Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Electricity Generating Company & 2 others (Interested Parties); Pinro Empire Limited (Exparte) (Miscellaneous Application E053 of 2024) [2024] KEHC 6634 (KLR) (Judicial Review) (7 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6634 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION E053 OF 2024

J NGAAH, J

JUNE 7, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... RESPONDENT

AND

THE ACCOUNTING OFFICER, KENYA ELECTRICITY GENERATING COMPANY ..... INTERESTED PARTY

KENYA ELECTRICITY GENERATING COMPANY ..... INTERESTED PARTY

SPARK GENERAL BUILDERS LTD ..... INTERESTED PARTY

AND

PINRO EMPIRE LIMITED ..... EXPARTE

JUDGMENT

1. The applicant's application is a motion dated 6 May 2024 expressed to be brought under Articles 47 and 227(1) of *the Constitution*, Sections 75(1), 80(2), 82 and 86 of the *Public Procurement and Asset*

Disposal Act No. 3 of 2015, Sections 3 and 4 of the Fair Administrative Actions Act, 2015 and Order 53 Rule 1 of the Civil Procedure Rules. The applicant seeks the following orders:

> " 1. An Order Of Certiorari be and is hereby issued to remove to this court for purposes of being quashed the proceedings and consequential orders thereto in the Respondent's decision dated the 24th of April 2024 by which decision the Respondent dismissed the Applicant's Request for Review Application dated the 3rd of April 2024.
>
> 2. An Order Of MandamuS be and is hereby issued to compel the 1st Interested Party to award the Tender for Rehabilitation Works Olkaria and Eburru Geothermal Fields Tender No. KGN-GDD-008-2024 to the Applicant being the bidder with the lowest evaluated price."

2. The application is based on a statutory statement dated 2 May 2024 and an affidavit sworn on even date by Mr. Michael Mwaniki verifying the facts relied upon.

   Mr. Mwaniki has sworn that he is the Chief Executive Officer and Director of the Applicant company. He has further sworn that the 1st interested party invited tenders for rehabilitation works for Olkaria and Eburu Geothermal fields more particularly described as "Tender Number KGN-GDD-008-2024 for Rehabilitation Works for Olkaria and Ebunu Geothermal Fields."

3. The Applicant collected the tender document and submitted its bid before the tender submission deadline. On 22 March 2024, the applicant received a notification informing it that its tender was unsuccessful for reasons that it was not the lowest evaluated tender.

4. The applicant then lodged a request for review of the procuring entity's decision in accordance with Section 167(1) of the *Public Procurement and Asset Disposal Act*. The request for review was registered before the respondent as no. 28 of 2024. The Respondent dismissed the applicant's application because, in the respondent's view, the procuring entity's Evaluation Committee properly arrived at the tender prices of the tenders received in the subject tender and that the Applicant's tender price was not the lowest evaluated as per the procuring entity's own computation.

5. The applicant is advised by its advocates, which advice it believes to be true, that the Respondent contravened Section 173 of the *Public Procurement and Asset Disposal Act* by computing tender prices using undisclosed engineers estimated measurements and arrived at tender prices different from those declared by the 3rd Interested Party. Yet the procuring entity has the sole mandate of conducting an evaluation process, and for that reason, the respondent could not usurp such powers.

6. To be precise, the Respondent determined that the 3rd Interested Party's tender sum is Kshs. 396,990,000.00 yet the procuring entity awarded the tender to the 3rd interested party at Kshs. 460,508,400. According to the applicant, the difference of over Kshs.64,000,000/= in the tender price made it difficult for any bidder to tell who the lowest evaluated bidder was and also the price for the lowest evaluated bidder.

7. It has been sworn on behalf of the applicant that the tender price read out and recorded at the tender opening for the Applicant was Kshs. 3,127, 750/=. According to section 82 of the *Public Procurement and Asset Disposal Act*, there is a finality of the tender price read out and recorded during the tender opening. The applicant has been advised by its counsel, which advice it verily believes to be true, that this price is not subject to any correction, revision, adjustment or amendment yet in its decision, the respondent is said to have unilaterally amended and adjusted the Applicant's tender price to Kshs. 687,060,000/=.

