Republic v Public Procurement Administrative Review Board & another; Abdulhakim ahmed Bayusuf and Sons Limited (Exparte Applicant); SS Mehta and Sons Limited (Interested Party) (Judicial Review Application E175 of 2024) [2024] KEHC 14767 (KLR) (Judicial Review) (24 September 2024) (Judgment)

Neutral citation: [2024] KEHC 14767 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E175 OF 2024

JM CHIGITI, J

SEPTEMBER 24, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

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

COUNTY GOVERNMENT OF KILIFI ..... 2ND RESPONDENT

AND

ABDULHAKIM AHMED BAYUSUF AND SONS LIMITED .... EXPARTE APPLICANT

AND

SS MEHTA AND SONS LIMITED ..... INTERESTED PARTY

JUDGMENT

1. The Application that is before this court is the notice of motion dated 16th August 2024 seeking the following orders:

    i. An order of Certiorari to remove to this Honourable Court for purposes of quashing the decision of the 1st Respondent made on 2nd August 2024 in PPARB Administrative Review No. 64 of 2024; Abdulhakim Ahmed Baysuf and Sons Limited v The Accounting Officer, Roads and Transport Services County Government of Kilifi & S.S. Mehta and Sons Limited

by which it directed the 2nd Respondent to proceed with the procurement proceedings with respect to Tender No. RTPW/1496775-2/2023-2024 to its logical conclusion.

ii. An order of Certiorari to remove to this Honourable Court for purposes of quashing the decision of the 2nd Respondent dated 28th June 2024 to award Tender No. RTPW/1496775-2/2023-2024 for the Proposed Upgrading to Bitumen Standards of Timboni - Crabshark Road in Dabaso Ward to S.S. Mehta and Sons Limited (the Interested Party).

iii. An order of Certiorari to remove to this Honourable Court to quash the entire procurement proceedings with respect to Tender No. RTPW/1496775-2/2023-2024 for the Proposed Upgrading to Bitumen Standards of Timboni - Crabshark Road in Dabaso Ward.

iv. An order of Prohibition against the 2nd Respondent restraining it from entering into a contract with the Interested Party in respect of Tender No. RTPW/1496775-2/2023-2024 for the Proposed Upgrading to Bitumen Standards of Timboni - Crabshark Road in Dabaso Ward.

v. An order of Mandamus to compel the Accounting Officer, Roads and Transport Services County Government of Kilifi to re-advertise and commence a fresh procurement process with respect to Tender No. RTPW/1496775-2/2023-2024 for the Proposed Upgrading to Bitumen Standards of Timboni - Crabshark Road in Dabaso Ward.

2. The Application is supported by the grounds on the Statement of Facts and Verifying Affidavit sworn by Adullatif Abdulhakim Ahmed on 15th August,2024 and a further Affidavit dated 23rd August 2024.

The Applicant's case:

3. The 2nd Respondent invited bids for Tender No. RTPW/1496775-2/2023-2024 for the Proposed Upgrading to Bitumen Standards of Timboni - Crabshark Road in Dabaso Ward (subject tender) whose closing date was 28th June, 2024.

4. On 27th June 2024 the Ex-Parte Applicant submitted its bid.

5. On 4th July 2024 the Applicant received an email notification from the IFMIS email-supplier@treasury.go.ke that its quote No. 2120224 for the subject tender had been shortlisted on 2nd July 2024 for the next phase of evaluation (commercial).

6. Subsequently, the Ex-Parte Applicant received an email notification from IFMIS on 4th July, 2024 that its bid for the subject tender had been rejected and that the award date for the tender was on 2nd July, 2024.

7. The Applicant noted that its quote had been deleted from the active responses received by the 2nd Respondent.

8. After a visit to the 2nd Respondent's offices on 5th July 2024 by the Ex-Parte's representative to inquire on the rejection email, he was handed a backdated letter of Notification of Intention to Enter into a Contract dated 28th June, 2024 which indicated that the Interested Party had emerged as the successful bidder for the subject tender.

9. This precipitated the filing of the Request for Review before the Public Procurement Administrative Review Board that rendered it's decision on 2nd August 2024 where the Request for Review was partially allowed and the 2nd Respondent was directed to simultaneously issue both the successful and unsuccessful tenderers with fresh letters of notification to enter into a contract within 3 days of the Decision but with the Interested Party still as the successful bidder.

10. The 2nd Respondent in compliance with the 1st Respondent's Decision issued a Notification of Intention to Award dated 5th August 2024 naming the Interested Party as the successful tenderer which according to the applicant is irrational, done with procedural impropriety, illegal and against legitimate expectations.

11. The applicant relies on the Ugandan case of Pastoli -vs- Kabale District Local Government Council and Others [2008] 2 EA 300which cited Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2. This case was cited with approval by Justice Odunga (as he then was) in Rahab Wanjiru Njuguna v Inspector General of Police & another [2013] eKLR where it was held as follows:

> "In order to succeed in an application for judicial review, the applicant must show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ... illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction ..., or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural justice ot to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision."

12. The Applicant also places reliance in the Court of Appeal in Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR wherein the court stated as follows:

> "Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons...."

13. It argues that it is irrationality based on the 1stRespondent's finding that the Ex-Parte Applicant did not adduce evidence that its tender document was deleted from the IFMIS portal.

14. It is its case that the 1st Respondent stated in paragraph 147 at page 112 of the decision that the Ex-Parte Applicant had provided a screen shot showing that its quote for the subject tender was no longer available on the IFMIS portal.

15. However, in paragraph 148 at page 112, the 1st Respondent went on to state that no evidence had been adduced that the 2ndRespondent had deleted the Ex-Parte Applicant's tender document from the IFMIS portal.

16. The 1st Respondent consequently held that the evidential burden had not shifted to the 2nd Respondent to disprove the Ex-Parte Applicant's allegation.

17. The Applicant is troubled by the fact that The 1st Respondent made this finding notwithstanding the fact that, in its grounds of opposition to the Request for Review, the 2nd Respondent had not controverted the fact of the non-availability of the tender on the IFMIS portal proffered any factual explanation for the same.

18. The 2nd Respondent attributed the alleged closure and re-opening of the IFMIS system as the reason for the slight lapse raised by the Ex-Parte Applicant.

19. The 2nd Respondent also urged the 1st Respondent to scrutinize the IFMIS system to investigate the Ex-Parte Applicant's claims.

20. It is the Applicant's case that notwithstanding the claims made by the 2nd Respondent that alleged closure of the IFMIS system was the reason why the Ex-Parte Applicant's tender was not available, no evidence of the same was adduced before the 1st Respondent and neither were the 2nd Respondent's assertions supported by the law.

21. As a result of the 2nd Respondent's admission that the IFMIS system had been suspended, it followed that the Ex-Parte Applicant could not access the system to follow up on the tendering process for the subject tender.

22. The Ex-Parte Applicant had provided evidence that it accessed the IFMIS system and noted that only the current tender in question was missing.

23. Other tenders that had been previously submitted by the Ex-Parte Applicant; some dating back to the year 2019; were still on the system and the Applicant could easily access them.

24. It is its case that the 1st Respondent should have resolved who between the Applicant and the 2nd Respondent could be believed but failed to decide whether the 2nd Respondent's explanation of suspension of IFMIS portal, when all other earlier tenders were available on the system as shown in the screenshot, was factual and legally tenable.

25. Instead, the 1st Respondent, citing the IFMIS manual, came up with its own explanation that the tender having been finalized and communicated to the Ex-Parte Applicant on 9th July 2024 at 1:33 pm, then the same was no longer active for listing and viewing.

26. This holding is not based on how the IFMIS platform operates and was not supported by the submissions made by the 2nd Respondent in its defence before the 1st Respondent.

27. It submits that the correct position is that, when a bidder wants to bid, it can access the tender document from the IFMIS supplier portal under the sourcing home page irrespective of whether the same is "Active, Disqualified, Accepted / Awarded or Rejected."

