analysis establishes a prima facie case for debarment, the Board shall issue a notice of intended debarment to the party, who shall be the subject of the debarment proceedings requiring him or her to file a written response with the Board.

23. The respondents argue that after analysis of the Request for Debarment, the 1st respondent found that there was a prima facie case and as such issued a Notice of Intended Debarment dated 25th March, 2025 to all the parties involved with directions on disposal of the Request for Debarment.

24. That in compliance with the said notice, the exparte applicant filed its reply via a replying affidavit sworn on 8th April, 2025 by its director Martin Gitonga Mbae, upon which, the 1st respondent subsequently issued a hearing notice dated 16th April, 2025 requiring the parties to appear before it on the 29th April, 2025 for the hearing failure to which the 1st Respondent would proceed and issue such orders as it deemed fit notwithstanding the absence of either party. That on the said date, the interested party did not appear despite the 1st respondent confirming that the hearing notice had been duly served upon it. The exparte applicant herein is said to have been represented by counsel.

25. That upon consideration of the filed pleadings and the oral submissions of the exparte applicant herein, the 1st respondent in its decision rendered on 29th May 2025, found that the exparte applicant had falsified documents whilst participating in the tender by the interested party, being Tender No. JUD/OT/031/2023-2024 for the Partitioning and Refurbishment of the Judiciary Office in Upperhill and the applicant was debarred for a period of three [3] years.

26. In responding to the allegations that the 1st respondent ought to have dismissed the application for want of prosecution or adjourned the same, the respondents contend that as a quasi-judicial body, the Debarment Committee is not bound by strict rules of evidence or procedure, that it is independent in making its decisions on how to proceed with disposition of the different matters before it depending on the dynamics of each case.

27. The 1st respondent, it is contended, considered the strict timelines in which it was to hear and determined debarment matters in making its decision to have the hearing proceed in the absence of the interested party.

28. In response to the allegations that the 1st respondent ought to have halted the debarment proceedings in view of the alleged criminal investigations with the DCI, the respondents contend that the Debarment Committee exercises its powers independently as an administrative body and that neither the Act nor the Regulations make provision for staying of debarment proceedings to pave way for any other investigative proceedings being undertaken.

29. The respondents rely on the case of Republic v Public Procurement Administrative Review Board & Another Ex-parte Express DDB Kenya Limited [2018] eKLR where the court is said to have observed that as long as the process followed by the decision maker was proper, the court ought not to interfere.

30. It is submitted that if the applicant wanted the debarment proceedings to be stayed pending the DCI investigations, nothing prevented it from seeking such orders from the High Court which has the supervisory jurisdiction over the respondent. Further, that there was nothing unprocedurally and/or unlawful with the conduct of the respondents in the impugned debarment proceedings to warrant this Court to interfere with the Debarment proceedings and the exercise of the mandate of the Public Procurement Regulatory Board in executing the powers bestowed upon it by section 41 of the Act.

31. Further reliance is placed on the Court of Appeal case of Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR where the Court is said to have reiterated that where the Review Board makes a decision within its jurisdiction, the same should not be lightly interfered with.

32. The respondents submit that it has been stated time and again that where *the Constitution* has allocated certain powers and functions to various bodies and tribunals, it is important that these bodies and tribunals be given leeway to discharge the mandate bestowed upon them by *the Constitution* so long as there is compliance with *the Constitution* and national legislation. The case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR is relied on where the Court it is said to have held that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or Statute the same ought to be strictly followed.

33. They also rely on the case of Republic *v Public Procurement Regulatory Authority & another; Auditor General & another [Interested Party] Judicial Review No. 55 of 2022* where the Court is said to have observed that the court's role in judicial review remains strictly supervisory and that it would be an error for the court to overturn the decision simply on the basis that THE Court would have decided the matter differently.

Analysis and Determination

34. Having considered the application, the response by the respondents and written submissions by the participating parties, one issue falls for determination and that is whether the ex parte applicant has made a case for the grant of the orders sought.

