



Republic v Public Procurement Administrative Review Board; Chief Executive Officer, Sacco Society Regulatory Authority & 2 others (Interested Parties); Nash EQ INC (Exparte) (Application E069 of 2024) [2024] KEHC 5107 (KLR) (Judicial Review) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5107 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E069 OF 2024**

**J NGAAH, J
MAY 13, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD RESPONDENT

AND

CHIEF EXECUTIVE OFFICER, SACCO SOCIETY REGULATORY AUTHORITY INTERESTED PARTY

SACCO SOCIETY REGULATORY AUTHORITY INTERESTED PARTY

AGILE BUSINESS SOLUTIONS LIMITED INTERESTED PARTY

AND

NASH EQ INC EXPARTE

JUDGMENT

1. The application before court is the applicant’s motion dated 1 April 2024 expressed to be brought under Articles 10, 47, 159 and 227 (1) of the *Constitution*; sections 8 and 9 of the *Law Reform Act*,



cap. 26; sections 7, 8, 9, 10 and 11 of the *Fair Administrative Action Act*, 2015; and, Order 53 Rule 1 of the *Civil Procedure Rules*.

- “1. An order of *Certiorari* to remove into the High Court for purposes of quashing the Respondent's decision dated 22nd March 2024 in Public Procurement Administrative Review Board Application No. 15 of 2024 in respect of Tender No. Sasra/Oit/007/2023 - 2024 for the Supply, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of a Risk-Based Supervision System.
 2. An order of Prohibition directed at the 1st and 2nd interested parties prohibiting them from executing contracts with the 3rd Interested Party in respect of Lots I and II for Tender No. Sasra/Oit/007/2023 - 2024 for the Supply, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of a Risk Based Supervision System, pending the hearing and determination of this application or as this honorable court shall direct.
 3. An order of Declaration that the due diligence exercise carried out by the 1st and 2nd interested parties on the applicant's tender is null and void for being in contravention of the provisions of section 83 of the *Public Procurement and Asset Disposal Act*.
 4. An order of Declaration that the award of Lots I and II of Tender No. Sasra/Oit/007/2023 - 2024 for the Supply, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of a Risk-Based Supervision System to the 3rd interested party is null and void for being in contravention of the provisions of section 82 (1) of the *Public Procurement and Asset Disposal Act*.”
2. The applicant has also prayed that the costs of the suit be borne by the respondents and interested parties.
- The application is based on a statutory statement dated 28 March 2024 and an affidavit sworn on even dated by Mr. Anthony Wagacha verifying the facts relied upon.
3. According to the affidavit, Mr. Wagacha is the chief executive officer of the applicant company. He has sworn that the 2nd interested party invited bids for a tender more particularly described as Tender No. Sasra/Oit/007/2023-2024 for Supply, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of a Risk-Based Supervision System (hereinafter “the tender”). The tender was made up three lots.
 4. The applicant participated in the Tender for the three (3) Lots and was successful at the preliminary, technical and financial stages of the tender evaluation process. However, at the due diligence stage, the 1st and 2nd interested parties went back to the tender's preliminary evaluation requirements and decided that the applicant's tender security was not valid for the required period of 150 days from the date of tender opening.
 5. The applicant has been advised by its counsel, which advice Mr wagacha believes to be true, that the 1st and 2nd interested parties' decision to reconsider the applicant's tender security at the due diligence stage was contrary to the provisions of section 83 of the *Public Procurement and Asset Disposal Act* and the legal precedents of this Honorable Court.



The 1st and 2nd interested party's decision to reject the applicant's tender was communicated to the applicant through the 3rd interested party's letter dated 19 February 2024.

The applicant filed a request for review before the respondent, being PPARB Application No. 15 of 2024; *Nash EQ Inc v CEO, Sasra & 2 Others*.

