



Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Electricity Generating Company Plc & 2 others (Interested Parties); Sinopec International Petroleum Service Corporation (Exparte) (Judicial Review Miscellaneous Application E128 of 2023) [2024] KEHC 16676 (KLR) (Judicial Review) (4 January 2024) (Judgment)

Neutral citation: [2024] KEHC 16676 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E128 OF 2023
JM CHIGITI, J
JANUARY 4, 2024

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD RESPONDENT

AND

THE ACCOUNTING OFFICER, KENYA ELECTRICITY GENERATING COMPANY PLC INTERESTED PARTY

AND

SINOPEC INTERNATIONAL PETROLEUM SERVICE CORPORATION EXPARTE

AND

KENYA ELECTRICITY GENERATING COMPANY INTERESTED PARTY
JV LEX OIL FIELD SOLUTIONS LIMITED & EPCM CONSULTANTS SA (PTY) LIMITED INTERESTED PARTY



JUDGMENT

1. The application before this Court is the Ex parte Applicant's Notice of Motion application dated November 24, 2023. The application is supported by a Statutory Statement dated 23rd November, 2023 and the Verifying Affidavit of Jiawei He which is sworn on even date.
2. The Motion seeks the following orders;
 1. An order of Certiorari to be issued to bring into the High Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board dated 17th November, 2023 in Review Application No.84 of 2023 in regard to Tender No. KGN-GDD-056-2023 for the Procurement of Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olakria 1AU Power Plant.
 2. An order of Mandamus be issued compelling the Respondent to re-hear PPARB Application No.84 of 2023 by a different panel of board members and consider all the grounds raised therein by the Applicant in the Request for Review and submissions filed and exchanged amongst the parties.
 3. An order of Prohibition be issued prohibiting the 1st and 2nd Interested Parties from awarding Tender No. KGN-GDD-056-2023 for the Procurement of Connection of Makeup Wells OW-50A, OW-50B, OW-50C to Olakria 1AU Power Plant and signing any contract with the 3rd Interested Party pending re-hearing and determination of PPARB Application No.84 of 2023,
 4. Such further and other reliefs as the Honourable Court may deem just and expedient to grant.
 5. Costs of this application be provided for.
3. The Ex parte Applicant before this Court seeks to challenge the Respondent's decision delivered on 17th November, 2023 on several grounds as will be set out herein below.
4. Aggrieved by the 1st and 2nd Interested Party's decision to award Tender No. KGN-GDD-056-2023 to the 3rd Interested Party, the Ex parte Applicant filed a Request for Review Application dated 27th October, 2023 before the Respondent.
5. The applicant is said to have largely relied on the provisions of Article 10 and 227(1) of *the Constitution* and Section 3,79,82(1) of the PPADA.
6. Clause 17 of the Instructions to Tenderers (ITT) is said to have provided instructions of Currencies of Tender and Payment.
7. The Clause is said to particularly state as here under;

“Tenderers shall quote entirely in Kenya Shillings. The unit rates and the prices shall be quoted by the Tendered in the Bill of Quantities entirely in Kenya Shillings.”
8. Clause 34.1 of the ITT is also said to have provided thus;

“Tenders will be priced in Kenya Shillings Only. Tenderers quoting in currencies other than Kenya Shillings will be determined non-responsive and rejected.”



9. The 3rd Interested Party is said to have quoted its bid in both Kenyan Currency and United States Dollars and that in a blatant breach of Article 227(1) of *the Constitution*, the principles enunciated under section 3 of the *Public Procurement and Asset Disposal Act* and its own ITT the 1st and 2nd Interested Party went ahead and converted the said United States Dollar sums into Kenya Shillings and then awarded the tender to the 3rd Interested Party for the sum of Kshs.1,138,200,012.34.
10. The 1st and 2nd Interested Parties' actions are said to have been in bad faith and also fallen short of transparency, integrity, accountability and were meant to deliberately tilt the outcome of the tendering process in favour of the 3rd Interested Party.
11. The Respondent through its secretariat is said to have issued a notification of the Request for Review to the Interested Parties who filed their responses together with Preliminary Objections. The Respondent is said to have in its decision upheld the said objections and proceeded to strike out the Applicant's Request for Review.
12. In the said decision the Respondent is said to have stated that the Applicant failed to plead by particularizing, having suffered or risked suffering loss and damage and therefore lacked the locus standi to bring the Request for Review.
13. According to the Applicant this finding was irrational, unreasonable, and unfair and based on misinterpretation of the provisions of Section 167(1) PPADA which it is argued does not require a candidate or a tender to particularize his alleged loss or damage but simply requires a tenderer to "claim" having suffered or risk suffering loss or damage.
14. Further, the decision is said to have been contradictory as at paragraph 96 the Respondent found that the Applicant had not demonstrated any loss or damage while at paragraph 97 it finds as follows "Accordingly, there has not been demonstrated a connection between the loss alluded to and any breach of a statutory duty on the part of the Respondents". It is contended that the Respondent failed to consider the obvious that violation of the law need not have monetary value so as to demonstrate loss or damage.
15. The Respondent is said to have erred in law when it failed to consider that it has not prescribed any form or manner in which an Applicant in a Request for Review ought to plead that it has suffered loss or damage in the rules that it is legally mandated to develop under section 28(2) of the PPADA.
16. Further that the current form provided for under Regulation 203(1) and the Fourteenth schedule of the Regulations do not provide for any instance where the Applicant can claim loss or damage.
17. The Applicant also argues that contrary to the Respondent's reasoning at paragraphs 112 and 113 of its decision that the Request for Review ought to have been signed by the Applicant and not his Advocates nowhere in the PPADA nor the body of the Regulations thereunder is it required that the Applicant must sign the same and therefore the Respondent's decision to strike out the Request for Review was draconian and not proportionate to the interests and rights of the Applicant that were being affected.
18. The Respondent is said to have misapplied case law in determining the Applicant's Request for Review and elevated distinguishable case law above express provisions of the Act and facts of the matter before it.
19. The Court of Appeal decision of Nairobi Civil Appeal NO.295 OF 2023; Lake Victoria North Water Works Development Agency v Toddy Civil Engineering Company Limited which was an appeal against this court's decision it is argued did not deal with the merits of the decision before the High



