



Accounting Officers, East Africa Portland Cement PLC & another v Public Procurement Administrative Review Board Review Board; Spenomatic Kenya Limited & another (Interested Parties) (Application E140 of 2023) [2024] KEHC 729 (KLR) (Judicial Review) (1 February 2024) (Judgment)

Neutral citation: [2024] KEHC 729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E140 OF 2023
J NGAAH, J
FEBRUARY 1, 2024**

BETWEEN

**ACCOUNTING OFFICERS, EAST AFRICA PORTLAND CEMENT
PLC 1ST APPLICANT
EAST AFRICA PORTLAND CEMENT PLC 2ND APPLICANT**

AND

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD REVIEW
BOARD RESPONDENT**

AND

**SPENOMATIC KENYA LIMITED INTERESTED PARTY
CENTRAL ELECTRICALS INTERNATIONAL LIMITED INTERESTED
PARTY**

JUDGMENT

1. The application before court is a motion dated 18 December 2023 brought under Article 47 of *the Constitution*, sections 3, 4, 7, 9, 10 and 11 of the *Fair Administrative Action Act*, 2015, Section 175 (1) of the *Public Procurement and Asset Disposal Act*, 2015 and Order 53 rule 1 and 2 of the Civil Procedure Rules. The applicants seek the order of certiorari against the respondent. The prayer for this order is framed as follows:
 - a. An order of certiorari to remove into this Honourable Court for the purposes of being quashed the entire decision and orders of the Public Procurement Administrative Review Board, the



respondent herein, made on 1st December, 2023 under the Request for Review Application No. 94/2023 in regards to Request for Proposal No. EAPCPLC/RFP/009/202 for Design, Supply, Installation and Commissioning of a Grid-Tied solar PV Plant.”

2. Being an application for judicial review orders, the application ought to have been made in the name of the state rather than in the applicants’ names. In Mohammed Ahmed versus Republic (1957) E.A. 523 which was cited with approval in Farmers Bus Service & Others versus The Transport Licensing Appeal Tribunal (1959) E.A 779 it was held that prerogative orders are issued in the name of the crown and applications for such orders must be intitled accordingly.
3. However, nothing much turns on this since it was not raised as an issue for determination in these proceedings.
4. According to the applicants, the 2nd applicant invited eligible bidders to make applications for the development of what they have described as “captive solar generation.” This was through an expression of interest (EOI) advertised in the Daily Nation newspaper of 18 November 2022.
5. As at 25 November 2022, which was the closing date for submission of the applications, thirteen proposals had been received and were subsequently opened in the presence of bidders’ representatives in accordance with section 120 of the [Public Procurement and Asset Disposal Act](#). The bidders who had submitted proposals were as follows:
 - a. Grid X Africa/NSE Kenya
 - b. Central Electrical International
 - c. Kenden Limited
 - d. Multi-skilled Engineers
 - e. Frontier Investment Management
 - f. Solar Solutions Providers
 - g. Spenomatic Kenya Limited
 - h. Power China Haudong Engineering Corporation Limited
 - i. Imexolutions Limited
 - j. Voltalia Kenya Services limited
 - k. Ofgen Energy Solutions Simplified
 - l. Ric Energy
 - m. Tianqui Hongyuan
6. After the procuring entity’s evaluation, the following bidders were found to have qualified:
 - a. Central Electrical International
 - b. Spenomatic Kenya Limited
 - c. Voltalia Kenya Services Limited
 - d. Imexolutions Limited
 - e. Ofgen Energy Solutions Simplified



