**Republic v Accounting Officer/ Chief Officer Department of Urban Development County Government of Machakos & another; Seluk Investments Limited (Exparte Applicant) (Judicial Review Application 2 of 2024) [2024] KEHC 6768 (KLR) (7 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6768 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**JUDICIAL REVIEW APPLICATION 2 OF 2024**

**FR OLEL, J**

**JUNE 7, 2024**

**BETWEEN**

**REPUBLIC ........................................................................................... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER/ CHIEF OFFICER DEPARTMENT OF URBAN DEVELOPMENT COUNTY GOVERNMENT OF MACHAKOS ......................................................................... 1ST RESPONDENT**

**COUNTY GOVERNMENT OF MACHAKOS ........................... 2ND RESPONDENT**

**AND**

**SELUK INVESTMENTS LIMITED .................................... EXPARTE APPLICANT**

**JUDGMENT**

## A. Introduction

1. This suit was initiated by way of chamber summons dated 16.02.2024 wherein the *ex parte* Applicant sought leave to file the substantive judicial review application and by an order of this court dated 19.02.2024, leave was so granted and it was to operate as stay of the 1st Respondent's decision to re advertise the said tender No GMC/KUSP/MKSMUN/O1/2022-2023, pending hearing and determination of the substantive Judicial Review Application.

2. The *ex parte* Applicant subsequently filed their Notice of Motion Application dated 20.02.2024 seeking the following orders;

    a. An order of *certiorari* to quash the decision of the 1st and 2nd Respondent to terminate tender No GMC/KUSP/MKS MUN/O1/2022-2023 Negotiation No 1300044/2022-2023 for upgrading of wholesale and retail market loops

roads St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2022-2023 via their notice dated the 6th February 2024.

b. An order of *certiorari* to quash the decision of the 1st and 2nd Respondent to re-advertise for a tender upgrading of wholesale and retail market loops roads St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP with inclusion of integrated solar street lights FY 2023-2024 via advertisement dated 9the of February 2024.

c. An order of *mandamus* compelling the 1st and 2nd Respondent to complete the procurement process of tender No GMC/LUSP/MKS MUN/ O1/2022-2023 Negotiation No 1300044/2022-2023 for upgrading of wholesale and retail market loops roads St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2022-2023 as per the ruling made of 2nd of February, 2024 by the Public Procurement Review Board.

d. An order of prohibition against the 1st and 2nd Respondent from terminating, re- advertising and reevaluation of tender No GMC/LUSP/MKS MUN/ O1/2022-2023 Negotiation No 1300044/2022-2023 for upgrading of wholesale and retail market loops roads St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2022-2023.

e. (Repeat of the above).

f. costs of the application

3. Before proceeding to analysis the facts herein, the court, notes that, there are two tender documents relating to the same tender that is tender No.GMC/LUSP/MKSMUN/01/2022-2023 Negotiation No 1300044/2022-2023 for upgrading of wholesale and retail market loops roads St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2022-2023, (hereinafter referred to as the 1st tender) and tender No GMC/LUSP/MKS MUN/O1/2023-2024 for upgrading of wholesale and retail market loops roads, St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2023-2024 (Hereinafter referred to as the 2nd tender). This probably is due to the fact that, the same tender lapsed through two government financial cycles.

4. The grounds in support of the Application were set out in the statutory statement and the verifying Affidavit of one Mohamed Rashid Ali Haji dated 16.02.2024, in which it was deposed that on 2.2.2024, the Public Procurement and Administrative Review Board (Hereinafter referred to as "PPARB") had nullified and set aside, the letter of notification of award dated 07.12.2023 issued by the Respondents in respect to tender No GMC/LUSP/MKS MUN/O1/2023-2024 for upgrading of wholesale and retail market loops roads, St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2023-2024 .( the 2nd tender).