Court but the appeal was allowed for the sole reason that the decision of the High Court was delivered outside the 45 days statutory limit provided for under Section 175(3) of the PPADA.

20. The Respondent is said to have acted unfairly and violated the Applicant's right to legitimate expectation in finding that the Applicant's Request for Review was filed outside the 14 days statutory timeline. Further that it employed a narrow and pedantic reading of section 167(1) of the Act solely to drive away the Applicant from the seat of justice.
21. The section is said to use the conjunction "or" in determining when a tenderer ought to file the Request for Review before the Respondent and not the conjunction "and" and as such the Respondent fell into error of law.

Respondent's Response

22. In response the Respondent filed a Replying Affidavit sworn by James Kilaka on 30th November, 2023. In the affidavit the deponent avers that in its decision of 17th November, 2023 it issued the following orders;
 1. The Interested Party's Notice of Preliminary Objection dated 6th November 2023 be and is hereby upheld only in so far as the Applicant lacks the locus standi to bring the Request for Review and that the Request for Review does not conform to Regulation 203(1) of the Regulations 2020.
 2. The Respondents' Notice of Preliminary Objection dated 8th November 2023 be and is hereby upheld only to the extent that the Applicant lacks locus standi to bring the instant Request for Review and that the Request for Review is time-barred.
 3. The Request for Review dated 27th November 2023 be and is hereby struck out.
 4. Given the Board's finding above, each party shall bear its own costs.
23. Further that in arriving at its decision the following issues for determination emanated from the parties' cases, documents and pleadings;
 - i. Whether the Board has jurisdiction to hear and determine the instant Request for Review?
 - ii. Whether the Tender Document in the subject tender permitted tenderers to submit their tenders in a currency other than Kenyan Shillings?
 - iii. Whether the Procuring Entity's Evaluation Committee properly evaluated the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document?
 - iv. What orders should the Board grant in the circumstances?
24. The Respondent is said to have found that it had no jurisdiction and could therefore not determine issue number 2. The deponent also contends that the application before this Court by the Ex parte Applicant is an Appeal disguised as a judicial review application and the court therefore ought to decline to allow it for want of jurisdiction.
25. It is argued that under Section 167(1) of the *Public Procurement and Asset Disposal Act* only candidates and tenderers who plead having suffered loss or risk suffering loss flowing from the breach of statutory duties by a Procuring Entity have the requisite locus to invoke the jurisdiction of the Respondent.



26. The Applicant is was argued was to identify specific statutory duties which in its view had been breached by the Procuring Entity and then to demonstrate the connection between the alleged loss it had claimed to have suffered or risked suffering with the Procuring Entity's breach of the specified statutory duty.
27. The Ex-parte Applicant is said to have fallen short of this and effectively failed to meet the requirements under Section 167(1) of the *Public Procurement and Asset Disposal Act*. The Respondent is said to have made an extensive analysis on the question of pleading loss at paragraphs 88 to 102 of its Decision.
28. The deponent also states that Regulation 203(1) of the Public Procurement and Asset Disposal Regulations 2020 prescribes a form that should be used in presenting a Request for Review before the Respondent. The said form it is averred should be made in the name of a candidate or tenderer and signed by the candidate or tenderer.
29. Further that the only exception is where the Request for Review is brought in the name of the candidate's or tenderer's representative and in which case the representative is permitted to sign it on behalf of the candidate or tenderer. In the Applicant's case the Request is said to have been filed in the name of the Applicant but signed by its advocates.
30. The deponent reiterates that the Applicant's Request for Review was filed out of the 14 days window as is required under section 203(2) of the PPADA. Also, that although Regulation 203(2)(c) of the Public Procurement and Asset Disposal Regulations 2020 identifies 3 alternative benchmark events for computing the 14 days' statutory timeline within which a Request for Review should be filed, knowledge of the breach complained of is the guide on which of the 3 benchmark events applies and to support this argument the case of Nairobi High Court Judicial Review Application No. 102 of 2023 is relied upon.
31. The Request for Review is said to have confirmed that the Applicant's complaint revolved around the date of 13th June 2023, from which date the 14 days' statutory timeline ended on 27th June 2023 and as such, the Ex-parte Applicant's Request for Review having been filed on 27th October 2023 was time-barred.
32. The Respondent is said to have correctly exercised its powers in the Request and was not biased in any way. In addition to this addressed Request for Review No. 84 of 2023 and Request for Review No. 85 of 2023 separately with each having its own Decision even though the two were in respect of the same tender.
33. The Respondent is said to have observed the rules of natural justice in the exercise of its statutory mandate and powers under Section 28 and Section 173 of the *Public Procurement and Asset Disposal Act* respectively. It is also its case that the Applicant has failed to demonstrate any elements of illegality, irrationality, procedural impropriety and/or unfairness in the manner in which the Respondent considered and interrogated the evidence, documents, pleadings, and information before it in arriving at its Decision dated 17th November 2023 and in the manner parties to the Request for Review were notified of the completion of the review of Request for Review application by the Respondent when the Decision dated 17th November 2023 was transmitted to all parties to the Request for Review application via email on 17th November 2023.
34. The deponent in conclusion seeks for the application before this court to be dismissed and that in the event the Honourable Court finds that the instant Application is merited, the same be referred back to the Respondent for determination. Prayer 2 in the Applicant's application is also said to be unmerited and also unsubstantiated.



