



**Shemax Consult Limited v Public Procurement Administrative Review Board;
National Health Insurance Fund (Interested Party) (Miscellaneous Civil Application
E196 of 2023) [2024] KEHC 150 (KLR) (Judicial Review) (17 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS CIVIL APPLICATION E196 OF 2023
JM CHIGITI, J
JANUARY 17, 2024**

BETWEEN

SHEMAX CONSULT LIMITED APPLICANT

AND

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD RESPONDENT**

AND

NATIONAL HEALTH INSURANCE FUND INTERESTED PARTY

JUDGMENT

1. The Interested Party advertised for bids on its website on 22nd August, 2023 for various tenders that formed the basis of the Board's Proceedings. On 30th August, 2023 the Applicant challenged the decision of the Interested Party to advertise the said Tenders. The Board found that the Request for Review had been filed out of time, hence necessitating these proceedings.
2. The Applicant having been aggrieved with the Board's decision filed a Judicial Review Misc No. E102 of 2023 whereby the Court directed the Board to hear and determine the Request for Review on its Merits.
3. The Application that is before this court is dated 7th December, 2023. It is supported by the Statutory Statement of Facts, and Verifying Affidavit sworn on 5th September, 2023.
4. The Applicant seeks the following orders:



- a. An Order Of *Certiorari* do issue bringing into the High Court and quashing the entire decision of the Respondent made on 21st November, 2023 in Application No. 62/2023 inter alia dismissing the Request for Review dated 29th August, 2023.
 - b. An Order Of Prohibition do issue prohibiting the Interested Party from proceeding with the subject procurement/contract implementation.
 - c. An Order do issue compelling the Procuring Entity to re- upload/proceed/progress with the procurement process of Tender Nos. NHIF/002/2022-23; NHIF/032/ /2022-2023; NHIF/033/ /2022-2023; NHIF/035/2022-2023; NHIF/033/2022-2023; NHIF/035/2022-2023; NHIF /036/2022-2023 and NHIF/037 /2022-2023 to its conclusion in line with the Ruling of Application No. 43 of 2023.
 - d. The costs of this Application be provided for.
5. The Applicants case is that the Respondent erred in law and in fact in finding that the Procuring Entity legally terminated tenders no. Tenders No. NHIF/002/2022-23; NHIF/032/ /2022-2023; NHIF/033/ /2022-2023; NHIF/035/2022-2023; NHIF/033/2022-2023; NHIF/035/2022-2023; NHIF/036/2022-2023 and NHIF/037/2022-2023 *vide* a letter dated 24th July, 2023 rather than challenging the decision by the Board dated 7th July, 2023 through a Judicial Review.

Applicant's Case

6. The Legal test and the Applicant's case against the decision of the Review by Respondent is that the settled law is; judicial review jurisdiction is by its very nature supervisory; it is the means through which judicial control over administrative action is exercised and generally speaking, it is intended to impugn any unlawful decision.
7. The leading authority that has often been cited with acceptance is *Council of Civil Unions vs. Minister for the Civil Service*, (1985) A.C. 374, 410. In that case, the Privy Council set out the three grounds for review which are:
- (a) illegality,
 - (b) irrationality, and
 - (c) procedural impropriety. The first line of the Applicant's attack on the decision by the Respondent is illegality. Lord Diplock observed as follows:

“ My Lords, I see no reason why simply because a decision-making power is derived from 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 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, irrationality and 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 recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose on the instance case 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 state is exercisable.

By irrationality I mean that what can by now be succinctly referred to as "Wednesbury unreasonableness." [Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 K.B 233]. 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 Bairston* (1956) A.C. 14 of irrationality by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."

8. The Applicant contends that in handling the request for review that was before the Respondent, Review namely, Application No.62 of 2023 of 30th August, 2023 it did not understand correctly the law that regulates its decision making nor did it give effect to it.
9. It is the Applicants case that the decision in 21st November, 2023 is illegal because the Respondent interpreted Section 167 and Section 63 erroneously.
10. Section 63(2), (3) and (4) provide that an accounting officer who terminates a procurement or asset disposal proceedings shall give the Public Procurement Regulatory Authority a written report on the termination within 14 days.
11. The report shall include the reasons for termination. The officer shall also notify all persons who submitted tenders of the termination within 14 days of termination and such notice shall contain the reason for termination. For the jurisdiction of the Board to be ousted, the termination must meet the conditions set in section 63 of the Act.
12. It is the Applicant's argument that section 63 of the Act, if left unchecked, is prone to abuse by rogue accounting officers or procurement entities leading to erosion of the long fought for ethos of accountability in public procurement envisaged under Article 227 of *Constitution*.
13. Where it is disputed whether the termination was proper, the Board must rise to the occasion and resolve the question within its mandate under Section 167 of the Act.
14. This court Nyamweya J (as she then was) in *Republic v Public Procurement Review Board; Leeds Equipment & systems Limited (Interested Party); Ex Parte Kenya Veterinary Vaccines Production Institute* [2018] eKLR held;

"The main question to be answered is whether the Respondent erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement.



