



Republic v Public Procurement Administrative Review Board & 3 others; Astronea Construction Limited (Exparte Applicant) (Miscellaneous Civil Application E143 of 2023) [2024] KEHC 1429 (KLR) (Judicial Review) (14 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS CIVIL APPLICATION E143 OF 2023
JM CHIGITI, J
FEBRUARY 14, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 1ST RESPONDENT

THE ACCOUNTING OFFICER, COUNTY GOVERNMENT OF BOMET 2ND RESPONDENT

COUNTY GOVERNEMENT OF BOMET 3RD RESPONDENT

BIOMAX AFRICA LIMITED 4TH RESPONDENT

AND

ASTRONEA CONSTRUCTION LIMITED EXPARTE APPLICANT

JUDGMENT

1. The Application before this court is Notice of Motion dated 5th January, 2024 wherein the applicant seeks the following orders:
 - a. An Order of certiorari to bring to the Honourable Court for purposes of being quashed the 1st Respondent’s decision dated 18th December 2023 dismissing the Applicant’s Request for Review dated 27th November 2023 between Astronea Construction Limited Vs. The Accounting Officer County Government of Bomet & Anor in Public Procurement Administrative Review Board (PPARB) Application No. 99 of 2023.



- b. An Order of mandamus to compel the 1st Respondent to exercise its powers under Section 173 (b) to extend the tender validity period of the subject tender for a period of 90 days or such period that it deems necessary within 7 days of the determination by the court in the matter herein for purposes of the 2nd and 3rd Respondents herein to lawfully conclude the subject tender process.
 - c. An Order of mandamus compelling the 2nd Respondent to issue the Applicant with a letter of award/ letter of intention to enter into a contract in terms of section 87 of the *Public Procurement and Asset Disposal Act* in respect of Tender No. CGB/TETII/001/2023-2024 for proposed construction of the County Aggregation and Industrial Park within 14 days of the decision hereof.
 - d. An Order of mandamus compelling the 2nd and 3rd Respondents to enter into a procurement contract with the Applicant within the time frame of the extended tender validity period in terms of section 135 of the *Public Procurement and Asset Disposal Act* in respect of Tender No. CGB/Tetii/001/2023-2024 for proposed construction of the County Aggregation and Industrial Park.
 - e. An Order of prohibition restraining the 2nd Respondent from re-tendering and/or re-advertising or inviting fresh tenders or undertaking any further procurement in respect of the subject matter of Tender No. CGB/Tetii/001/2023-2024 for proposed construction of the County Aggregation and Industrial Park until hearing and determination of the review herein.
 - f. That this Honourable Court be pleased to issue such other or further relief as this Honourable Court may deem just and expedient to grant.
 - g. That the costs of and incidental to this application be borne by the Respondents.
2. Which Application is based on the grounds set out below and in the Statutory Statement filed herewith, the facts set out in the Verifying Affidavit of Anup Jethwa sworn on 29th December, 2023.

Ex-parte Applicant's Case

3. The Applicant has moved this court through the said Notice of Motion Application to challenge the 1st Respondent's decision dated 18th December, 2023 upon the dismissal of the Ex-Parte Applicant's Request for Review Application in PPARB Application No.99 of 2023 Astronea Construction Limited vs The Accounting Officer County Government of Bomet & Another.
4. The Ex-Parte Applicant was a tenderer in tender no. CGB/TETII/001/2023-2024 for proposed construction of the 3rd Respondent's County Aggregation and Industrial Park, a project the 3rd Respondent was undertaking in collaboration with the National Government through the Ministry of Investments, Trade, and Industry.
5. The Applicant submitted that the said tender was at price of Kes. 495,576,184.94/-. The National Government was to bear the cost of Kes.250 Million, whilst the 3rd Respondent is to bear a matching cost of Kes.250 Million.
6. On 7th September, 2023 the Ex-Parte Applicant received an email from the 3rd Respondents titled "due diligence" recommending the Applicant for the award of the tender who subsequently visited the Ex-Parte Applicant's premises on 11th September, 2023 and conducted the said due diligence.



