Republic v Public Procurement Administrative Review Board & another; Board of Trustees Kenya National Examinations Council Staff Retirements Benefits Scheme, 2011 & another (Exparte); Octagon Pension Services Limited & another (Interested Parties) (Application E075 of 2024) [2024] KEHC 6327 (KLR) (Judicial Review) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6327 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E075 OF 2024

J NGAAH, J

MAY 23, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD .... 1ST RESPONDENT

ENWEALTH FINANCIAL SERVICES LIMITED ..... 2ND RESPONDENT

AND

BOARD OF TRUSTEES KENYA NATIONAL EXAMINATIONS COUNCIL STAFF RETIREMENTS BENEFITS SCHEME, 2011 ..... EXPARTE

ACCOUNTING OFFICER, BOARD OF TRUSTEES KENYA NATIONAL EXAMINATIONS COUNCIL STAFF RETIREMENT BENEFITS SCHEME, 2011 ..... EXPARTE

AND

OCTAGON PENSION SERVICES LIMITED ..... INTERESTED PARTY

ZAMARA ACTUARIES, ADMINISTRATORS AND CONSULTANTS ..... INTERESTED PARTY

JUDGMENT

1. The application before court is the applicants' motion dated 12 April 2024 expressed to be filed under Articles 10, 22, 23, 47 and 227 of *the Constitution*, Sections 7(1) and (2), 9, 11(1) and (2) of the *Fair Administrative Action Act*, 2015;Section 175(1)and (3) of the *Public Procurement and Asset Disposal Act*, 2015; Sections 8 and 9 of the *Law Reform Act*, cap. 26 and Order 53 Rule 3 and 7 of the Civil Procedure Rules. The applicants pray for the judicial review orders of certiorari and declaration and the prayers have been framed thus:

> " 1. CERTIORARI to remove into the High Court and quash the decision of the Public Procurement Administrative Review Board delivered on the 28th of March 2024 in PPARB Application No. 19 of 2024.
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> 2. DECLARATION that:
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> (a) the Public Procurement Administrative Review Board lacked jurisdiction to entertain the Request for Review in PPARB Application No. 19 of 2024 by virtue of the provisions of section 167(4)(b) of the *Public Procurement and Asset Disposal Act*.
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> (b) the Ex-Parte Applicants lawfully terminated the procurement proceedings (with respect to tender number KNECSRBS/EOI/2023- 2024/01 for the provision of scheme administration services) under the provisions of section 63(1)(e) of the *Public Procurement and Asset Disposal Act*.
>
> (c) Material governance issues as set out under section 63(1)(e) of the *Public Procurement and Asset Disposal Act* are not limited to governance issues arising out of the procurement process.
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> (d) The letter dated the 24th of February 2024 terminating the procurement proceedings disclosed with sufficient clarity the reasons for the termination of the procurement proceedings.
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> (e) The Ex-Parte Applicants were at liberty, at any stage of the procurement proceedings in question, to conduct a due diligence exercise.
>
> (f) the Ex-Parte Applicants are at liberty to proceed with the re-advertised tender (tender KNECSRBS/RFP/2023-2024/01) to its logical conclusion."

The applicants have also asked for the order that the respondents bear the costs of this application.

2. The application is based on a statutory statement dated 11 April 2024 and an affidavit sworn on even date by Dr. Ibrahim Otieno, verifying the facts relied upon. Dr. Otieno has sworn that he is the Chairman of the Board of Trustees of the Kenya National Examinations Council Staff Retirement Benefits Scheme, 2011, which is named as the 1st applicant in these proceedings and which I will hence forth refer to as "the procuring entity".

3. According to Dr. Otieno, in the procuring entity's board meeting held on the 26 September 2023, a resolution was passed for procuring for pension scheme administration consultancy services through open tender. The procurement process commenced immediately and was set to be completed by the

31 December, apparently of the same year. A tender, more particularly described as KNECSRBS/EOI/2023-2024/01 and which the applicants have described as "Tender 1" was floated.