6. In a decision rendered on 22 March 2024, the respondent dismissed the request for review on the ground that the 1st and 2nd interested parties had correctly evaluated the applicant's tender. The respondent also found that the 3rd interested party had been correctly awarded the tender. It is this decision that the applicant seeks to impeach in these proceedings.
7. According to the applicant, in reaching the impugned decision, the respondent committed an error of law or illegality by failing to correctly interpret the provisions of sections 82 (1) and 83 of the Act. The applicant is also alleged to have taken into account irrelevant considerations by, inter alia, "equating bank references that may be subjected to a due diligence exercise to a tender security, a document that is evaluated and considered at the preliminary evaluation stage".
8. The applicant is alleged to have committed errors of fact by interpreting bank letters (or references) as if they were tender security and because of this misdirection, the respondent reached the wrong conclusion that the tender security was subject to due diligence yet it had been found to be responsive at the preliminary evaluation stage. The respondent is also said to have misdirected itself on the facts when it held that the 3rd interested party quoted in the forms of tender Kshs.37,911,758/- as its total cost for Lot I and Kshs.18,950,456/- for Lot II yet the 3rd interested party had admitted that it had quoted recurrent costs of Kshs.23,014,400 /- for Lot I and Kshs.15,776,000/- for Lot II. The respondent is also alleged to have erred in holding that the 3rd interested party was the successful tenderer yet the award comprised of installation costs and six months handholding only whereas the bidder price for purposes of evaluation comprised of supply and installation costs and the five years recurrent costs.
9. The respondent is said to have been irrational for failure to consider that the 1st and 2nd interested parties had received a confirmation from the bank to the effect that the applicant's tender security was valid until 30 March 2024 and also by failing to take into consideration the first option of the applicant's tender security which unequivocally provided that the tender security was valid until such a time as the bank shall receive copies of the contract agreement signed by the applicant together with the performance security if the applicant was successful. The decision is also said to be irrational because the respondent failed to note that the discrepancies in the tender security would not affect the performance of the tender by the applicant.
10. The state appears to have filed document or documents on the Case Tracking System portal but I could not download whatever it is that was filed. That being the case, I will proceed on the assumption that the state did not file any response.
11. The 1st and 2nd interested parties filed replying affidavit opposing the application. The affidavit was sworn by Mr. Peter Njuguna, who states that he is the chief executive officer of the Sacco Societies Regulatory Authority.

Mr. Njuguna has been informed by the 1st and 2nd interested parties' advocate, which information he believes to be true, that the respondent is a specialized statutory tribunal established to deal with all complaints of breach of duty by a procuring entity, and that its decision in matters within its jurisdiction should not be lightly interfered with. He has further been informed by the 1st and 2nd interested parties' advocate, which information he believes to be true, that the applicant has not



complied with Rule 222 of the [Public Procurement and Asset Disposal Regulations](#), 2020 as read with Section 175 (2) of the [Public Procurement and Asset Disposal Act](#).

12. The 1st and 2nd respondents have generally defended the decision of the respondent and urged that the respondent properly applied its mind to both facts and law touching on the request for review and arrived at the correct interpretation of sections 82 (1) and 83 of the [Public Procurement and Asset Disposal Act](#) as read with Regulations 74 (1) and 75 (1) of the [Public Procurement and Asset Disposal Regulations](#), 2020. The applicant, it is claimed, has failed to demonstrate the manner the constitutional and statutory provisions cited in its application have been violated.
13. The 3rd interested party also opposed the applicant's motion and a replying affidavit to that end was sworn by Anthony Kibet Komen who has stated that he is the director of Agile Business Solutions Limited. Mr. Komen has sworn that the 3rd interested party participated in the procurement process of the tender. The 3rd interested party participated in all the tender categories by submitting competitive, compliant and responsive bids in the three lots that constituted the tender.
14. The 3rd interested party's bid was accompanied by all the mandatory documents as specified in the tender Documents for evaluation and consideration by the 2nd and 3rd interested parties. The 3rd interested party duly filled all the required parts of the tender document and provided all the required documentations and information for consideration by the procuring entity during the preliminary, technical and financial evaluation. The tenders were opened after submission deadline on 5 October 2023. Among the documents needed for evaluation, was an Original Tender Security of Kenya Shillings One Million (Kes 1,000,000) or equivalent in a freely convertible currency valid for 30 days beyond the tender validity period, from a reputable commercial bank registered by the Central Bank of Kenya. In compliance with this requirement, the 3rd interested party submitted a valid tender security. As far as Lot I of the tender is concerned, the 3rd interested party submitted a bid for total price of Kshs. 37,911,758.00 which was inclusive of the 6 months handholding and year 1 support. The 3rd interested party quoted Kshs. 5,753,600.00 as annual recurrent cost for year 2, year 3, year 4 and year 5. The total recurrent cost for Lot I for year 2 to year 5 was Kshs. 23,014,400.00.
15. In Lot II, the 3rd party's bid was for Kshs. 18,950,456.00 together with the recurrent cost of Kshs. 3,944,000.00. The submitted price of Kshs. 18,950,456.00 was inclusive of the 6 months handholding and Year 1 support. In addition, the annual recurrent costs of Kshs. 3,944,000.00 was quoted for year 2 to year 5. The total recurrent cost for Lot I year 2 to year 5 was Kshs. 15,776,000.00.
16. The 3rd interested party's bid was evaluated as the most responsive and, therefore, successful bid with a financial concession of Kshs. 37,911,58.00 for Lot I and Kshs. 18,950,456.00 for Lot II respectively. As for Lot III, the 3rd interested party's bid was disqualified for being non-responsive. The 3rd interested party's bid, it is contended, was competitive and compliant with the mandatory requirements in the Tender Documents, and as such, it was responsive as prescribed in section 79 of the [Public Procurement and Asset Disposal Act](#) and the regulations made thereunder.
17. Contrary to the requirement that the tender security should be valid for 150 days from 5 October 2023, tender opening date, the applicant's tender security was valid only up to 17 December 2024. It was on this basis that the applicant's bid was disqualified and it is for the same reason that the applicant's application for review before the respondent was dismissed.
18. I have considered the application, the response thereto and the submissions filed on behalf of the applicant and the 1st to 3rd interested parties. What is obvious in the applicant's application is that the