35. The grounds upon which judicial review orders such as an order of certiorari and prohibition may be granted were clearly articulated in the Ugandan case Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300 where the court while citing with approval the case of Council of Civil Unions v Minister for the Civil Service [1985] AC 2 and Re Application by Bukoba Gymkhana Club [1963] EA 478 at 479 held 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....illegality is when the decision - making authority commits an error of law in the process of taking 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 ..... procedural impropriety is when there is a failure to act

fairly on the part of the decision – making authority in the process of taking a decision. The unfairness may be its none 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 legislature instrument by which such authority exercises jurisdiction to make a decision."

36. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and grant the remedy for judicial review if any of them is proved to exist. However, the list is by no means exhaustive.

37. The *Fair Administrative Action Act*, 4 of 2015 has to a greater degree codified these grounds of judicial review. It states in section 7 as follows:

> 7. Institution of proceedings.
>
> [1] Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-
>
> [a] a court in accordance with section 8; or
>
> [b] a tribunal in exercise of its jurisdiction conferred in that regard under any written law.
>
> [2] A court or tribunal under subsection [1] may review an administrative action or decision, if-
>
> [a] the person who made the decision-
>
> [i] was not authorized to do so by the empowering provision;
>
> [ii] acted in excess of jurisdiction or power conferred under any written law;
>
> [iii] acted pursuant to delegated power in contravention of any law prohibiting such delegation;
>
> [iv] was biased or may reasonably be suspected of bias; or
>
> [v] denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
>
> [b] a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
>
> [c] the action or decision was procedurally unfair;
>
> [d] the action or decision was materially influenced by an error of law;
>
> [e] the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
>
> [f] the administrator failed to take into account relevant considerations;
>
> [g] the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
>
> [h] the administrative action or decision was made in bad faith;

[i] the administrative action or decision is not rationally connected to-

[i] the purpose for which it was taken;

[ii] the purpose of the empowering provision;

[iii] the information before the administrator; or

[iv] the reasons given for it by the administrator;

[j] there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

[k] the administrative action or decision is unreasonable;

[l] the administrative action or decision is not proportionate to the interests or rights affected;

[m] the administrative action or decision violates the legitimate expectations of the person to whom it relates;

[n] the administrative action or decision is unfair; or

[o] the administrative action or decision is taken or made in abuse of power." [emphasis added]

38. Courts have reaffirmed the above position as seen in the Court of Appeal decisions of Webb Fontaine Group FZ – LLC v Public Procurement and Administrative Review Board & 3 others [2020] eKLR, Henry Asava Mudamba v Institute of Certified Public Accountants of Kenya [2015] KECA 171 [KLR] and Pharmacy and Poisons Board v George Wang'anga & 5 others [2020] KECA 775 [KLR].

39. The ex parte applicant contends that the debarment proceedings were conducted in a manner that violated its right to fair administrative action. In particular, it argues that the 1st respondent proceeded with the hearing despite the interested party, who had lodged the request for debarment, failing to appear or prosecute the application for debarment. According to the exparte applicant, this not only deprived it of the opportunity to confront and test the veracity of the allegations made against it, but also placed the Debarment Committee in the impermissible position of acting as a complainant.

40. In response to this accusation, the respondents acknowledge that the interested party, although duly served, was not present during the oral hearing as directed by the Debarment Committee. They nevertheless maintain that the debarment proceedings were fair and that the Committee is not bound by the strict rules of evidence and procedure. It is their position that the Debarment Committee was entitled to proceed and determine the matter on the basis of the material on record.

41. The question is, what is the effect of the Debarment Committee proceeding to hear and determine the merits of an application for debarment of the exparte applicant, without the participation of the initiator of the debarment proceedings and where such initiator literally abandoned its own case and left it to the exparte applicant and the Debarment Committee?