5. In addition, the PPARB further nullified and set-aside, the respondent's decision to advertise and publish the 2nd tender including, the subsequent procurement processes undertaken with respect to the said tender, issuance of the professional opinion dated 22.11.2023 and issuance of the letters of notification of intention to award dated 07.12.2023. Finally, the PPARB extended the validity period of the tender by 148 days up to 4.03.2024 and directed the Respondents to conclude the procurement process and submit its compliance with the said orders to the authority within 21 days.

6. It was contended that there was no appeal filed as against the decision of PPARB by either party. On 05.02.2024, the Respondents issued notice of extension of tender validity period as directed by the PPARB however, on 06.02.2024, the 1st Respondent served the *ex parte* Applicant with a notice of termination of procurement and assets disposal proceedings for the Said tender. The reasons for termination according to the *ex parte* applicant constituted an excuse to disregard the orders of the PPARB, as the said board had held that the inclusion of integrated solar street lighting does not qualify for the cancellation of the tender at an awarding stage and based Section 63 of the Public Procurement and Assets Disposal Act, the same could be incorporated by an addendum to the said contract.

7. It was further deposed by the *ex parte* Applicant, that the actions of the Respondents were illegal and they not only violated the *Constitution* and procurement laws but also the rights of the Applicant. Further, the Respondents had re advertised the tender on 09.02.2024 and the *ex parte* applicant was apprehensive that these actions were intended and calculated to deny it the tender earlier awarded, which they had won fairly and squarely by being the lowest and most responsive bidder. Good administrative procedure and procedural justice dictates, that where a benefit was legitimately expected, it is unfair to dash those expectations.

8. The *ex parte* Applicant therefore prayed that the court finds merit in the said Application and proceed to allow the same with costs.

**B. The Response**

9. The respondents filed, their reply affidavit sworn by one Collins Adipo Otieno and he did contend that his response was set out in the Supporting affidavit dated 12.03.2o24. In the said affidavit, it was deposed that the 1st tender had been advertised and various steps taken on the tender including evaluation but at the notification of award stage, the had to review, the same in view of serious change in the scope of works, which arose due to an omission to include the integrated solar streetlights works. The said tender, was stopped and the 2nd tender incorporated to include the civil works excluded.

10. The *ex parte* Applicant, being dissatisfied by this process moved to the PPARB and by its order dated order dated 02.02.2024, said tribunal cancelled the 2nd tender and directed that the 1st tender be pursued to its logical conclusion taking into consideration the board's findings therein, the provisions of the tender document, the Procurement and Disposal of Goods Act and the relevant provisions of the *Constitution*. The respondents further deponed, that there having been a change of scope in the works to be carried out, it was not possible to award the 1st tender without incorporating the very vital component of integrated solar works in the scope of works to be undertaken and also in view of the competing interest at hand they chose the painful option of terminating the said tender and re advertising the same.

11. In compliance with the tribunal ruling, they notified all the thirteen (13) bidders that the said tender validity period had been extended for 148 days, gave them notice terminating both, the 1st tender and 2nd tender, before proceeding to re advertised the same, to let every interested bidder participate. The *ex parte* Applicant deliberately chose not to participate in the re-advertised tender, never submitted its bid, and willingly chose not to subject itself to competition as stipulated under Article 277 of the *Constitution* of Kenya, the *Public Procurement and Asset Disposal Act* (PPADA), 2015 and the public procurement and Assets disposal regulations 2020.This was in spite of the fact, that the *ex parte* applicant too had been notified of the decision to terminate the 1st tender, and in spite of him having being notified of the re advertised tender to which he was free to participate.

12. After re- advertisement, and new evaluation process was undertaken, and the new tender was awarded to M/S Hayaty Enterprises Limited /Mahteck Limited (JV). The Respondents alleged that, according to the *ex parte* Applicant, the only acceptable outcome of the procurement process was if it led to them being awarded the tender and that position was a fallacy. The interest of the *ex parte* applicant in all fairness could not supersede the interests of more than 1.5 million residents of Machakos town, who were staring at losing development fund from the World Bank to the tune of Kshs 89 Million as a result of delay in implementing this process. The respondents therefore urged this court to uphold the award of tender to M/S Hayaty Enterprises Limited /Mahteck Limited (JV) and proceed to dismiss this Application.