7. Section 83 of the Public Procurement & Asset Disposal Act which reads in part as follows: “an evaluation committee may after tender evaluation, but prior to the award of tender, conduct due diligence...;
8. In a sudden turn of events, on 28th September, 2023 the Ex-Parte Applicant was instead notified of cancellation of the subject tender on grounds stated to be, ‘inadequate budgetary provision as stipulated by section 63(b) of the Public Procurement and Asset Disposal Act, 2015 and its attendant Regulation No. 48(1&2) of 2020’.
9. The Applicant lodged a Request for Review No.75 of 2023: Astronea Construction Limited vs The Accounting Officer, County Government of Bomet & Another.
10. The 1st Respondent through a decision dated 1st November, 2023 found that the 2nd and 3rd Respondents had failed to satisfy the substantive statutory pre-conditions for termination of procurement proceedings under section 63 (1) (b) of the PPADA and issued the following Orders:
 - a. The decision by the 1st Respondent to terminate the procurement proceedings of tender no. CGB/TETII/001/2023/2024 for proposed construction of County Aggregation and Industrial Park be and is hereby quashed and set aside.
 - b. The Procuring Entity’s letter dated 28th September 2023 issued to the Applicant and other tenderers in the subject tender communicating the decision to terminate the procurement proceedings with respect to tender no. CGB/TETII/001/2023/2024 for proposed construction of County Aggregation and Industrial Park be nullified and set aside.
 - c. The 1st Respondent is hereby ordered to ensure the procurement process with respect to tender no. CGB/TETII/001/2023/2024 for proposed construction of County Aggregation and Industrial Park proceeds to its logical conclusion within 14 days of this decision taking into consideration the boards findings herein and the provisions of the Act, the Constitution and Regulations 2020.
11. The Ex-Parte Applicant was once again notified through a regret letter from the 2nd Respondent dated 14th November, 2023 that the subject procurement proceedings have been cancelled for the second time due to inadequate budgetary provisions.
12. This precipitated the filing of Request for Review Application No.99 of 2023: Astronea Construction Limited vs The Accounting Officer County Government of Bomet & Another dated 27th November, 2023.
13. This Request for Review was dismissed on 18th December, 2023 and the Ex-Parte Applicant contends that this decision failed to take into account the 1st Respondent’s initial decision dated 1st November, 2023 more particularly the finding at paragraph 93 thereof; that the 2nd and 3rd Respondents failed to fulfil the substantive requirements for the termination of procurement proceedings in the subject tender as required by section 63 (1) of the PPADA.
14. The Ex-Parte Applicant argues that the decision is patently unlawful for departing from the established legal position in the 1st Respondent’s decision dated 1st November, 2023 that the reasons given by the 2nd and 3rd Respondents for terminating the procurement proceedings were short of the substantive statutory requirement under section 63 (1)(b) of the PPADA.
15. The 1st Respondent in its decision of 18th December, 2023 relied on the same evidence adduced by the 2nd and 3rd Respondents to terminate the procurement proceedings, which evidence it had



- evaluated and returned a verdict on 1st November, 2023 that the 3rd Respondent's procurement plan and approved budget adduced in evidence had not sufficiently met the substantive test.
16. The 1st Respondent's decision was materially influenced by an error in law, as it departed from an already established position of law without any evidentiary or lawful basis.
 17. The 1st Respondent in arriving at the impugned decision, failed to take into account relevant considerations including the fact that the 2nd & 3rd Respondents failed to submit any evidence to prove that the 3rd Respondent had inadequate budgetary allocation to justify the termination of the procurement proceedings.
 18. The 1st Respondent failed to take into consideration the fact that the 2nd and 3rd Respondents were fully aware of the likely budgetary implications at the time of re-advertising the subject tender and that the 2nd Respondent was aware that the subject tender proceedings could only be commenced upon satisfaction that the 3rd Respondent has sufficient funds to meet the obligations of the resulting contract.
 19. Section 58 (8) of the PPDA, it states: "The Accounting officer shall not commence any procurement proceedings until satisfied that sufficient funds to meet obligations of the resulting contract are reflected in its approved budget estimates."
 20. The 1st Respondent equally failed to take into account the fact that the National Government budgetary allocation towards the 3rd Respondent's tender of proposed construction of the County Aggregation and Industrial Park, being Kes. 250 Million was scheduled for the current year's supplementary budget.
 21. It believes that the 1st Respondent acted irrationally and unlawfully by failing to uphold its initial position in the decision of 1st November, 2023 and failing to find that the 2nd Respondent's decision to cancel the procurement proceedings herein was null and void pursuant to the provisions of section 175 (6) of the PPADA which reads: "A party to the Review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such a party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void."
 22. Reliance is placed on the Court of Appeal in *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR stated as follows in regard to applications for Judicial Review Orders:

"Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters..."
 23. It also relies on the Supreme Court of Kenya observation in *Petition No. 28 of 2014: Peninah Nadako Kiliswa v Independent Electoral & Boundaries Commission (IEBC) & 2 others* [2015] eKLR remarked that judicial review is one of the greatest providers of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. The apex court while addressing itself to what is incumbent upon an Applicant in a Judicial Review case, cited with authority the Ugandan



High Court case of *Pastoli v. Kabale District Local Government Council and Others* [2008] 2 EA 300-301, 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 or procedural impropriety....

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

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards....

Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be 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 [to] and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision”

24. The Supreme Court further opined that the elements highlighted in the *Pastoli Kabale* case will manifest themselves in various forms and degrees in different cases, further that their presence or absence remains an evidential question.

The 1st Respondent’s Case

25. The 1st Respondent relies on the Replying Affidavit sworn by one, James Kilaka dated 15th January, 2024.
26. The 1st Respondent is the Public Procurement Administrative Review Board established under section 27 of the *Public Procurement and Asset Disposal Act*.
27. Section 173 of the Act provides for the powers of the Review Board. It provides that upon completing a review, the Review Board may do any of the following: -
- a. Annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
 - b. Give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
 - c. Substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
 - d. Order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
 - e. Order termination of the procurement process and commencement of a new procurement process.