1st & 2nd Interested Parties' Response

35. The 1st and 2nd Interested Parties in their response sworn on 29th November, 2023 by one Philip Yego argue that the tender processes were carried out in an open, fair, transparent, equitable, competitive and cost-effective manner as stipulated under *the Constitution*, PPADA and the Public Procurement and Disposal Regulations, 2020.
36. The parties argue that the Applicant is guilty of material concealment as it has failed to avail or exhibit their Memorandum of Response to the Request for Review and Replying Affidavit filed before the Respondent in the Request for Review No. 84 of 2023. It is reiterated that the said Request was disallowed on account of failure to meet the tenets of section 167(1) of the PPADA.
37. It is averred that the Applicant's attempt to comply with the said section through paragraph 5 of its Further Affidavit filed on 6th November, 2023 and through a Supplementary Affidavit contained at pages 52-55 of the record was an afterthought intended to defeat or preempt the preliminary objections raised without any application for amendment of the Review application being made, considered and allowed by the Board.
38. It is their case that the Review Board's decision of 17th November, 2023 is a proper interpretation of Parliament's explicit and compulsive language contained in Section 167 (1) of the PPADA and as per precedent from the Court of Appeal the same is binding on the Board and the Honorable Court.
39. The Interested Parties also argue that the foreign currency aspect was not part of the Mandatory Requirements in the Evaluation criteria. Also, that Ex Parte Applicant's Judicial Review application does not meet the threshold required for the grant of reliefs sought and therefore ought to be dismissed with costs.

3rd Interested Party's Response:

40. The 3rd Interested Party filed a Replying Affidavit sworn by Emmanuel Kitusa on 29th November, 2023 and in the affidavit Mr. Kitusa avers that the 3rd Interested Party supports entirely the decision rendered by the Respondent on 17th November, 2023 in PPARB NO. 84 OF 2023. It is also averred that in making the said decision the Respondent was within its mandate as donated by section 173 of the PPADA.
41. The Applicant's application is said to offend the provisions of Order 53 Rule 1 of the Civil Procedure Rules, 2010 and therefore is incompetent and incurably defective. It is also contended that breach of the Act and Regulations that invoke the jurisdiction of the Review Board and which deny an applicant locus standi cannot be cured by the provisions of Article 159(2)(d) of *the Constitution* as locus standi is a jurisdiction question and not a procedural technicality.
42. The deponent also depones that his understanding of paragraph 97 of the Respondent's decision is that the Review Board held that there was no nexus between the costs incurred in preparing the tender and breach of any of the provisions of the Act and Regulations by the Respondents.

Submissions By Parties.

43. The Applicant in its submissions identifies three issues for determination and these are; Whether the Respondent's decision is tainted with error of law, unreasonableness, irrationality, illegalities and unfairness, whether the Respondent exceeded its jurisdiction in reaching its findings, whether the Request for Review was filed out of time.