28. Reliance is placed in Judicial Review Miscellaneous Application No. E039 of 2022; Procurement Administrative Review Board; Ex-Parte Madison General Insurance Kenya Ltd; Accounting Officer KEBS & another recognized the jurisdiction and powers of the Public Procurement Administrative Review Board as follows:

> "The jurisdiction and powers of the Board are enormous. The Board is the primary superintendent of public procurement ....Its role was described in lofty terms by the Court of Appeal in Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others [2012] eKLR as follows;
>
> > '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 power to engage an expert to assist in the proceedings in which it feels it lacks the necessary experience ...."

29. It is further the Applicant's case that the 1st Respondent acted irrationally by proceeding to direct the 2nd Respondent to issue fresh Letters of Notification to Enter into a Contract and to proceed with the procurement proceedings of the subject tender, thereby treating the Applicant's complaints as trivial yet they went to fairness and transparency of the entire procurement process.

30. These unexplained discrepancies, which the 1st Respondent failed to make a finding on was on the sheer impossibility of the fact that the 2nd Respondent's letter of intention to enter into a contract was dated 28th July, 2024 yet the Ex-Parte Applicant received an IFMIS email notification on 4th July, 2024 that its quote No. 2120224 had been shortlisted on 2ndJuly, 2024 for the next phase of evaluation and that on the same date of 4th July 2024, the Ex-Parte Applicant later received an email that its bid had been rejected.

31. By failing to address these discrepancies, the 1stRespondent regarded the date of 28th June 2024 appearing on the letter of notification of intention to enter into a contract as a typing error which could be cured by issuing another letter.

32. It is its case that it defies logic that while the subject tender submission deadline was 28th June 2024 at 10:00 AM, from the 1st Respondent's Decision where it relied on the confidential documents submitted by the 2nd Respondent, that the subject tender was opened on 28th June 2024, evaluated on the preliminary, technical and commercial aspects on 28th June 2024, a professional opinion issued on 28th June 2024 which the 2nd Respondent concurred with and prepared Letters of Notification on the same date.

33. Justice A.K. Ndung'u in Judicial Review Miscellaneous Application No. E039 of 2022; Procurement Administrative Review Board; Ex-Parte Madison General Insurance Kenya Ltd; Accounting Officer KEBS & another cited with approval the case of Council of Civil Service Unions v Minister for the Civil Service (1985) A.C 374 where Lord Diplock stated:

> "....By irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness"... it applies to a decision which is so outrageous in it is in 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....'Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review..."

34. It argues that it is evident that the backdated notification of intention to enter into a contract was intended to obscure the procurement process in light of the email notifications received by the Ex-Parte Applicant on 4th July, 2024.

35. Reliance is placed in Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR cited with approval the case of Trinity Broadcasting (Ciskei) v ICA SA 2004(3) SA 346 (SCA) at 354H-335A which stated the rationality test as follows:

> "... the reviewing Court will ask; is there a rational objective basis justifying the connection made by the administrative decision- maker between the material made available and the conclusion arrived at."

36. It believes that the 1st Respondent's decision was not based on materials and reasoning that logically support the existence of facts consistent with its pronouncement and by virtue of section 7(2) i (iii) and (iv) of the *Fair Administrative Action Act* 2015, the decision is amenable to judicial review on grounds of irrationality.

37. The Applicant further argues that the impugned process and decision is ailing from procedural impropriety.

38. Lord Diplock in Council for Civil Service Unions v Minister for Civil Service [1985] A.C. 374 at 401 D described procedural impropriety as:

> "...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."

39. In its Decision dated 2nd August 2024, the 1stRespondent acknowledged receipt of various confidential documents from the 2nd Respondent which were not available to the Ex-Parte Applicant such as the register of the tender opening, evaluation of the tenders and the professional opinion.

40. It is clear that had the 1st Respondent discharged its mandate by carefully considering the confidential documents, it would not have arrived at its Decision.

41. Some of these documents which the Applicant did not have was the letter of intention sent to the 3rd Respondent dated 10th July 2024 and the professional opinion dated 28th June 2024.

42. The professional opinion issued pursuant to section 84 of the PPADA remains dated 28th June 2024.

43. Section 84(1) of the PPADA provides: -

> 1. The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings."

44. The professional opinion is after evaluation but before the letter of intention to award the contract.

45. This would mean that the email communication dated 2nd July 2024 from the 2nd Respondent to the Applicant that its tender had passed for commercial evaluation remains unexplained.

46. In Procurement Administrative Review Board; Ex-Parte Madison General Insurance Kenya Ltd (supra):

> "It goes without saying that any responsive tender would of necessity have countrywide coverage with proof of business permits ....The confidential bundle/documents were forwarded to the Board by the procuring entity as would be expected under section 67 of the Act. In hearing the request for review, the Board is obligated to consider the documents sent to it under confidential cover. Notably, these documents are not available to the tenderers/parties. A cursory look at the tender documents would readily reveal to the Board whether the 2nd Respondent met the mandatory requirement ....This was a duty on the part of the Board in playing its part in ensuring that the procurement process abided by the principles of procurement set in Article 227(1) of *the Constitution* and the guiding values and principles expounded under section 3 of the Act...This duty is not a light one. It has constitutional and statutory underpinning."

47. It argues that the 1st Respondent further abdicated its role as a statutory tribunal established to deal with breaches by procuring entities by failing to act as an impartial arbiter.

48. This is demonstrated by the fact that the 1st Respondent resorted to conjuring its own explanation unsupported by the evidence before it on why the Ex-Parte Applicant's tender quote was no longer available from the active responses on the IFMIS platform yet the 2nd Respondent had alleged that the reason was because of IFMIS's closure which position was not verified by the 1st Respondent.

49. In the Procurement Administrative Review Board; Ex-Parte Madison General Insurance Kenya Ltd; Accounting Officer KEBS case cited above stated:

> " ....I have not come across any indication that the Board considered all the material before it to confirm that the 2nd Interested Party's tender was complaint. Instead what manifests from the record is a spirited effort by the procuring entity to require the applicant to prove the non-compliance of the 2nd Interested Party, a position the Board agreed with. Put simply, the Board has the mandate and the wherewithal to confirm and pronounce itself over the responsiveness or lack thereof .... The Board cannot run away from its duty. It is worthy of note that the Board in its decision never pronounced itself on the compliance of the 2nd Interested Party but rather based its finding on the premise that the applicant had failed to prove that the 2nd Interested Party did not have the permits in question....
>
> ... the Board despite having the competency and jurisdiction to decide whether or not the 2nd Interested Party had met the mandatory conditions, shirked its responsibility by failing to consider confidential documents accessible by it and make a definite finding on the issue. By so doing, the Board failed to consider a relevant matter, indeed a key one at that, in making the impugned decision...
>
> The failure to take into account the confidential documents accessible by it renders the decision unprocedural and unfair...."

50. It is argued that the 1st Respondent while arriving at its decision on the unavailability of the Ex-Parte Applicant's tender quote on the IFMIS portal failed to consider the fact that the Ex-Parte Applicant had provided evidence that its other historical tender quotes dating back to the year 2019/2020 were still accessible on the same portal. In doing so, the 1stRespondent abdicated its duty since it was supposed to satisfy itself that based on the evidence adduced, the procurement process of the subject tender was done in system that is fair equitable, transparent, competitive and cost-effective as enshrined in Article 227 of *the Constitution* of Kenya.

51. To further advance its case on why an order of certiorari should issue the applicant relies on the case of Rongo University case (supra) stated as follows regarding illegality:

> " Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple ultra vires and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion and failing to fulfill substantive legitimate expectations are grounds within the second category."

52. It argues that the 1st Respondent's decision which directed the 2nd Respondent to issue fresh Letters of Notification of Intention to Enter into a Contract and to proceed with the procurement proceedings for the subject tender is an illegality since it sanctions a flawed tender process marred with patent opaqueness and a lack of transparency contrary to the core tenets of public procurement.