8. It is the applicant's case that that the Respondent acted ultra vires Section 75(1) of the *Public Procurement and Asset Disposal Act* by introducing engineers' estimates, which is a foreign concept that was not in the tender document and whose introduction materially altered the substance of the original tender document. The Respondent therefore aided the Procuring Entity in revising the tender document.

9. Mr. James Kilaka swore a replying affidavit on behalf of the respondent and stated that he is a procurement professional and the Acting Secretary of the Respondent. He has admitted that indeed the applicant instituted a request for review as sworn in the applicant's affidavit. The request for review was heard and eventually dismissed.

10. In dismissing the request for review, the respondent identified the issue of whether the procuring entity's evaluation committee properly arrived at the tender prices of the tenders received in the subject tender as the primary issue of determination. Upon analysis of the material before it, the respondent came to the conclusion that Evaluation Committee properly arrived at the tender prices of the tenders received in the tender. It thendirected the procuring entity to proceed with the subject tender to its logical conclusion.

11. The respondent has reiterated that the procuring entity's evaluation committee undertook a computation of the tender prices in respect of the submitted tenders and it was apparent that the Applicant's tender was not the lowest evaluated tender. In reaching its decision, the Respondent simply cross-checked the accuracy of the computation in the Evaluation Report as submitted to the respondent. The respondent denied usurping the procuring Entity's statutory role of evaluating the tenders submitted in the subject tender. The tender prices in question, it has been sworn, are contained in the Evaluation Report and were not a creation of the Respondent.

12. The respondent has further sworn that the subject tender was a rates-based tender involving multiple line items expressed in different units of measurements. It would, therefore, be erroneous for one to presuppose, as suggested by the Applicant, that the rates for the different line items could be simply summed up to determine a tenderer's tender price. The tender price in the subject tender could only be objectively arrived at if the rates for the different line items were converted in to the actual cost under a common currencyfor the respective line items and, thereafter, an addition of the various line items.

13. The respondent has defended its decision as being reasonable, rational and lawful and, at any rate, intra vires the Respondent's powers. The applicant, according to the respondent, 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, documents, pleadings, and information before it in arriving at its decision.

14. The 1st and 2nd interested parties also opposed the applicant's application. Their replying affidavit to this end was sworn by Mr. Vincent Mamboleo who states that he was the Acting General Manager (Supply Chain) of the 2nd Interested Party during the procurement proceedings of the subject tender.

15. The interested parties have denied that the applicant submitted the lowest price or the lowest evaluated price as alleged in the Request for Review. On the contrary, the Applicant's evaluated price of Kshs.796,989,600/= was the highest and the most expensive evaluated price of the five bids that made it to the Financial Evaluation stage of the procurement proceedings. The successful candidate's evaluated price of KShs.460,508,400/= was the lowest.

    The interested parties have defended the respondent's decision as being reasonable and procedural.

16. It has also been sworn on behalf of the interested parties that the tender was evaluated in three stages in accordance with the criteria and procedures set out in the tender document. These stages were the preliminary evaluation, the technical evaluation and the financial evaluation.

17. The applicant and four other tenders passed the evaluation stage. They also passed the technical evaluation stage. At the financial stage, the evaluated price for each of the bids were as follows:

    Spark General Builders Limited Kshs. 460,508,400/=

    Tykhe Enterprises Limited Kshs. 493, 301, 600/=

    Whitewash Africa Limited Kshs. 570,558, 760/=

    Bhoki Limited Kshs. 728,996,200/=

    Pinro Empire Limited Kshs.796, 989,600/=

    It followed that the successful lowest evaluated bid price was Kshs. 460,508,400/=. It is therefore factually incorrect for the applicant to allege that its bid was Kshs. 3,127,750/=.