44. The Ex parte Applicant submits that for a judicial review court to determine whether an administrative body or a body exercising a quasi-judicial authority acted reasonably, the court must examine some measure of merit analysis. The Court of Appeal case of *Judicial Service Commission & another v Njora, Civil Appeal 486 of 2019* [2021]KECA 366 (KLR) is cited to further buttress this argument.
45. It is also submitted that judicial review is not static and its parameters have evolved. Judicial Review is said to be a constitutional remedy and therefore the court ought to look at a merit review of the impugned decision to determine whether the Respondent acted unreasonably, unfairly, irrationally and committed an error of law.
46. The Applicant further submits that the primary rule of interpretation of a statute is that words of a statute must be interpreted in their ordinary, plain and literal meaning and therefore the word used under section 167(1) of the Act is “claims”. It is argued that there was no absurdity in the word claim so that the Respondent could introduce the new threshold of “particularizing” the claim. This is said to have been an error of law, unreasonable and irrational.
47. The Applicant cites the case of Equity Group Holdings Limited vs Commissioner of Domestic Taxes [2021] eKLR where the Court went ahead to clarify on when there is need for interpretation of a statute. The court states in part as follows; “The need of interpretation arises only when the words used in the statute are on their own term, ambivalent and do not manifest the intention of legislature”. It is submitted that there is no ambivalence in the words used under section 167(1) of the Act.
48. The Respondent is said to have taken into account irrelevant considerations, and was also unreasonable and irrational in arriving at its impugned decision. The Respondent is also said to have acted unfairly towards the Ex parte Applicant by finding that it had no locus standi to bring the Request for Review. The case of Republic v The Public Procurement Administrative Review Board & Another ex parte Meru University of Science & Technology, Misc. Civil App. No. 85 of 2018 is referred on what constitutes unreasonableness.
49. The Respondent is said to have ignored the excerpt of the minutes of the Ex parte Applicant that were annexed to the Supplementary Affidavit of Jiawei He as exhibit JH 6 where the Directors of the Ex parte Applicant had appointed the firm of Mogire Hezron & Co. Advocates as its Advocates with full authority to represent the Ex parte Applicant before the Respondent. Therefore, the said Advocates had authority to act.
50. The Respondent is said to have declined to strike out a Request for Review for failure of being signed by the Applicant in its recent decision in Star Discover Insurance Limited vs County Chief Officer-Public Service, Nairobi City County Government & 3 others, Application No. 47 of 2023. In the said decision the Respondent is said to have held that where form has been prescribed by a written law, a document or statutory instrument which purports to be in such form shall not be void due to a deviation which is not calculated to mislead or which subsequently does not affect the substance of the document or statutory instrument. It is argued that the Respondent ignored Section 26(2) of the *Statutory Instruments Act* and Section 72 of the *Interpretation and General Provisions Act*.
51. The Applicant refers to the case of Kenya Ports Authority v Kenya Power & Lighting Co. Ltd [2012] eKLR where the court held that “ “procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law” .
52. It is the Applicant’s submission that the Interested Parties did not state that they had been prejudiced by the Ex parte Applicant’s advocate signing the Request for Review neither was the Respondent prejudiced in any way. The Applicant also submits that the same did not affect the Respondent’s



jurisdiction in any way. The Respondent is said to have acted unreasonably by ignoring precedence from the Court of Appeal dealing with rules of procedure.

53. The Applicant refers to the cases of Microsoft Corporation v Mitsumi Computer Garage Ltd & another [2001] eKLR and Dhanjal Investments Limited v Kenindia Assurance Company Limited where both courts opted not to dismiss the said suits on account of what they referred to as technicalities.
54. The Respondent it is submitted found it did not have jurisdiction to entertain the Request for Review and therefore, it could not purport to determine anything else. Also, that the question of time of filing the Request for Review ought to have been determined first and not at the tail end of the Respondent's decision.
55. The Respondent it is argued ought not to have pronounced itself on other issues such as the signing of the Request for Review by the Applicant's Advocates. It is said to have clearly exceeded its jurisdiction.
56. The Ex parte Applicant argues that its Request for Review was filed within time as it received a letter dated 16th October, 2023 from the 1st and 2nd Interested Party notifying it that it was unsuccessful in the Tender it had bid for which prompted it to file the Request for Review on 27th October, 2023 which was on the 11th day. It is submitted that there was no breach committed by the 1st and 2nd Interested Party during the tender opening on 13th June, 2023 to warrant moving the Respondent.
57. It is the Applicant's submission that the tender opening committee does not have a role in evaluation of the tenders and therefore, on 13th June, 2023 when the tenders were opened, the tender opening committee simply read out the tender prices as submitted by the tenderers. There was no evaluation of tenders and therefore, no breach committed by the 1st and 2nd Interested Parties which the Ex parte Applicant could be expected to file a Request for Review on.
58. The Respondent is said to have in the case of Elijah Nabea Mukaria vs. The Accounting Officer, Kenya Broadcasting Corporation, Application No.26 of 2020 dismissed Elijah's request for review on grounds that the same was a fishing expedition as the Procuring Entity was yet to conclude the Evaluation process. In this case the Applicant is said to have filed the Request for Review shortly after opening of tenders and before the evaluating committee could begin evaluating the tenders.
59. The Applicant argues that if it had filed its Request for Review before evaluation of tenders the same fate would have befallen it.
60. It is the Applicant's submission that the Respondent did not find that Request for Review No.85 of 2023 which raised similar grounds as those raised by the Applicant in its Request for Review had been filed out of time yet both Requests were filed on the same day.

Respondent's Submissions

61. The Respondent in its submissions urges that the ex-parte applicant's motion is essentially a review of the merits of the decision of the Respondent and that for all intents and purposes though it is framed as a judicial review application it is seeking to improperly invoke an appellate jurisdiction of the High Court.
62. The Applicant is faulted for failing to establish that the Respondent acted unreasonably, irrationally or with misapprehension of the law. The Respondent cites the case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 in which the Court citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 set out the grounds upon which an application for judicial review would succeed.



