Republic v Review Board; Accounting Officer, Kenya Power & Lighting Co. Plc & 21 others (Interested Parties); Total Security Surveillance Limited (Exparte) (Application E067 of 2024) [2024] KEHC 5106 (KLR) (Judicial Review) (10 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5106 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E067 OF 2024

J NGAAH, J

MAY 10, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... RESPONDENT

AND

ACCOUNTING OFFICER, KENYA POWER & LIGHTING CO. PLC ..... INTERESTED PARTY

KENYA POWER & LIGHTING CO. PLC ..... INTERESTED PARTY

BOB MORGAN SERVICES LTD ..... INTERESTED PARTY

HATARI SECURITY GUARDS LTD ..... INTERESTED PARTY

LAVINGTON SECURITY LTD ..... INTERESTED PARTY

RILEY FALCON SECURITY SERVICES LTD ..... INTERESTED PARTY

BASEIN SECURITY SERVICES LTD ..... INTERESTED PARTY

ROSE GUARDS SERVICES LTD ..... INTERESTED PARTY

MOCAM SECURITY SERVICES LTD ..... INTERESTED PARTY

PRIDE KINGS SERVICES LTD ..... INTERESTED PARTY

PROTECTIVE CUSTODITY LTD ..... INTERESTED PARTY

SOLVIT SECURITY SOLUTIONS LTD ..... INTERESTED PARTY

SPYEAGLE SECURITY SERVICES LTD ..... INTERESTED PARTY

VICKERS SECURITY SERVICES ..... INTERESTED PARTY

BABS SECURITY SERVICES ..... INTERESTED PARTY

DELTA GUARDS LTD ..... INTERESTED PARTY

GYTO SUCCESS CO. LTD ..... INTERESTED PARTY

ISMAX SECURITY LTD ..... INTERESTED PARTY

SUPERIOR SECURITY LTD ..... INTERESTED PARTY

HOUNSLOW SECURITY LTD ..... INTERESTED PARTY

KLEEN HOMES SECURITY SERVICES LTD ..... INTERESTED PARTY

HARPCON SECURITY SERVICES LIMITED ..... INTERESTED PARTY

AND

TOTAL SECURITY SURVEILLANCE LIMITED ..... EXPARTE

JUDGMENT

1. Before court is the applicant's motion dated 28 March 2024 expressed to be brought under Articles 22, 23 (3) (b) (f), 4 7, 48, 50 (I), 159 (I) (2) and 1 65 (6) (7) of *the Constitution*; section 175(I) of the *Public Procurement and Asset Disposal Act*, 2015 and Sections 7, 8, 9, I 0 and 11 of the *Fair Administrative Action Act*, 2015. The applicant prays as follows:

> " 1. That an order of certiorari be and is hereby issued removing into the High Court the respondent' s decision dated the 25th March 2024 dismissing the Request for Review Application No. 16 of 2024 in regard to the Tender for Provision of Guarding Services Companywide - Tender No. KPl/9A.2/0T /043/SS /23-24 for purposes of being quashed.
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> 2. That an order of certiorari be and is hereby issued removing into the High Court the 1st and 2ndinterested parties' decision dated 19th February 2024 disqualify (sic) the Applicant 's bid in relation to the Tender for provision of Guarding Services Companywide Tender No. KPI /9A.2/0T/043/SS /23-24 for purposes of being quashed.
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> 3. That an order of prohibition be and is hereby issued restraining the 1st and 2nd interested parties, their officers, servants and/or agents, from executing a contract or any transaction in respect to the Tender for Provision of Guarding Services Companywide Tender No. K P l/ 9A.2/0T/043/SS/23 -24 with the 3rd to 21st interested parties or any other company or anybody.
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> 4. That an order of mandamus be and is issued compelling the 1st and 2nd interested parties, their officers, servants and/or agents to re-evaluate the Applicant's bid in respect to Tender for Provision of Guarding Services Companywide- Tender No. K P l/ 9A.2/0T /043/SS /23-24 in accordance with the tender requirements and to award the tender to the lowest evaluated bidder."

