Republic v Kenya Institute of Supplies Management & 2 others; Global Procurement Academy Limited (Exparte) (Application E138 of 2023) [2024] KEHC 10645 (KLR) (Judicial Review) (13 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10645 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E138 OF 2023

J NGAAH, J

SEPTEMBER 13, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

KENYA INSTITUTE OF SUPPLIES MANAGEMENT ..... 1ST RESPONDENT

COMPETITION AUTHORITY ..... 2ND RESPONDENT

DIRECTOR GENERAL, COMPETITION AUTHORITY ..... 3RD RESPONDENT

AND

GLOBAL PROCUREMENT ACADEMY LIMITED ..... EXPARTE

JUDGMENT

1. The application before court is a motion dated 6 December 2023 but amended on 28 September 2023. It is expressed to be brought under sections 4, 5, 7, 8, 9, and 11 of the *Fair Administrative Action Act*, No. 2015 and section 8 of the *Law Reform Act*, cap. 26. The orders sought have been framed as follows:

> "1. That this Honourable Court be pleased to issue An Order Of Judicial Reviewin the nature of Mandamuscompelling the 2nd and 3rd Respondents to enforce the Decision/ Directives issued by the 2nd Respondent on 4th April, 2023 in favor of the Applicant.
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> 2. Thatthis Honourable Court be pleased to issue anOrder ofJudicial Reviewin the nature of Mandamuscompelling the 1st Respondent to comply with the

Decision/Directives issued by the 2nd Respondent on 4th April, 2023 in favor of the Applicant.

3 ...

4 ...

5 ...

6. Thatthis Honourable Court be pleased to issue anOrder ofJudicial Reviewin the nature of Mandamusdirecting the 1st Respondent to issue a Memo to all its members and to the public including all public entities within one week of the Judgment of the Court confirming compliance with the Judgment."

Prayers 2, 3, 4 and 5 were deleted by way of amendment to the motion. The applicant has also asked for costs of the application.

2. The application is based on an amended statutory statement dated 19 September 2023 but amended on 6 December 2023. The affidavit verifying facts relied upon is sworn by Mr. Christopher Ohanda who has introduced himself as a director of the applicant company.

3. According to Mr. Ohanda, the Applicant is a duly licensed Continuous Professional Development (CPD) trainer. The 1st respondent, on the other hand, is a body corporate established under Section 3 of the *Supplies Practitioners Management Act*, No. 7 of 2007 (the Act) and, among its functions listed under section 5 of the Act, the 1st respondent is established to establish, monitor, improve and publish the standards of the supplies practitioners' profession and safeguard the interest of all supplies practitioners.

4. In performance of its functions under the Act, the 1st respondent is said to have introduced a CPD Policy according to which members are required to earn 24 CPD points in a year to qualify for their membership renewal. The CPD program offers an avenue for updating the knowledge and skills of supply chain practitioners by ensuring that they have relevant competencies at all times in selected core areas of their professional practice to ensure that they continuously acquire new skills and knowledge in order to remain relevant in their practice and provide quality services.

5. Prior to the year 2021, the CPD Policy fostered a competitive environment according to which training providers participated in the procurement and supply chain management training and development market subject to the requirement that the learning outcomes were relevant to a professional' s area of practice and that the CPD activity was verifiable. Under this policy, and during this period, training providers such as the Applicant would offer the CPD programs and participants would get the CPD points awarded by 1st respondent.

6. In the year 2020 and 2021, the 1st respondent made variations to its existing CPD Policy as a result of which, among other things, procurement and supply chain management professionals would henceforth enroll and obtain 50% of the CPD points from 1st respondent. The applicant is aggrieved that the policy is being implemented in its draft form before being adopted and gazetted.

7. Further, it is alleged that in a bid to frustrate the Applicant's efforts to continue to offer training to the members of the Institute, the 1st respondent has on certain occasions deliberately instigated inordinate delays and arbitrarily refused to review and accredit programs submitted to it by the Applicant for approval.This has resulted in practitioners preferring CPD programs organized by the 1st respondent rather than those offered by other trainers such as the applicant where CPD points are not guaranteed.