4. The Tender Opening Committee meeting took place on 7 November 2023 for purposes of opening of Expression of Interest Bids for Tender 1. The exercise of tender opening took place on the 7 November 2023 at 10.AM. The venue for this exercise was at the 1st applicant's board room at New Mitihani House, 6th floor, at South C in Nairobi. At this meeting, five bidders were found to have met the criteria at this stage of evaluation; these have been listed as:

    a. Zamora Actuaries, Administrators & Consultants.

    b. CPF Financial Services

    c. Enwealth Financial Services Limited

    d. Minet Kenya Financial Services.

    e. Octagon Pension Services Limited

5. The tender Evaluation Committee duly convened, deliberated on preliminary and technical evaluation of all bidders and prepared an Evaluation Report for Tender 1. The Evaluation Report which is dated 6 December 2023, recommended progression to the next stage (Request for Proposal) for all the five qualified bidders. The successful bidders were duly notified and proceeded to submit their financial bids. Thereafter, the Tender Opening Financial Bids took place on the 16 February 2024 at 2.00 p.m. at the same venue where the initial tender opening was done. It is at this meeting that the sealed bids were opened in what has been described as a 'two key' process.

6. Once again, the Tender Evaluation Committee duly convened, deliberated on the financial evaluation of four (4) bidders, and proceeded to prepare an Evaluation Report for Tender 1.Upon receipt of the Tender Evaluation Committee Report, the Board of Trustees of the 1st applicant convened a special board of trustees meeting on the 21 February 2024 with the sole agenda of considering and deliberating on the Tender Evaluation Committee Report with respect to Tender 1. In that meeting, it emerged that there were outstanding governance issues between the 2nd respondent and the procuring entity.

7. The governance issues were that during the transition from Enwealth Financial Services to Zamora Administrators, obtaining the transfer of member data from the 2nd respondent was a challenge to an extent that the new scheme administrators had to reconstruct some of the scheme's members' bio data themselves. Indeed, the regulator, the Retirement Benefits Authority, had to be involved for the matter to be addressed. The 2nd respondent had also calculated wrongly members' benefits as a result of which an overpayment of Kshs. 114,000,000.00 was made. The cumulative sum including the legal and actuarial costs claimed amounted to Kshs. 1 18,027,437.93.

8. A demand had been issued to the 2nd respondent, but its response was defiant to the extent that it refused to admit liability. So far, the 2nd respondent has not made any efforts to resolve this issue despite adverse findings made against it by the Retirement Benefits Tribunal. Consequently, the procuring entity has initiated legal action against the 2nd respondent to recover the amounts alleged to have been lost.

9. The procuring entity then took the position that it would not be prudent to contract with the 2nd respondent due to these outstanding legal and governance issues. It, instead, resolved that the procurement process be terminated in accordance with section 63 of the *Public Procurement and Asset Disposal Act* and a report to that effect be submitted to the Public Procurement Regulatory Authority.

10. All bidders were to be informed that the procurement process had been terminated and that a fresh advertisement of the tender for provision of scheme administration services would be done by Tuesday 27 February 2024. A new Tender Evaluation Committee was to be constituted for this purpose.

11. All tenderers or bidders, including the 2nd Respondent, were duly notified of the termination of the procurement proceedings and the reasons for the termination through a letter dated 23 February 2024. As a matter of fact, a specific request for clarification was made by the 2nd Respondent through an email dated the 4 March 2024 and the clarification was made by the procuring entity's e-mail dated 5 March 2024. Therefore, prior to the filing of the Request for Review before the 1st Respondent, the 2nd Respondent had been given sufficient information regarding the "material governance issues" being the reasons for the termination of the procurement proceedings.

12. Contrary to the applicant's 2nd respondent's allegations, the reasons for the termination were neither vague nor ambiguous. Further, a Report on the Termination of Procurement and Disposal Proceedings required under section 63(2) of the Act, was duly submitted to the Authority on 4 March 2024.

13. The 2nd respondent was dissatisfied with the termination of the procurement proceedings and so it filed a Request for Review before the 1st Respondent on 7 March 2024. The only parties that participated in those proceedings are the Applicants, the 2nd Respondent and the 1st and 2nd Interested Parties. The applicants opposed the Request for Review and filed all necessary documents before the 1st Respondent.

14. In its decision delivered on 28 March 2024, the 1st Respondent allowed the Request for Review and nullified or set aside the decision to terminate the procurement proceedings. It also nullified or set aside the decision to re-advertise the tender, anddirected the Applicants to conclude procurement proceedings within fourteen days.