28. First, in determining the Request for Review No. 99 of 2023, the issues raised in consideration arose after the 1st Respondent's decision in Request for Review No. 75 of 2023 and thus creating a new set of intervening facts which the 1st Respondent was required to consider and determine.
29. This is because the Ex-parte Applicants in Request for Review No. 75 of 2023 did not submit in the confidential file a certified copy of the budget for approved estimates FY 2023/2024 regarding Trade, Tourism, and Industry; and a certified Procurement Plan.
30. The 1st Respondent in paragraph 103 and 104 in Request No. 99 of 2023 revisited its findings in Request No. 75 of 2023 and noted at Paragraph 105 that:

“termination of the subject tender was not done in accordance with the provisions of Section 63 of the Act which was the basis upon which the Board made a declaration, and subsequently quashed the 1st Respondent's decision as communicated in the letter dated 28th September, 2023 and ordered that the procurement proceedings in the subject tender proceed to its logical conclusion while taking into consideration the Board's finds and the provisions of the Act, *the Constitution* and Regulations 2020”

31. The 1st Respondent believes that it proved that the 2nd and 3rd Respondents had fulfilled the procedural requirements for termination of a tender pursuant to Section 62 and 63 having notified all the tenderers of its decision and having notified the Public Procurement Regulatory Authority.
32. The 1st Respondent confirmed that the 2nd and 3rd Respondents had supplied the following documents pursuant to Section 69 of the PPADA to prove lack of budgetary allocation;
 - a. A Certified copy of the Budget for the Approved Estimates FY 2023/24 regarding Trade, Tourism and Industry which was only approved a total cost of Kes. 50,000,000/-;
 - b. The 3rd Respondent's total Development Budget which was approved at an estimate of Kes. 110,500,000.00/-;
 - c. The 3rd Respondent Procurement Plan for the year 2023/2024 which set the Budget for the project herein at Kes. 50,000,000.00/-
33. The 1st Respondent also considered a letter dated 14th November, 2023 from the Council of Governors submitted in the confidential file by the 2nd Respondent demonstrating that the subject procurement had inadequate budgetary allocation and observed that the National Government is yet to allocate the 3rd Respondent the Kes. 250 million for implementation of the County Aggregation and Industrial Parks, and neither had the 3rd Respondent signed any Intergovernmental Agreement on the establishment of the County Aggregation and Industrial Parks.
34. The 1st Respondent was entitled to make the decision it made and if the Applicant had any issues about that decision then it ought to have filed an appeal.
35. Reliance is placed in the Court of Appeal in Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd decision.

“The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity



and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”

36. According to the 1st Respondent, the power of the Court to review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality, or procedural impropriety has been proved.
37. The arguments advanced by counsel for the Ex-parte Applicant were raised and considered by the Board. By inviting this court to re-consider the same issues amounts to inviting this court to engage in a merit review which is an appellate function hence outside the scope of Judicial Review jurisdiction.
38. The Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*: -

“Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant...”

39. The 1st Respondent’s findings in Request for Review No. 99 of 2023 took into account provisions of Article 227 of *the Constitution*, the Act and Regulation 2020 and as such the Decision was neither irrational, nor unlawful as alleged in the Statutory Statement, Verifying Affidavit, and Notice of Motion by the Ex-parte Applicant.
40. Article 227 of *the Constitution* provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

2nd & 3rd Respondent’s Written Submissions

41. In opposing the Application, the 2nd and 3rd Respondents filed a Replying Affidavit sworn on 17th January, 2024 by Paul Mutai.



42. They submit that Section 149(1) (a) and 2(b) of the *Public Finance Management Act*, 2012 provides that an Accounting Officer is accountable to the County Assembly for ensuring that the resources of the entity for which the Officer is designated are in a way that is lawful and authorized.
43. It is their case that the reliefs sought, if granted will amount to an unlawful compulsion of award of tender devoid of a budgetary allocation.
44. The Request for Review dated 27th November, 2023 PPARB Application No. 99 of 2023, the Ex-parte Applicant challenged the decision of the 2nd and 3rd Respondents.
45. In response, the 2nd and 3rd Respondents filed Confidential Documents before the Board pursuant to section 69 of the PPADA which included certified copies of communication from Council of Governors to the effect that there is NO budgetary allocation from the National Government as at now, since it will be factored in the 2023/2024 supplementary budget and that the County Government of Bomet has NOT signed any inter-governmental agreement on the implementation of the joint Project.
46. Certified copies of an approved budget, procurement plan, Appropriation Act 2023 and commitment letter from the chief officer, Economic planning from Bomet County to demonstrate the allocation for the project in the current FY2023/2024.
47. The issue that was before the 1st Respondent was whether the 2nd & 3rd Respondents' decision to terminate the Tender Proceedings on the grounds of Inadequate Budgetary provisions met the substantive and procedural requirements of Section 63 of the PPADA, which upon review, the 1st Respondent found to the same to have been terminated in compliance with the statutory requirements.
48. They argue that 1st Respondent is well versed with the jurisdiction to determine the subject matter in dispute as was rightly held in Civil Appeal No. 145 of 2011, Kenya Pipeline Company Limited vs Hyosung Ebara Company Limited & 2 others (2012) e KLR, which held that the Review Board is a specialized Statutory Tribunal established to deal with all Complains of breach of Duty by the four (4) procuring entity. It was further stated that from its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procuring entity. It follows then that its decision in matters within its jurisdiction should not be lightly interfered with.
49. Further reliance is placed in the Court's decision in Republic v Public Procurement & Administrative Review Board & 2 others Ex parte Applicant Dar-Yuksel-Ama (A Consortium of Dar-Al-Handasah in Joint Venture with Yukelproje A.S & AMA Consulting Engineers Ltd; Korea Express Corporation (KEC) Korea Consultants International Company Limited (KIC) & Apec Consortium Limited & 2 others (Interested Parties) [2022] eKLR

“Noting that the board acted within its powers and after an elaborate analysis reached the conclusion to direct how evaluation was to be done, this court finds no grounds upon which to review the decision. I concur with the decision in Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Ex parte Kenya Power and Lighting Company Limited [2019] eKLR where Mativo J while relying on the decision in Paul Kiplagat Birgen & 25 Others v Interim Independent Electoral Commission & 2 Others (2011) eKLR held as follows;

“A Judicial Review court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the body. Where a body is granted wide decision-making powers with a number of options or variables, a judicial review court may not interfere unless it is clear that the choice preferred is at odds with the law. If the impugned decision lies within a range of



permissible decisions, a Judicial Review court may not interfere only because it favours a different option within the range...”