application is on all fours with the request for review that was presented before the respondent. The grounds upon which the request for review was based were captured as follows:

“Request For Review

We, Nash EQ Inc, the above named Applicant of P.O Box 59857-00300 Nairobi, Email: awagacha@nasheg.co hereby request the Public Procurement Administrative Review Board to review the 1st Respondent's decision to declare the Applicant's bid unsuccessful and to award the Tender to the Interested Party on the grounds;

1. In its letter dated 19th February 2024, the 1st respondent informed the applicant that its tender was unsuccessful for the reason that the "Applicant's Tender Security was not valid for the required period of 150 days from the date of tender opening".
2. In declaring the Applicant's tender unsuccessful on the said ground after the Applicant's tender had been evaluated at the preliminary and technical evaluation stages, the 1st respondent's(sic) acted contrary to clauses 1.4 and 1.2 of the Evaluation and Qualification Criteria.
3. The respondents' failure to fairly and diligently evaluate the Applicant's tender in accordance with the set criteria is contrary to section 46 (4) (c) of the Public Procurement and Disposal Act, 2015 (hereinafter the Act) which enjoins the respondents to adopt an evaluation process that adheres to section 3 of the Act and Article 227 (1) of the Constitution.
4. The decision by the 1st respondent to declare the applicant's tender unsuccessful on the ground that the applicant's Tender Security was not valid when the applicant had passed the preliminary and technical stages of the evaluation process is contrary to Sections 79 (1) and 80 (1) as read together with Regulations 74 (1) and 75 (1) of the Public Procurement and Disposal Regulations, 2020 (hereinafter the Regulations).
5. The decision by the 1st respondent to declare the applicant's tender unsuccessful on the ground that the applicant's Tender Security was not valid when the applicant had passed the preliminary and technical evaluation stages is devoid of fairness, transparency and is discriminatory and therefore contrary to section 3 of the Act and Articles 27 (1) & 227 (1) of the Constitution.
6. The 1st respondent's decision to declare the Applicant's tender unsuccessful on the ground stated is tainted with unfairness, opaqueness, lack of transparency, devoid of integrity and accountability. It is therefore not in consonance with the Constitutional values and principles espoused at Articles 10 and 227 (1) of the Constitution.
7. The Applicant's bid met all the preliminary requirements and that is the reason why the Respondents proceeded to evaluate the same at the technical evaluation stage.
8. The award of Lot I and Lot II to the Interested Party is in contravention of section 82 (1) of the Act because the figures read out during the tender opening (Kshs.37,911,758/- for Lot 1 and Kshs.18,950,456/- for Lot II) did



not include the supply and installation costs and the 6 months handholding and 1 year warranty.