53. The 1st Respondent's finding at paragraph 168 of the Decision that the Exparte Applicant's tender was not the lowest evaluated responsive tender to qualify for award of the subject tender is null and an illegality since the said finding was based on opaque and discredited evaluation process from which no finding of who was the lowest evaluated bidder can be made since there are no materials that logically support the existence of facts consistent with the finding but was based on reasoning that is marred with discrepancies and inconsistencies.

54. The 1st Respondent's Decision is devoid of a legal basis since it purports to unreasonably and arbitrarily vindicate the 2nd Respondent by allowing it to proceed with the impugned tender proceedings despite the blatant irregularities in the tendering process.

55. As such, the 1stRespondent by its actions undermined the guiding principles of public procurement as set out in section 3 of the PPADA, Article 10 of *the Constitution* of Kenya on good governance, integrity, transparency and accountability.

56. In the case of Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR stated that the objectives of public procurement law are:

> " ....To promote the integrity and fairness of those procedures;
>
> To increase transparency and accountability in those procedures;
>
> To increase public confidence in those procedures;...."

57. Justice Aburili went on to state that:

> " In my humble view, irregularities and the breaches complained of against the Review Board and the procuring entity impact on the outcome of the procurement process and undermine the guiding principles set out in section 3 of the PPAD Act, Article 10 and 227(1) of *the Constitution* ....
>
> ...had the Review Board inquired into the illegalities cited above, it would not have declined jurisdiction .... It would have further considered the serious illegality of the contract ....
>
> In my humble view, the 1st Interested Party / procuring entity's general conduct of the procurement process was tainted with opaqueness, lack of transparency, integrity, accountability and in blatant breach of the provisions of the PPAD Act. The process was not in consonance with the Constitutional values and principles espoused in Article 10 and 227 (1). It cannot, therefore be said that the contract entered into between the procuring entity and the 2nd Interested party was valid and enforceable or that it was devoid of any illegalities...."

58. The 1st Respondent's Decision is an illegality and is contrary to section 7(2) (a), (d), and (l) of the *Fair Administrative Action Act*.

59. On another front the applicant advances a case of legitimate expectation violation.

60. The Ex-Parte Applicant had a legitimate expectation that at the very least, the 1st Respondent in the discharge of its duties would consider the evidence presented before it including the confidential documents submitted by the 2ndRespondent.

61. It is its case that the 1st Respondent did not review the confidential documents and evidence submitted by the Ex-Parte Applicant before reaching its decision with regards transparency in the conduct of the subject tender.

62. Reliance is placed in The Supreme Court of Kenya in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others S.C Petition No. 14 Consolidated with 14A, 14B & 14C of 2014 [2014] eKLR stated that:

> "In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise."

63. It also relies in the case of Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Ex parte Kenya Power and Lighting Company Limited [2019] eKLR stated that:

> "A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims the court follows a two-step approach. First, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, that is enforce the legitimate expectation..."

64. It argues that the 2nd Respondent as a public body to procure goods and services in a system that is fair, transparent, and competitive. However, the 1st Respondent's Decision does not align with the evidence particularly with regards to transparency of the whole process.

65. Reliance is placed in the case of Procurement Administrative Review Board; Ex-Parte Madison General Insurance Kenya Ltd case, Justice A.K. Ndung'u held that:

> "....The applicant has ably demonstrated before this court that a relevant consideration was not taken into account resulting in procedural impropriety and unfairness to the applicant and further, trampling on the applicant's legitimate expectation that upon presentation of his Request for review before the Board, all relevant materials and documentation would be considered."

66. It believes that by virtue of Section 8 and 9 of the *Law Reform Act*, Cap. 26 Laws of Kenya, this Honourable Court has the powers to issue the prerogative writ of certiorari to quash the Decision by the 1stRespondent on 2nd August 2024.

67. The Ex-Parte Applicant is also seeking the judicial review order of prohibition.

68. The 1st Respondent in its Decision dated 2nd August 2024 directed the 2nd Respondent to issue fresh letters of notification of intention to enter into a contract and proceed with the procurement proceedings with the Interested party as the successful tenderer.

69. The 2nd Respondent has already issued a Notification of Intention to Award dated 5th August, 2024.

70. In Republic v Principal Kadhi, Mombasa Ex-Parties Alibhai Adamali Dar & 2 Others; Murtaza Turabali Patel (Interested Party) [2022] eKLR the judge quoted the book by Sr. W. Wade and C. Forsyth on Administrative Law where it was noted that:

> " I can see no difference in principle between Certiorari and Prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari. I think that prohibition will lie to restrain it from so exceeding its jurisdiction.
>
> Although prohibition was originally used to prevent tribunals from meddling with cases ... it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal, or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself."

71. Based on the grounds of irrationality, procedural impropriety illegality and legitimate expectation violation, the Ex-Parte Applicant submits that it is entitled to the judicial review order of prohibition to restrain the 2nd Respondent from executing the impugned Decision by the 1st Respondent.

72. The Ex-Parte Applicant further seeks a judicial review order of mandamus to compel the 2nd Respondent to re-advertise the subject tender.

73. The Court of Appeal in Kenya National Examination Council case (supra) dealt with the scope and efficacy of an order of mandamus. It stated:

> "...The order of mandamus is one of a most extensive remedial nature and is, in form of a command issuing from the High Court of Justice directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its nature is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where, although there is a specific legal right and no specific legal remedy for enforcing that right, and it may issue in cases where, although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual.
>
> ...an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has the legal right to expect that duty to be performed..."

74. Section 44 (1) of the PPADA provides that an accounting officer is primarily responsible for ensuring that the public entity complies with the Act.

75. According to section 44 (2) (f) and (g), the Accounting Officer is also responsible for approving and signing all contracts of the procuring entity and tasked with ensuring that the procurement processes by the public entity comply with the PPADA.

76. The 2nd Respondent was the person primarily responsible for ensuring that the procuring entity complied with the provisions of *the Constitution* and the governing statute while conducting procurement for the subject tender and the 2nd Respondent should be compelled to conduct a fresh

procurement process for the subject tender in compliance with the law especially with regards to transparency of the procurement process.

77. The result of a sham procurement process cannot be upheld if it can be shown that it was arrived at through an opaque process devoid of transparency which is a constitutional imperative.

78. The Court in the Lordship Africa case (supra) cited with approval the Court of Appeal case of Henry Muthee Kathurima -vs- Commissioner of Lands & another [2015] eKLR which held that:

> " Estoppel cannot be used to circumvent Constitutional provisions and estoppel cannot override express statutory procedures; there cannot be estoppel against a statute...."

79. The Court in the Lordship Africa case further stated:

> " ...once a court or tribunal's attention is brought to an issue of an illegality or breach of statute or constitutional provision, in the course of proceedings then in the interest of justice the court or tribunal must investigate it because the court's fundamental role is to uphold the law."

80. In response to the 2nd respondent's submissions the applicant argues that apart from the 2nd Respondent's submissions stating that judicial review is only concerned with the decision-making process and not the merits, the 2nd Respondent has failed to show how the Ex-Parte Applicant seeks to allegedly invoke the appellate jurisdiction of this Court through its application disguised as judicial review.

81. It is its case that under the Statutory Statement, the judicial review orders sought have been anchored on the grounds of irrationality, procedural impropriety, illegality and legitimate expectation which are recognized as valid grounds upon which an aggrieved party may seek judicial review of a decision.

82. It argues that with the promulgation of the 2010 Constitution, there was a radical shift from the traditional common law judicial review of administrative decisions. Accordingly, judicial review is not restricted to review of the process alone but also the merits in certain special circumstances.

83. Due to the elevation of judicial review beyond the common law restrictions, the right to fair administrative action has been constitutionalized which led to the enactment of the *Fair Administrative Action Act*, 2015.