15. The Applicant relies in *Halsbury's Laws of England, 4th Edition* at paragraph 77 as follows:

“There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. 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. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed. In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete. A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power...

16. The Applicant submits that the Respondent's decision was unreasonable and untenable since it denies the Applicant since it did not address on the issues raised in the Request for Review.

17. It was an illegality for the Interested Party continuing with the procurement process even before the lapse of the fourteen (14) days period, contemplated under section 175(1), for the Applicant to challenge the Board decision which hence catapulted to this further proceeding.

18. The Applicant followed the avenue of filing the Request within fourteen (14) days from the date of occurrence of the alleged breach at any stage of the procurement process since the advertisement of the said Tenders.

19. Reliance is placed on *Speaker of the National Assembly vs Karume* (Civil Application No.92 of 1992) KECA 42 (KLR) for the proposition that; “... where there is a clear procedure for the redress of any particular grievance prescribed by *Constitution* or any Act of Parliament, that procedure should be strictly followed.”

20. Articles 48, 50 and 159 of *Constitution* of Kenya, 2010 supports that it was wrong and totally unreasonable for the Respondent to have dismissed the Request for Review citing compliance of an illegitimate termination of the aforesaid tenders. That it did not aversely consider whether the Request for Review was merited or not, the position taken by the Respondent is so fundamentally erroneous, and if allowed to take root will mean that grievances with regard to tendering process will not be given on their merits.

Respondent's Case

21. On 22nd August, 2023 the Procuring Entity advertised three (3) tenders for the provision of various services. On 30th August, 2023 the Ex Parte Applicant herein filed a Request for Review Application No.62 of 2023 dated 29th August, 2023 before the Respondent (hereinafter “the Request for Review”)



against the decision of the Accounting Officer, National Health Insurance Fund in relation to re-advertisement of the above Tender seeking the following orders:

- a. An order quashing the procurement process of the re-advertised Tender No. NHIF/RFP/001/2023-2024; NHIF/001/2023-2024; NHIF/002/2023-2024 by the Procuring Entity.
 - b. An order compelling the Procuring Entity to re-upload/ proceed/ progress with the procurement process of Tender Nos. NHIF/002/2022-23; NHIF/032/2022-2023; NHIF/033/2022-2023; NHIF/035/2022-2023; NHIF/033/2022-2023; NHIF/035/2022-2023; NHIF/036/2022-2023; and NHIF/037/2022-2023 to its conclusion in line with the Ruling of Application No. 43 of 2023.
 - c. The Respondent be ordered to pay the costs of and incidental to these proceedings.
 - d. For any other relief that the Review Board may deem fit to grant, having regard to the circumstances of this case in order to give effect to the Board's orders.
22. On 20th September, 2023 the Respondent struck out the Applicant's Request for Review dated 29th August, 2023 for want of jurisdiction.
23. Being dissatisfied with the Decision of the Respondent, the Ex parte Applicant sought judicial review by the High Court in Nairobi against the said decision through Judicial Review Application No. E102 of 2023.
24. The High Court in Nairobi considered Judicial Review Application No. E102 of 2023 and found that the Applicant had proven that the Respondent's decision dated 20th September, 2023 was tainted with illegality, irrationality, and procedural impropriety and issued the following orders dated 7th November, 2023:
- a. The Notice of Motion dated 27th September, 2023 is allowed.
 - b. The Request for Review dated 30th August, 2023, Shemax Consult Limited and the Accounting Officer, National Health Insurance Fund shall be heard and determined within 14 days.
 - c. Costs to the Applicant.
25. The Respondent obeyed the High Court and re heard the Request for Review on 15th November, 2023 and made the following final orders with respect to the Request for Review, which it dismissed.
26. In determining whether the Procuring Entity (the Interested Party herein) had complied with the orders of the Board issued in Request for Review No. 43 of 2023, the Respondent noted that the issue in contention in the Request for Review was grounded on Order No. 3 at page 56 of the Respondent's decision in Request for Review No. 43 of 2023 dated 7th July, 2023 which directed the Respondent to proceed with the procurement process in strict compliance with the Applicable law taking into considerations the findings of the Board in the said decision.
27. The Respondent noted from the confidential documents submitted to it pursuant to Section 67(3) (e) of the Act that the Procuring Entity resulted to seek guidance from PPRA on implementing its orders issued on 7th July, 2023 in Request for Review No. 43 of 2023 and found at pages 41 to 42 of its Decision dated 21st November, 2023 in the Request for Review that the advisory by PPRA on termination of procurement proceedings was in line with its findings on termination of procurement proceedings as held in its decision dated 7th July, 2023 in Request for Review No. 43 of 2023.