50. In *Peninah Nadako Kiliswa v Independent Electoral & Boundaries Commission (IEBC) & 2 others* [2015] eKLR, the Supreme Court of Kenya stated as follows in relation to judicial review proceedings;

“The well-recognized principle in such cases, is that the court’s target in judicial review is always no more than the process which conveyed the ultimate decisions arrived at. It is not the merits of the decision, but the compliance of the decision-making process with certain established criteria of fairness. Hence an Applicant making a case for judicial Review has to show that the decision in question was illegal, irrational or procedurally defective.”

51. Judicial Review proceedings are concerned with the process that a statutory body employs to arrive at a decision and not the merits of the decision itself. Once it is established that a statutory body has made a decision within its jurisdiction following all statutory procedures then unless the decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court.

52. They placed further reliance in the decision of the Court of Appeal in *Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others* (2012) eKLR where the Court held that;

“So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the request for review, it was as much entitled to decide those matters wrongly as it was to decide them rightly. The High Court erred in essence in treating the Judicial Review Application as an appeal and in granting review orders which were outside the scope of Judicial Review Jurisdiction.”

“From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by the Procurement Entity. It follows that its decision in matters within its jurisdiction should not be lightly be interfered with.”

53. They invite the Court to dismiss the Application herein and not accept to do a merit analysis.

54. Mandamus is set out in the case of *Republic v Public Procurement Administrative Review Board & 2 others Ex-parte BABS Security Services Limited* [2018] eKLR which in quoting the case of *Apotex Inc. vs. Canada (Attorney General)*, summarized the eight factors that must be present for the writ to issue are: -

- i. There must be a public legal duty to act;
- ii. The duty must be owed to the Applicants;
- iii. There must be a clear right to the performance of that duty, meaning that:
 - a. The Applicants have satisfied all conditions precedent; and
 - b. There must have been:
 - i. A prior demand for performance;
 - ii. A reasonable time to comply with the demand, unless there was outright refusal; and



- iii. An express refusal, or an implied refusal through unreasonable delay;
 - iv. No other adequate remedy is available to the Applicants;
 - v. The Order sought must be of some practical value or effect;
 - vi. There is no equitable bar to the relief sought;
 - vii. On a balance of convenience, mandamus should lie.
55. In arguing the parameters of judicial review reliance is placed in the Court of Appeal in *Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996* as follows:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...”

56. They also rely on the case of *Prabhulal Gulabchand Shah vs. Attorney General & Erastus Gathoni Miano Civil Appeal No.24 of 1985* the Court of Appeal stated that: -

“The person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party against whom the mandamus is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private nature.”

57. They submit that upon the 2nd and 3rd Respondents terminating the Tender herein and giving out sufficient reasons, there was no statutory underpinning and duty owed to the Applicant to warrant the orders for Mandamus herein.
58. The 1st Respondent, found that the Respondent satisfied both the substantive statutory pre-conditions of termination of procurement proceedings, the Board found and held that the Respondents



terminated the procurement proceedings of the subject tender in accordance with Section 63 of the Act. In the circumstances, the Board is divested of jurisdiction by dint of section 167 (4)(b) of the Act.

59. It is their case that there are no statutory provisions that imposes a duty upon the 2nd and 3rd Respondents to enter into a contract with the ex-parte Applicant especially in the absence of the necessary budget provisions.
60. In a Without prejudice basis to the foregoing, they submit that it is not disputed that the Tender herein was cancelled by the 2nd and 3rd Respondents.
61. The Ex-parte Applicant has failed to seek Orders quashing the cancellation of the said Tender and now seeks for this Honourable Court to award the Tender that has already been cancelled, and an Order of mandamus is unattainable on this premise.
62. In making these submissions, they distinguish the Court's decision in Republic V Public Procurement Administrative Review Board & 2 Others Ex-Parte Selex Sistemi Integrati [2008] EKLr where the Honourable Court stated thus;

“The application, not having specifically asked me to quash the termination of the awarded Tender, I cannot so quash the same, in my view, it cannot have been an oversight that the applicant did not ask for the quashing of the decision of the 2nd Respondent terminating the awarded Tender. The fourth prayer seeking for mandamus to compel the 2nd respondent to award the subject tender to the applicant in accordance with section 68(1) of the public procurement Act 2005 and the Tender Document cannot also be granted. This is because the purported termination of tender has not been quashed by the court nor has the applicant sought for such quashing of the termination of Tender.”

ii. Whether there is a clear right to the performance of that duty.