42. While it is correct that the Debarment Committee, being a quasi-judicial administrative body, is not bound by strict rules of evidence, that does not mean that it may disregard foundational principles of fair hearing and impartial adjudication. The law does not permit a situation where a party who initiates a complaint fails to substantiate it through evidence and or participation, even if the matter is not heard by way of viva voce evidence, only for the tribunal to then assume the burden of prosecuting

the matter on behalf of the initiator of the complainant. The role of a decision-making tribunal must remain distinct from that of an accuser or complainant. There are no two ways about that.

43. The legal principle that he who claims must prove as codified in Section 107 of the *Evidence Act* is static, and remains on the claimant throughout the trial. It is the duty of the claimant to prove his case on a balance of probabilities. The section provides as follows;

    107. Burden of proof.

        [1] Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

44. In the case of Stephen Gachau Githaiga & another v Attorney General [2015] KEHC 655 [KLR], the Court observed as follows:

> " Again, in the case of Trust Bank Limited v Paramount Universal Bank Limited & 2 Others [16] the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings."

45. The Court of Appeal in an earlier case CMC Aviation Ltd v Kenya Airways Ltd [Cruisair Ltd] [1978] eKLR stated that:

> " The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven. Averments in no way satisfy, for example, the following definition of "evidence" in Cassell's English Dictionary, p 394:
>
> Anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.
>
> "The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."

46. The court in the case of *Be Energy Limited v Dorine Emily Akinyi Okeno t/a Regold Etipet Enterprises [Civil Appeal E213 of 2023]* [2024] KEHC 7721 [KLR] [25 June 2024] [Judgment] observed thus:

> " The appellant's counsel also cited the case of CMC Aviation Ltd v Kenya Airways Ltd [Cruisair Ltd] [1978] eKLR where Madan JA stated that:
>
> "The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence.
>
> "I have taken the liberty to read the above decision which is very precise and this is what led to the above statement by Madan JA:

> "The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy, for example, the following definition of "evidence" in Cassell's English Dictionary, p 394:
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>
> In the Australian case, Re Williams Bros Ltd [1928] 29 SRNSW 248, Harvey CJ said: "To give evidence in my opinion means to make statements on oath before a person duly authorized to administer an oath".
>
> "The above decision as captured verbatim is clear that pleadings only become evidence if they are admitted and once admitted by the adverse party, then they become evidence which need not be proven by other evidence."

47. The implication of the above decisions is that once the interested party herein, the Judiciary, failed to participate in the hearing of the debarment proceedings, the allegations raised against the exparte applicant in the request for debarment were unproven.

48. it follows that the Debarment Committee's reliance on the contents of that request, absence of any submission on the part of the interested party initiator of the request for debarment to prosecute the application/ request for debarment, effectively converted the Debarment Committee into a complainant, prosecutor and judge, roles that it has no legal authority to assume simultaneously.

49. This Court's finding is that, the decision by the Debarment Committee to proceed and render adverse findings against the exparte applicant in such circumstances fell short of the constitutional guarantees under Articles 47 and 50 of *the Constitution* and violated the exparte applicant's legitimate expectation that the Debarment Committee will hear the accuser and the accused before rendering a decision.

50. Further, Regulation 22[5] of the Public Procurement and Asset Disposal Regulations, 2020 envisions that the Debarment Committee shall hear and determine debarment proceedings in accordance with the rules of natural justice. It follows therefore, that the Debarment Committee cannot hide under the rubric that it is not bound by the strict rules of evidence in its determination.

51. The exparte applicant is asking, "where is my accuser?" as such, the Debarment Committee not being the accuser cannot assume that role and at the same time be the impartial adjudicator. By doing so, the Debarment Committee became a judge in its own cause, thereby violating the foundational tenets of natural justice, procedural fairness and the adversarial system of adjudication.

52. The rule against being a judge in one's own cause, nemo judex in causa sua, is a cardinal rule of natural justice. An adjudicative body must maintain impartiality and that impartiality is compromised when it proceeds to adjudicate a matter on behalf of an inactive or absent party.