13. On 15.04.2024, the parties were directed to file submissions on the main Petition with the Applicant being granted 10 days to do so and the Respondents too being granted 10 days to file and serve upon being served. The court also directed that the status quo be maintained.

**C. Submissions**

**i. The *ex parte* Applicants submissions.**

14. The *ex parte* Applicant filed their submissions dated 26.04.2024, wherein they gave a detailed background of the facts herein and pointed out that what the court needed to determine was; what logical conclusion meant in light of the orders issued by the PPARB, and Whether the decision of the procuring entity to cancel the tender and re advertise the same prior to the tender validity period was unreasonable and finally whether the procuring entity owed the *ex parte* Applicant and the General public a duty which they had breached.

15. It was submitted that the procuring entity had not complied with the PPARB orders to ensure that they concluded the 1st tender to its logical conclusion and indeed if the board was of the opinion that the said tender could not be finalized, nothing could have been easier than for them to order for termination of the said process and commencement of a new process. The board had applied its powers under section 173(b) of the PPAD Act and given directions to the respondents on what to do, but the said directions had been ignored. To re advertise the tender was not even close to what the board had envisaged when it rendered it decision and if the respondents had felt that it was practically impossible to complete the tender process, then they should have appealed as against the board decision. Reliance was placed on The chief Executive officer, the public service superannuation *Fund Board of Trustees v CPF Financial services limited & 2 others* ( Civil Appeal No E510 of 2022), where the court after considering the history of the matter directed that the tender process be concluded in favour of the 1st respondent.

16. Further the *ex parte* Applicant while relying on the decision of *Republic v The Commissioner of Lands, ex parte, Lake Flowers Limited*, Nairobi Misc Application No 1235 of 1998, noted that the court could be called upon to intervene in situations, where persons in Authority had acted in bad faith, abused their power, failed to take into account relevant consideration in decision making or acted contrary to legitimate expectations of the public. Applying these trajectories, it could be clearly seen that the actions of the procuring entity were marred with bad faith, abuse of power and failure to take into account relevant considerations and thus made contrary to the *ex parte* Applicant legitimate expectation.

17. The board had made a clear in its determination at paragraph 57 that, changing the scope of works could be cured by an addendum and further extended the tender validity period to enable them complete the process. The procuring entity had not appealed as against the PPARB decision and therefore it was not open for them to repeat the same thing, it had previously done by terminating

the tender and re advertising the same. Reliance was placed in *Republic v Public procurement & Administrative Review board & 2 others ex parte Applicant Dar-Yuksel-Ama ( A consortium of Dar-Al- Handasah in joint venture with Yukelproje AS & AMA Consulting Engineers Ltd; Korea Express Corporation (KEC) Korea consultants International company limited (KIC) & Apec consortium limited & 2 others ( Interested parties)*[2022] eKLR, where emphasis was placed on the procurement process being carried out in an accountable manner as envisaged under Article 227 of the *Constitution*.

18. The *ex parte* Applicant urged the court to find that the procuring entity had not complied with the PPARB decision, yet it had a public duty to do so. There was therefore no other equitable remedy available for the *ex parte* applicant to fall back on, other than to apply for the orders sought. Reliance was placed on *Apex Inc v Canada (Attorney General)* as quoted in *Republic v County Government of Lamu & 2 others, ex parte Superserve Limited* [2021] eKLR.

19. The *ex parte* Applicant therefore urged this court not to allow the illegal acts of the respondents to stand, and prayed that the orders sought be allowed quashing the subsequent re-advertisement and notification of the award issued on the 21st of February, 2024. The *ex parte* Applicant also prayed for costs of this suit.