    Being dissatisfied with the 1st respondent's decision, the applicant has filed the instant proceedings. The grounds for which he seeks judicial review orders are, as far as I can gather, illegality, irrationality and legitimate expectation.

15. The 1st respondent opposed the motion and set out facts as laid out by the applicants, particularly, as between the time the 2nd respondent filed its application for review and the time it delivered its decision which, as noted, is the subject of these proceedings. As usual in this kind of proceedings, the 1st respondent has defended its decision as being consistent with the provisions of Article 227 of *the Constitution*, the *Public Procurement and Asset Disposal Act* and the Regulations made thereunder. It is its case that the decision was well reasoned and was neither unlawful nor irrational. It was also not in violation of the applicants' legitimate expectations. I will return to this decision later.

16. Like the 1st respondent, the 2nd respondent also opposed the applicant's motion. A replying affidavit to this effect was sworn by Mr. Simon Wafubwa who has described himself as the managing director of the 2nd respondent. And like the applicant and the 1st respondent, the 2nd respondent has chronicled the events from the commencement of the procurement process all the way to the 1st respondent's impugned decision.

17. On the specific question about the previous contract between the applicant and the 2nd respondent, Mr. Wafubwa has admitted that indeed the 2nd Respondent had previously been contracted by the procuring entity as an administrator of the Kenya National Examination Council Staff Retirement Benefits Scheme which, according to him, was a Defined Benefit scheme for the period between 15 October 2011 and 25 February 2017. To be precise, the contract was entered on 15 October 2011.

However, the current scheme, which is the Kenya National Examination Council Staff Retirement Benefits Scheme 2011, is a distinct scheme independent of the previous scheme.

18. The 2nd respondent, it is alleged, diligently administered the scheme in accordance with the terms of the contract and at the end of its tenure, calculated member benefits as stipulated in the *Retirement Benefits Act* and Scheme Trust Deed and Rules and as recommended by the Trustees. Apart from the Retirement Benefits Scheme and the rules, computation of member benefits is an exercise that is undertaken in accordance with the professional advice of an actuary and as approved by Trustees of the relevant scheme and, therefore, an administrator cannot use an unknown independent calculation criterion. In any event, there are different formulae used in calculating benefits and the actuary did not show that the formulae adopted, apparently by the 2nd respondent was not the proper one.

19. As far as the demand letter which the applicants have referred to is concerned, the 2nd Respondent responded to the letter and denied all the allegations by the applicant. In its response, the 2nd respondent asked the applicant to furnish it with a copy of the judgment of the Retirement Benefits Appeals Tribunal and a complete list of members who were overpaid. The applicants did not respond to the letter and, neither has legal action been taken against the 2nd respondent as alleged. Again, contrary to the applicants' allegations, there are no pending legal proceedings by the applicant against the 2nd respondent.

20. The 2nd respondent is of the view that if historical engagements between the applicant and the 2nd respondent was a factor in the determination of the responsiveness of the tender, then this ought to have been brought up at the earliest stage of the evaluation process. In any event, the tender ought to have been evaluated based on the criteria, apparently in the tender document, and not such extraneous considerations as the historical engagements between the procuring entity and the 2nd respondent. The instruction of the new evaluation criteria was contrary to section 80(2) of the *Public Procurement and Asset Disposal Act*.

21. Going by the affidavits sworn by the applicants, on the one hand, and the respondents on the other, the facts that form the background of this case are not in dispute. It is not in dispute that the procuring entity floated a tender in which the 2nd respondent and interested parties, amongst other bidders, participated and that the 2nd respondent surmounted all the evaluation stages including, the preliminary, the technical and the financial stages. It is also not in dispute that the 2nd respondent emerged as the lowest evaluated bidder and would have been awarded the tender except that the 2nd applicant terminated the tender before the award was made.

22. The 2nd respondent was aggrieved by the decision of the procuring entity and so it took its case against the decision before the 1st respondent. In its decision rendered on 28 March 2024, the 1st respondent ruled in favour of the 2nd respondent. In its 'final orders' the 1st respondent held as follows:

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> "150. In exercise of the powers conferred upon it by Section 173 of the *Public Procurement and Asset Disposal Act*, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 6th March 2024 and filed on 7thMarch 2024:
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> A. The Respondents Notice of Preliminary Objection dated 12th March 2024 be and is hereby dismissed.