63. The Respondent also cites the case of Republic v Public Procurement Administrative Review Board Ex parte Giant Forex Bureau De' Change Limited & 2 others [2017] eKLR where the Court held thus "That misapprehension, or error of law or fact, however, is not an issue within the judicial review purview of this court".
64. It is submitted that the Applicant is seeking this court to review the merits of the decision of the Respondent and further that it is asking this court to substitute the decision the Respondent arrived at procedurally, with that of this Honorable Court. The Respondent further submits that the Courts have previously held that judicial review jurisdiction should not act as the Court of Appeal. The cases of Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd [2002] eKLR and Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 together with Peter Kaluma's Judicial Review, Law Procedure and Practice at page 46 are cited in this regard.
65. The Respondent also cites the Court of Appeal case of Pipeline Ltd vs. Hyosung Ebara Company Ltd [2012] eKLR and Republic vs. Public Procurement Review Board & 2 Others ex-parte Numerical Machining Complex Limited [2016] eKLR where the Courts spoke to the powers conferred upon the Respondent as stipulated under section 98 of the PPADA.
66. The Respondent further refers to the case of Republic v Public Procurement Administrative Review Board Ex parte Giant Forex Bureau De' Change Limited & 2 others [2017] eKLR where the Court held as follows;
- "I find that the applicant has not established that it is entitled to the prayers sought. There is no challenge to the legality of the decision of the Review Board and neither has the applicant challenged the procedure adopted by the Review Board in arriving at the impugned decision. Accordingly, I proceed to dismiss the application for judicial review and order each party to bear their own costs of the chamber summons for leave and for these judicial review proceedings."
67. On the Order of Mandamus, the Respondent cites the cases of Republic vs National Employment Authority & 3 Others Ex-Parte Middle East Consultancy Services Ltd (2018) eKLR and Kenya National Examination Council Vs Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR. It is argued that there is no defect of justice and no specific legal duty owed to the Applicant to warrant issuance of the order.

Interested Parties' Submissions.

68. The 1st and 2nd Interested Parties in their submissions cite the case of County Government of Nyeri & Another vs. Cecilia Wangeci Ndungu [2015] eKLR where the Court of Appeal stated that "the cardinal rule for construction of a statute; that is, a statute should be construed according to the intention expressed in the statute itself".
69. The Applicant is said to have failed to comply with Section 167(1) whose minimum/basic threshold requirement is a claim to having suffered loss or damage or risk suffering loss of damage due to breach of a duty imposed on the procuring entity. Further that in the absence of an application for amendment being made and allowed incorporating the stated minimum requirements the Applicant was deprived of locus to continue with the application before the Board.



70. In support of this argument the case of James Oyondi t/a Betooyo Contractors & Another v Elroba Enterprises Limited & 8 Others [2019] eKLR is cited where the Court held as follows;

“.....on the second issue as well, the learned judge cannot be faulted. It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of 3 section 167(1) of the PPADA;....

...its seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at risk of suffering loss or damage.”

71. The 1st and 2nd Interested Parties also submit that the Applicant’s Further Affidavit filed on 6th November,2023 was rejected by the Respondent as it neither amounted to a pleading nor an amendment of the Request for Review Application No.84 of 2023. The case of Stephen Boro Githua v Family Finance Building Society & 3 Others [2015] eKLR is cited in support of this argument where the Court stated that an Affidavit is not a pleading and therefore cannot be subject to amendment as it is evidence.

72. The parties also refer to the Supreme Court case of Law Society of Kenya v Communications Authority of Kenya & 10 Others [2023] eKLR where the Court cited with approval Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR where it was held that the issue of Locus standi raises a point of law which touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity.

73. It is submitted that in the present matter on the cause of action that arose on 17th October 2023 upon ,notification of the successful and unsuccessful tenderers, then, averments in the Further Affidavit filed on 6th November 2023 and Supplementary Affidavit filed on 8th November 2023 if treated as a pleading are deemed time barred as a lawful Request for Review that meets the threshold ought to have been filed within fourteen (14) days by 27th October, 2023 and not thereafter.

74. The Ex parte Applicant it is contended in the Request for Review Application is said to have had knowledge that on 13th June, 2023 during tender opening that the 3rd Interested Party had quoted her Bid in both Kenya Shillings and US Dollars. The cause of action on the issue of currency is said to have therefore arose on 13th June, 2023 and time started running over the same effective 14th June, 2023.

75. It is also the 1st and 2nd Interested Parties’ case that both Request for Review applications No. 84 and 85 of 2023 were struck out by the Board pursuant to Preliminary Objections raised.

76. The 1st and 2nd Interested Parties also contended that as is evidenced in the Chamber Summons dated 23rd November,2023 leave that was sought and granted was only for the institution of proceedings seeking an order of certiorari none was sought or granted in relation to the orders of mandamus and prohibition.

77. The case of Khobesh Agencies Limited & 32 Others vs. The Minister of Foreign Affairs & International Relations & 4 Others [2013] eKLR is cited where the Court held as follows;

“ Again, where leave is granted to apply for a particular relief, it is that relief that the applicant is entitled to seek in the substantive Motion and he cannot be allowed to seek a relief for which leave was neither sought nor granted. This is so because an application for judicial review can only be granted where leave of the court has been sought to apply for a particular



relief. Accordingly, a relief for which leave to apply therefor was not sought cannot be granted.”