84. Therefore, any administrative action must be measured from the lens of *the Constitution* specifically its values and principles on transparency, accountability and good governance as enshrined under Article 10 of *the Constitution*.

85. As regards the subject matter at hand which is procurement, the administrative decision must be measured based on the standards set under Article 227(1) of *the Constitution* which requires public entities to contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

86. Notably, the Ex-Parte Applicant's has been brought under Article 10, 47 and 227 of *the Constitution*, section 8(2)(4) & 9 of the *Law Reform Act* Cap. 26, Section 7(a), (c), (d), (f), I (iii) and (iv) , (k), (l), (m), (n) & 9(1) of the *Fair Administrative Action Act* and Order 53 of the Civil Procedure Rules 2010.The

Supreme Court 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) held that:

> "...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 a 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...."

87. The Supreme Court in the Dande case also disagreed with the reasoning of the Court of Appeal and held that:

> "With utmost respect to the learned judges of the Court of Appeal, we disagree ... 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....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 the parties at the inception of the pleadings...."

88. The Supreme Court in SC Petitions 39 & 40 of 2019; Praxidis Namoni Saisi & 7 others v DPP & 2 others also state at paras. 74-75 with regards to how courts should handle judicial review in light of *the Constitution* and the *Fair Administrative Action Act* that;

> "...when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative .... It was a clarion call to ensure that the constitutional right to fair administrative action permeated every aspect of the lives of Kenyans ... to engaging with public bodies in whatever capacity ... 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 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...."

89. The scope of judicial review has been expanded beyond the traditional common law principles of judicial review restricted to procedural considerations. Justice Mativo (as he then was) in Republic v Firearms Licensing Board & another Ex parte Boniface Mwaura [2019] eKLR stated that:

> "The concept of Judicial Review under *the Constitution* of Kenya is similar to that under *the Constitution* of South Africa where the South African court held in Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & others that 'the common law principles that previously provided for the grounds for Judicial Review of public power have been subsumed under *the Constitution* and, insofar as they might continue to be relevant to public power have been subsumed under *the Constitution* and, insofar as they might continue to be relevant to Judicial Review,

they gain their force from *the Constitution*. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts..."The court held that:

"The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy.... section 7 of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8....

Judicial Review is now a constitutional supervision of public authorities involving a challenge to the legal validity of the decision...Courts must develop judicial review jurisprudence alongside the mainstreamed 'theory of a holistic interpretation of *the Constitution*. Judicial review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes...."

90. In Republic v Fazul Mohamed & 3 others Ex-Parte Okiya Omtatah Okoiti [2018] eKLR:

> "Article 259 of *the Constitution* introduced a new approach to the interpretation of *the Constitution*. The Article obliges courts to promote 'the spirit, purport, values and principles of *the Constitution* ... and contribute to good governance. This approach has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation.' The duty to adopt an interpretation that conforms to Article 259 is mandatory."

91. Whereas the Court in exercise of its judicial review jurisdiction is not required to look at the evidence to reach a finding on whether there was indeed irrationality, procedural impropriety, illegality and breach of legitimate expectation, the Court would be required to engage in a measure of merit review.

92. This was held by the Court of Appeal in *Judicial Service Commission & another v Njora(Civil Appeal 486 of 2019*) [2021] KECA 366 (KLR) that:

> "To my mind, even fealty to the traditional "process-only" approach to judicial review must involve a measure of merit analysis....I think it would be unrealistic for a court to engage in a dry and formalistic approach, steeped in process alone, while eschewing a measure of merit examination....
>
> The superior courts of this country has spoken with near-unanimity that the current constitutional and statutory landscape calls for a more robust application of the relief of judicial review to include, in appropriate cases, a merit review of the impugned decision....We emphatically find and hold that there is nothing ... amiss or erroneous in a judge's adoption of a merit review in judicial proceedings. To the contrary, this would lie in a failure to do so out of a misconception that judicial review is limited to a dry or formalistic examination of the process while strenuously and artificially avoiding merit...."

93. The Court of Appeal decision in Energy Regulatory Commission -vs- SGS Kenya Limited & 2 others [2018] eKLR where it was held that:

> "...In his final order, the learned Judge granted mandamus directing the appellant to proceed with the tender and effect the recommendations that the tender ... be awarded to SGS. That order was wholly underserving for a number of reasons. We have already indicated that there was nothing perverse or outrageous about the Board's decision upholding the appellant's termination of the award...."

94. The Ex-Parte Applicant argues that an outrageous Decision like the impugned one cannot be allowed to stand since it will be upholding an illegal procurement process lacking in transparency contrary to Article 227 of *the Constitution*.

95. In Republic v Public Procurement & Administrative Review Board & 2 others Ex parte Applicant Dar-Yuksel-Ama; Korea Express Corporation (KEC) Korea Consultants International Company Limited (KIC) & Apec Consortium Limited & 2 others (Interested Parties) [2022] eKLR

> " A public body will err in law if it acts in breach of fundamental human rights ... takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, ... fails to fulfill an express or implied duty to give reasons or otherwise abuses its power...."

96. The Interested Party has cited the Court of Appeal decision in Energy Regulatory Commission -vs- SGS Kenya Limited & 2 others [2018] eKLR at para. 31 of its submissions in support of its proposition that the Ex-Parte Applicant should not be granted the order of mandamus.

97. Specifically, the Court of Appeal in the Energy Regulatory case held that:

> " In his final order the learned Judge granted mandamus directing the appellant to proceed with the tender and effect the recommendation that the tender/contract be awarded to SGS. That order was wholly undeserved .... the appellant did not bear a statutory duty to award the tender to SGS or to any other entity to attract the compulsive force of mandamus. The grant or award of such tenders and contracts are matters that lie within its discretion ...To command the award therefore denied the appellant's accounting officer of a right and discretion flowing from statute ...."

98. The Applicant distinguishes the Energy Regulatory from the instant case where the Ex-Parte Applicant seeks:

> " That this Hounourable Court be pleased to grant judicial review order of mandamus to compel the Accounting Officer ... to re-advertise and commence a fresh procurement process with respect to Tender No....for the Proposed Upgrading to Bitumen Standards of Kizingo-Jacaranda Road Phase I in Watamu Ward."

99. The distinguishing factor between the Energy Regulatory case and the instant case is that the Ex-Parte Applicant herein is not seeking an order of mandamus to be awarded the subject tender which was the main contention.

100. It argues that the Court of Appeal rightly faulted the High Court Judge by stating that the Energy Regulatory Commission did not have a statutory duty to ward the tender to SGS.

101. Reliance is placed in Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR where the Ex-Parte Applicant had sought an order of mandamus to compel the Nairobi City County to commence a fresh procurement process granted the following orders inter alia:

> " I hereby direct and order the Nairobi City County the procuring entity herein to commence a fresh procurement process with respect to Tender No ...for the Urban Renewal and

Redevelopment of Phase 2 ... which procurement process shall accord with the established laws and procedures..."

The 1st Respondent's Case;

102. The 1st Respondent opposes the motion via a Replying Affidavit sworn by Mr. James Kilaka on 20th August 2024.

103. According to him, the ex-parte applicant's motion is a review of the merits and the application is seeking to improperly invoke an appellate jurisdiction of the High Court.

104. Section 173 of the Public Procurement and Disposal Act, 2015 provides for the powers of the Review Board which include:

1. give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

2. It is its case that the Review Board acted within section 173 of the Act.

105. It is The Respondent case that it indeed had jurisdiction to hear and determine the request for review No. 63 of 2021 which had been filed within the stipulated statutory period of 14 days prescribed under Section 167(1) of the Act read with Regulation 203(2)(c) (i) of Regulations 2020.

106. This court is not empowered to venture into correcting the decision of the Review Board on the merits (whether wrong or correct) and it places reliance in the following cases.