18. In the submissions filed on behalf of the applicant, the latter's learned counsel identified three issues for determination. These are, first, whether the Judicial Review Application is a merit review application under the Fair Administrative Actions Act; second, whether the Respondent acted unfairly and illegally by determining that the tender price is not what is provided in the Form of Tender under Regulation 77 of the Regulations and Section 82 of the *Public Procurement and Asset Disposal Act*; and, finally, whether the Respondent's decision to independently compute the tender prices of all the tenderers was unlawful and ultra vires.

19. On the first issue, it was urged that the traditional approach to judicial review is that, an applicant was restricted to demonstrating that the administrative decision or act complained off was tainted with illegality, irrationality, or procedural impropriety. The threshold for the grant of judicial review orders and the grounds under which such orders may be granted were therefore well settled.

20. The learned counsel for the applicant cited Republic versus Principal Secretary, Ministry of Defence & 2 others; Kenya Tents Limited (Interested Party) Ex parte Unique Supplies Ltd [2019] eKLR in which Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374 was cited with approval. In that case Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision amenable to invalidation.

21. But under Article 47 of *the Constitution*, judicial review has been entrenched as a constitutional right and, therefore, judicial review is not just an administrative law remedy. It is urged that the Fair Administrative Action, on the other hand, has widened the scope of judicial review in Kenya by going beyond the traditional approach restricted to procedural considerations which was previously the focus of judicial review, to now include a consideration of the merits of administration action or decision forming the subject of the judicial review proceedings.

22. In support of this submission the learned counsel for the applicant cited the Supreme Court decision 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) where it said the Supreme Court set the scope of Judicial Review and the circumstances under which the scope may be expanded to include inquiry into the merits of administrative action. Also, in Judicial Service commission & Another v Lucy Muthoni Njora (2021) eKLR, the Court of Appeal is said to have been emphatic that there has been a seismic shift towards a merit-based approach in judicial review applications.

23. The applicant, therefore, adopted the position that the orders of judicial review have become available not only within the previous confines of the *Law Reform Act* and Order 53 of the Civil procedure Rules but also in instances of breach of any of the fundamental rights and freedoms conferred under *the Constitution* which includes the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair pursuant to Article 47 of *the Constitution*. Accordingly, the decisions of administrative bodies ought to be subjected to greater scrutiny, including interrogation of their merits.

24. On the second issue, it has been urged that the respondent's decision is unlawful and ultra vires because contrary to section 82 and regulation 77(2) of the Public Procurement and Asset Disposal Regulations, 2020 because the respondent adjusted or amended the tender prices submitted by the bidders.

25. It was submitted thatadherence to the applicable law is the only guarantee of fairness and in the case of procurement law, the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. In this regard, the applicant relied on Civil Application No. 540 of 2008; Public Procurement Review Board versus the Kenya Revenue Authority (2008) eKLR.

26. The applicant's case is that the introduction of the engineer's estimate was shrouded in mystery as the measurements were not disclosed to the bidders and neither have they been disclosed to the parties. The applicant submits that while the tenderers were required to take a site visit, they were not under any obligations to take measurements and, indeed none of the tenderers took any measurement.

27. The 1st interested party is alleged to have conducted an illegal procurement process lacking in transparency and on its part, the Respondent is accused of upholding an illegal procurement process and failed to exercise its powers in accordance with the provisions of Article 227(1) of *the Constitution* and Section 167 of the *Public Procurement and Asset Disposal Act*.

28. On the third question, it was submitted thatthe 1st and 2nd Interested Parties admitted the use of engineer's estimates to provide a scientific way of budgeting for the tender. According to the applicant, this was contradictory because the measurements were used to determine the tender price yet they were not disclosed to the bidders to allow them to quote their prices on the basis of the engineers' measurements.The Respondent is faulted for having contravened Section 173 of the *Public Procurement and Asset Disposal Act* by proceeding to compute the tender prices using undisclosed engineers estimated measurements and arrived at tender prices different from what was declared by the 3rd Interested Party.