78. The 3rd Interested Party in its submissions dated 6th December, 2023 submits that judicial review is concerned with the decision-making process as opposed to the merits of the impugned decision as was held by the Court in *R vs. Disciplinary Committee & Another Ex parte Daniel Kamunda Njue* [2016] eKLR.
79. The Interested Party also argues that the Applicant has not met the threshold for grant of the orders sought as it neither sought or obtained leave to apply for orders of mandamus and prohibition and also because it has failed to demonstrate that the Respondent’s decision is irrational, took into consideration irrelevant considerations, acted in error of law, acted unfairly, acted illegally and/or violated the Applicant’s legitimate expectation.
80. The 3rd Interested Party cites the case of *Republic vs. Chief Magistrate Milimani Commercial Courts & 2 Others Ex parte Fredrick Bett* [2022] eKLR where the Court struck out the chamber summons application on grounds that it sought substantive judicial review orders without leave having been sought.
81. The party further cites Lord Diplock in the *Council of Civil Servants* case on the meaning of illegality and *Nyamweya (J)* as she then was in the case of *Republic vs. Public Procurement Administrative Board; Kenya Power & Lighting Company Limited (Interested Party) Ex parte Transcend Media Group Limited* [2018] eKLR on determining whether or not the Board acted in error of law.
82. It is the 3rd Interested Party’s submission that even if the Respondent committed an error of law, the said error would not have affected the final outcome of the matter. The Halsbury’s Laws of England 4th Edition at paragraph 77 page 170 is cited where it is stated that “The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself”.
83. The Courts it is submitted have held as in the cases of *Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR and in *Raila Odinga v IEBC & 2 Others* [2013] eKLR that Article 159 of *the Constitution* is not a panacea to all procedural improprieties.
84. It is submitted that different from our instant case the Applicant in *Star Discover Insurance Ltd vs. County Chief Officer-Public Service, Nairobi City County Government & 3 Others* which was referred to by the Ex parte Applicant herein had expressly appointed the advocates to act for it.
85. The 3rd Interested Party also submits that Section 173 of the PPADA enumerates the powers of the Respondent and further that under Part XV of the Act the Respondent has powers to review decisions made by procuring entities through their evaluation committees. Further that in determining an application for review, the Respondent may be called upon to determine a preliminary objection filed pursuant to Regulation 209(1) of the Regulations.
86. The Court in the case of *Republic vs. Public Procurement Administrative Review Board & 2 Others Ex parte Kemotrade Investment Limited* [2018] eKLR is said to have adopted the test of discoverability which means time for purposes of filing a request for review started to run when the applicant discovered the alleged breach. This is also said to have been the Respondent’s position in the *Star Discover Insurance Ltd* case (*supra*).
87. According to the 3rd Interested Party legitimate expectation must be anchored in law. The Applicant’s legitimate expectation is said to have been extinguished by operation of section 167(1) of the Act, want



of jurisdiction. On legitimate expectation the H.W.R Wade & C.F. Forsyth at pages 449 and 450 is cited.

88. The 3rd Interested Party also cites the case of Republic vs. Nairobi City County[2019] eKLR where the court emphasizes that a decision maker cannot be required to act against clear provisions of statute just to meet one's expectations.
89. It is the Interested Party's submission that Application No. 26 of 2020; Elijah Nabea Mukari vs The Accounting Officer, Kenya Broadcasting Corporation cited by the Applicant is different in the sense that in the said case there was no breach that had been committed. Further that the Applicant sought a declaration that he was the successful tenderer.
90. The 3rd Interested Party also submits that the mere fact that the Respondent did not address a particular issue in a totally in a different matter is not evidence of bias.
91. The case of Republic v Public Procurement Administrative Board & 2 Others; Ex parte Central Kenya Fresh Merchants Limited [2018] eKLR is cited on the discretionary nature of judicial review matters.

Analysis And Determination

92. The Court has taken into consideration the Parties' respective cases and it finds that the following issues arise for determination;
 - a. The issue of jurisdiction:
 - b. The issue of leave
 - c. Whether the Application meets the standards of a merit analysis
 - d. Failure to plead loss likely to be suffered

The issue of jurisdiction:

93. In the classic case of Samuel Kamau Macharia Vs KCB & 2 Others, (2012) eKLR the Court held that:-

“ A Court's jurisdiction flows from either *the Constitution* or Legislation or both and that the court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law.
94. This Court has jurisdiction as provided under Article 165 of *the Constitution*, 2010 and Section 175(1) of PPADA to hear and determine the matter before it.

Issue of leave:

95. At the leave stage in its Chamber Summons application dated 23rd November, 2023 the Applicant sought the following reliefs:
 - “ 1. This Honourable Court be pleased to certify this matter urgent and direct that the same be heard ex-parte in the first instance.
 2. Leave be granted to the Applicant to apply for the Judicial Review order of Certiorari to bring into the High Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board dated the 17th November, 2023 in Review Application No. 84 of 2023 in regard to Tender No. KGN—GDD-056—2023 for the Procurement of Connection



of Makeup Wells OW—50A, OW-50B and OW-50C to Olkaria 1AU Power Plant.

3. The leave so granted do operate as an order prohibiting the 1st and 2nd Interested Parties from awarding Tender No. KGN—GDD-056-2023 for the Procurement of Connection of Makeup Wells OW—50A, OW-50B and OW-50C to Olkaria 1AU Power Plant and signing any contract with the 3rd Interested Party pending hearing and determination of the Judicial Review Application.
4. An order of Mandamus be issued compelling the Respondent to re-hear PPARB Application No. 84 of 2023 by a different panel of board members and consider all the grounds raised therein by the Applicant in the Request for Review and submissions filed and exchanged amongst the parties.
5. An order of prohibition be issued prohibiting the 1st and 2nd Interested Parties from awarding Tender No. KGN—GDD-056—2023 for the Procurement of Connection of Makeup Wells OW—50A, OW—50B and OW-50C to Olkaria 1AU Power Plant and signing any contract with the 3rd Interested Party pending re-hearing and determination of PPARB Application No. 84 of 2023.
6. Such further and other reliefs as this Honourable Court may deem just and expedient to grant.”