2. The application is based on a statutory statement dated 27 March 2024 and an affidavit sworn on even date by Daniel Kipkorir Bunei verifying the facts relied upon. Mr. Bunei has sworn that he is the General Manager of the of Total Security Surveillance Limited, the applicant in these proceedings. He has sworn further that on 6 December 2023, the 1st and 2nd interested parties invited interested bidders to submit their bids for the tender for provision of security services, more particularly described as "Provision of Guarding Services Companywide Tender No. KPl /9A.2/0T/043/SS/23-24". Between 18 December 2023, and 27 December 2023, the 1st and 2nd interested parties published several addenda as a result of which the closing date for the tender was extended from 4 January 2024 to 11 January 2024.

3. The applicant submitted its tender which it is claimed was a "responsive and compliant" bid dated 13 December 2023. According to the applicant, its bid was in accordance with the requirements of the tender document and the provisions of the public procurement laws. Under clause ITT 3.1 .5 of the requirements in the tender document, bidders were required to submit what was described as a duly filled Confidential Business Questionnaire while under clause ITT 3.1 .9, they were required to submit a current and complete CR 12 form showing directorship and the shareholding of their company within the last 12 months before the date of opening the tender.

4. Further, paragraph 3 (d) (i), (ii) and (iii) of the Confidential Business Questionnaire required the bidders to indicate whether their company was private or public. They were also required to provide nominal and issued capital of the company and to give details of the directors only, being the names, nationality, citizenship and percentage of the shares held by the directors. The requirements, according to the applicant, did not ask for the details of other shareholders who are not directors.

5. As far as the applicant is concerned, the applicant had only two directors whom it has named as Everton E. Terigin and Tabitha Cheruto. They own 41 ,000 and 29,500 shares respectively, translating to 41 % and 29.5% ownership. In the evidence produced before the respondent, the applicant demonstrated that Elvis Kiprono Terigin is a shareholder with 29,500 shares or 29.5% stake, and he is not a director, while the secretary of the applicant company is M/s Kelly Registrars. Despite having provided all the details of the directors as required in the Confidential Business Questionnaire, the 1st and 2nd interested parties disqualified the applicant's bid vide a letter dated 19 February 2024 on the ground that "shareholding declared in the CBQ does not correspond with CR12".

6. The applicant was aggrieved by the 1st and 2nd interested parties' decision and, therefore, lodged an application for review of the decision before the respondent. Contrary to what the applicant has stated be its legitimate expectations, the respondent dismissed the application. In its decision dated 25 March 2024, the respondent upheld the 1st and 2nd interested parties' decision in the following terms: -

> "77. When the Applicant's Confidential Business Questionnaire and CR 12 are studied side by side the following is observed: (i) Both documents capture Tabitha Cheruto Terigin and Everton E zekiel Terigin as directors/ shareholders. (ii) The Confidential Business Questionnaire does not capture Elvis Kiprono Terigin as shareholder in the Applicant. However, the CR 12 Form indicates that he is a shareholder in the Applicant. 78. From the above, it would suffice that the information contained in the Confidential Business Questionnaire does not correspond to the information in the CR 12 Form...79. The Board therefore finds that the Respondent properly disqualified the applicant from the subject tender..."

7. The applicant is aggrieved by this decision on, amongst other grounds:

> " 20. However, the Respondent, while exercising administrative powers, committed
> (d) an error of law by failing to take into account the ex-parte Applicant's affidavit evidence, the well-researched and supported written submissions, authorities relied upon as well the oral arguments made on 14th March 2024.
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> (e) the Respondent disregarded the evidence and materials showing that despite having provided all the details of the directors as required in the CBQ, the 1st and 2nd interested parties disqualified the Ex-parte Applicant's bid on the allegations that the "shareholding declared in the CBQ does not correspond with CR 12".
>
> (f) The Respondent further disregarded the evidence and materials showing that the CBQ did not require the bidders to declare any shareholding of the company, other than to give details of the directors, being the names, nationality, citizenship and percentage (%) of the shares held by the directors only, as well as the nominal and issued capital."