9. The disqualification of the applicant's bid on flimsy and unfair grounds and the subsequent award of the Tender to the Interested Party at tender prices that do not accord to the provisions of Section 82 (1) of the Act is contrary to Section 3 (e), (f) & (h) of the Act and Articles 201 (d) and 232 (1) (b) of the Constitution.
 10. The 1st respondent is in breach of Section 44 (1) of the Act for abdicating his responsibilities of ensuring that the 2nd respondent complies with the provisions of the Act and in particular sections 3, 44 (2), 46 (4) (e), 79 (1) & 80 (1) of the Act and Articles 27 (1), 201 (d), 227 (1) and 232 (1) (b) of the Constitution .
 11. As a result of the Respondent's breach of the Constitution, the Act and the Regulations, the applicant has been denied a legitimate expectation to fully participate in the tendering process and to secure an award of the Tender. The applicant risks to suffer loss and damage through loss of profit or commercial gain that it would have earned from the tender award had its tender been evaluated fairly at the technical evaluation stage.
 12. The Request for Review has merit and the applicant prays that the 1st respondent's decision declaring that the applicant's tender unsuccessful and to award the Tender to the interested party be nullified and set aside.”
19. This appears to me to be the same case that the applicant has now escalated to this Honourable Court as a judicial review application. And if this is the case, the applicant is appealing against the decision of the respondent rather than invoking the court's judicial review jurisdiction. The written submissions by the applicant makes this point much clearer at paragraphs 24 to 30 thereof. In those paragraphs it has been submitted as follows:
- “ 24. Clause 1.4 of the tender document, enjoined the 1st and 2nd interested parties to carry out due diligence as the last stage in the tendering process. A due diligence exercise in the tendering process is anchored on the provisions of section 83 of the Act, which provides the parameters of a due diligence exercise. It states as follows;
- “(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.
 - (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.
 - (3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall



- (a) initial each page of the report; and
 - (b) append his or her signature as well as their full name and designation."
 25. The purport of the foregoing provision of the Act is that for a tenderer to move to the due diligence stage, it must have made all the tender requirements, financial requirements included. Indeed the 1st and 2nd interested parties admitted before the respondent that the applicant met all the tender requirements but failed to secure the tender award because it failed at the due diligence stage.
 26. The question that the respondent had to answer was whether the due diligence carried out by the 1st and 2nd interested parties on the applicant's bid was in accordance with the provisions of section 83 of the Act. Section 83 (2) provides that the conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.
 27. Regulation 80 (1) of the Regulations, captioned as 'post qualification ', is explicit on how the post qualification exercise under section 83 of the Act ought to be conducted. It provides as follows;
 - "(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act."
 28. Due diligence therefore entails ascertaining the prior performance of the tenderer who submitted the bid recommended by the Evaluation Committee and not a re-evaluation of the tenderer's documents. Sections 55 and 86 of the Act have nothing to do with the responsiveness of the tender.
 29. By purporting to revisit the tender security validity, that it had considered at the preliminary evaluation stage pursuant to Regulation 74 (1) (c) and found to be responsive, the 1st and 2nd interested parties conducted a due diligence exercise that was not contemplated by the provisions of section 83 of the Act.
 30. The Respondent erred in law in holding that the due diligence was proper contrary to the precedents by the Respondent and this honorable court."
20. The learned counsel for the applicant then proceeded to cite authorities on what due diligence entails with particular reference to interpretation of section 83 of the *Public Procurement and Asset Disposals Act*. Among the authorities cited are application no. 158 of 2020; *On the Mark Security v Kenya Revenue Authority & another* where the respondent is said to have held that due is conducted after the evaluation of the tender but before the tender is awarded and *Republic v Public Procurement Administrative Review Board; Kenya Airports Authority & another, ex parte Kenya Airports Parking Services Limited* (2019) eKLR. in the same breath, the learned counsel submitted on Regulations 74,75, 76 and 77 on the evaluation procedure.



He submitted that if the applicant's tender had not met the preliminary requirements, it would have been rejected at the preliminary evaluation stage pursuant to section 79(1) and 80(1) Of the Act as read with regulations 74(1) and 75(1) of the Regulations.

21. According to the applicant, the respondent did not interpret this provision of the law properly. To quote the learned counsel:

“ 39. Therefore the decision by the Respondent that the 1st and 2nd interested parties were at liberty to ascertain the responsiveness of the applicant's tender to the tender's preliminary requirements at the due diligence stage is in error of the provisions of section 83 of the Act and regulation 80 (1) and therefore an illegality.”

22. It is trite that Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but with ensuring that the bodies exercising public functions observe the substantive principles of public law and that the decision-making process itself is lawful. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected yet it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power (see *Chief Constable of the North Wales Police v Evans* (1982) 3 All ER 141 at 143 and 154).