29. In response to the applicant's submissions, the respondent submitted that the applicant is seeking review of the merits of the respondent's decision, hence an appeal and not judicial review. The learned counsel for the respondent relied on the Court of Appeal decision in Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd (2002) Eklr and this Honourable Court's decision in Republic vs Public Procurement Administrative Review Board & Another ex parte; Selex Sistemi Integrati Nairobi (2008) KLR 728 for the submission that judicial review is concerned about the decision-making process and not with the merits of the decision.

    It was urged that the respondent properly exercised its jurisdiction under section 173 of the *Public Procurement and Asset Disposal Act*.

30. It was further urged that in applications such as the one before court, the Court of Appeal has stated that deference ought to be made to the specialised nature of the review board. Owing to its constitution of experts, it is better placed to deal with issues of evidence than a court of law would. In this regard

the respondent relied on the Court of Appeal decision in Kenya Pipeline ltd versus Hyosung Ebara Company ltd (2012) eKLR where it held that:

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

31. As far as the applicant's quest for the order of mandamus is concerned the respondent relied on Kenya National Examination Council VS Republic Ex- Parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR and urged that an order of mandamus is an equitable remedy that compels a Public Authority to fulfill its legal duty and addresses procedural delays.The learned counsel for the respondent then submitted that there is no miscarriage of justice nor is there a specific legal duty owed to the applicant that justifies issuance of the order.

32. On the 1st and 2nd interested parties' part, it was urged that the role of the Court in judicial review is supervisory and not appellate in nature. It was further submitted that judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or mala fides; and that as long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a judicial review court ought not to interfere with it. In so submitting, the learned counsel for the 1st and 2nd interested parties relied on *Saisi & 7 others versus Director of Public Prosecutions & 2 Others (Supreme Court of Kenya Petition No. 39 & 40 of 2019)*; Municipal Council of Mombasa versus Republic & Umoja Consultants Ltd (Civil Appeal (Nairobi) No. 185 of 2001); Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300; and Republic v Public Procurement Administrative Review Board & 3 Others Ex-Parte Saracen Media Limited (High Court of Kenya (Nairobi) Judicial Review Application No. 90 of 2018.

33. It was further submitted that the applicant's application is an appeal disguised as a judicial review application to the extent that it seeks a different outcome on merits of the 1st respondent's decision. In any event, the application does not disclose any of the judicial review grounds of illegality, procedural impropriety or irrationality to warrant the invocation of this Honourable Court's judicial review jurisdiction.

    The rest of what the 1st and 2nd interested parties have presented as submissions are the matters of fact that have been deponed to in their replying affidavit.

34. The facts constituting the background of this case are not in dispute. In summary, they are that the procuring entity invited tenders for rehabilitation works at its Olkaria and Eburru Geothermal fields. Both the applicant and the 3rd interested party, amongst other bidders, participated in the tender. The 3rd interested party's bid emerged the lowest price evaluated bid and, therefore, the 3rd interested party won the tender. Notifications to that end were subsequently issued to all the tenderers.

35. The applicant was aggrieved by the procuring entity's decision awarding the 3rd interested party the tender and so it exercised its right under section 167 of the *Public Procurement and Asset Disposal Act* and requested for a review of the procuring entity's decision. That section reads as follows:

> 167. Request for a review
> Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

36. A copy of the request for review exhibited on the applicant's affidavit sworn in verification of the facts relied upon shows that the applicant's complaint before the respondent was that it was the lowest yet the tender was awarded to the 3rd interested party. The applicant, therefore, sought to have the respondent reverse the procuring entity's decision and award it the tender instead. This is captured in paragraphs 10,11,12 and 16 of the affidavit in support of the application for the request for review. These paragraphs read as follows:

> " 10. We have calculated the quoted price by the successful bidder and noted with concern that their bid amount is a total of Kenya Shillings Six Million, Nine Hundred and Sixty Four Thousand, Three Hundred and Seventy (Kshs. 6,964,370/=) which amount is over double our bid price of Kenya Shillings Three Million, One Hundred and Twenty Seven Thousand and Seven Hundred and Fifty (Kshs.3,127 ,750/=). 11.I am advised by my advocates on record which advise I verily believe to be true that Section 86 (a) stipulates that the successful tender shall be the tender with the lowest evaluated price.
>
> 12. That it is therefore expected that since our bid had the lowest evaluated price, it is expected that we should have been awarded the tender on the basis of having the lowest price. It is therefore unfair and absurd for the Procuring entity to have rejected our bid on the basis of not having the lowest priced (sic) but instead it awarded the tender to an entity which had over double our bid amount.
>
> 16. In the circumstances aforesaid, it is my further belief, therefore, that the Board should preclude the Procuring Entity from proceeding with the awarding of the contract process and that the Applicant be declared the lowest evaluated tenderer.

37. In line with these depositions the applicant prayed for orders that:

> " I. A declaration that the Procurement Entity breached the requirements under the Tender Document.
>
> II. A declaration that the Procurement Entity breached the provisions of the *Public Procurement and Asset Disposal Act*, 2015;
>
> III. A declaration that the Procurement Entity breached Article 227(i) of *the Constitution*, 2010.

IV. The decision of the Procuring Entity dated 22nd March 2024 to award the tender to Spark General Builders Ltd be annulled and set aside forthwith.

V. The Applicant be declared the Lowest Evaluated Bidder and the Tender No. KGN-GDD- 008-2024 For Rehabilitation Works For Olkaria And Eburru Geothermal Fields be awarded to the Applicant."

38. Considering that the crux of the applicant's request for review was about which, between the applicant's and the 3rd interested party's bid, was the lowest evaluated price, the respondent identified one issue for determination which it framed as follows:

> " whether the procuring entity's evaluation committee properly arrived at the tender prices of the tenders received in the subject tender?"

The other issue on the orders that the respondent ought to make in the circumstances was, in my humble view, secondary to the extent that its answer was consequent upon the answer upon the first issue.

39. In answering this question, the respondent acknowledged that it was enjoined to interrogate the evaluation by the procuring entity's evaluation committee of the tenderers' tender prices the result of which the applicant's evaluated price was found to be higher than the 3rd interested party's.

40. Inevitably, the respondent had to navigate through the evidence submitted to it by the procuring entity. It considered, for instance, the tender requirements with respect to evaluation of tenders in particular requirement no. ITT. 40 at page 23 of the tender document. It found this requirement to be consistent with the requirements in section 86 of the *Public Procurement and Asset Disposal Act* that define what constitutes a successful tender. The respondent considered requirement nos. ITT 31.1 and ITT. 18.3 at pages 19 and 27 respectively of the tender document on the finality of the tender and established that these requirements were consistent with section 82 of the Act which stresses the finality of the tender price read and recorded during the tender opening. As far as the tender price is concerned, the respondent considered requirement no. ITT 14.3 at page 12 of the tender document which it found it mirrored regulation 77(2) of the Regulations, 2020 that stipulate that the tender price of each tender shall be that indicated in the form of tender. Other requirements in the tender document which the respondent considered in its decision were nos. ITT 12.1 on filling of the form of tender and ITT 42.0 on the award criteria.

41. In a further demonstration that the issue before the respondent could only be resolved by evaluation of the evidence which, as will become apparent in due course, the respondent evaluated before coming to its determination, it is noted at paragraph 86 of the respondent's decision as follows:

> " 86. The only point of departure appears to be the manner of establishing the tender prices submitted by the tenderer's in the subject tender. Whereas the Applicant maintains that its tender was the lowest evaluated tender from a summation of the rates it quoted under the various line items in the Bill of Quantities, the Respondents are of the view that in fact the highest evaluated tender. The Respondents fault the Applicant's computation which involved a simple addition of the individual quoted rates for the different line items. According to the Respondents, a tenderer's tender price was to be determined from multiplying the tenderer's quoted rates for the various line items against

estimates or actual measurements of the work to be done and thereafter adding the values under the individual line items."