Consequently, the number of trainees attending licensed firm's programs has declined resulting in loss of business by the training providers.

8. The applicant is also concerned that besides denying the trainers business, the fees imposed by the 1st respondent on the trainers is punitive. In particular, training providers have been compelled to bear membership fees of KShs. 4,000/-; individual licensing fees of KShs. 6,000/-; firm's licensing fees of KShs. 20,000/-); and annual accreditation fees of Kshs. 100,000/-.

9. It is also alleged that the 1st respondent does not allow any overlap of competing programs and events that interfere with its planned events which run for nearly a full calendar year. This, according to the Applicant, is to ensure that other institutions accredited to conduct such trainings, such as the Applicant, do not get an opportunity to do so. It is the applicant's case that as a regulator, the mandate of the 1st respondent under section 5 of the Act is to oversee the registration, regulation, education, promotion of standards and discipline of procurement and supply chain management professionals and not to conduct trainings itself. By offering CPD trainings, the 1st respondent is alleged to have abdicated its regulatory role and instead chosen to be part of the industry player while at the same time setting the rules of the game. According to the applicant, the 1st respondent has become both a player and a referee in the game and this is contrary to the rules of natural justice.

10. In order to address the applicant's grievances, the applicant lodged a complaint with the 2nd respondent. The 2nd respondent issued its decision on 4 April 2022 in favor of the Applicant and directed the 1st Respondent to review the CPD Guidelines through consultations with practitioners. Subsequently, the 1st Respondent held a meeting with some practitioners over their concerns about the CPD Policy and also established a sub-committee to review the issues and recommend remedial action. The Sub-Committee prepared reports and made recommendations for changing the policy to comply with the competition laws.

11. The 1st respondent is alleged to have failed to comply with the directives of the 2nd respondent. Whereas the 2nd Respondent is empowered by law to enforce its directives, it has also failed to do so. The fact that the 2nd Respondent has not been able to enforce its decision more than one year after giving a directive to the 1st Respondent is a clear demonstration that the remedy provided by the 2nd Respondent is neither expeditious nor is it available to address the Applicant's concerns hence the instant application.

12. The 1st respondent filed grounds of objection and a replying affidavit in opposition to the applicant's application. The grounds of objection are thatthe application is res judicata because it raises the same issues which have been raised and determined Nairobi High Court Constitutional Petition No. E023 of 2021; Okiya Omtatah Okoiti v Kenya Institute of Supplies Management & others ("the constitutional petition). In particular, the court in the constitutional petition considered the question whether the *Supplies Practitioners Management Act* No. 17 of 2007 mandates the 1st Respondent, as a regulator, to conduct CPD programs for its members and whether there is a conflict of interest in the 1st Respondent offering trainings alongside the entities it regulates. The court also considered whether the 1st Respondent's CPD policy was subjected to public participation. To the extent that the applicant is raising the same issues that were raised in Constitutional Petition No. E023 of 2021, the applicant is inviting this Honourable Court to sit on an appeal over its own decision.

13. The application is also said to be premature, incompetent and offends the principle of exhaustion as there are other remedies available to the applicant under the *Competition Act* cap. 504 and the *Copyright Act*, cap. 130. According to the 1st respondent, there is no proper legal or factual basis that has been laid to warrant grant of the orders sought in the application.

14. The 1st respondents replying affidavit was sworn by Mr. Nicholas Wafula who has identified himself as the 1st respondent's acing chief executive officer. The 1st respondent has admitted having authored a CPD policy in 2021. Section 16 (10) of the *Supplies Practitioners Management Act* mandates the 1st Respondents to prescribe CPD programmes for its members and it is in accordance with this provision of the law that the 1st Respondent developed a CPD Policy in 2007 which provided, inter alia, procedures and criteria for the awarding of CPD points. Further to section 5 (b) of the Act which provides for the training of persons seeking registration under the Act, the 1st Respondent conducts CPD training for its members as well as vetting or accrediting trainers and licensing firms which members can access in order to obtain the CPD points. The CPD *Policy of 2007* was revised in 2021 through a consultative process involving the members.