- f. Ric Energy
7. On 17 April 2023, the procuring entity sent a request for proposal to the six applicants and on 25 April 2023 the qualified applicants visited the site of the captive solar plant. The visit was organised by the procuring entity.
8. Subsequently, upon preliminary evaluation, three bids were determined to be responsive. These were:
 - a. Central Electrical International
 - b. Spenomatic Kenya Limited
 - c. Ofgen Energy Solutions Simplified
9. At the technical evaluation, the bidders' scores were as follows:
 - a. Central Electrical International 77.8%
 - b. Spenomatic Kenya Limited 86.8 %
 - c. Ofgen Energy Solutions Simplified 66.4%
10. The minimum technical score was 80% and, therefore, Central Electrical International and Ofgen Energy Solutions Simplified were determined to have fallen short of the threshold. Spenomatic Kenya Limited was the only bidder that proceeded to the financial evaluation stage. It was ultimately adjudged to be the successful bidder and was, therefore, awarded the tender.
11. Being aggrieved by the award, the 1st interested party lodged a request for review before the respondent in application no. 65 of 2023. After hearing the parties, the respondent made the following orders:
 - a. The letter of notification of award issued to the 1st interested party dated 11th September 2023 with respect to RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of Grid tied Solar PV Plant, be and is hereby nullified and set aside.
 - b. The letters of regret notification dated 11 September 2023 issue to the applicant and other unsuccessful tenders with respect to RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of Grid tied Solar PV Plant, be and are hereby nullified and set aside.
 - c. The rest 1st respondent is ordered to direct the procuring entity's evaluation committee to admit the applicant's tender, together with all other tenders that were determined responsive at the preliminary examination stage for re-evaluation at the technical proposal stage taking into consideration the board's findings in this request for review.
 - d. Further to order no. (c), the 1st respondent is hereby ordered to proceed with the procurement process of RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of Grid tied Solar PV Plant to its logical conclusion within fourteen (14) days of this decision in accordance with the provisions of the tender document, the Act, Regulations 2020 and *the Constitution*.
 - e. Given that the procurement process/proceedings of the subject tender is not complete, each party shall bear its own costs in the request for review."
12. Following this decision, the procuring entity readmitted the 1st interested party's tender together with all other tenders that were determined responsive at the preliminary evaluation stage for evaluation at the technical proposal stage. The scores were as follows:



- a. Central Electrical International 62.24%
 - b. Spenomatic Kenya Limited 88.76 %
 - c. Ofgen Energy Solutions Simplified 53.06%
13. For the second time, Central Electrical International and Ofgen Energy Solutions Simplified fell short of the minimum score of 80%. Spenomatic Kenya Limited proceeded to financial evaluation stage and was eventually awarded the tender.
 14. The 1st interested party was not satisfied with the award and, therefore, for the second time, lodged a request for review challenging the award. The application for review was filed before the respondent as application no. 94 of 2023. Similarly, for the second time, the respondent allowed the request and set aside or cancelled the notification of the award to the successful tenderer and the unsuccessful tenderers.
 15. The applicants were also ordered to readmit the 1st interested party's tender together with all other tenders that were determined responsive at the preliminary examination stage for re-evaluation at the technical proposal stage.
 16. It is the respondent's second decision that is the subject of this judgment.
 17. The applicants are aggrieved that the respondent's decision is unreasonable, irrational and illegal and, in particular, contrary to section 135 (3) of the *Public Procurement and Asset Disposal Act*, 2015.
 18. According to the applicants, the tender validity period was 120 days from 23 May 2023 and, therefore, set to expire on 20 September 2023. Given that the 1st interested party's request for review was filed on 25 September 2023, it was filed 5 days beyond the tender validity period. Since the tender validity period had not been extended, the only logical and legal conclusion that the respondent could come to was to terminate the tender.
 19. The applicants are also aggrieved that the respondent's decision was not consistent with its prior findings or directions in application no. 65 of 2023 and, in particular, with respect to the respondent's direction to the procuring entity not to prorate the marks given to the respective bidders. The applicants contend that the respondent contradicted itself when in its second decision in application no. 94 of 2023 directed that the marks ought to have been prorated.
 20. The applicants also contend that in its decision, the respondent went beyond the scope of its mandate as defined in section 46 of the *Public Procurement and Asset Disposal Act* by evaluating technical bids and determining their compliance yet this is a task that is reserved for the evaluation committee of the procuring entity.
 21. The respondent's decision is also impugned on the ground that the 1st respondent's evaluation of the 1st interested party's bid was conducted in total disregard of sections 80 of the *Public Procurement and Asset Disposal Act*. According to the applicant's, despite evidence to the contrary, the respondent held that the 1st interested party's bid was consistent with the requirements in the tender documents.
 22. The respondent failed to note and take into consideration the fact that the 1st interested party's failure to provide or attach requisite certificates of completion as required in the tender documents and further that there were major inconsistencies in the project documentation submitted by the 1st interested party which included the use of another company's letterhead for project -related documents and certificates.
 23. The respondent did not file any response to the applicants' motion.