**ii. The Respondents submissions**

20. The Respondents filed their submissions dated 06.05.2024, in which it was submitted that they are unable to utilize Kenya shillings eight nine million (89) million in funds that were allocated by the World Bank in its Kenya Urban Support Program (KUSP) for this contract and had to close their books of account for financial year 2023/2024 by 30th June 2024 as per government accounting procedures and thus there was need to finalize litigation relating to this project. The court was asked to weigh between the rights of One million, five Hundred thousand (1,500,000) residents of Machakos town, against those of the *ex parte* Applicant and find that it was in public interest that this project be implemented.

21. The history of the tender was given at length and it was also noted, that the 1st Respondent guided by a letter of 15.06.2023 from the Machakos Municipal manager on the omission of integrated solar works in the original scope of works and guided by the professional opinion of the head, supply chain management, decided to re advertise the tender on 23.10.2023. The process led to issuance of notification of award to Turin Enterprise Limited which was challenged by the *ex parte* applicant at the Public Procurement and Administrative Review Board (PPARB) and its decision was issued on 02.02.2024 under PPARB decision no 05 of 2024. The tribunal pointed out that the 1st and 2nd Respondents had not properly terminated the tender and proceeded to annul the same, then extended time for its completion.

22. The PPARB further directed PPRA to ensure compliance with its orders and also further directed the Respondents to file its progress report, with PPRA within 21 days of the judgment. The respondents contend that they complied with the orders of the PPARB as directed and that PPRA has not raised any complaint of non- compliance and thus the application by the *ex parte* applicant was premised on wrongful and/or incorrect interpretation of the PPARB decision.

23. Secondly, it was submitted that the review board exercised the power bestowed upon it by section 173 (a) ,(b) of the *Public Procurement and Asset Disposal Act* and at paragraph 144 A, 144B, 144C and 144D of its decision, they did not exercise its powers under Section 173 (2) of the *Public Procurement and Asset Disposal Act* ,that is, they did not expressly direct to have the tender awarded to the *ex parte* Applicant. Further at paragraph 114E the tribunal directed the 1st Respondent to ensure that the procurement process of the subject tender proceeds to its lawful and logical conclusion upon taking

into consideration the board's findings therein, the provisions of the tender document, the Act and the *Constitution*. This "its logical conclusion" meant that the subject tender was to be terminated, re advertised so that every interested bidder could participate in the re- advertised tender. Upon re advertisement, the *ex parte* applicant did not participate. Reliance was placed on the decisions of PPARB No 28 of 24 of 3.04.2024 between *Pinpro Empire Limited and accounting officer Kenya Power & Lighting Co PLC and Kenya Power & Lighting Co and Spark General builders Limited* and PPARB No 22 of 24 of 8.03.2024 between *Tofada Security Services Limited and accounting officer Kenya Power & Lighting Co PLLC and Kenya Power & Lighting Co and 19 other interested parties*.

24. Further, the issues raised by the *ex parte* Applicant were procurement and tender disputes that fell within the jurisdiction of the PPARB under section 9 (1) (1) of the *PPADA*. To buttress this point, reliance was placed on the case of *Republic v Principal Kadhi, Mombasa Ex parties Alibhai Adamali Dar & 2 others, Murtaxa Turabali Patel (interested party)* [2022] eKLR and *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 other* [1997] eKLR.

25. It was further submitted that there was no basis or compelling reasons whether logical or in law, the basis upon which, the court could quash the 1st and 2nd Respondents decision to terminate the subject tender, nor was the High court the appropriate forum to entertain the grievances of the *ex parte* Applicant. The respondents therefore urged the court to find that the application under consideration was unmeritorious and should be dismissed.