B. The decision by the 1st Respondent to terminate the procurement proceedings of Tender No. KNECSRBS/E01/2023-2024/01 for Provision of Scheme Administration - consultancy Services be and is hereby annulled and set aside.

C. The Procuring Entity's letter dated 23rd February 2024 issued to the Applicant and other tenderers in the subject tender communicating the decision to terminate the procurement proceedings with respect to Tender No. KNECSRBS/EO /2023/2024/0 1 for provision of Scheme Administration Consultancy Services be and is hereby nullified and set aside.

D. The decision by the Respondents to re-advertise the subject tender on 27th February 2024 be and is hereby cancelled and set aside and any consequent procurement process thereafter is equally null and void. set aside and any consequent procurement process thereafter is equally null and void.

E. The Applicant's tender and all other tenders that were responsive at the Financial Evaluation stage be and are hereby re-admitted for evaluation at the Financial Evaluation stage and the Respondents are hereby ordered to ensure that the procurement process with respect to Tender No. KNECSRSS/EO /2023-2024/01 for Provision of Scheme Administration Consultancy Services proceeds to its lawful and logical conclusion within 14 days of this decision taking into consideration the Board's findings herein, the Tender Document, *the Constitution*, the Act and Regulations 2020.

F. Given that the procurement proceedings of the subject tender are not complete, each party shall bear its own costs in the Request for Review."

23. As noted from the prayers in the motion, the applicants want this Honourable Court to quash this decision. The rest of the prayers are declarations and, as far as I understand them, whether they are tenable or not depends very much on whether the quashing order is granted.

24. In their submissions, the applicants have urged that the application is properly before this Honourable Court and that this Court is properly seized of jurisdiction under section 175(1) of the *Public Procurement and Asset Disposal Act*. They have also, in the same breath, cited Articles 10, 22, 23, 47 and 227 of *the Constitution* of Kenya, Section 7(1) and (2), 9, 11(1) and (2) of the *Fair Administrative Action Act*, Sections 8 and 9 of the *Law Reform Act*, Order 53 Rule 3 and 7 of the Civil Procedure Rules.

25. It was never in doubt that this Honourable Court has jurisdiction to entertain this application and, for this very reason, it is not an issue for determination.

26. In what the applicants have captioned in their submissions as "the Basis of The Ex-Parte Applicants' Claim" the applicants have acknowledged the grounds upon which judicial review reliefs may be granted are as enunciated by Lord Diplock in Council of Civil Service Union & Others –vs- Ministry of Civil Service (1984) 3 All ER 935 at Page 949. These grounds are illegality, irrationality and procedural impropriety. The case is said to have been cited with approval in the unreported decision in R –vs- Minister of Finance Ex-Parte Nyong'o & 2 Others. Miscellaneous Application No. 10789 of 2007.

27. However, in the wake of *the Constitution* of Kenya 2010 and the *Fair Administrative Action Act*, it is urged, the grounds have been expanded "to include merit review". For this submission, the Court of Appeal decisions in Nairobi Civil Appeal No. 224 of 2017 Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others (2017) eKLR; Peter Muchai Muhura v Teachers Service Commission [2015] eKLR and Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] eKLR at para 55-56 have been cited.

28. No doubt, the applicants could only be making these submissions in their quest to have this Honourable Court look beyond the process by which the impugned decision was reached and interrogate the merits of the decision.

29. On the grounds of illegality and error of law, it is submitted that the 1st Respondent lacked jurisdiction to entertain the Request for Review because by virtue of the provisions of section 167(4)(b) of the *Public Procurement and Asset Disposal Act*, the jurisdiction of the Review Board was ousted as the termination of the procurement proceedings was made under the provisions of section 63(1)(e) of the Act. In addition, the Applicants contend that they submitted evidence that they fully complied with both the procedural and substantive pre-conditions for termination of procurement proceedings and this not-withstanding, the 1st Respondent erroneously held that it had jurisdiction to entertain the Request for Review.

30. The other argument in support of the grounds of illegality and error of law is that1st Respondent employed what the applicants think is a restrictive view, of what material governance issues as set out in section 63(1)(e) of the Act entail. This, the 1st respondent did notwithstanding the express provisions of Articles 10(2)(c) and 259 of *the Constitution*.