42. In resolving what the respondent found to be the "point of departure", the respondent considered the evidence on the calculation of the tender prices in the subject tender and held that the formula adopted by the procuring entity was the correct one. The reason given for the respondent's conclusion in this regard is found at paragraph 87 of the its decision where it stated as follows:

> "We say so, because the the (sic) subject tender constituted multiple line items where tenderers were to indicate their different rates and thus there was need to have baseline measurement against which these rates would be objectively compared. The Respondents provided this baseline measurement as the Engineer's estimated measurements of the site."

43. As to why the engineers estimated measurements of the site were deemed to be baseline measurement, the respondent explained at paragraphs 88, 89 and 90 of its decision as follows:

> "88. The said Engineer's estimated measurements find application in the subject tender by virtue of the tender document which outlined that during the evaluation, the Procuring Entity shall use non-binding estimated quantities for determination of non-binding contract price.
>
> 89. Equally Clauses 9 and 21 at pages 130 and 132 of the Tender Document together with page 2 of the Tender Document made the site-visit exercise in the subject tender, an avenue for tenderers to measure or estimate the level of degradation of the site for purposes of determining their tender prices for the respective Line items in the Bill of Quantities."
>
> 90. Page 2 of the Tender Document made the site-visit a mandatory exercise in the subject tender. On their part, Clauses 9 and 21 under Section V(E): Preamble of the Bill of Quantities made provision for tenderers to assess the site for purposes of pricing the works under the various Line Items in the Bill of Quantities."

44. While dismissing the applicant's arguments upon evaluation of the evidence, the respondent discounted the notion that a simple summation of the rates under different line items in the bill of quantities would offer a tenderer's tender price in the subject tender. According to the respondent, the simple addition of the rates quoted for the different line items in the Bill of Quantities made an erroneous assumption that all line items had 1 unit. The Engineer's Estimated Measurements were said to bear different units for the various line items in the Bill of Quantities.

45. The applicant was also faultedfor making the assumption that the different line items in the Bill of Quantities were expressed in the same standard of measurement and thus capable of a simple addition yet the Bill of Quantities contained seven-line items expressed in what the respondent described as "multiple units of measurement."

46. The respondent then established that when the Applicant's and interested party's rates for the different line items were expressed in their actual prices in accordance with the Engineer's estimate

measurements of the site, the applicant's bid price was Kshs. 687,060,000/= while the 3rd interested parties was Kshs. 396,990,000/=. And with that the respondent concluded that:

> " 98. From the above it is apparent that the Applicant's tender price was not the lowest as the Interested Party's tender price was much lower. The Board has independently computed the tender prices of the other tenderers evaluated at the Financial Evaluation Stage and established that the Interested Party's tender price was in fact the lowest. Accordingly, in line with Section 86 of the Act and ITT 40.0, the Interested Party was correctly identified as the successful tenderer in the subject tender.
>
> 99. The Board therefore finds that the Respondents' Evaluation Committee properly arrived at the tender prices of the tenders received in the subject tender."

47. I have gone to great lengths in reproducing the respondents' analysis of the evidence not necessarily for purposes of endorsing the outcome but to demonstrate that in arriving the decision it did the respondent's attention was drawn to the material with which it was presented and, more importantly it gave due regard to this material before arriving at its decision.