107. Reliance is placed in the case of REPUBLIC V PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & ANOTHER EX PARTE GIBB AFRICA LTD & ANOTHER [2012] eKLR set out the established reach of judicial review in Kenya thus;

> " The reach of judicial review is now well established. In the case of COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935Lord Diplock summarized the scope of judicial review thus:-
>
> "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 are subject to control by judicial review.
>
> The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety."".....
>
> 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.

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."

108. In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means least he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals. The Court of Appeal in GRAIN BULK HANDLERS LIMITED V J. B. MAINA & CO. LTD & 2 OTHERS [2006] eKLR summarized the purpose of judicial review by stating that: -

> "Judicial Review jurisdiction regulates the process by which a decision-making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions."

109. From the foregoing it is clear that in judicial review, the court does not exercise its appellate powers. It mainly looks at the decision-making process to ensure that the citizen who has come into contact with an administrative body or tribunal has been treated fairly. But as observed by Lord Diplock in the already cited CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE case, the court can quash the decision if the same is so unreasonable to the extent that a reasonable tribunal addressing its mind to the facts of the case would not have arrived at such a decision. In doing so, I submit, the court will have descended into the arena of decision-making. For a court to justify such action it must be clearly obvious that the decision is truly and obviously unreasonable.

110. In Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, it was held while citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 that:

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to

be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

111. In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that;

> 'The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power"

112. The High Court in Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR held that:

> 'The purpose judicial review proceedings is to ensure that the individual is given fair treatment by the authority to which he has been subjected and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court".

113. On the issue of certiorari, it relies in the case of Republic v Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited where Majanja J. quoting with approval the decision of Githua J in Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of [2012] eKLR as follows;

> " It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates."

114. The Court of Appeal in Kenya Pipeline Company Limited V Hyosung Ebara Company Limited & 2 Others (2012) e KLR drew the boundaries for reviewing the decisions of the Review Board as follows:

> " The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity...S.98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procuring entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the review board is obviously better equipped that the High Court to handle

disputes relating to breach of duty of the procuring entity .it follows that its decision in matters within its jurisdiction should not be lightly interfered with.

Having regard to the wide powers of the Review Board we are satisfied that the High court erred in holding that the Review Board was not competent to decide whether or not the 1st respondent's tender had met the mandatory conditions. The issue whether or not the 1st Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it.

In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1stRespondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of natural justice of that the decision was irrational. The Judicial review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly"

The High Court erred in essence in treating the Judicial Review Application as an appeal and in granting review orders on the grounds which were outside the scope of Judicial Review jurisdiction".

115. It prays that this court adopts similar view as the Court of Appeal in the case above.

116. It is its case that in order for an applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the applicant must demonstrate that there is indeed a mistake that goes to the jurisdiction of the tribunal.

117. Once a judicial review court gives a clean bill of health to the process, it must down its tools without considering the merits of the decision for to do so would amount to usurping the power of the body that was mandated by the law giver to make the decision.

118. The Court of Appeal in Municipal Council of Mombasa V Republic & another (2002) e KLR held that in judicial review:

> " The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters of did he take into account irrelevant matters? These are the kind of the questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was ore there was not sufficient evidence to support the decision –and that, as we have, is not the province of judicial review".

119. In Republic Vs Kenya Power & Lighting Company Limited & Another [2013] e KLR the learned Judge quoting a decision of the Court of Appeal stated:

> " The Board considering all the arguments of the Applicant and made findings on each of these issues. The Board may have been wrong in its decision but this Court would be

usurping the statutory function of the Board were it to substitute its own views for those of the Board"

120. In the matter of Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR the court stated at paragraph *59* stated that: -

> " An administrative functionary that is vested by statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary."

The 2nd Respondent's case;

121. In opposing the application, the 2nd respondent filed Grounds of Opposition dated 20th day of August, 2024 and the Replying Affidavit of Mr. Philip Charo sworn on 28th August,2024.

122. It is its case that the right to administrative action that is lawful, reasonable and procedurally fair now draws its legitimacy as a fundamental right in Article 47(1) of *the Constitution* of Kenya, 2010, which states as follows:

> " Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

123. It is its case that Judicial review orders are therefore no longer exclusively common law remedies as evident in Article 23(3) (f) of *the Constitution* of Kenya.

124. Reliance is placed in the case of Kenya National Examination vs The Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 Others, *CA No. 266 of 1996* [1997] eKLR set out the scope of Judicial Review orders of certiorari, mandamus and prohibition as follows:

> "...Until 1992, the heading for Order 53 was "ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI." *Legal Notice No. 164 of 1992* changed that heading to "APPLICATIONS FOR JUDICIAL REVIEW" and that heading is retained in the current rules vide *Legal Notice No. 5 of 1996* which restored the position to the pre-1992 meddlesome amendments which were, understandably, ruled ultra vires the provisions of the *Law Reform Act*. Why is it necessary for us to go into this historical explanation?, one may ask. Our answer to that is that we think the time has now come for this court to set out and explain as far as is within our power, the efficacy and scope of each of the remedies, namely mandamus, prohibition and certiorari.... These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition

would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.... The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again, we turn to HALSBURY'S LAWS OF ENGLAND, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says: - "The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual." At paragraph 90 headed "the mandate", it is stated: "The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."... Like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

125. It argues that an order of Prohibition can only prevent the making of a decision; it cannot issue in respect of a decision already made. It does not lie to challenge the merits of the proceedings; it lies to challenge the legality of a decision or a departure from rules of natural justice by a public body.

126. It is its case that an Order of Mandamus can only command the making of a decision; it cannot issue in respect of a decision already made. It commands the performance of an act which a public body is bound to perform and it cannot command the performance of an act in a specific way where a statute imposing a duty leaves discretion to a public body as to the mode of performing the duty.

127. An Order of Certiorari quashes a decision already made, if the decision is so made in excess of jurisdiction or in disregard of the rules of natural justice.

128. It further argues that an Applicant in Judicial Review Application to demonstrate that the impugned decision is tainted with illegality, irrationality and procedural impropriety before orders of judicial review can issue as restated in the Ugandan case of Pastoli vs. Kabale District Local Government Council and Others[2008] 2 EA 300 as reproduced and quoted with approval in Republic v Law Society of Kenya Disciplinary Tribunal & another Ex Parte Muema Kitulu [2018] eKLR at paragraph *31* therein as follows:

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when

there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards... Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

129. It also argues that Judicial review is concerned with the decision-making process, not with the merits of the decision itself: judicial review Court would concern itself with such issues as to whether:

i. The decision makers had the jurisdiction to make the decision it made;

ii. Whether the persons affected by the decision were heard before it was made; and

iii. Whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.

130. A Judicial Review court is not and should not act as a Court of Appeal over the impugned decision. Thus, a prayer by the Ex parte Applicant for: "An Order of Certiorari ...to compel the...., an Order of Certiorari ... an Order of Certiorari ... and an Order of Certiorari... and .....An Order of Prohibition..." is clearly untenable.

131. The statutory power, duty and mandate of the Respondent is donated by legislation and the decision to approve or reject the Applicant is for the Respondent to prescribe not for the Judicial Review Court to decree.

132. It is its case that the Applicant failed to prove his allegations against the 2nd Respondent before the 1st Respondent as evidenced by the impugned judgment dated 2nd August, 2024.

133. The 2ndRespondent further argues that it legally and procedurally rejected the Ex Parte Applicant's bid hence the Ex Parte Applicant's contentions are grossly misconceived and unfounded and is contrary to the principles enshrined in Article 227 of *the Constitution* on public procurement of goods and services.

134. Section 2 of the *Fair Administrative Action Act* defines an "administrative action" to include — the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

135. It argues that Judicial Review is about the decision-making process, not the decision itself. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. In Municipal Council of Mombasa -vs-Republic & Umoja Consultants Ltd (2002) eKLR, the Court of Appeal stated;

"Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers has the jurisdiction, whether the persons affected by the decision were heard before it was made and whether the in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.....This court should not act as a court of appeal

over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision".

136. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the Rule of Law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramountcy of the law.

137. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. Broadly, in order to succeed, the applicant will need to show either: -

i. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or

ii. a decision or action that has been taken is 'beyond the powers' (in Latin, 'ultra vires') of the person or body responsible for it.

138. An administrative decision is flawed if it is illegal. A decision is illegal if it: -

(a) contravenes or exceeds the terms of the power which authorizes the making of the decision;

(b) pursues an objective other than that for which the power to make the decision was conferred;

(c) is not authorized by any power;

(d) contravenes or fails to implement a public duty.

139. The 1st Respondent did not act illegally and followed due procedure required in its decision making and to that extent the decision that it made was not ultra vires its mandate because the decision was made by persons with the technical knowhow in their areas of practice.

140. The Court of Appeal in Pipeline Ltd v Hyosung Ebara Company Ltd and 2 Others (2012) eKLR while addressing this aspect stated;

> " 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 power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S.98 confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling anything done by the procuring entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes arising from the breach of duty by procuring entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with."

141. The 2nd Respondent argues that it had from the onset of the matter geared towards seeking justice in an expeditious, efficient, lawful, reasonable and procedurally fair manner free from bias which would result in an illegality; unfairness; and irrationality.

The Interested Party's Case;

142. It filed a Replying Affidavit sworn on 23rd day of August, 2024 in opposition to the Ex Parte Applicant's Notice of Motion dated 16th August, 2024.

143. According to it, the 1st Respondent acted within its power which is conferred by Section 28(1)(a), 167(1) and 173 of the Public Procurement and Asset Disposal Asset, 2015 to hear, review and determine procuring disputes.

144. It did not act without authority or in excess of its said powers. In the case of Henry Asava Mudamba v Institute of Certified Public Accountants of Kenya [2015] eKLR the Court of Appeal stated that:

> " 17. ... Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality..."

145. Section 7(2)(i) of Fair Administrative Actions Act, 2015 empowers the High Court to review the Respondent's Request for review if:

...the administrative action or decision is not rationally connected to;

i. the purpose for which it was taken;

ii. the purpose of the empowering provision;

iii. the information before the administrator; or

iv. the reasons given for it by the administrator;

146. It is its case that there was no evidence before the 1st Respondent to demonstrate that the 2nd Respondent deleted the Ex Parte Applicant's Tender from IFMIS platform.

147. Although the Ex Parte Applicant was fully aware that the administrator of IFMIS was the National Treasury it did not confirm its allegations with the National Treasury. It also failed to apply for joinder of the National Treasury as a party to the Request for Review pursuant to Section 170(d) of the Public Procurement and Asset Disposal Asset, 2015 to shed light on the alleged deletion.

148. The 1st Respondent's decision-making process did not affect its decision as it was rationally connected with the information before it. In the case of Council of Civil Service Unions v Minister for the Civil Service (1985) A.C. 374,410 Lord Diplock stated that:

> " 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."

149. In the case of Mahon v Air New Zealand Ltd, Lord Diplock assured that the decision maker, in the process of finding of fact, must base their judgment upon materials and reasoning that logically support the existence of facts consistent with the pronouncement in order to stand sensibly and not self-contradictory once it is revealed.

150. In addressing the issue whether or not the Respondent's decision-making process was tainted with procedural impropriety it has invoked Section 7(2)(c) of Fair Administrative Actions Act, 2015 which empowers the High Court to review the 1st Respondent's decision if its decision-making process thereof is tainted with procedural unfairness.

151. It argues that The Ex Parte Applicant did not demonstrate that the 1st Respondent failed to observe basic rules of natural justice or it failed to act with procedural fairness towards it or that it failed to observe procedural rules that are expressly laid down in Section 28(2)(a), 167 and 173 of the *Public Procurement and Asset Disposal Act*, 2015 and Part XV of the Public Procurement and Asset Disposal Regulations, 2020.

152. Ii is its case that the Ex Parte Applicant did not demonstrate that the 1st Respondent's decision-making process was tainted with illegality which affected its decision by exceeding or misunderstanding or abusing or failing to give effect to its powers under Section 28(2)(a), 167 and 173 of the *Public Procurement and Asset Disposal Act*, 2015.

153. Reliance is placed in the case of Pastoli v Kabale District Local Government Council & others [2008] 2 EA 303 it was held that:

> " Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

154. It argues that the Ex Parte Applicant failed to demonstrate that the 1st Respondent's decision making process was tainted with procedural unfairness and affected its decision and we therefore pray that the ground of procedural unfairness be dismissed.

155. On the issue of breach of the doctrine of legitimate expectation it relies on the case of Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR it was held that:

> " 207. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4th Edition, 2001 Reissue, of Halsbury's Laws of England the authors at page 212, paragraph 92 explains the concept behind the development of the principle as follows:
>
> > "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by

reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.

The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker."

156. In the case of Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others, (2014) eKLR the Supreme Court held that:

> " In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.
>
> An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.
>
> ....
>
> (269) The emerging principles may be succinctly set out as follows:
>
> a. there must be an express, clear and unambiguous promise given by a public authority;
>
> b. the expectation itself must be reasonable;
>
> c. the representation must be one which it was competent and lawful for the decision-maker to make; and
>
> d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*."

157. It is its case that the Ex Parte Applicant did not provide any evidence of any representations made, or conduct by the 1stRespondent, that could form the basis of its legitimate expectations.

158. In advancing a case why the applicant should not be granted the order if certiorari, it invokes Section 9(1(h) of the Fair Administrative Action, 2015; Section 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules, 2010 the power to quash or to set aside the 1st Respondent's decision is discretionary.

159. In Halsbury's Laws of England, 4th Ed. Vol. II, P. 805 para. 1505 it is posited that:

> "Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining."

160. It argues that the Ex Parte Applicant did not demonstrate why it should be granted an Order of Certiorari and the prayer ought to be declined.

161. It is opposed to the grant of the order of prohibition.

162. It is its case that Section 9(1(d) of the Fair Administrative Action, 2015; Section 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules, 2010 empowers the High Court to prohibit the 2nd Respondent from entering into contract with the Interested Party.

163. Reliance is placed in Halsbury's Laws of England, 4th Edition, Reissue Vol. 1(1) page 2012 paragraph *109*,

> "The order of prohibition is an order issuing out of the High Court directed to an inferior court or tribunal or public authority which forbids that court or tribunal or authority to act in excess of its jurisdiction or contrary to law. Prohibition is employed for the control of inferior courts, tribunals and public authorities. Prohibition is concerned with decisions of the future. Prohibition will issue to prohibit a determination in excess of jurisdiction, error of law on the face of the record or breach of the rules of natural justice."

164. In the instant suit it argues that The 2nd Respondent has power under Article 227(1) of *the Constitution* of Kenya, 2010 and the *Public Procurement and Asset Disposal Act*, 2015 to enter into contract with the Interested Party.

165. It believes that an order of Prohibition will not be efficacious as the Ex Parte Applicant did not demonstrate that entering into contract between the 2nd Respondent and the Interested Party is in excess of jurisdiction, error of law or in breach of rules of natural justice.

166. Reliance is reliance is placed in the case of Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR the Court of Appeal held that:

> "What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol. 1 at pg. 37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before

such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition."

167. In arguing why an order of Mandamus should not be granted, it invokes Section 9(1(f) of the Fair Administrative Action, 2015; Section 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules, 2010 empowers the High Court to compel the performance of a public duty owed in law and in respect of which the Ex Parte Applicant has a legally enforceable right.

168. It argues that The Ex Parte Applicant did not demonstrate that the 2nd Respondent owes it a public duty in law to commence the procurement proceeding.

169. It did not demonstrate that the specified procurement is its legally enforceable right and under which law.

170. According to The Black's Law Dictionary, 9th Edition defines Mandamus as:

> "a writ issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act."

171. It believes that Mandamus is a remedy of last resort which is granted in exceptional circumstances, and, where an applicant has no other remedy.