31. The decision is also impugned on the grounds of illegality on the ground that the 1st respondent considered additional grounds for review that were not part of the 2nd respondent's application for review. These grounds are listed as whether the grounds for termination met the legal threshold; whether the grounds for termination were valid grounds, and, whether the process of termination met the legal requirement.

32. As far as the ground for irrationality or unreasonableness is concerned, it is urged that in support of its assertion that the Applicants had failed to meet the procedural requirements for termination of procurement proceedings under section 63 of the Act, the 1st respondent held that the Applicants had failed to submit the written report on the termination of proceedings as required under section 63(2) of the Act. This position, according to the applicants, is factually incorrect as the report was indeed submitted in the bundle of confidential documents submitted to the 1st respondent.

33. It is also urged that the decision is unreasonable because the 1st respondent decided that Applicants failed to disclose the reasons of the termination of the procurement proceedings when none of the other tenderers raised this complaint and, secondly, the 2nd Respondent through a separate request for clarification was indeed informed in additional detail of the reasons for the termination and was satisfied with that communication. Finally, the decision is unreasonable because the 1st Respondent directed the Applicants to re-admit all tenders for evaluation at the financial evaluation stage when indeed the financial evaluation had already been done and completed, a fact that was disclosed in the materials submitted by the Applicants to the 1st Respondent whether through pleadings or confidential information.

34. On the ground of legitimate expectation, it has been submitted that Applicants submitted evidence to explain why, in their view, the issues identified during its special board of trustees meeting were indeed material governance issues that warranted the termination of the procurement proceedings under section 63(1)(e) of the Act. The 2nd Respondent, similarly, extensively submitted on this issue. The impugned decision, without reason, failed to address whether the matters identified by the Applicants were indeed material governance issues.

35. This last submission leaves no doubt that what has been presented before this Honourable Court as the application for judicial review is, in fact, the applicants' case before the 1st respondent. The applicants'

case, in a nutshell, is that the 1st respondent misapprehended the law and misdirected itself on facts and, ultimately, arrived at a wrong decision. The applicant's mission is to have this Honourable Court overturn the 1st respondent's decision and substitute it with its own decision. I suppose this is the reason that the applicants started their submissions by arguing for interrogation of the merits of the decision and not just the process by which this decision was arrived at.

36. The following paragraphs in the 1st respondent's decision removes any doubt that the applicants' case before court is an escalation of its cause against the 2nd respondent's request for review before the 1st respondent. On jurisdiction, the applicants' case was captured as follows:

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> " 59. In his submissions, Mr. Nyaribo relied on the Notice of Preliminary Objection dated 12th March 2024, Memorandum of Response in Opposition to the Request for Review dated 12th March 2024 together with confidential documents concerning the subject tender submitted to the Board pursuant to Section 67(3)(e) of the Act; Affidavit sworn by Dr. Ibrahim Otieno on 25th March 2024 and Written Submissions dated 25th March 2024.
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> Mr. Nyaribo submitted that jurisdiction is everything and ought to be considered in priority before the Board can proceed to hear the matter on its merits. He pointed out that by virtue of Section 167(4)(b) of the Act, the Board has no jurisdiction to entertain the instant Request for Review since termination of the procurement proceedings was done in accordance with the provisions of Section 63(1) of the Act."

37. On what governance issues entail; the applicant's case was captured as follows:

> " 64. Mr. Nyaribo urged the Board to look at grounds 4,.5, and 6 of the Request for Review where the Applicant complains that the reasons issued for termination were vague and ambiguous and submitted that all other grounds submitted by the Applicant are an afterthought. He further submitted that on the material governance issues, he urged the Board to look at a more holistic and purposeful view of the term governance as opposed to the restrictive view that the Applicant would want the Board to take."

38. On who an accounting officer is, the applicants' case was captured as follows:

> " 70. On the issue of an accounting officer, counsel submitted that the definition of an accounting officer under the Act and the *Public Finance Management Act* does not per se capture the Scheme particularly in fight of its unique constitution as a trust and the fact that it is a separate legal entity from its sponsor being the Kenya National Examinations Council which is a government entity."