96. The requirement to seek for leave to file for judicial review orders is provided for under Order 53 Rule 1 of the Civil Procedure Rules which stipulates in mandatory terms that no application for an order of mandamus shall be made unless leave therefore has been granted in accordance with the rule.
97. The Applicant in its Chamber Summons application sought the court’s leave to move the court for an order of Certiorari. It did not seek the leave of the court to institute the suit for the orders of Mandamus and Prohibition.
98. At the leave stage all the applicant has to show is not only that its case might turn out to be, an arguable case. In exercise of its discretion, this court has the duty to determine whether or not the Applicant has made out a case that has the potential of fitting into a case that is within the *Fair Administrative Action Act* framework.
99. At the leave stage, the Applicant has to satisfy the court that there is a need to delve deeper into its case so as to establish that the respondent has acted ultra vires, irregularly or through procedural impropriety.
100. An applicant who wants the court to grant them leave so as to advance into the substantive phase of their case must demonstrate that they have a case that falls within the remit of Article 47 of *The Constitution*.
101. The standards and the burden of proof at the leave stage is not the same as what presents at the substantive hearing phase. All that the court has to do at the leave phase is to carry out an initial assessment of what the applicant has presented before it.
102. No doubt, an applicant who misleads the court and/or fails to disclose to the court the truth simply exposes their case to the calamity of a dismissal when the truth comes out at the substantive hearing phase when the real merits of the case are assessed and determined.



103. During the leave stage an applicant owes the court a duty of full candid disclosure of all the facts. An applicant who seeks to steal a match at the ex parte leave stage through an intentional scheme, ill motive and material non-disclosure plants a rotten seed that will poison their case in due course.
104. In *IRC V National Federation of Self-Employed and Small Businesses Ltd* (1982) 617, (1981) 2 ALL ER 93 Lord Diplock explained the need for leave as follows:
- “Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”
105. It would therefore appear that the reasons for leave are two-fold and that is number one to save the court’s time and, two, so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed with their operations.
106. In the same case, Lord Scarman saw the need for leave as ‘an essential protection against abuse of legal process’. In his words, “it enables the court to prevent abuse by busybodies, cranks and other mischief makers”. (see pages 653 and 113).
107. On his part, Woolf LJ referred to the need for leave, in the same case, as ‘the unique statutory means by which the court can protect itself against abuse of judicial review’. In order to avoid from delving into the merits of the case, Lord Diplock, in *IRC V National Federation of Self-Employed and Small Businesses Ltd* (supra) suggested the following approach.
- “If, on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.”
108. The question of whether a case is arguable or not may occasionally require a light interrogation of the case’s merits. This type of questioning should not be done in a manner that will determine whether the Applicant will win or fail. The questioning must be very conservative and limited in nature, only going as far as is required to decide whether the matter can be argued, and nothing beyond. It is from this perspective that I have considered the applicant’s application.
109. In the case of *Khobesh Agencies Limited & 32 Others v The Minister of Foreign Affairs & International Relations & 4 Others* the Court held:-
28. “...Again where leave is granted to apply for a particular relief, it is that relief that the applicant is entitled to seek in the substantive motion and he cannot be allowed to seek a relief for which leave was neither sought nor granted. This is so because an application for judicial review can only be granted where leave of the court has been sought to apply for a particular relief. Accordingly, a relief for which leave to apply therefor was not sought cannot be granted.”
110. The Notice of Motion is therefore incompetent and fatally defective in so far as it seeks orders of Mandamus and Prohibition without leave of this honorable court. The prayers for orders of Mandamus and Prohibition shall not be entertained by this honorable court and the same are hereby struck out.



111. In the circumstances, the court will limit itself to the prayer for an order of Certiorari be issued to bring into the High Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board dated the 17th November, 2023 in Review Application No. 84 of 2023 in regard to Tender No. KGN–GDD-056-2023 for the Procurement of Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olkaria 1AU Power Plant survives.
112. The grounds upon which judicial review orders can be granted were stated in the Ugandan case of *Pastoli Vs. Kabale District Local Government Council and Others* [2008] 2 EA 300 where the court held thus:

“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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission.

...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 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.”

Whether the Application meets the standards of a merit analysis

113. The applicant has invited this court to carry out a merit analysis.
114. The Applicant relies on the Court of Appeal case of *Judicial Service Commission & another v Njora, Civil Appeal 486 of 2019* [2021] KECA 366 (KLR).
115. This court is aligned to the fact that the scope of judicial review has now expanded beyond the common law principles, the *Law Reform Act* and Order 53 of the Civil Procedure Rules and it has now been entrenched under Article 23 of *the Constitution* as well as the Fair Administrative Actions Act.
116. Recently, the Supreme Court in *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) held at paragraph 85 that:

“It is clear from the above decisions that when a party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the Court can only



limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se.”