172. Reliance is placed in the case of R (Regina) v Dudsheath ex parte Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C.J. said:

> "It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it."

173. In the case of Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 others (supra) the Court of Appeal held that:

> "The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again, we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says: -"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."
>
> At paragraph 90 headed "the mandate" it is stated:
>
> > "The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the

party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed..."

174. In the case of Republic v Nairobi Coffee Exchange & 2 others Ex parte Kenya Planters Co-operative Union Limited [2019] eKLR Mativo J held that:

"

"20. Mandamus is a judicial command requiring the performance of a specified duty, which has not been performed. Mandamus is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.

21. Mandamus is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised based on evidence and sound legal principles.

The test for mandamus is set out in Apotex Inc. v Canada (Attorney General), and, was also discussed in Dragan v Canada (Minister of Citizenship and Immigration).The eight factors that must be present for the writ to issue are:-

i. There must be a public legal duty to act;

ii. The duty must be owed to the Applicants;

iii. There must be a clear right to the performance of that duty, meaning that:

The Applicants have satisfied all conditions precedent; and

There must have been:

i. A prior demand for performance;

ii. A reasonable time to comply with the demand, unless there was outright refusal; and

iii. An express refusal, or an implied refusal through unreasonable delay;

1. No other adequate remedy is available to the Applicants;

2. The Order sought must be of some practical value or effect;

3. There is no equitable bar to the relief sought;

4. On a balance of convenience, mandamus should lie.

175. In the case of Energy Regulatory Commission v SGS Kenya Limited & 2 others [2018] eKLR the Court of Appeal held that:

> " We have said enough to show that this appeal is for granting but there is yet one more reason. In his final order, the learned Judge granted mandamus directing the appellant to proceed with the tender and effect the recommendation that the tender/contract be awarded to SGS. That order was wholly underserved for a number of reasons. We have already indicated that there was nothing perverse or outrageous about the Board's decision upholding the appellant's termination of the award, the said termination being statutorily recognized in the Act and also expressly stated in the tender documents.
>
> Further, and more critical, the appellant did not bear a statutory duty to award the tender to SGS or to any other entity to attract the compulsive force of mandamus. The grant or award of such tenders and contracts are matters that lie within its discretion. Moreover, the recommendation of the tender committee was just that; a recommendation, which did not divest the accounting officer of the appellant of the authority to apply his mind and either accept or reject the recommendation for good cause. To command the award therefore denied the appellant's accounting officer of a right and discretion flowing from statute and the order was therefore a classic case of the court, in the guise of preventing abuse of power itself engaging in a conspicuous abuse of its powers by usurping those that which belong to other entities.

176. It is its case that costs are awarded to compensate the successful party for the trouble taken in prosecuting or defending the suit. In the case of DGM v EWG [2021] eKLR it was held that:

> " This court agrees with the defendant that it has no fault at all in the plaintiff's misadventure in filing premature suit in terms of the indicators set above. The blame lies square on here shoulder who like a doctor ought to have known whether she was administering the right dose in her client's situation and circumstances. The misadventure occasioned defendant some expenses and legal fees."

177. In Judicial Hints on Civil Procedure, 2nd Ed. (Nairobi: Law Africa, 2011), p. 94, Kuloba J posits that:

> " The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure... Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."

Analysis and determination:

178. Upon perusing the pleadings, the rival submissions and authorities referred to and relied upon by counsel, this court has come up with the following issues for determination:

    1. Whether the applicant is entitled to the orders as sought.

    2. Who should be the cost of the suit.

Whether the applicant is entitled to the orders as sought:

179. In the case of Council of Civil Service Unions v Minister For The Civil Service [1984] 3 ALL ER 935 Lord Diplock summarized the scope of judicial review thus: -

> " 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 are subject to control by judicial review.
>
> The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety."……..
>
> 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.
>
> 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."
>
> In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means least he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals.

180. The Court of Appeal in Grain Bulk Handlers Limited V J. B. Maina & Co. Ltd & 2 Others [2006] eKLR summarized the purpose of judicial review by stating that:-

> " Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions."

181. From the foregoing it is clear that in judicial review, the court does not exercise its appellate powers. It mainly looks at the decision-making process to ensure that the citizen who has come into contact with an administrative body or tribunal has been treated fairly. But as observed by Lord Diplock in the already cited CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE case, the court can quash the decision if the same is so unreasonable to the extent that a reasonable tribunal addressing its mind to the facts of the case would not have arrived at such a decision. In doing so, I submit, the court will have descended into the arena of decision-making. For a court to justify such action it must be clearly obvious that the decision is truly and obviously unreasonable.

182. The case of Kenya National Examination vs The Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 Others, *CA No. 266 of 1996* [1997] eKLR set out the scope of Judicial Review orders of certiorari, mandamus and prohibition as follows:

> "...Until 1992, the heading for Order 53 was "ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI." *Legal Notice No. 164 of 1992* changed that heading to "APPLICATIONS FOR JUDICIAL REVIEW" and that heading is retained in the current rules vide *Legal Notice No. 5 of 1996* which restored the position to the pre-1992 meddlesome amendments which were, understandably, ruled ultra vires the provisions of the *Law Reform Act*. Why is it necessary for us to go into this historical explanation?, one may ask. Our answer to that is that we think the time has now come for this court to set out and explain as far as is within our power, the efficacy and scope of each of the remedies, namely mandamus, prohibition and certiorari.... These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.... The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again, we turn to HALSBURY'S LAWS OF ENGLAND, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says: - "The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual." At paragraph 90 headed "the mandate", it is stated: "The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of

> performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."... Like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

183. Upon looking at the application and the case supporting documents, I am satisfied that the instant Application is not an appeal against the 1st Respondent's decision disguised as a judicial review and this court has jurisdiction to determine the suit without engaging in a merit analysis.

184. In arriving at this position, I am guided by Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that;

> 'the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power"

185. The High Court in Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR held that

> 'The purpose judicial review proceedings is to ensure that the individual is given fair treatment by the authority to which he has been subjected and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court".

This court is now proceeding to address it's mind to the issue whether or not the applicant is entitled to the order of Certiorari;

186. The Applicant's case is that the 2nd Respondent issued a Notification of Intention to Award dated 5th August 2024 naming the Interested Party as the successful tenderer which according to the applicant is irrational, done with procedural impropriety, illegal and against legitimate expectations.

187. It argues that it is irrationality based on the 1st Respondent's finding that the Ex-Parte Applicant did not adduce evidence that its tender document was deleted from the IFMIS portal.

188. The 1st Respondent stated in paragraph 147 at page 112 of the decision that the Ex-Parte Applicant had provided a screen shot showing that its quote for the subject tender was no longer available on the IFMIS portal.

189. However, in paragraph 148 at page 112, the 1st Respondent went on to state that no evidence had been adduced that the 2nd Respondent had deleted the Ex-Parte Applicant's tender document from the IFMIS portal.

190. The 1st Respondent consequently held that the evidential burden had not shifted to the 2nd Respondent to disprove the Ex-Parte Applicant's allegation.

191. The 2nd Respondent attributed alleged closure and re-opening of the IFMIS system as the reason for the slight lapse raised by the Ex-Parte Applicant.

192. Notwithstanding the claims made by the 2nd Respondent that alleged closure of the IFMIS system was the reason why the Ex-Parte Applicant's tender was not available, no evidence of the same was adduced before the 1st Respondent and neither were the 2nd Respondent's assertions supported by the law.

193. As a result of the 2nd Respondent's admission that the IFMIS system had been suspended, it followed that the Ex-Parte Applicant could not access the system to follow up on the tendering process for the subject tender.

194. It is this court's finding and I so hold that the 1st Respondent acted illogically in arriving at the finding. It failed to take into consideration the parties evidence around the issue of the IFMIS in arriving at its finding and this court is satisfied that an order of certiorari must issue.