39. In answering these questions, amongst other questions raised in the request for review, the 1st respondent noted as follows:

> " In view of the above role and responsibilities, it is our considered opinion that the Board of Trustees is the designated Accounting Officer of the Scheme and the functions of an accounting officer lie on the entire Board of Trustees hence there was no objectionable issue for the Board of Trustees to convene for the Special Board of Trustees meeting held

on 21st February 2024 to discuss the Evaluation Report and recommendations made upon evaluation of the subject tender by the Evaluation Committee."

40. It then proceeded to state:

> 108. ln the circumstances, we find and hold that Dr. Ibrahim Otieno, the Chairman of the Board of Trustees represents the Board of Trustees which is the Accounting Officer of the Scheme for purposes of the, procurement proceedings in the subject tender has the requisite authority to act in the subject tender as a representative and on behalf of the Board of Trustees. As such, we find no objectionable issue on the ground that the communication to tenderers with regard to the outcome of evaluation of the subject tender was signed off by Dr. Ibrahim Otieno, the Chairman of the Board of Trustees of the Scheme.

41. On the question of the termination of the tender and the jurisdiction of the Board, the submissions were captured as follows:

> " 109. The Respondents in a Notice of Preliminary Objection dated 12th March 2024 sought for dismissal of the instant Request for Review in limine on the ground that the Board has no jurisdiction to hear and determine the instant Request for Review since the procurement proceedings in the subject tender were terminated in line with Section 63 of the Act and that Section 167(4)(b) of the Act expressly precludes termination of procurement proceedings in accordance with Section 63 of the Act from being subject to the review of the Board and as such, the instant Request for Review ought to be dismissed with costs to the 1st and 2nd Respondents.

The 1st respondent's answer was:

> " 119. It is therefore important for the Board to determine the legality, or lack thereof, of the Procuring Entity's decision terminating the procurement proceedings in the subject tender, which determination can only be made by interrogating the reason cited for the impugned termination. It is only then, that a determination whether or not the Board has jurisdiction can be made."

42. As regards termination of the tender the 1st respondent noted as follows:

> " 128. Having considered partes pleadings and submissions in the instant Request for Review and the confidential file submitted to the Board pursuant to Section 67(3)(e) of the Act, the question that comes up for this Board's determination is whether the Respondents decision to terminate the subject tender on the basis of 'material governance Issues have been detected' was in line with section 63(1)(e) of the Act."

43. The 1st respondent answered this question in the negative and amongst the provisions it considered in settling this issue was section 80(2) of the *Public Procurement and Asset Disposal Act*. The 1st respondent noted as follows:

> " 140. Section 80(2) of the Act dictates that tenders ought to be evaluated using the procedures and criteria set out in the tender document. The Evaluation Criteria in the Tender document as floated did not restrict bidders that may have had outstanding contractual or legal issues arising from past contracts or previous dealings with the Scheme from participating in the subject tender and any conduct relating to previous contracts that may have come to the attention of the Scheme cannot now be interpreted to mean detection of material governance issues in the current procurement proceedings of the subject tender that justifies termination of the entire procurement proceedings or disqualification from the bid to the detriment of any bidder on the basis of a criteria outside the tender document as this is patently illegal. To further buttress this point, reference is had to the Respondents email dated 5th of March, 2024 sent to the Applicant highlighting the introduction of the new criteria (outstanding governance, contractual or legal matters arising from past contracts) as an evaluation criterion in the proposed re-advertised tender, which was not an evaluation criterion in the present tender.

44. In the final analysis, the 1st respondent concluded that:

> " 147. Having established that the Respondents failed to satisfy both the substantive and procedural statutory pre-conditions of termination of Procurement proceedings in line with Section 63 (1)(e) of the Act the Board finds and holds that the Respondents failed to terminate the procurement proceedings of the subject tender in accordance with Section 63 of the Act. As such, the Board's jurisdiction to hear and determine the Instant Request for Review has not been ousted by dint of Section 167(4)(b) of the Act."

45. So, the questions raised in this application have been raised and determined in the request for review proceedings before the 1st respondent. The 1st respondent, in answering the questions and reaching its decision, made reference to various provisions of the law and decided cases. Although theirs is a judicial review application, the applicants want this Honourable Court to assume appellate jurisdiction and consider the evidence afresh and arrive at its own conclusion. The applicants also want this Honourable Court to give a different interpretation of the law which, in their view, is the correct interpretation.