63. They reiterate their submissions and further stated that in the absence of a statutory underpinning and/or a duty to the ex-parte Applicant, the ex-parte Applicant does not possess any right to the performance of any such duty which we reiterate is not available in law or otherwise to the Applicant.
64. They submit that the Orders sought by the ex-parte Applicant have no practical value or effect. The ex-parte Applicant prays for Orders that will be granted in vain.
65. They submit that the 2nd and 3rd Respondent clearly demonstrated before the 1st Respondent that the 3rd Respondent lacks adequate budgetary allocation to undertake the collaborative project that was between the 3rd Respondent and the National Government through the Ministry of Investments, Trade, and Industry as coordinated by the Council of Governors wherein the National Government is to bear the project cost of Kes. 250 Million whilst the 3rd Respondent is to bear a matching cost of Kes. 250 Million.
66. The 2nd and 3rd Respondent clearly demonstrated before the 3rd Respondent through certified copies of the approved Estimates FY 2023/2024 and a certified Procurement Plan that the demonstrated that the 3rd Respondent only appropriated the sum of Kes. 50,000,000.00 towards the project.
67. The Council of Governors (COG) through its letter dated 14th November, 2023 confirmed the position that the 3rd Respondent is yet to be allocated the Kes. 250,000,000.00/- contribution by the National Government and further that that the 3rd Respondent has not signed an inter-governmental agreement on the establishment of the County Aggregation and Industrial Parks.



68. It is their case that in the absence of commitment by the National Government the 3rd Respondent cannot assume liabilities and engage in an embarrassing situation of awarding tenders in the first instance where its reasonably foreseeable that funding may not be forthcoming as contemplated.
69. The Order of Mandamus sought will have no practical effect or value and will in effect be moot as buttressed in the case of Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi [2019] eKLR:

“A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.

It is trite that as a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it was at the time when the suit was instituted and by applying the facts to the law and circumstances.

Time and again, it has been expressed that a court should not act in vain. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.

A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use.

In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.

The legal doctrine known as 'mootness' is well developed in constitutional law jurisprudence. Accordingly, a case is a moot one if it '...seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy.'

Furthermore, a case will be moot '...if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision.'”

70. On a balance of convenience, in the absence of adequate budgetary allocation, it is inordinate and impractical for this Honourable Court to issue an Order of Mandamus against the 2nd and 3rd Respondents to award a Contract to the ex-parte Applicant. To do so, will further expose the 2nd and 3rd Respondents to a myriad of litigation risks and will therefore highly prejudice the 2nd and 3rd Respondents.



71. On the issue of the prayer for an order of certiorari they submit that the application does not meet the threshold to grant an order of certiorari upon considering the following;
- i. Whether the Respondent decision is irrational and unreasonable.
 - ii. Whether the Respondent made an error of law
 - iii. Was the Respondents Action Unfair?
 - iv. Was there a breach of legitimate expectation?
- i) Whether the Respondent decision is irrational and unreasonable.
72. They submit that following the submission by the 2nd and 3rd Respondents adequate documentation to prove lack of budgetary provision to undertake the Project herein, the 1st Respondent made a rational and reasonable decision to uphold the termination of the Tender proceeding on account of insufficient budgetary allocation.
73. Indeed, the 1st Respondent interrogated the said documents at length and consequently came to a conclusion that the 2nd and 3rd Respondents had satisfied both the substantive and procedural requirements of Section 63 of the Act, and therefore its decision is not irrational and/or illegal.
74. An error of law was defined by the Honourable Court in Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Numerical Machining Complex Limited [2016] eKLR where the Court stated thus;
- “ 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...”
75. The 1st Respondent acted within the statutory powers vested in them by upholding the Termination of the tender proceedings herein after hearing all the parties and upon considering all the confidential documents before it.
76. They challenge the argument that the 1st Respondent changed the course of its decision in Request for Review No. 75 of 2023 vis-a-vis its decision in Request for Review No. 99 of 2023 without more and that the said departure occasioned an error in the law.
77. They further submit that pursuant to the 1st Respondent’s decision in Request for Review No. 75 of 2023 delivered on 1st November, 2023 the 2nd Respondent requested for the supply of documents/ information relating to the funding by the National Government through the Ministry of Investments, Trade, and Industry towards the Project whereupon the Council of Governors supplied the said the said information vide its letters dated 14th November, 2023 and 17th November, 2023.
78. The 2nd and 3rd Respondents further supplied certified copies of the approved Estimates FY 2023/2024 and a certified Procurement Plan that the demonstrated that the 3rd Respondent only appropriated the sum of Kes. 50,000,000.00 towards the project and there is no error of the law on the 1st Respondent’s decision as defined herein above or at all.



79. The 1st Respondent took into account all the relevant material before reaching its decision. Additionally, the said decision is not in breach of the ex-parte Applicant’s fundamental human right and neither did the 1st Respondent misinterprets a statute, or any other legal document, or a rule of common law. They submit that the said decision was well within the law and is supported.

iii. Was the Respondents Action Unfair?

80. Section 7 (2) of the *Fair Administrative Action Act*, 2015 provides that a court may review an administrative action or decision if the administrative action or decision is unfair. Additionally, under Article 47 of *the Constitution* and section 4 (1) of the *Fair Administrative Action Act* every person has the right to administrative action that is procedurally fair.

81. It is their case that the process leading to the impugned decision took into account all the relevant material information and submissions by the parties before it and the decision can only be summed up as being fair. Relied on the Court’s decision in Republic v Principal Secretary, Ministry of Transport, Housing and Urban Development Ex-parte Soweto Residents Forum CBO [2019] eKLR where the Honourable Court stated thus in relation to fairness; “What does fairness require in the present case?” The standards of fairness are not immutable. They may change with the passage of time, both in the general, and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.

82. The foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. “... the 1st Respondent’s decision was fair in the circumstances of this case.”

83. The 2nd and 3rd Respondent’s did not conclude the tendering process and neither did it award the Tender herein and therefore, the Applicant herein cannot claim legitimate expectation as a basis for the award of the tender.