23. In *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others*, the Court of Appeal held that, to a certain degree, a judicial review court may entertain merit determination. But the court was cautious that even where the judicial court may interrogate the merits of a decision, it cannot thereby substitute its own decision for that of the tribunal or the subordinate court. The court noted as follows:

“ 56. Analysis of Article 7 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action... It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in section 11 of the Act. On a case by case basis, future judicial decisions should delineate the extent of merit review under the provisions of the Fair Administrative Action Act.”

24. Thus, while a judicial review court is may now play a more intrusive role in exercise of its supervisory jurisdiction by way of judicial review over subordinate courts, tribunals and other such like bodies whose decisions are amenable to judicial review, and subject the decisions of these bodies to merit examination, the merit review may not be of much consequence because a judicial review court will not substitute its own decision for that of the court, tribunal or other public body. Perhaps the only purpose merit review would serve in these circumstances would be to influence or guide the direction of the court, tribunal or other public body would take in making, what in the court's view, is the correct decision in a case where the impugned decision is remitted to these decision-making bodies for consideration. As I have noted elsewhere, I cannot think of any other reason a judicial review court would engage in a merit review exercise only for it to remit the matter to the decision-making body.



25. It is acknowledged that there is room for development in this area of the law and indeed its growth has been dynamic over the years. But while embracing these developments I would adopt the words of Donaldson LJ in *R v Crown Court at Carlisle, ex p Marcus-Moore* (1981) Times, 26 October, DC, where he said that judicial review was capable of being extended to meet changing circumstances, but not to the extent that it became something different from review by developing an appellate nature. Judicial review, as we know it, must be keep to its lane.
26. A judicial review court must, as much as possible, confine itself to the question of legality. That is, its concern is with whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers. (See Halsbury's Laws of England/Judicial Review (volume 61 (2010) 5th Edition) at paragraph 602).

I cannot say that I have seen any of these deficiencies in the respondent's decision. As a matter of fact, the respondent's decision shows that the respondent addressed itself to the issues of raised by the applicant by evaluating the evidence presented and applying the law to the facts as it understood it.

27. The respondent's evaluation of the evidence and its interpretation of the law is captured in its decision as follows:

“

“82. From the foregoing, Stage 1of the evaluation process made provision for mandatory requirements that tenderers were required to comply with under each Lot under the subject tender and non-compliance with any of the requirements would lead to the disqualification of a tenderer from the subject tender.

83. Further, Mandatory Requirement No. 6 above required Tenderers to submit as part of their tender a tender security for thirty (30) days beyond the tender validity period, in the format of a 'Bank Demand Guarantee' provided under the Tender Document.

84. The Tender Document outlined the Form of Tender security at page 81: The respondent then reproduced the form of the tender security document took in its decision. It then proceeded as follows:

85. From the above provisions it is apparent that tenderers participating in Lots I and II of the subject tender were required to provide as part of their tenders, tender security documents valid for 30 days beyond the tender validity and in the format given at Page 81 of the Tender Document. Accordingly, any tenderer who failed to provide as part of their tender a tender security valid for 30 days beyond the tender validity and in the format given at page 81of the Tender Document would be non responsive to Mandatory Requirement No. 6 at the Preliminary Evaluation Stage in the subject tender.

86. The Tender Document provided at ITT 21.1on page 33 that the tender validity period shall be 120 days. Accordingly, for a tenderer to be responsive to Mandatory requirement No. 6 above they had to have provided a tender security valid for 150 d9YS from tender opening. The subject tender was opened on 5th October 2023.