46. As I have noted from time to time in such matters, if the court would take the direction proposed by the applicants, it would be encroaching into the area of interrogating the merits of the decision rather than the process by which the decision was reached. Judicial review, as it were, is a bout process and not merits of the decision.

47. In *Energy Regulatory Commission v S G S Kenya Limited & 2 others (2018) eKLR Civil Appeal No. 341 of 2017* the substratum of appeal was a tender award by the Energy Regulatory Commission (appellant). It was alleged that on the 18 April 2017, the appellant advertised an open tender inviting bids for the "provision of marking and monitoring of petroleum products" under tender No. ERC/PROC/4/3/16-17/119 in which the respondent and two other bidders (including the 3rd respondent) participated. On 30 June 2017, after evaluating both the technical and financial bids placed by

the bidder, the respondent's bid was assessed as the lowest bid and the technical committee of the appellant recommended that the tender be awarded to the respondent. However, the committee, in its recommendation, made a general observation that there is in existence a new technology that can detect jet fuel in motor fuel which was of relevance to the award.

48. Acting on this general observation of the tender committee, the tender awarded to the respondent was terminated by the appellant and the tender process re-started with a requirement that the new technology changes be incorporated in the bid documents. The decision to terminate the tender was communicated to all bidders including the respondent and the Public Procurement Regulatory Authority.

49. Aggrieved by the termination, the respondent filed an application challenging the decision aforesaid for review of the tender award aforesaid, at the Public Procurement Administrative Review Board ("the Review Board") and in an award delivered on 1 August, 2017, the Review Board dismissed the application for review stating that the appellant was at liberty to re-advertise the tender without notice to any bidder, including the Respondent.

50. Dissatisfied with the Review Board's decision therefore, the respondent filed a judicial review application – Nairobi Miscellaneous Application No. 496 of 2017 – at the Judicial Review Division and, in his judgement delivered on the 25 September 2017, Mativo J. (as he then was), granted the prayers sought and quashed the decision of the Review Board and ordered the appellant to proceed with the implementation of tender No. ERC/PROC/4/3/16-17/119 dated 12 May 2017.

51. Being aggrieved by the High Court's findings, the appellant lodged the appeal to the Court of Appeal. The issue for determination in the appeal was whether the learned superior judge erred in forming a view of the evidence and improperly substituting the decision of the Board with his own. In allowing the appeal, the Court of Appeal answered this question in the affirmative and faulted the High Court Judge 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. The court noted:

> " In a judicial review matter, the Court's mandate is limited to procedural improprieties, and extends not to the merits of a decision. 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 1st respondent 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. The Appellant did not bear a statutory duty to award the tender to SGS, or to any other entity, so as to attract the compulsive force of Mandamus."

52. In holding as it did, the court relied on 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 where it was held:

> " 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."

53. The Court of Appeal did not rule out the window to interfere with the decision of a tribunal albeit in very exceptional circumstances. In this regard it relied on Biren Amritlal Shah & anor vs. Republic & 3 others [2013] eKLR where 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."

54. I cannot say that the 1st respondent's decision that the termination of the tender was improper was not founded on any evidence or had no legal basis. The decision cannot be of the kind that no reasonable tribunal, properly directing its mind to the case could have arrived at.

55. Amongst the decision the applicants have relied on in their argument for merit review is the Court of Appeal case of Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR. While addressing the provisions of section 7(2)(l) of the *Fair Administrative Action Act*, the court held as follows;

> " An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the *Fair Administrative Action Act* provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance

which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of *the Constitution* to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

56. The court, however, was cautious to note that while Article 47 of *the Constitution* as read with the grounds for review provided by Section 7 of the *Fair Administrative Action Act* reveals an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator.

57. But in another Court of Appeal Judgment, in the case of Kenya Revenue Authority & 2 Others v. Darasa Investments Limited [2018] eKLR the Court of Appeal was emphatic that judicial review is about the process rather than the merits of the decision. It observed as follows;

> " The next issue for consideration is whether the appellants' decision was amenable to judicial review. As we have set out above, judicial review is concerned with the decision-making process and not the merits of the decision in respect of which the application for judicial review is made. This was aptly stated by this Court in Commissioner of Lands vs Kunste Hotel Ltd [1997] eKLR. As such, what the learned Judge was called upon to do was to examine the process adopted by the appellants in declining to exempt the respondent's consignment."