Irrationality

195. The 2nd Respondent's letter of intention to enter into a contract was dated 28th July, 2024 yet the Ex-Parte Applicant received an IFMIS email notification on 4th July, 2024 that its quote No. 2120224 had been shortlisted on 2ndJuly, 2024 for the next phase of evaluation and later on the same date of 4th July 2024, the Ex-Parte Applicant received an email that its bid had been rejected.

196. Justice A.K. Ndung'u in Judicial Review Miscellaneous Application No. E039 of 2022; Procurement Administrative Review Board; Ex-Parte Madison General Insurance Kenya Ltd; Accounting Officer KEBS & another cited with approval the case of Council of Civil Service Unions v Minister for the Civil Service (1985) A.C 374 where Lord Diplock stated:

> "....'By irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness"... it applies to a decision which is so outrageous in it is indefiance 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....'Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review..."

197. It is this court's finding and I so hold that the backdated notification of intention to enter into a contract obscured and or blurred the procurement process in light of the email notifications received by the Ex-Parte Applicant on 4th July, 2024.

198. I am in agreement with the Applicant that the decision by the 1st Respondent is irrationality for the reason that it proceeding to direct the 2nd Respondent to issue fresh Letters of Notification of Intention to Enter into a Contract despite the unexplained discrepancies.

199. The right to administrative action that is lawful, reasonable and procedurally fair now draws its legitimacy as a fundamental right in Article 47(1) of *the Constitution* of Kenya, 2010, which states as follows: "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." The foregoing cannot be said to be a reasonable and procedurally fair state of affairs.

In addressing my mind to the issue whether the applicant's right to a legitimate expectation was offended or not;

200. I am guided by the case of Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others, (2014) eKLR the Supreme Court held that:

> "(264) In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.
>
> (265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.
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> ....
>
> (269) The emerging principles may be succinctly set out as follows:
>
> i. there must be an express, clear and unambiguous promise given by a public authority;
>
> ii. the expectation itself must be reasonable;
>
> iii. the representation must be one which it was competent and lawful for the decision-maker to make; and
>
> iv. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*."

201. In its Decision dated 2nd August 2024, the 1stRespondent acknowledged receipt of various confidential documents from the 2nd Respondent which were not available to the Ex-Parte Applicant such as the register of the tender opening, evaluation of the tenders and the professional opinion.

202. Some of these documents which the Applicant did not have was the letter of intention sent to the 3rd Respondent dated 10th July 2024 and the professional opinion dated 28th June 2024.

203. Section 84(1) of the PPADA provides: -

> "The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings."

204. The professional opinion is after evaluation but before the letter of intention to award the contract.

205. This would mean that the email communication dated 2nd July 2024 from the 2nd Respondent to the Applicant that its tender had passed for commercial evaluation remains unexplained.

206. It is my finding, and I so hold that the applicant had legitimate expectation that it would receive all the information and the shareable documents as the procurement process progressed so as to be able to appreciate how the procurement contest and process was advancing.

207. This was not done at the expense of the Applicant's right to legitimate expectation. The upshot of this lapse is that the procurement process culminated into an illegality.The fundamental lapse was not in consonance with the fair administrative action or fair hearing and I so hold.

The Applicant also seeks an order of Mandamus;

208. In the case of Republic v Nairobi Coffee Exchange & 2 others Ex parte Kenya Planters Co-operative Union Limited [2019] eKLR Mativo J held that:

> " 20. Mandamus is a judicial command requiring the performance of a specified duty, which has not been performed. Mandamus is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.
>
> 21. Mandamus is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised based on evidence and sound legal principles."

209. Having arrived at a finding that the backdated notification of intention to enter into a contract obscured the procurement process in light of the email notifications received by the Ex-Parte Applicant on 4th July, 2024 as read alongside the court's finding that there was a breach of the right to legitimate expectation, I find that the Applicant has made out a case for the issuance of the judicial order of Mandamus as sought.

210. In granting the order of mandamus I am further guided by the case of Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR where the Ex-Parte Applicant had sought an order of mandamus to compel the Nairobi City County to commence a fresh procurement process granted the following orders inter alia:

> " I hereby direct and order the Nairobi City County the procuring entity herein to commence a fresh procurement process with respect to Tender No....for the Urban Renewal and Redevelopment of Phase 2 ... which procurement process shall accord with the established laws and procedures..."

On whether or not an order of prohibition should issue:

211. This court is guided by Halsbury's Laws of England, 4th Edition, Reissue Vol. 1(1) page 2012 paragraph *109*,

> " The order of prohibition is an order issuing out of the High Court directed to an inferior court or tribunal or public authority which forbids that court or tribunal or authority to act in excess of its jurisdiction or contrary to law. Prohibition is employed for the control of inferior courts, tribunals and public authorities. Prohibition is concerned with decisions of the future. Prohibition will issue to prohibit a determination in excess of jurisdiction, error of law on the face of the record or breach of the rules of natural justice."

212. It is this court's finding that administrative action must at all times be processed within the values and principles on transparency, accountability and good governance as enshrined under Articles 10 and 227 of *the Constitution*. To do otherwise would lead to an illegality.

213. Kenya must move forward in a democratic trajectory where all the administrative decisions in procurement matters are based on the standards set under Article 227(1) of *the Constitution* which requires public entities to contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective and nothing less.

214. In the instant, suit having found that there was a breach of legitimate expectation, and having established that they are entitled to be orders of certiorari and mandamus, this court finds that there is a need to grant the order of prohibition as sought, which I do hear by issue.

Costs;

215. The general rule flowing from Section 27 of the *Civil Procedure Act*, Cap 21, Laws of Kenya is that costs should follow the event. That is to say, the successful party should be awarded its costs. This general rule is elaborated by Justice Kuloba in his book, Judicial Hints on Civil Procedure, Vol. 1 at p. 99 as follows:

> " The first question is what is meant by "the event" in the proviso to subsection (1) of this section? The words "the event" mean the result of all the proceedings incidental to the litigation. The event is the result of the entire litigation. .... Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action." (Emphasis provided).

216. It is my finding that the applicant is entitled to costs.

Disposition;

217. The applicant has made out a case for the grant of the judicial review orders as sought.

Order;

1. An order of Certiorari is hereby issued removing to this Honourable Court for purposes of quashing the decision of the 1stRespondent made on 2nd August 2024 in PPARB Administrative Review No. 64 of 2024; Abdulhakim Ahmed Baysuf and Sons Limited v The Accounting Officer, Roads and Transport Services County Government of Kilifi & S.S. Mehta and Sons Limited by which it directed the 2nd Respondent to proceed with the procurement proceedings with respect to Tender No. RTPW/1496775-2/2023-2024 to its logical conclusion.

2. An order of Certiorari is hereby issued removing to this Honourable Court for purposes of quashing the decision of the 2nd Respondent dated 28th June 2024 to award Tender No. RTPW/1496775-2/2023-2024 for the Proposed Upgrading to Bitumen Standards of Timboni - Crabshark Road in Dabaso Ward to S.S. Mehta and Sons Limited (the Interested Party).

3. An order of Certiorari is hereby issued removing to this Honourable Court quashing the entire procurement proceedings with respect to Tender No. RTPW/1496775-2/2023-2024 for the Proposed Upgrading to Bitumen Standards of Timboni - Crabshark Road in DabasoWard.

4. An order of Prohibition is hereby issued against the 2nd Respondent restraining it from entering into a contract with the Interested Party in respect of Tender No. RTPW/1496775-2/2023-2024 for the Proposed Upgrading to Bitumen Standards of Timboni - Crabshark Road in Dabaso Ward.

5. An order of Mandamus is hereby issued compelling the Accounting Officer, Roads and Transport Services County Government of Kilifi to re-advertise and commence a fresh procurement process with respect to Tender No. RTPW/1496775-2/2023-2024 for the Proposed Upgrading to Bitumen Standards of Timboni - Crabshark Road in Dabaso Ward within 14 days of today's date.

6. Costs to the Applicant.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2024

.....

CHIGITI J (SC)

JUDGE