84. A Procuring Entity has the statutory right to cancel/terminate a tender at any point before an award. We restate the provisions of Section 63 of the PPADA as follows;

- “(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—
 - (a)
 - i.
 - ii.
 - (b) inadequate budgetary provision;
 - (c)
 - (d) “

85. They submit that noting the 3rd Respondent had not yet concluded the procurement proceedings and/or awarded the Tender herein to the Ex-parte Applicant, the claim for legitimate expectation is not available to the Applicant.

86. It is their case that an Ex-parte Applicant cannot plead legitimate expectation for the award of a Tender without any budgetary allocation. It is noteworthy that the Ex-parte Applicant herein is well aware that the 3rd Respondent is yet to receive the necessary funding from the National Government.
87. Therefore, to expect an awarding of Tender in the absence of the requisite budgetary allocation will be to expect an unlawful act on the 2nd and 3rd Respondent's part.
88. Reliance is placed in Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO [2019] eKLR where the Honourable Court held thus;

“Addressing the subject of legitimate expectation, H. W. R. Wade & C. F. Forsyth [3] at pages 449 to 450, thus: - “It is not enough that an expectation should exist; it must in addition be legitimate.... First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation.... Second, clear statutory words, of course, override an expectation howsoever founded.... Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy....” “An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.” (Emphasis added)

The Court went on to state as follows; “The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. Once a reasonable expectation exists the administrator is required to act in accordance with that expectation, except if there are public interest considerations which outweighs the individual's expectation..... Additionally, statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet one's expectations otherwise his decision would be outrightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute.”

89. Public Procurement has a Constitutional underpinning as per Article 227 of *the Constitution* which includes; Right to reasonable expectation, transparency, openness, accountability and fairness. Indeed, the 1st Respondent found that the 2nd and 3rd Respondents adequately demonstrated the absence of budgetary allocation and that the termination of procurement proceedings met the threshold under Section 63 of the PPADA; and that Consequently, the 1st Respondent did not have the jurisdiction to hear and determine the matter by dint of Section 167 (4) of the PPADA.
90. The 1st Respondent's decision is therefore lawful, rational, and fair.
91. To quash the decision of the 1st Respondent and to compel the 3rd Respondent to award the Tender herein to the Ex-parte Applicant where it has been clearly demonstrated that the 3rd Respondent lacks the budgetary allocation will not be efficacious and will go contrary to the principles enshrined in Article 227 of *the Constitution*.



92. The Ex-parte Applicant has failed to meet the threshold for the Orders sought as held by the Honorable Court in *Republic vs Public Procurement Administrative Board & Anor Ex parte Accounting Officer, Energy and Petroleum Regulatory Authority & Anor* (2022) eKLR.

Analysis and Determination:

93. From the material before court, the broad issue for determination is whether the Applicants have established a case for the grant of the judicial review orders sought.
94. This court’s jurisdiction in matters procurement is donated by section 175 (1) of the PPADA, whereby a party aggrieved by the decision of the Board may seek judicial review orders.
95. Judicial review jurisdiction was discussed in the Ugandan case of *Pastoli vs Kabale District Local Government Council & Others*, (2008) 2 EA 300, that:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntuandothers v Kyambogo University*, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

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

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

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

96. On 1st November, 2023 and in exercise of the powers conferred upon it under the Act, the Board made the following final orders with respect to Request for Review No. 75 of 2023:
- (a) The decision by the 1st Respondent to terminate the procurement proceedings of Tender No. CGB/TETII/001/2023/2024 for Proposed Construction of County Aggregation and Industrial Parks be and is hereby quashed and set aside.
- (b) The Procuring Entity’s Letter dated 28th September 2023 issued to the Applicant and other tenderers in the subject tender communicating the decision to terminate the procurement proceedings with respect to Tender No. CGB/TETII/001/2023/2024 for Proposed Construction of County Aggregation and Industrial Parks be and is nullified and set aside.



- (c) The 1st Respondent is hereby ordered to ensure the procurement process with respect to Tender No. CGB/TETII/001/2023/2024 for Proposed Construction of County Aggregation and Industrial Parks proceeds to its logical conclusion within 14 days of this decision taking into consideration the Board's findings herein and the provisions of the Act, *the Constitution* and Regulations 2020.
- (d) In view of the Board's findings and orders above, each party shall bear its own costs in the Request for Review.
97. 27th November, 2023 the Ex-Parte Applicant herein being dissatisfied with the decision of the 2nd and 3rd Respondents filed a Request for Review Application No. 99 of 2023 dated 27th November, 2023 before the 1st Respondent (hereinafter "Request for Review No. 99")
98. Thereafter, on 18th December, 2023 the Respondent made the following orders with respect to the Request for Review:
- (a) The Applicant's Request for Review dated 27th November, 2023 and filed on even date be and is hereby dismissed.
- (b) Given our findings herein, each party shall bear its own costs in the Request for Review.
99. In determining whether the 2nd and 3rd Respondents had terminated the procurement proceedings in the subject tender in accordance with the Act, *the Constitution* and Regulations 2020, the 1st Respondent at paragraphs 103 and 104 in Request for Review No, 99 of 2023 revisited its findings in Request for Review No. 75 of 2023 and noted at paragraph 105 that;
- “termination of the subject tender was not done in accordance with the provisions of Section 63 of the Act which was the basis upon which the Board made a declaration that termination of the subject tender had not been done in accordance with Section 63 of the Act, subsequently quashed the 1st Respondent's decision as communicated in the letter dated 28th September 2023 and ordered that the procurement proceedings in the subject tender proceed to its logical conclusion while taking into consideration the Board's findings and the provisions of the Act, *the Constitution* and Regulations 2020.”
100. The Respondent noted from the confidential documents submitted to it pursuant to Section 67(3)(e) of the Act, that the unlike in Request for Review No. 75 of 2023, the 2nd Respondent had submitted in the confidential file a certified copy of the budget for the Approved Estimates FY 2023/2024 regarding Trade, Tourism and Industry and a certified Procurement Plan.
101. The court has looked at paragraph 118 of the Decision in Request for Review No. 99 of 2023 and noted that, the 1st Respondent stated that,
- ‘The subject tender was the result of joint efforts of the Procuring entity, the Council of Governors and the Ministry of Investments, Trade and Industry (State Department for Industry. The Board at paragraph 78 of its Decision dated 1st November 2023 in Request for Review No. 75 of 2023 duly acknowledged from its reading of the Professional Opinion that the project in the subject tender was cost shared between the Ministry of Investments, Trade and Industry (State Department for Industry and the 2nd Respondent herein.’
102. The 1st Respondent considered the letter dated 14th November, 2023 from the Council of Governors submitted in the confidential file by the 2nd Respondent demonstrating that the subject procurement