24. Mohammed Taki Rashid swore a replying affidavit on behalf of the 1st interested party. Rashid describes himself as the head of marketing and tendering of the 1st interested party. By and large he has not contested the facts as set out in the applicants' affidavit verifying the facts relied upon.
25. As far as his company is concerned, it submitted its expression of interest on 25 November 2022 and on 3 March 2023 the head of supply chain at the East African Portland Cement PLC informed them that the company had prequalified for expression of interest for the development of the captive solar generation.
26. By a letter dated 11 September 2023, the 2nd applicant informed the 1st interested party that it did not meet the technical proposal evaluation pass mark. The 1st interested party challenged the procuring entity's decision in application no. 65 of 2023. However, in subsequent evaluation, following the respondent's decision, the 1st interested party's score was reduced from 77.5% to 62.24%.
27. The 1st interested party claims that the applicant's departure from its earlier decision is logical unreasonable and unfair and contrary to article 47 and 227 of *the Constitution*.
28. Harprit Kaur Sagoo, swore a replying affidavit on behalf of the 2nd interested party. He has sworn that he is the group financial controller of the 2nd interested party. The 2nd interested party participated in the procurement process as a bidder. It emerged the winner in the technical and financial proposals and on 11 September 2023 it received a letter from the applicants awarding the tender to the 2nd interested party.
29. According to Sagoo, the procurement process was conducted fairly and professionally and in an open and transparent manner. However, the 1st interested party challenged the award in application no. 65 of 2023. The award was set aside. But in the 2nd evaluation, the 2nd interested party still emerged the winner and was awarded the tender. The award, as noted, was set aside by the respondent in application no. 94 of 2023.
30. The 2nd interested party opposed the application and contended that the respondent's decision to set aside the letters dated 11 September 2023 and 30 October 2023 awarding the tender to the 2nd interested party were unreasonable and high-handed.
31. Parties filed written submissions in support of positions they have adopted in these proceedings.
32. It is worth noting that the facts culminating in the impugned decision are not in dispute.
33. All that this Honourable Court has to do is to evaluate the impugned decision on grounds of illegality and irrationality which, as far as I gather from the statutory statement, are the grounds upon which the judicial review relief is sought.
34. These grounds are two of the three traditional grounds of judicial review enunciated in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410 in which Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can



conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.” That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

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

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

36. I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.”
37. 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. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit that the principle of proportionality as a further ground for judicial review has been developed.
38. Based on the grounds upon which the reliefs are sought two questions arise; The first question is whether the respondent understood correctly the law that regulates its decision-making power and gave effect to it. The second question is whether the decision 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.
39. In answering these questions, this Honourable Court is not out to interrogate the merits of the impugned decision; it is concerned about the process by which this decision was arrived at.



40. According to the applicants, “the respondent’s decision directing the applicants to re-evaluate the tender despite the expiry of the tender validity period was irrational, unreasonable and illegal contrary to section 135 (3) of the *Public Procurement and Asset Disposal Act 2015*.”
41. As far as I understand the applicants, this argument is targeted at the decision that was delivered in application no. 65 of 2023. According to the applicants, the tender validity period was 120 days from 23 May 2023 and was set to expire on 20 September 2023. Given that the 1st interested party’s request for review was filed on 25 September 2023, it was filed 5 days beyond the tender validity period. It is the application no. 65 of 2023 that was filed on 25 September 2023.
42. Since application no. 65 of 2023 is not the subject of this decision, the question of tender validity period need not arise in these proceedings. In any event, there is nothing in the decision in application no. 65 of 2023 that suggests that the applicants raised the issue before the respondent. Assuming it was a viable issue, it is late in the day to raise it in these proceedings and I need not delve into it any further.
43. The applicants’ other grievance with the respondent’s decision is that it is alleged to be inconsistent with the decision in application no. 65 of 2023. The inconsistency, according to the applicants stems from the respondent’s holding on prorating of the scores. The respondent is said to have held in application no. 65 of 2023 that the applicants need not to have prorated marks in awarding marks to the bidders but in application no. 94 of 2023, it is said to have held the contrary.
44. Prorating of marks stood out prominently in the respondent’s decision in application no. 65 of 2023 and, as the applicants have stated, one of the reasons why the applicants’ award of the tender was set aside was because of the prorating of the marks. It is necessary that I reproduce here the part of the decision on this aspect of prorating. It reads as follows:

106.