28. The Respondent further held that the Procuring Entity was required to take into consideration its findings on termination proceedings in the event that in proceeding with the procurement proceedings, it resulted to terminate the six tenders and had the Respondent expressly intended for the Procuring Entity to proceed with the six tenders by issuing a new tender submission date for the said tenders as alleged by the *Ex parte* Applicant, it would have stated as much in its findings and orders issued in its decision dated 7th July, 2023 in Request for Review No. 43 of 2023.
29. The Respondent also held that proceeding with the procurement process in strict compliance with the applicable law is not limited to opening of tenders, evaluation of tenders, and award to the successful tenderer; but, also includes inter alia termination of procurement proceedings as stipulated under Section 63 of the Act.
30. The Respondent took note of the contents of the letter dated 24th July, 2023 which communicated the decision of the Procuring Entity to terminate the procurement proceedings in the six tenders.
31. That the Respondent also considered the judgment in Judicial Review Application No. E102 of 2023 at paragraphs 124 and 125 where the High Court held that:
- “ 124. The Interested Parties’ letters dated 24th July 2023 communicating the termination of all the six (6) tenders marked the end of the initial ailing tender process.
125. The 22nd August, 2023 advertisement of three (3) tenders by the procuring entity marked the beginning of a fresh procurement process that created the relevant date of reckoning in so far as the 14 days is concerned. This generated a new cause of action.”
32. That in essence, the Learned Judge found the Procuring Entity’s letters dated 24th July, 2023 communicating its decision to terminate the six tenders marked the end of the initial ailing tender process and in this regard, the Procuring Entity did comply with the findings made in the Respondent’s decision dated 7th July, 2023 in Request for Review No. 43 of 2023 by resulting to the right substantive and procedural provisions of the Act and Regulations 2020 in terminating the six tenders as seen from the contents of the letter dated 24th July, 2023.
33. The foregoing, there is no doubt that 1st Respondent acted within the confines of Constitution, the Act, the provisions of the Tender Document, and the rule of law by finding that the Procuring Entity complied with the Respondent’s orders issued on 7th July, 2023 in Request for Review No. 43 of 2023.
34. The Respondent’s Decision dated 2nd November, 2023 was fair, reasonable, rational, and lawful without overreaching the Respondent’s mandate and jurisdiction.

Analysis and Determination:

35. The issue of jurisdiction: 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 Constitution or Legislation or both and that the court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law.”



36. 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.”

37. Constitution under Article 47 provides as follows;

“Fair administrative action.

47.

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.”

38. It is the Applicants case that the decision in 21st November, 2023 is illegal because the Respondent interpreted Section 167 and Section 63 erroneously.



39. Section 63(2), (3) and (4) provide that an accounting officer who terminates a procurement or asset disposal proceedings shall give the Public Procurement Regulatory Authority a written report on the termination within 14 days.
40. The report shall include the reasons for termination. The officer shall also notify all persons who submitted tenders of the termination within 14 days of termination, and such notice shall contain the reason for termination. For the jurisdiction of the Board to be ousted, the termination must meet the conditions set in section 63 of the Act.
41. From the ruling it is clear that the Respondent considered the judgment in Judicial Review Application No. E102 of 2023 at paragraphs 124 and 125 where the High Court held that:
- “124. The Interested Parties’ letters dated 24th July 2023 communicating the termination of all the six (6) tenders marked the end of the initial ailing tender process.
125. The 2nd August, 2023 advertisement of three (3) tenders by the procuring entity marked the beginning of a fresh procurement process that created the relevant date of reckoning in so far as the 14 days is concerned. This generated a new cause of action.”
42. This court finds no illegality, irregularity, or the procedural Impropriety in the manner in which the Respondent preceded with the hearing.
43. This court finds that the Respondent complied with the directions of this court in arriving at the impugned ruling. This court cannot interfere with the manner in which the Respondent exercised its discretion.
44. The court is satisfied that the Respondent’s findings in the Request for Review took into account provisions of Article 227 of the *Constitution*, the Act, and Regulation 2020.
45. The Decision was not irrational, nor unlawful as alleged in the Statutory Statement, Verifying Affidavit, and Notice of Motion by the Ex parte Applicant.

Disposition:

46. The Applicant has failed the tests of judicial review.

Order:

The Notice of Motion date 7th December, 2023 lacks merit and the same is dismissed with costs.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2024

J. CHIGITI (SC)

JUDGE