87. The Board will now proceed to compute the expiry date of tender securities contemplated under the Tender Document. In computing the 150 days contemplated under the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:
88. When computing time for the validity of the tender security contemplated under the Tender Document, 5th October 2023 is excluded as per section 57(a) of the IGPA being the day that the tender was opened. This means time started to run on 5th October 2023 and up to the 150th day. Essentially, each tenderer was to ensure that its submitted tender security was valid through to the lapse of 150 days.
89. The Board has keenly studied the Form of Tender Security supplied by the Applicant and it bears reproducing the same:”
28. The respondent then reproduced the tender security supplied by the applicant and made the following remarks:
- “90. The Applicant’s Tender Security adopts the format outlined in the blank Tender Document but with some modifications. For instance, whereas the form outlined at page 81 of the Tender Document provided for 2 alternatives of when the tender security would expire if a tenderer was unsuccessful, the Applicants tender security form provides for 3 alternatives. The extra alternative in the Applicant’s form of tender expresses 17th December 2023 to be the expiry date of the tender security.
91. From the above, the Applicant’s tender security contemplated an instance when its validity would be shorter than the stipulated 150 days under the Tender Document. For this, the Applicant’s tender was unresponsive to Mandatory Requirement No. 6 at the Preliminary Evaluation Stage and ought to have been disqualified at that stage for both Lots I and II of the subject tender.
92. However, the Evaluation Committee failed to detect this irregularity on the part of the Applicant’s tender at the Preliminary Evaluation Stage. According to the Procuring Entity’s Evaluation Report, it is at the Due Diligence Stage that it became apparent to the Evaluation Committee that the Applicant’s tender was non-responsive to Mandatory Requirement No. 6 under the Preliminary Evaluation Stage.
93. It is the disqualification at the Due Diligence Stage that the Applicant now contests to be in breach of the law
94. Section 83 of the Act provides room for a Procuring Entity’s Evaluation Committee to conduct due diligence on tenderers before an award is made and this serves to verify the qualification of a tenderer:”
29. The respondent then made reference to section 83 of the *Public Procurement and Asset Disposal Act* on when due diligence should be conducted by the procuring entity’s evaluation committee. It then referred to page 54 of the Tender Document according to which the procuring entity was entitled to verify reference documents provided by the bidder including company references, team references,



bank letters, and team members CVs and certificate. The respondent interpreted this to mean that “under document verification, the procuring entity could conduct checks on among others bank letters.”

30. The respondent considered and evaluated letters from the applicant’s bank and noted as follows:
103. The Board has already observed in the foregoing parts of this Decision that the Applicant's tender contained a tender security that provided for a shorter validity period than the 150 days stipulated in the Tender Document, and thus non-responsive. Can the Applicant validly claim it was erroneously disqualified at the Due Diligence stage when it is apparent that it was non-responsive to a Mandatory requirement at the Preliminary Evaluation Stage? We think not. We say so because Article 227(1) of the Constitution of Kenya, 2010 espouses among others the principles of fairness, transparency and competitiveness in public procurement processes.
104. Firstly, Stage 4 of the evaluation process under the subject tender provided for a Due Diligence exercise that would include checks on documents such as bank letters. The Evaluation Committee was therefore not in error when it disqualified the Applicant after establishing at the Due Diligence Stage that the Applicant's tender security was non-responsive to the requirements at the Preliminary Evaluation Stage.
105. Additionally, allowing a non-responsive tenderer to qualify for award of the subject tender would be inimical to the principle of fairness and competition as this would be unfair especially to other tenderers whose tenders are responsive to that specific requirement. This is in line with this Board's finding in PPRAB Application No. 109 of 2021; *Ernie Campbell & Co. Ltd v The Accounting Officer National Housing Corporation & others* where it held that excusing a non-responsive tender stifles competition.
107. In light of the foregoing analysis, the Board finds that the Respondents properly disqualified the applicant from the subject tender at the Due Diligence Stage? (sic)”.
31. What this boils down to is that the respondent evaluated and analysed the evidence on the question before it. Upon this consideration, the respondent made a finding or findings of fact and applied the law to the facts accordingly before reaching the impugned decision. This court cannot purport to interrogate the evidence afresh and substitute the respondent’s decision on merits, whether on facts or in law. To do that would be assuming the appellate jurisdiction in a judicial review application.
32. As far as I can gather from the applicant’s statutory statement, the grounds for which the judicial review reliefs are sought are those of illegality and irrationality. These grounds were explained by Lord Diplock in the English case of *Council of Civil Service Unions v Minister for the Civil Service* (1985) A.C. 374,410 as follows:

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

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer,



or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

33. The other ground which the learned judge defined in this case was that of "procedural impropriety" but it is not relevant to this application as it is not one of the grounds upon which reliefs are sought.

As far as the ground of illegality is concerned, there is no proof that the decision maker did not understand correctly the law that regulates its decision-making power and that that it did not give effect to it. And for irrationality, it cannot be said that the respondent's decision was 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.

In the ultimate, I find no merits in the applicant's application. It is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED ON 13 MAY 2024

NGAAH JAIRUS

JUDGE