- had inadequate budgetary allocation and observed that the National Government is yet to allocate the 3rd Respondent the Kes. 250 Million for implementation of the County Aggregation and Industrial Parks and neither had the 3rd Respondent signed any Intergovernmental Agreement on the establishment of the County Aggregation and Industrial Parks.
103. The 1st Respondent also took note from the 1st Respondent satisfies itself that the 2nd Respondent commenced the procurement process of the subject tender without ascertaining whether there were sufficient funds to meet the obligations of a resulting contract noting that there was no indication of when the Supplementary Budget in Financial Year 2023/24 would be issued contrary to the provisions of the Act, *the Constitution* and the *Public Finance Management Act* despite the fact that the subject tender had earlier on been floated and such issues of budgetary allocation ought to have been arrested before re-advertisement of the same.
 104. The 1st Respondent established that only Kes. 50,000,000 was budgeted for Industrial Development and Support (Industrial Park) by the 2nd Respondent being the basis of the subject tender. The decision making authority committed no error of law in the process of taking the decision, the subject of the complaint. The determination was within the provisions of a law or its principles.
 105. The 1st Respondent in exercise of its discretion arrived at a finding that the 2nd and 3rd Respondents did not fulfil the substantive requirements for the termination of procurement proceedings in the subject tender as required by Section 63(1)(b) of the Act. Further, at paragraphs 130 to 132 of its Decision dated 18th December, 2023 in Request for Review No. 99 of 2023, the 1st Respondent found that the procedural statutory pre-conditions that must be satisfied before a termination of procurement proceedings is deemed lawful as required by Section 63(2) & (3) of the Act had been met by the Respondents.
 106. The 1st Respondent found and held that the 2nd and 3rd Respondents terminated the procurement proceedings of the subject tender in accordance with Section 63 of the Act and in the circumstances, it was divested of its jurisdiction by dint of Section 167(4)(b) of the Act.
 107. The 2nd Respondent commenced the procurement process of the subject tender without ascertaining whether there were sufficient funds to meet the obligations of a resulting contract noting that there was no indication of when the Supplementary Budget in Financial Year 2023/24.
 108. This court is cognizant of the fact that it cannot delve in to a merit analysis in arriving at its decision as a judicial Review court. In order for a procuring entity to satisfy the court that the termination of procurement proceedings was legal and free from procedural impropriety, a procuring entity must demonstrate that it complied with both the substantive and procedural requirements under Section 63 of the Act.
 109. With this in mind, and in order to determine whether or not the 1st Respondent committed an error of law in the process of taking the impugned decision the subject of the complaint or contrary to the provisions of a law, or its principles; or whether the 1st Respondent acted through a procedural impropriety through failure to act fairly in the process of taking a decision.
 110. The unfairness may be in non-observance of the Rules of Natural Justice towards one and in this case the Ex-parte Applicant who is adversely affected by the decision.
 111. The court has considered Section 63 of the PPDA Act which makes provision for the substantive and partly the procedural aspect of the termination of procurement or asset disposal proceedings without entering into a contract.



112. In the case of Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Rongo University [2018] eKLR the court held that the grant of orders of certiorari, mandamus, and prohibition is discretionary. The court is entitled to consider the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.
113. The court has looked at the confidential documents submitted by the 1st Respondent to the Board pursuant to Section 67(3)(e) of the Act and noted that the Respondents submitted in the confidential file a certified copy of the budget for the Approved Estimates FY 2023/2024 regarding Trade, Tourism, and Industry.
114. The subject tender was the result of joint efforts of the Procuring entity; the Council of Governors; and the Ministry of Investments, Trade, and Industry (State Department for Industry).
115. From this letter it is clear that:
- i. The County Governments in collaboration with the Ministry of Investment, Trade, and Industry shall establish County Aggregation and Industrial Parks (CAIPs) in all the 47 Counties.
 - ii. the Counties shall budget Kes. 250 million to enable matching funds from the National Government during the Financial Year 2023/ 2024.
 - iii. the County Governments shall enter into an intergovernmental Agreement on the establishment of the County Aggregation and industrial Parks.
 - iv. the Council wishes to notify the County as follows;

That, the Council acknowledges the status update on advertisement on CAIPs and further recommends the fast-tracking of the same.