- b) Under requirements 3 on the design methodology the scoring under the various requirements 3(a) and 3(b) in the technical evaluation report had been prorated yet this criterion as provided in the tender document had no option of prorating the marks scored under clause 3a and 3b of the technical evaluation criteria.
- c) In regard to the scoring of the various requirements under the technical evaluation criteria, the maximum scores provided did not have any option for prorating of marks.

107.

- b) Noting that there was no provision for prorating marks under requirement 1a. Under the technical evaluation criteria, it is unclear how the evaluation committee scored the applicant’s noting the innovation of marks under the scoring category in the evaluation report.
- c) In compliance with the requirement 3(a) and (b) under the technical evaluation criteria the applicant submitted at pages 155 to 245 documents in response to this requirement and in evaluating the same, the evaluation committee prorated the marks scored yet this was not provided for in the tender document.”

The respondent then concluded as follows:

108. It is our considered opinion that the evaluation committee adopted an incorrect approach in evaluating and scoring the applicant’s tender as it failed to give reasons why did not score full marks where the technical evaluation criteria was fully met by the applicant. If the respondent had intended to prorate the scores under the evaluation of the technical proposal,



nothing would have been easier than indicating and detailing as such within the technical evaluation criteria of the tender document so that the tenderers would know from inception the evaluation criteria at the evaluation of the technical proposal stage for them to prepare and submit tenders in conformity with the said requirements.”

There is no mention of prorating of marks in the respondent’s decision in application no. 94 of 2023. In particular, nowhere, in that decision, is it indicated, as the applicants suggest, that the applicants ought to have prorated the marks. For the avoidance of doubt, the respondent’s findings and holding with respect to award of marks in application no. 94 of 2023 reads as follows:

87. We have studied the applicant’s original tender submitted to the board by the 1st respondent as part of the confidential documents in respect of the subject tender and note the following with respect to its re-evaluation:
88. Additionally, we note that the applicant and a requirement no. 2 (d) of the technical evaluation criteria requiring ‘experience profile of the electrical engineer should demonstrate at least 5 years experience in the design and commissioning of PV solar plant with MV systems provide CV and relevant certificate to support this requirement’ the maximum score provided was 3 marks and the applicant was scored 0 following re-evaluation while in the previous evaluation, the applicant had been scored full marks. It is not clear why the previous marks were withdrawn noting that award of the 2 marks was quite fair as the applicant has submitted at page 118 of its tender as follows...
89. We also note that under requirement no. 4 (b) of the technical evaluation criteria requiring ‘quality management plan submit a detailed QA/QC plan detailing all the test procedures, all the functional checks to be carried out on the on each equipment and the system. Submit procedure for handling any non-compliances and the corrective action to be taken ‘the maximum score provided was 4 marks and the applicant was scored 0 following re-evaluation while in the previous evaluation, the applicant had scored 2.7 marks. It is not clear and there is no justification why no marks were awarded for this requirement in view of the fact that what has been provided under the scoring criteria is a maximum score and in view of the fact that the applicant had previously been scored having provided a quality management plan provided at pages 281 to 293 of its tender.
90. From the foregoing, and in view of the orders issued by the board in the decision dated 16 October 2023 in request review no. 65 of 2023, it is our considered view that the respondents failed to score the applicant accordingly as provided for in the tender document were the applicant had met the stipulated requirements, noting that the scoring provided was for maximum marks that a tenderer could score and did not limit issuance of scores below the set maximum scores.”
91. If the respondent’s decision is faulted for setting aside the award of the tender because the procuring entity did not prorate the marks, this is not apparent from these statements. In other words, the respondent’s decision does not say in clear and unambiguous terms that the evaluation committee ought to have prorated the marks yet it did not.
92. The applicants have not invited the court to draw this inference from the respondent’s decision and, in particular, in statements that I have quoted. Neither have they come out clearly to explain that the respondent’s decision on award of the marks is tantamount to asking the procuring entity to prorate the marks. In these circumstances, the court cannot proceed on the assumption that in the impugned decision, the respondent demanded prorating of marks yet in application no. 65 of 2023 it had deprecated that method of awarding marks.