**D. Determination**

26. I have considered the Notice of Motion Application on record, the responses filed, submissions on record and find that the issues for determination are;

    a. Whether the Respondents followed the proper procedure for terminating the subject tender & and/or if their action was not in compliance with the orders issues by the PPARB.

    b. Whether the *ex parte* applicant is entitled to the orders sought.

27. Traditionally, judicial review was not concerned with the merits of the decision but rather the propriety of the process and procedure in arriving at the decision. the *Constitution* of Kenya 2010 entrenched the importance of fair administrative action under Article 47 (1), which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47 (3) of the *Constitution*, further mandated parliament to enact legislation to give effect to the rights espoused under, Article 47 (1). Consequently in 2015, Parliament enacted the *Fair Administrative Action Act*, 2015 ("the Act). This completely shifted the judicial review process from the rigid and limited tradition previously propagated, of only examining the propriety of the process and procedure in arriving at the decision and extended court's jurisdiction to proceed further to examine the merits of the said administrative actions.

28. The Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] KLR noted as follows:

> " 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.....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."

29. In the case of *Republic v Public Procurement Administrative Review Board; ex parte Madison General Insurance Kenya Ltd; Accounting Officer (KEBS) & another (Interested Parties)* 2022 KEHC the court stated as follows;

> A person aggrieved by the decision of the Board has recourse before this court by dint of section 175 of the Act. The emphasis I would wish to lay here is that the recourse is one under the judicial review jurisdiction of this court and not an appellate one. The court, thus, would be exercising its supervisory powers over the board through sniffing for any whiff of illegality, irrationality or procedural impropriety. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374,410 Lord Diplock stated as follows:
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> > "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> > 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.
> >
> > I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is

because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.

30. Initially, Supreme Court in *SGS Kenya Limited v Energy Regulatory Commission & 2 others* SC Petition No 2 of 2019 [2020] eKLR had a different view and held as follows:

> "[40] The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic 'Administrative Law', is clear enough, and it is unnecessary to belabour the point.' We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of *mandamus*, since the 1st respondent did not owe any delimited statutory duty to the petitioner."

31. Recently however, the Supreme Court has clarified the conflicting approach to Judicial review. In a Judgment dated 16th June 2023 in *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), the Supreme Court has set the scope of Judicial and the circumstances under which the scope may be expanded to include inquiry into the merits of administrative action. In the said case *Dande & 3 others*, the Supreme Court while disagreeing with the reasoning of the Court of Appeal and in complete shift from its previous decision in *SGS Kenya Limited* case held inter alia that:

> "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."

32. Based on the above decision of the Supreme Court, the current position can be summarized as follows:

    a. The entrenchment of judicial review under the *Constitution* of Kenya, 2010 has elevated it to a substantive and justiciable right under the *Constitution*. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in the *Constitution*.

    b. When a party approaches a court under the provisions of the *Constitution*, then the court ought to carry out a merit review of the case. However, if a party files suit under the provisions of order 53 of the *Civil Procedure Rules* and does not claim any violation of rights or even violation of

the *Constitution*, then 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 per se.

(i)Whether the Respondent followed the proper procedure for terminating the subject tender & and/or if their action was not in compliance with the orders issues by the PPARB.

33. The *ex parte* Applicant has approached court under Order 53 rule 3(1) and 4(1) of the civil procedure rules & section 1A, 1B, and 3A of the *Civil Procedure Act*, Cap 21 laws of Kenya. Based on the supreme court finding as espoused in the Dande case (Supra), the decision sought to be challenged can therefore only be looked at from the limited lens of the process and manner in which the action complained of was reached or action taken, but not the merits of the decision per se.

34. The applicant sort for orders of *certiorari* to quash the decision of the 1st and 2nd respondent decision to terminate, Tender No GMC/KUSP/MKS-MUN/01/2022-2023 Negotiation No 1300044/2022-2023 for upgrading of wholesale and retail market loops roads St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2022-2023 (hereinafter referred to as the 1st tender awarded) and also to further quash their decision to re advertise the said tender with inclusion of integrated solar street lights FY 2023-2024 Via advertisement dated the 9th of February, 2024.