During the recently concluded retreat of Governors held in Mara, the Governors through the Chair proposed to the National Treasury that the allocation of Kes. 250 million grant to the remaining 29 counties be provided through a supplementary budget in the FY 2023/24 for implementation of CAIPs
116. It is expected that the County Government shall enter into an agreement with the National Government on implementation of CAIPs. In this regard, the Council in collaboration with the Ministry has PARBNO.99 of 28th December, 2023 developed the draft CAIPs agreement for consideration upon clearance by the Attorney General.
117. Further, it is expected that the County Government of Bomet shall open a Special Purpose Accounts for transfer and subsequently arrangement of the CAIPs funds. The Council notes that this has not been attained by Counties under Phase two and three due to delay in authorization letter from the Ministry of Investment, Trade, and Industry.
118. Notably, the 1st Respondent submitted in the confidential file a certified copy of a letter dated 17th November, 2023 from the Council of Governors forwarding to 18 Counties benefiting from the 1st allocation of funds from the Ministry the Inter-Governmental Agreement for their consideration and inviting the County Governors for signing of the said agreement with the Cabinet Secretary Ministry of Investment Trade and Industry on 24th November, 2023.
119. Additionally, the 1st Respondent submitted a Press Statement dated 22nd November, 2023 and signed by the Chairperson, Council of Governors, on the signing of the Inter-Governmental Partnership Agreements for the County Aggregation and Industrial Parks (CAIPs) which indicated that the



- National Government would fast-track allocation of the conditional grants to the remaining 29 counties through a supplementary budget in FY2023/24.
120. The foregoing confirms that the county governors have already been invited to sign the Inter-Governmental Partnership Agreements on 24th November, 2023. The National Government is committing to fast track the allocation of additional grants. This is through the supplementary budget for the year 2023/24.
 121. The foregoing are monumental entries that leave the court with conclusion, and I so hold, that the 1st Respondent terminated the procurement on the grounds of Section 63(1)(b) of The PPDA prematurely yet the National Government had committed to fast-track allocation of the conditional grants to the remaining 29 counties through a supplementary budget in FY2023/24.
 122. The decision to terminate the Procurement amounts of illegality which offends the principal set out in the case of *Pastoli vs Kabale District Local Government Council & Others*, (2008) 2 EA and the decision cannot stand.
 123. The Applicant also seeks orders of mandamus compelling the 1st Respondent to exercise its powers under Section 173 (b) of The PPAD Act to extend the tender validity period, compelling the 2nd Respondent to issue the Applicant with a letter of award/letter of intention to enter into a contract in terms of section 87 of the [*Public Procurement and Asset Disposal Act*](#), and compelling the 2nd and 3rd Respondents to enter into a procurement contract with the Applicant within the time frame of the extended tender validity period in terms of section 135 of the [*Public Procurement and Asset Disposal Act*](#).
 124. Section 173(B) the [*Public Procurement and Asset Disposal Act*](#) stipulates that upon completing a review, the Review Board may do any one or more of the following—give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings.
 125. Section 87 of the [*Public Procurement and Asset Disposal Act*](#) provides that before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted. (2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award. (3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.
 126. Section 135 of the [*Public Procurement and Asset Disposal Act*](#) stipulates that:(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer; (2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings; (3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period; (4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties; and (5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where



a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

127. In the case of Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & Another, the court stated as follows;

“The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again we turn to Halsbury’s Law of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says: -

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

128. Having found that the Applicant had made out a case for the issuance of the order of certiorari as sought in prayer 1A, it is this court’s finding that prayers 1B, C, and D as structured in the Notice of Motion will be best attended to by the 1st Respondent.

Disposition:

129. The Court of Appeal in Pipeline Ltd v Hyosung Ebara Company Ltd while addressing this aspect stated;

“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling anything done by the procuring entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the review Board is obviously better equipped than the High Court to handle disputes arising from the breach of duty by procuring entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”

130. This Honourable court finds the Notice of Motion meritorious leading to quashing of the 1st Respondent’s Decision dated 18th December, 2023 to the extent of prayer 1A.

131. In the interest of justice, this Honorable Court remits the Request for Review Application No. 99 of 2023 for re-hearing by the 1st Respondent noting that the 1st Respondent is the specialized central independent body mandated to review, hear, and determine tendering disputes.

Order:

1. An Order of Certiorari is hereby issued to bring to the Honourable Court for purposes of being quashed the 1st Respondent’s decision dated 18th December, 2023 dismissing the Applicant’s Request for Review dated 27th November, 2023 between Astronea



Construction Limited vs. The Accounting Officer County Government of Bomet & Anor in Public Procurement Administrative Review Board (PPARB) Application No. 99 of 2023.

2. The Applicant's Request for Review dated 27th November, 2023 between Astronea Construction Limited vs. The Accounting Officer County Government of Bomet & Anor in Public Procurement Administrative Review Board (PPARB) Application No. 99 of 2023 shall be reheard a fresh before a different board within fourteen (14) days.
3. The Prayers 1B, C and D are disallowed.
4. The prayer for an Order of Prohibition restraining the 2nd Respondent from re-tendering and/or re-advertising or inviting fresh tenders or undertaking any further procurement in respect of the subject matter of Tender No. CGB/TETII/001/2023-2024 for proposed construction of the County Aggregation and industrial Park is spent.
5. Costs to the Applicant

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY, 2024.

J. CHIGITI (SC)

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