93. I must also add that it is not for this court to evaluate the evidence and determine whether the respondent's critique of the manner the marks were awarded implied that the procuring entity ought to have prorated the marks. The burden was always on the applicants to persuade the court that indeed this was the case. In my humble view, they have not discharged this burden and for this reason, I am not convinced that, contrary to its decision in application no. 65 of 2023, the respondent insisted on prorating of marks in application no. 94 of 2023.
94. The applicants have also urged that the respondent took upon itself the task of evaluating the tenders and found that the 1st interested party had complied with the requirements in the tender document. In doing so, the respondent is said to have breached sections 46 and 80 of the [Public Procurement and Asset Disposal Act](#).
95. Section 46 of the Act provides for the establishment of the evaluation committee and, among other things, the composition of its membership and functions which, of course, includes completion of the evaluation process for which it was appointed.
96. Section 80, on the other hand provides for, inter alia, the manner of evaluation of tenders by the evaluation committee, in particular, the procedures for evaluation and the criteria to be adopted in evaluating the tenders.
97. The applicants' argument is that in finding that the 1st interested party complied with the tender requirements, it thereby encroached on the functions of the evaluation committee.
98. Like the question of tender validity period, this question appears to be belated. This is because the question whether the Central Electricals International Limited complied with requirements of tender as prescribed in the tender documents was determined in application no. 65 of 2023. In particular, at paragraph 108 of its decision, the respondent noted as follows:
108. We have studied the applicant's original tender submitted to the board by the 1st respondent as part of the confidential documents in respect of the subject tender and not the following with respect to its evaluation:
- a. In compliance with the requirement 1a. Under the technical evaluation criteria, the applicant submitted at pages 47 to 58 proof of projects done in Kenya for Two Rivers Power Company Limited. IcFem Dreamland Hospital, Kimilili, and Kitugum/Lorgum Hospital. Additionally, the applicant provided at pages 59 to 82 of its tender proof of projects done in Kenya as follows:
 - i. The applicant submitted a letter of acceptance on the official letterhead of the clients at page 48 to 50 of its tender together with its certificate of completion and handing over indicating the total capacity of the project as 1521.0 kWp.
 - ii. The applicant submitted a purchase order for the supply, delivery and installation of 2300kWp solar grid-tie power system at page 54 of its tender and a handing over Certificate at page 55.
 - iii. The applicant submitted a purchase order for the supply, delivery and installation of 1027 kWp solar power system at page 57 of its tender and a handing over certificate at page 58.
 - iv. The other references given by the applicant are from Quantel Renewable Energy, Malawi; Mataba Farms Limited, Kigali; Congo Energy Solution; and Revolutionary Governemnt of Zanzibar.



- c) in compliance with requirement 3 (a) and (b) under the technical evaluation criteria, the applicant submitted at pages 155 to 245 documents in response to this requirement and in evaluating the same, the evaluation committee prorated the marks scored yet this was not provided for in the tender document.
- d) In compliance with the requirement 3(c) under the technical evaluation criteria the applicant submitted at pages 167 to 168 pictorial detents of the land and layout of the solar modules array provided depicting arrangement of the modules arrays on the proposed land.
- e) in compliance with requirement for (a) under the technical evaluation criteria, the applicant submitted at pages 248 a general work methodology, installation procedures and installation techniques for the equipment and material...”

99. Based on these findings, the respondent made a determination and issued orders which, according to the applicants, were complied with. If the applicants had any issue with the decision of the respondent in application no. 65 of 2023, they were bound to seek for its review under section 175(1) of the *Public Procurement and Asset Disposal Act*. This section reads as follows:

175. Right to judicial review to procurement

- (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

100. This provision of the law is clear that the decision is binding on the applicants since they did not seek its review within the prescribed timeline or at all. They cannot be heard questioning the decision in proceedings in application no. 94 of 2023 which the respondent analysed and came to the conclusion that the case was about whether the applicants here had complied with the orders given in application no. 65 of 2023. This is apparent from the issues that the respondent identified as issues for determination in application no. 94 of 2023. It set them out as follows:

- i. Whether the respondents complied with the orders of the board issued on 16th October 2023 in request for review no. 65 of 2023.
- ii. what orders should the Board grant in the circumstances.”