117. In the instant case The Applicant has given a mere recital of Articles 23(3), 47, 221 and 227(1) of *the Constitution* of Kenya without more. This cannot elevate this suit into a constitutional and human rights case. A party who invites the court to determine whether or not a right has been violated and or been infringed in the procurement journey has to go beyond the mere mention of the Articles of *the Constitution* or the Sections of the Law they are relying on in the heading of their suit.
118. A litigant who wants the judicial review court to do substantive or a merit analysis of their case must demonstrate how the right was threatened or violated with precision so as to enable the Respondent to counter the allegation within Article 24 of *the Constitution* of Kenya. The issues for determination must resonate with the question of whether the concerned right has been violated or not.
119. Just like in other cases, the burden of proof rests on he who alleges that there is a violation within the standards of the constitutional rights litigation. The litigant must articulate and canvass its case in such a manner that will allow the court to determine the violation question with a view to arriving at an informed decision that the litigant has suffered harm, prejudice or damage. The Applicant who is inviting or expecting the court to carry out a merit analysis must drive the court towards granting a relief by way of compensation within Section 11 of the *Fair Administrative Action Act*. The merit analysis must not be done in vain.
120. The applicant must also demonstrate through evidence that the Respondent violated the concerned rights or that the tendering process offended the law.
121. I find that the Ex parte applicant has not fulfilled nor met the standards that would call for a merit analysis and I so hold.
122. The *Fair Administrative Action Act* looks at the 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 and not the merits of the case.
123. Judicial review focuses on finding out whether the impugned decision or act complained of is tainted with illegality, irrationality and procedural impropriety. In order to persuade the court to go beyond this scope, a litigant has to satisfy the court that its case falls within the exceptions as enunciated in The Edwin Dande Case.
124. The Applicant before this court has failed to meet the said threshold and the court is not satisfied that the same qualifies as such.
Failure to plead loss likely to be suffered
125. Section 167(1) of the Act provides as follows:
“ 167. Request for review
(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review.”
126. In its decision dated 117th November,2023, the Respondent struck out the applicant’s request for review on the ground that the Applicant lacked locus standi to bring the Request for Review for failure



- to incorporate in its pleadings a claim of having suffered or being at the risk of suffering loss or damage in line with the provisions of section 167 (1) of the Act.
127. The word used under section 167(1) of the Act is “claims”. The Respondent introduced the new threshold of “particularizing” the claim.
128. The Court of Appeal in *James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited & 8 others* [2019] eKLR, held as follows;
- “It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review...”
129. The Respondent stated as follows at paragraph 93;
- “It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review...”
- “Upon careful study of the above paragraph, it is clear to the Board that the Applicant failed to plead having suffered or risked suffering loss and damage. The above paragraph simply states in general terms that the Applicant’s competitive position was affected without any particulars.”
130. In *Republic –vs- Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Ex Parte Transcend Media Group Limited* [2018] eKLR, Nyamweya J (as she then was) held as follows on the meaning of error of law;
- “In determining whether or not the 1st Respondent acted in error of law, regard is made to the description of illegality by Lord Diplock in *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 374 at 410 as a failure by a public body to understand correctly the law that regulates its decision-making power, or a failure to give effect to that law.”
131. At paragraph 97 of its decision, the Respondent found that, ...“Accordingly, there has not been demonstrated a connection between the loss alluded to and any breach of a statutory duty on the part of the Respondents”.
132. Before rendering the impugned ruling on 17th November 2023, the respondent was seized of the Applicant’s Further Affidavit Filed on 6th November 2023 contained at pages 41 – 51 and a Supplementary Affidavit at paragraphs 6 and 7 contained at pages 52 – 55 which set out the loss likely to be suffered by the Applicant.
133. The respondent’s reference to the loss alluded to in its ruling simply means that it was satisfied that the claim for the loss existed at the minimum and all that was left was for the applicant to prove the loss at a later stage after the Preliminary objection points of law.
134. Unfortunately, the foregoing cannot salvage the applicant’s case once it is placed through the jurisdiction prism as provided for under Section 167 (1) of the PPADA 2015.
135. Section 167 (1) of the PPADA2015, provides that the filing of a competent Request for Review Application ought to be filed within 14 days from the date when the cause of action arose.



136. The cause of action that arose on 17th October 2023 upon notification of the successful and unsuccessful tenderers then then a lawful Request for Review that meets the threshold ought to have been within fourteen (14) days from 17th October, 2023 and not thereafter.
137. The Administrative Review Board's decision of striking out or dismissing the Request for Review Application in the circumstances cannot be faulted.
138. In any event, the Ex parte Applicant contended in the Request for Review Application to have had knowledge on 13th June,2023 during tender opening that the 3rd Interested Party had quoted her Bid in both Kenya Shillings and US Dollars.
139. The cause of action on the issue of currency therefore arose on 13th June,2023 and time started running over the same effective 14th June 2023 and was to lapse within fourteen [14] days that was by 27th June, 2023 hence by the 27th October, 2023 when Application No. 84 of 2023 was lodged a claim/proceedings based on double currency Bid were time barred and hence the Administrative Review's Board's Decision of striking out the Request for Review Application over the same cannot be faulted.
140. The effluxion time took away the Respondents' jurisdiction to deal with the request for review and I so hold.
141. The Applicant has failed to prove that the Respondent acted illegally in so finding.

Disposition;

The Applicant has not proven that the Respondents' decision of November 17, 2023 in Review Application No. 84 of 2023 in regard to Tender No. KGN-GDD-056-2023 for the Procurement of Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olkaria 1AU Power Plant was illegal, irrational, or procedurally unfair.

Order:

The application dated November 24, 2023 lacks merit and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JANUARY, 2024.

JOHN CHIGITI (SC)

JUDGE