8. The respondent opposed the application. Mr. James Kilaka swore a replying affidavit on its behalf. Mr. Kilaka has sworn that he is a procurement professional and the acting secretary of the Public Procurement Administrative Review Board. By and large, Mr. Kilaka has simply set out what transpired before the respondent starting with the filing of the request for review by the applicant, the conduct of the proceedings and, ultimately, culminating in the impugned decision. He has defended the respondent's decision as being legally sound. In particular, the decision is said to be reasonable, rational and lawful and that it does not overreach the respondent's mandate. The applicant, it is alleged, has failed to demonstrate any elements of illegality, irrationality, procedural impropriety or unfairness in the manner in which the respondent considered and interrogated the evidence, and pleadings before arriving at its decision dated 25 March 2024

9. Like the respondent, the 1st and 2nd interested parties also opposed the applicant's application. Mr. Johnson Mutai swore a replying affidavit on their behalf and stated that he is a supply chain officer with the Kenya Power and Lighting Company Plc. They have outlined the events leading up to the award of the tender and, like the respondent, they have defended the respondent's decision in the same terms as expressed in the affidavit of Mr. Kilaka.

10. They have further sworn that contrary to the assertion by the applicant that the Confidential Business Questionnaire required them to only disclose the shareholding of the directors, the evaluation criteria requirements as set out under clause 3 of the tender document required tenderers to provide details of both their directors and shareholders. In disregard of this criteria, the applicant only disclosed details of two directors namely Everton E. Terigin owning 41 ,000 shares and Tabitha Cheruto holding 29,500 shares leaving Elvis Kiprono Terigin holding 29,500 shares. It has been sworn further that the tender document under clause 3.1 part 1 highlighted that the preliminary evaluation under Paragraph 34. l of the ITT provided for mandatory requirements which included clause 3.1.5 which required correlation of information in the bid and the Confidential Business Questionnaire. The applicant's Confidential Business Questionnaire did not disclose details of one of the shareholders thus rendering its bid nonresponsive.

11. After considering the applicant's application, the responses thereto and the submissions filed by the respective parties in support of the positions they have adopted in this matter, my assessment of the applicant's application is that it is not satisfied with the conclusions of fact by the respondent in its

decision of 25 March 2024. What the applicant is in effect asking this Honourable Court to do is to evaluate the evidence afresh and come to a different conclusion from that which the respondent reached.

12. From the very beginning when the applicant challenged the procuring entity's decision that held the applicant's bid was non-responsive the applicant's bone of contention has been that it was not bound to give particulars of shareholding by the directors and shareholders who are not directors. It understood the requirements in the tender document to say that only the shareholding in respect of the directors was necessary. This has been captured in the decision under review and, as noted, it is the same question that the applicant has now escalated to this Honourable Court.

13. A summary of the applicant's case against the procuring entity and which is the same case that was before the respondent is found at paragraphs 33 to 37 of the respondent's decision. The respondent captured it as follows:

> " 33. Counsel for the Applicant, Mr. Rotich, indicated that the Applicant would be relying on its filed documents i.e. the Request for Review dated 1st March 2024, Response to the Respondents' Memorandum of Response dated 12th March 2024 and Written Submissions and dated 13th March 2024.
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> 34. Counsel argued that the Request for Review was challenging the decision contained in the Notification of intention to award the subject tender disqualifying the Applicant citing that the information in its Confidential Business Questionnaire did not conform to that in its CR-12.
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> 35. Mr. Rotich argued that the disqualification of the Applicant was devoid of merit and could not be sustained. He argued that the Applicant provided a CR12 which showed that it had a share capital of 10 Million and that it had 2 directors who held 29% and 41 shares respectively but its 3rd shareholder was not a director in the company and thus his details were not required to be furnished in the Confidential Business Questionnaire.
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> 36. Counsel argued that the Confidential Business Questionnaire required tenderers to provide details of the director's shareholding and not the entire shareholding of the tenderers.
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> 37. It was the Applicant's position that if the Procuring Entity wanted tenderers to provide for their entire shareholding nothing would have been easier than to state as such in the Tender Document. Mr. Rotich therefore summed up that the Respondents disqualification of the applicant from the subject tender was in breach of the Act and thus the request for review was merited".