48. The applicant's case before court is no different from what it presented before the respondent. It is, obvious from the application before court that it is pursuing the same agenda that it sought before the respondent but which it failed to achieve. A very clear example of the applicant's quest in this regard is that apart from the order of certiorari which is sought to quash the respondent's decision, the applicant is seeking that it be awarded the tender in place of the 3rd interested party. This is what the prayer for mandamus is all about. I reproduced it earlier in this judgment but perhaps to illustrate my point it is necessary that I reproduce it here again side by side with a similar prayer that was made in the request for review. In this application the prayer has been couched as follows:

> " 2. An Order Of Mandamus be and is hereby issued to compel the 1st Interested Party to award the Tender for Rehabilitation Works Olkaria and Eburru Geothermal Fields Tender No. KGN-GDD-008-2024 to the Applicant being the bidder with the lowest evaluated price."

And in its request for review, among other prayers, the applicant prayed for:

> " V. The Applicant be declared the Lowest Evaluated Bidder and the Tender No. KGN-GDD-008-2024 For Rehabilitation Works For Olkaria And Eburru Geothermal Fields be awarded to the Applicant."

49. What this goes to show is that the respondent's decision is not impeached not necessarily because it is tainted by any of the judicial review grounds but because the applicant believes the respondent misapprehended the law and misdirected itself on the evidence and, consequently, arrived at a wrong decision. And for this reason, it is calling upon this Honourable court to examine afresh the evidence and interpret and apply the law in a manner that is different from that which the respondent adopted and come to its own conclusions. I believe this is what the applicant means by the forceful submissions on what has been described as "merit review" and why the court should adopt this approach in the determination of its application.

50. If "merit review" is understood in this sense, there is no reason why judicial review should now not be regarded as an appeal, in the alternative, in which event, this concept of "merit review" that is rapidly gaining traction in judicial review applications would be a misnomer.

51. Without digressing any further and being drawn to this debate, it is sufficient, for purposes of determination of this application, to state the obvious: a judicial review application is not an appeal and a judicial review court would not assume appellate jurisdiction in exercise of its judicial review jurisdiction.

52. It has been held in R versus Entry Clearance Officer, Bombay ex p Amin (1983) 818 at 829 (B-C) (per Lord Fraser) that judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and it is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.

53. The same point was emphasised in Chief Constable of North Wales Police versus Evans (supra) where Lord Brightman said at page 1173F and 1174G that:

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."(Emphasis added).

54. There is also a host of decisions from our local jurisdiction that speak to the notion that a judicial review court should restrict itself to the process of making the decision that is sought to be impeached rather than the merits of the decision.

55. In *Energy Regulatory Commission v S G S Kenya Limited & 2 others (2018) eKLR Civil Appeal No. 341 of 2017*, for instance, the substratum of appeal was a tender award by the Energy Regulatory Commission (appellant). It was alleged that on the 18 April 2017, the appellant advertised an open tender inviting bids for the "provision of marking and monitoring of petroleum products" under tender No. ERC/PROC/4/3/16-17/119 in which the respondent and two other bidders (including the 3rd respondent) participated. On 30 June 2017, after evaluating both the technical and financial bids placed by the bidder, the respondent's bid was assessed as the lowest bid and the technical committee of the appellant recommended that the tender be awarded to the respondent. However, the committee, in its recommendation, made a general observation that there is in existence a new technology that can detect jet fuel in motor fuel which was of relevance to the award.

56. 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.

57. 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.

58. 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.

59. Being aggrieved by the High Court's findings, the appellant lodged the appeal to the Court of Appeal. The issue for determination in the appeal was whether the learned superior judge erred in forming a view of the evidence and improperly substituting the decision of the Board with his own. In allowing the appeal, the Court of Appeal answered this question in the affirmative and faulted the High Court Judge for determining a judicial review matter as if it was an appeal, and for going into the merits of a decision already taken.

60. 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."

61. 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."

62. Nonetheless, the Court of Appeal did not rule out the possibility of interfering 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."