58. The Supreme Court in the case of *Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019* (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) held as follows;

> "(75) In order for the court to get through this extensive examination of Section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in *Judicial Service Commission & another v. Lucy Muthoni Njora, Civil Appeal 486 Of 2019*; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against Article 259 of *the Constitution*

which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.

(76) Be that as it may, it is the Court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in Section 11 (1) and (2) of the Fair Administrative Actions Act. Third, the Court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in Section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this Court held in the case of *Kenya Vision 2030 Delivery Board v. The Commission on Administrative Justice, the Attorney General and Eng. Judah Abekah, SC Petition 42 of 2019*; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised." (Emphasis added).

59. Subsequently the Court in the case of Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) while disagreeing with the reasoning of the Court of Appeal held as follows;

> " 87. With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under *the Constitution* if it limits itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the Jirongo and Praxedes Saisi cases speaks succinctly to this issue. That is also why, the question below is pertinent to the present appeal."

60. What I understand the Supreme Court to be saying is that when a party approaches a court under the provisions of *the Constitution*, the court is under an obligation to undertake a merit review of the case. However, the party must not only claim but provide evidence of the constitutional violations. On the other hand, in the case where a party brings a judicial review suit under the provisions of Order 53 of the Civil Procedure Rules and not claiming violations of rights the court can only limit itself to

the process and manner in which the decision complained of was reached or action taken and not the merits of the decision.

61. Taking cue from these decisions, I am persuaded that there is no basis to engage in merit review of the 1st respondent's decision. The court would restrict itself to the process by which the decision was arrived at.

62. Except for one aspect of the 1st respondent's final orders on re-evaluation of the tenders at the financial stage and which I agree with the applicants' submission that it is irrational, I am not satisfied that the 1st respondent's decision is tainted by any of the grounds for which judicial review reliefs have been sought. Going by the explanation of the grounds of judicial review enunciated in Council of Civil Service Union & Others –vs- Ministry of Civil Service (supra), there is no evidence that the 1st respondent did not understand correctly the law that regulates its decision-making power and that it did not give effect to it. The decision cannot also be said to be 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, except, of course, that aspect of the order on financial re-evaluations. Again, there is nothing to suggest that there was any procedural impropriety in the process of reaching the 1st respondent's decision.

63. The only stain on the 1st respondent's decision is with respect to the order that the bidders be subjected to a fresh financial evaluation. In their submissions, the applicants urged that this was unreasonable because the evaluation of the tenderers in this respect had already been done and, logically, if the termination was null and void, the procurement proceedings ought to have proceeded from where they had reached before the purported termination. The applicants submitted as follows on this point:

> "(d) In its impugned decision, the 1st Respondent directed the Ex-Parte Applicants to re-admit all tenders for evaluation at the financial evaluation stage when indeed the financial evaluation had already been done and completed, a fact that was not only disclosed in the materials submitted by the Ex-Parte Applicants to the 1st Respondent whether through pleadings or confidential information. This direction is not only an illegality but is unreasonable in the circumstances particularly as no party raised an issue as to financial evaluation of the tenders."

64. I am in total agreement with the applicants on this score except to add that the order directing the procuring entity to admit all tenders for fresh financial evaluation is severable and can be quashed without affecting the rest of the decision. Accordingly, I will allow the applicants' application only to the extent of quashing this particular order by the 1st respondent. For the avoidance of doubt this is order E in the 1st respondent's final orders which is couched as follows:

> "E. The Applicant's tender and all other tenders that were responsive at the Financial Evaluation stage be and are hereby re-admitted for evaluation at the Financial Evaluation stage and the Respondents are hereby ordered to ensure that the procurement process with respect to Tender No. KNECSRSS/EO /2023-2024/01 for Provision of Scheme Administration Consultancy Services proceeds to its lawful and logical conclusion within 14 days of this decision taking into consideration the Board's findings herein, the Tender Document, *the Constitution*, the Act and Regulations 2020."

65. This order is hereby quashed. For reasons I have given, the rest of the applicants' application is dismissed and considering that the applicants' application is partly successful, parties will bear their respective costs. It is so ordered.

Signed, dated and delivered on 23 May 2024

Ngaah Jairus

JUDGE