14. As the 1st and 2nd interested parties have urged in these proceedings, so did they urge in the proceedings before the respondent in opposition to the applicant's application. In paragraphs 39 to 42 of the decision, the respondent captured the procuring entity's arguments as follows:

> " 39. Ms. Mulela argued that the Respondents conducted the subject procurement process in a fair and transparent manner giving an equal opportunity to all the participating tenderers. According to Counsel, the Applicant failed to demonstrate that they were unfairly disqualified from the subject tender.

40. She argued that under clause 3 of the Tender Document, tenderers were to provide details on both their directors and shareholders. It was argued that the details on the Confidential Business Questionnaire were to include details on both directors and shareholders as contained in the CR12.

41. Counsel indicated that the Applicant's tender was not compliant as it only gave details on its directors while omitting one of its shareholders. According to Counsel, if the Applicant was to be found responsive despite this omission, this would (sic) unfair to the rest of the tenderers who had submitted compliant tenders.

42. Accordingly, Counsel urged the Board to dismiss the instant Request for Review."

15. Against the background of the applicant's claims and the procuring entity's response thereto, the respondent considered the law on evaluation and responsiveness of tenders and in particular cited sections 79 and 80 of the *Public Procurement and Asset Disposal Act*. It also considered decisions of this Honourable Court on interpretation of those two provisions of the law.

16. Turning to evidence, the respondent considered Clause 3.1.5 which provided for, among other things, "submission and considering the Confidential Business Questionnaire" that ought to have been "fully filed" and for purposes of this application "that the details correspond to the related information in the bid".

17. In navigating the evidence and coming to its conclusions, the respondent then proceeded as follows:

"73. Clause 3.1.5 above having made it mandatory that details supplied by tenderers in the Confidential Business Questionnaire must correspond to the rest of the documents in the tender, it would follow that the details on the directorship and shareholding of the Applicant as filled in the Confidential Business Questionnaire would mirror the details contained in the supplied CR12 Form.

74. The Board shall now interrogate the Applicant's compliance with this requirement under the Tender Document.

75. The Board has studied the Applicant's submitted tender and sighted its Confidential Business Questionnaire at pages 60 to 64. For purposes of the instant Request for Review page 62 which is relevant is hereinafter reproduced:

iii) Give details of Directors as follows. If director is a company is a company, give details of human directors until human directors are disclosed.

76. The Board has equally sighted a copy of the Applicant's CR12 Form at page 191 of the Applicant's tender and the same contains the following information as held by the Companies Registry as at 27th November 2023: 77. When the Applicant's Confidential Business Questionnaire and CR12 are studied side by side the following is observed:

i. Both documents capture Tabitha Cheruto Terigin and Everton Ezekiel Terigin as directors/shareholders.

ii. The Confidential Business Questionnaire does not capture Elvis Kiprono Terigin as a shareholder in the Applicant. However, the CR12 Form indicates that he is a shareholder in the Applicant.

78. From the above, it would suffice that the information contained in Confidential Business Questionnaire does not correspond to the information in the CR12 Form. Understanding that Clause 3.1.5 of the Tender Document made it mandatory for information in the two documents to mirror each other, we are unable to fault the Procuring Entity's disqualification of the Applicant on account of the information in the Confidential Business Questionnaire being at variance with that in its submitted CR12 Form.