63. I have already alluded to the respondent's evaluation of the evidence to demonstrate that the respondent considered and analysed the evidence with which it was presented before coming to the conclusion that the 3rd interested party's tender was properly adjudged by the procuring entity's tender evaluation committee to have been the lowest evaluated tender. It cannot, therefore, be said that the respondent's decision was plainly and self-evidently devoid of evidence. It is not a decision that can be said to have been inexplicable act of capriciousness or irrationality, deficient of any logic or reason. The decision is not such a decision that no reasonable tribunal, properly directing itself on the case would have arrived at.

64. Amongst the decisions the proponents of merit review have cited in advancement of their case is that of the Court of Appeal case of Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others (2016) KLR. While addressing the provisions of section 7(2)(l) of the *Fair Administrative Action Act*, the court held as follows;

> " An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the *Fair Administrative Action Act* provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of *the Constitution* to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate

to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

65. It is worth noting here that the court was considering a specific ground of proportionality whose consideration the court thought demands a measure of merit review.

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

67. In Kenya Revenue Authority & 2 Others v. Darasa Investments Limited (2018) eKLR the Court of Appeal was, however, more emphatic that judicial review is about the process rather than the merits of the decision. It observed as follows;

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

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

> "(75) In order for the court to get through this extensive examination of Section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in *Judicial Service Commission & another v. Lucy Muthoni Njora, Civil Appeal 486 Of 2019*; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against Article 259 of *the Constitution* which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.
>
> (76) Be that as it may, it is the Court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an

> appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in Section 11 (1) and (2) of the Fair Administrative Actions Act. Third, the Court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in Section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this Court held in the case of *Kenya Vision 2030 Delivery Board v. The Commission on Administrative Justice, the Attorney General and Eng. Judah Abekah, SC Petition 42 of 2019*; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised." (Emphasis added).

69. 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) (16 June 2023) (Judgment), a decision that the applicant has invoked in support of its case for merit review, the Supreme Court was of the view that it would be open to a court in a constitutional petition in which judicial review reliefs may be sought or granted to review a decision on merits without the clog of the traditional approach of restricting itself to process only. The court held as follows;

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

70. This decision would not be of much help to the applicant because, according to the Supreme Court, a party may only be entitled to merit review when he or she approaches a court under the provisions of *the Constitution*, apparently in a constitutional petition. In such a case, the court is under an obligation to undertake a merit review of the case on condition that the party does not just claim but also provides evidence of the constitutional rights violations. This is not the case with the applicant's application.

71. On the other hand, in a case, such as the applicant's, where a party brings a judicial review suit under the provisions of Order 53 of the Civil Procedure Rules and not claiming violations of rights the court

can only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision.

I understand this to be what the "dual approach" that the Court has made reference to is all about.

72. I have said what I think is sufficient to reach the conclusion that it would be unwise to engage in a fresh evaluation of the evidence presented before the respondent and come to my own conclusions. Neither am I inclined to interpret the law differently so as to substitute the respondent's decision with my own decision.

73. Finally, the only ground for judicial review I can decipher from the statutory statement and for which the judicial review reliefs are sought is that of illegality. That ground, amongst other traditional grounds of judicial review, was defined by Lord Diplock in Council of Civil Service Unions versus Minister for the Civil Service (supra) at page 410. The learned judge said of it 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.

74. For the reasons I have given I am not persuaded that the respondent did not understand correctly the law regulating his making power or that it did not give effect to it. On the contrary, I am convinced that the respondent acted intra vires the *Public Procurement and Asset Disposal Act*, and in particular section 173 thereof. For the same reasons the respondent's decision would not fall on any of the rest of the grounds of judicial review even if the applicant had pleaded them.

75. As to whether its decision was meritorious, it is a question that, as noted, is beyond the scope of jurisdiction of this Honourable Court as a judicial review court. In the ultimate, I have to reach the inevitable conclusion that the applicant's application has not merits; it is hereby dismissed with costs. It so ordered.

SIGNED, DATED AND DELIVERED ON 7 JUNE 2024

NGAAH JAIRUS

JUDGE