53. The Kenyan legal system, like many common law jurisdictions, operates on the adversarial model, where the parties are responsible for presenting their respective cases. The court or tribunal's role is to adjudicate based on the evidence and arguments provided, not to fill the gaps left by an absent or indolent complainant.

54. As was stated in Birkett v James [1977] 2 ALL ER 801, cited by R.N. Nyakundi J in Wasike v Mogire [Civil Appeal E197 of 2022] [2024] KEHC 7195 [KLR] [19 June 2024] [Ruling]:

> " To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so required [which will frequently be the case] the courts will dismiss the action. The evidence which was relied on to establish the abuse of process may be the Plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v James. In this case once the conclusion was reached that the reason for the delay were [Sic] one which involve abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court were [sic] entitled to dismiss the proceedings."

55. The learned Judge in the above Wasike v Mogire [supra] case concluded that indolent litigants are no longer permitted to file cases for the sake of it which do not serve the interests of justice.

56. In the Nigerian case of Suberu v The State [2010] LPELR-3120[SC]; [2010] 8 NWLR [Pt. 1197] 586, the Supreme Court stated that:

> " A Judge should not descend into the arena. A Court has no duty to bridge the yawning gap in the case of a party."

57. Similarly, in Elike v Nwokwoala & Ors.[1984] LPELR-1118[SC]. The issue was whether a Judge can take over from counsel the conduct of counsel's case. The Supreme Court of Nigeria held that:

> " A Judge who takes over from counsel the conduct of the case of either party to the conflict, is no more an impartial Judge, but a combatant in the fray, unworthy of his appointed seat." Per Aniagolu,JSC. [P.13,].

58. In other words, it is not for the court or tribunal to breathe life into a moribund claim. That responsibility rests with the claimant. The Court or tribunal cannot, therefore, be expected to enter the arena of conflict and play the role of both litigant and judge/adjudicator.

59. In these judicial review proceedings, despite being served with the application and the court's directions, the interested party neither responded nor participated in the challenge against the decision which was rendered in its favour by the Debarment Committee, so as to defend that impugned decision.

60. Finally, it is important to note that one of the core tenets of natural justice is that a party must be given a fair opportunity to challenge and test the case made against them. Where no such case is actively made, there is nothing for the respondent to answer. In this case, therefore, it follows that the Debarment Committee had a duty to dismiss the request for debarment for want of prosecution once it became clear that the interested party was not participating in the request for debarment.

61. To hold otherwise would be to set a very dangerous precedent where parties file pleadings and abandon them only for courts and tribunals to render decisions against those accused, without hearing the accuser. What that translates into is that the burden of proof is shifted to the accused/ respondent to establish their innocence in the accusations against them. That is not what the law envisages in proceedings of this nature.

62. Taking all the above into account, I find and hold that the Debarment Committee's determination cannot be said to have met the threshold of procedural fairness required under both *the Constitution* and the *Public Procurement and Asset Disposal Act*. The process was fundamentally flawed as it failed to provide the exparte applicant a fair and impartial forum and violated settled principles on the burden and standard of proof.

63. For the above reasons I find and hold that the application dated 13th June 2025 is merited. I make the following orders:

    a. An order of Certiorari is hereby issued removing into this Court for purposes of quashing and I hereby quash the 1st respondent's decision dated 29th May 2025 in the request for debarment No. 3 of 2025, debarring the applicant from undertaking procurement services for a period of three [3] years from the date of the said decision.

    b. The said decision is declared null and void ab initio.

    c. Having quashed the impugned decision, there is nothing left for implementation. I therefore shall not grant prohibition as sought.

    d. Each party shall bear its own costs, noting that the interested party author of the request for debarment never participated in these proceedings.

    e. This file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF JULY, 2025

R.E ABURILI

JUDGE