79. The Board therefore finds that the Respondents properly disqualified the Applicant from the subject tender."

18. What the applicant now wants this Honourable Court to do is to evaluate afresh the evidence in the tender document with particular emphasis on whether particular clauses of the mandatory requirements referred to the applicant's directors to the exclusion of the rest of the shareholders as far as the requirement of the shareholding is concerned. The applicant wants the court to substitute the respondent's decision that the shareholding required in the tender document was not just for directors but for other shareholders as well with what, in its view, is the proper interpretation of the requirement which is that only the directors' shareholding was relevant.

19. If this court was to take the course suggested by the applicant, it will be assuming appellate jurisdiction according to which it would then be enjoined to consider the evidence afresh and arrive at its own conclusion which may or may not be consistent with the conclusion reached by the respondent. In so doing, the court will be encroaching into the area of merit review from which a judicial review court is prohibited.

20. 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, as in the instant case, 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.

21. 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.

22. 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.

23. 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.

24. 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."

25. 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."

26. 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."

27. On the specific question whether a judicial review court can interrogate the evidence before it and come and resolve what is, otherwise disputed facts, the English decision of R versus Secretary of State for the Home Department, ex p Khawaja (1984) AC 74 provides some guidance. In that case it was held that:

> " The migration officer, whether at this stage of entry or at that of removal, has to consider a complex of statutory rules and non-statutory guidelines. He has to act upon documentary evidence and such other evidence as inquiries may provide. Often there will be documents whose genuineness is doubtful, statements which cannot be verified, misunderstandings as to what was said, practices and attitudes in a foreign state which have to be estimated. There is room for appreciation, even for discretion. The Divisional Court, on the other hand, on judicial review of a decision to remove and detain, is very different situated. It considers the case on affidavit evidence, as to which cross-examination, though available, does not take place in practice. It is, as this case well exemplifies, not in a position to find out the truth between conflicting statements-did the applicant receive notes, did he read them, was he incapable of misunderstanding them, what exactly took place at the point of entry? Nor is it in a position to weigh the materiality of personal or other factors present, or not present or partially present, to the mind of the immigration authorities. It cannot possibly act as, in effect, a court of appeal as to the facts on which the migration officer decided. What it is able to do, and this is the limit of its powers, is to see whether there was evidence on which the immigration officer, acting reasonably, would decide as he did. (Per Lord Wilberforce at p. 949B-D). (Emphasis added).

28. Though this case related to immigration and the questions asked are pertinent to the immigration issues that had been raised, the principle applied as to the limits of a judicial review court entertaining disputes on factual issues would be applicable in this case. It relies on the affidavit before it and, for this very reason, it is not in a position to tell the truth between conflicting depositions. A judicial review court cannot assume appellate jurisdiction and interrogate the evidence afresh so as to come to its own conclusion.

29. Lord Woolf was more apt in R versus Derbyshire County Council, ex p Noble (1990) ICR at p. 813C-D where he stated:

> " The present application is one which is unsuitable for disposal on an application for judicial review-unsuitable because it clearly involves a conflict of fact and conflict of evidence which

would require investigation and would involve discovery and cross examination. Cross-examination and discovery can take place on application for judicial review, but in the ordinary way judicial review is designed to deal with matters which can be resolved without resorting to those procedures."

30. On the same point Lord Diplock at p.316G in Hoffmann-La-Roche (F) & Co AG versus Secretary of State for Trade and Industry (1975) AC 295 was of the view that the procedure on a judicial review motion is unsuited to enquiries into disputed facts. Oral evidence and discovery, although catered for by the rules are not part of the ordinary stock in trade of the prerogative jurisdiction.

In conclusion, therefore, I am not satisfied that the respondent's decision is tainted on any of the grounds of judicial review. It follows that the applicant's application is without merit and it is hereby dismissed with costs. It is so ordered.

SIGNED, DATED AND UPLOADED ON THE CTS PORTAL ON 10 MAY 2024.

NGAAH JAIRUS

JUDGE