35. The *ex parte* applicant further sought for orders of *mandamus* to compel the 1st and 2nd respondent to complete the procurement process of the 1st tender as directed under the ruling of PPARB dated 2nd February 2024, and finally they also sort for orders of Prohibition to issue, restraining the respondents from terminating, re-advertising and re evaluating the 1st tender and for costs of this Application. It should be noted that the *ex parte* Applicant in this case does not take issue with the decision of the PPARB, but with the decision of the Respondents to terminate the 1st tender and re advertisement of the same.

36. The Respondents on the other hand did contend that they have complied with all the directives of PPARB. The decision of the board was made on 2nd February 2024, on 05.02.2024, it notified all the thirteen bidders of the extension of the tender validity period as ordered by the board, on 06.02.2024 issued a notice of termination of both the 1st and 2nd tender to all the bidders therein and on 09.02.2024 re advertised a new tender on the county Government portal and PPIP portal as statutorily mandated. On 20.02.2024, the said tender was closed and a new tender awarded competitively to M/S Hayaty Enterprises Limited /Mahteck Limited(JV).

37. First and foremost, the *ex parte* applicant has moved the court Order 53 rule 3(1) and 4(1) of the *Civil Procedure Rules* & section 1A, 1B, and 3A of the *Civil Procedure Act*, Cap 21 laws of Kenya and based on the supreme court finding as espoused in the *Dande case* (*supra*), the orders sought can only be looked at from the limited lens of the process and manner in which the action complained of was reached, but not the merits of the decision per se. The law as espoused by the supreme court, is binding to this court, and automatically knocks out the *ex parte* applicant's case as they seek to have the court determine the merits of the respondent's approach in interpreting the orders issued by the PPARB in Misc Application No 5 of 2024 dated 02.02.2024 and the merits of their implementation thereof.

38. But even if their approach is stretched to include process and manner in which the action complained of was reached or action taken, the same still cannot be faulted as the procuring entity did comply with provisions of Article 47 of the *Constitution*, as their administrative actions after the ruling of the tribunal dated 02.02.2024, were lawful, reasonable and procedurally fair. They informed the *ex parte* applicant of cancellation of the said tender (the merits thereof not withstanding), and proceeded to re advertise and award the same as provided for under the PPADA. This process obviously was not

carried out without the knowledge of the *ex parte* Applicant and they opted not to participate in re advertised tender. The process and manner of implementation was therefore fair, transparent and done in accordance of the provisions of the PPADA and Article 227 of the *Constitution* of Kenya.

39. In an ideal situation, the *ex parte* Applicant should have raised the issue of compliance with the said orders before the tribunal and seek its interpretation as to the question of completing the 1st tender to its logical conclusion as opposed to raising the same questions before this court for interpretation and determination. This is based on the simple interpretation of section 34(1) of the *Civil Procedure Act*, which provides that, "All questions arising between the parties to the suit which the decree was passed, to their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit."

40. Finally, the new tender has been awarded to M/S Hayaty Enterprises Limited/Mashteck Limited (JV). The *ex parte* applicant opted not to enjoin them herein and that too proved to be fatal as no adverse orders can be issued as against a party who is not a party to a suit. The *ex parte* applicant's option should have been to file a claim of damages and quantify the same.

**Disposition**

41. The upshot considering the totally of all the facts herein, I do find that the *ex parte* applicant has failed to prove on balance of probability that the respondents acted in an ultra vires manner and/or that he is entitled to the orders sought.

42. This notice of motion dated 10th February 2024 therefore fails and is dismissed with no orders as to costs.

**JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF JUNE, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 7TH DAY OF JUNE, 2024.**

Mr. Irungu for Petitioner

Mr. E Mutua for Respondents

Sam Court Assistant