101. It then went on to note at paragraph 75 of its decision as follows:

75. It is not in contest that the applicant's tender together with all other tenderers that were responsive for the preliminary examination stage were admitted for re-evaluation at the technical proposal stage. The issue in contention in the instant request for review is whether the evaluation committee in conducting the re-evaluation of the subject tender at the technical proposal stage strictly adhered to the findings of the board as provided in the board's decision dated 16th October, 2023 in request for review no. 65 of 2023. The applicant pointed to non-adherence of paragraphs 107(d) and (e) and 108 of the board's decision dated 16th October 2023, denial of full marks earned, non-disclosure of the marks scored and issuance of new reasons for disqualification of its tender which depart from the reasons cited in the letter dated 26th September 2023 when the applicant was first notified of its unsuccessfulness.”



102. It is worth noting that in coming to its decision whether the 1st interested party had complied with the requirements in the tender documents, the respondent considered and analysed the evidence before it including the documents which the interested party submitted in its bid and the tender documents.
103. A judicial review court would not evaluate that evidence afresh and come to its own conclusions for the simple reason that a judicial review court does not assume appellate jurisdiction as to substitute its own decision for that of a tribunal or an inferior court whose decision may be the subject of the judicial review proceedings.
104. In *Energy Regulatory Commission v S G S Kenya Limited & 2 others* (2018) eKLR Civil Appeal No. 341 of 2017 the Court of Appeal faulted the High Court for determining a judicial review matter as if it was an appeal, and for going into the merits of a decision already taken. The Appellate Court held it to be improper for the High Court to make value judgment regarding the evidence; to weigh the same, and to minutely examine it, to determine whether it reached a certain standard of acceptance. The Court found that the High Court had occasioned room for abuse of its power, by usurping the competences of the Public Procurement Administrative Review Board.
105. It was held that in a judicial review matter, the Court's mandate is limited to procedural improprieties, and extends not to the merits of a decision. In the case before the Court of Appeal, the Board had been duly mindful of its own earlier decision in *Avante International INC v. IEBC* (Review No. 19 of 2017): it took into consideration the nature and weight of the opinion on technological change, which the procuring entity had acted upon; and the Board's reasoning exhibited a fidelity to practicality and to good sense. Consequently, the Judge ought to have shown greater deference to the Board's decision, and should have been more circumspect in its view of such a decision, bearing in mind the specializations of the Board.
106. And in *OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others* [2017] eKLR Civil Appeal No. 28 of 2016 it was held that:

"Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See *Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited* (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. See *East African Railways Corp. vs. Anthony Sefu Far-Es-Salaam* (1973) EA 327."



Further in *Biren Amritlal Shah & Anor vs. Republic & 3 others* (2013) eKLR it was held:

"The learned Judge would only have been entitled to interfere were it the case that there was absolutely no evidence before the Board that would have justified the upholding of the appellant's termination of the tender. In other words, the case should have been so plainly and self-evidently devoid of evidence or basis for termination, as to render upholding of the termination an inexplicable act of capricious irrationality defiant of all logic and reason. It should have been such a decision that no reasonable tribunal, properly directing itself on the case would have arrived at. That is the *Wednesbury* unreasonableness that would invalidate a tribunal's decision by way of certiorari."

107. Courts may intervene to review a power conferred by statute on the ground of unfairness but only if the unfairness in the purported exercise of the power be such as to amount to an abuse of the power. See *Preston v IRC* [1985] 2 All ER 327, [1985] AC 835, per Lord Templeman.

108. And in *Chief Constable of the North West Police vs Evans* (1982) 3 ALL ER 141 at 154 it was held that:

"Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

It was held further in this case that:

"The remedy by way of judicial review under RSC..., vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and ...administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner...and not to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law." (Per Lord Hailsham at 1160E-H).

109. These authorities are sufficient enough to demonstrate that a judicial review court should not supplant a tribunal's or administrative body's decision with its own decision. I need not belabour the point that judicial review is concerned more with the process by which a decision is arrived at than with the merits of that decision unless, of course, the decision is so irrational or unreasonable that no reasonable tribunal could have reached it.

110. A difference of opinion on interpretation of the law or conclusions on matters of fact cannot be a basis for the intervention of a judicial review court to upset a tribunal's or administrative body's decision that has, otherwise been procedurally taken.

111. In the ultimate, I am not satisfied that the applicants have made out a case for this Honourable Court to interfere with the respondent's decision dated 1st December 2023. The applicants' motion dated 18 December 2023 is dismissed. Parties will bear their respective costs. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 1 FEBRUARY 2024

NGAAH JAIRUS



JUDGE