15. After the revisions to the policy were effected, the 1st Respondent was sued in Nairobi High Court Constitutional Petition *No. E023 of 2021* Okiya Omtata, Okoiti v Kenya Institute of Supplies Management & others in which the petitioner contended, inter alia, that the Act does not mandate the 1st respondent to be a trainer itself but, rather, it gives the 1st Respondent the responsibility to regulate trainers. It was also contended that there is a conflict of interest in so far as the ls[1] Respondent conducts training for its members and at the same time vets and regulates other trainers. The petitioner also urged that 1st Respondent was engaging in anti-competitive behaviour by conducting training for its members while acting as a regulator over all other trainers. Finally, the petitioner contended that the revised CPD *policy of 2021* was issued unlawful and unconstitutional since it was being implemented without public participation and parliamentary approval.

16. The petition was heard and determined on 22 September 2023 and in its judgment, the court (Ong'udi, J.) held that the petitioner had the requisite locus standi to institute the petition as he genuinely believed that there was a violation of *the Constitution* and hence was entitled to approach the court for redress in the public interest. The court also held that the CPD policy was enacted under the authority of the Act and, therefore, it qualified as a statutory instrument. However, the policy was adjudged to be null and void since the 1st Respondent failed to comply with the requirements and threshold for public participation as envisaged in Article 10 of *the Constitution* and the *Statutory Instruments Act*. That notwithstanding, the court held that there is no conflict of interest where the 1st Respondent offers training alongside the entities it regulates.

17. It is the 1st respondent's contention that the issues raised by the Applicant in the instant application are similar to those issues raised and determined in the constitutional petition. The parties in the petition and in the instant application are more or less the same and, in any event, to the extent that the constitutional petition was filed in the public interest, the Applicant's interests were catered for. For this reason, the 1st respondent contends that this application is res judicata.

18. It has further been sworn on behalf of the 1st respondent that, following the judgment delivered in the constitutional petition, the 1st respondent has stopped implementing the impugned CPD policy and is in the process of conducting fresh consultations with the public, its members and the relevant stakeholders before the enactment of CPD Guidelines as required under the Statutory Instrument Act and as ordered by the Court.

19. As far as the applicant's complaint to the 2nd respondent is concerned, it has been sworn on behalf of the 1st respondent that, the Applicant alleged in its complaint that the 1st respondent had engaged in non-competitive conflict of interest behaviour by allegedly rendering the training programs of licensed firms unattractive in favour of its own training programs. Upon receipt of the complaint, the 2nd Respondent commenced investigations and invited the 1st Respondent to a virtual meeting to discuss the issue. The 1st respondent responded to the invitation by informing the 2nd respondent that

a petition had been filed in the this Honourable Court and that it raised issues that were similar or related to the issues raised in the complaint by the Applicant. That notwithstanding, the 1st respondent responded to the issues raised in the complaint.

20. By a letter dated 10 March 2022, the 2nd Respondent invited the 1st Respondent to give clarifications on the issues raised in the complaint in so far as they related to whether the CPD policy documents published and implemented by the 1st Respondent had the object of preventing, lessening or distorting competition in the market. The 1st Respondent provided the clarification sought and, after considering the submissions by both parties, the 2nd Respondent gave an advisory dated 4 April 2022 on the matter and noted, inter alia, that the 1st Respondent is both a regulator and a trainer under the Act. It also noted that the Act contemplates that CPD services are to be initiated and developed by the 1st Respondent and this characteristic is not unique to the I st Respondent but similar to other professional bodies such as the Law Society of Kenya. The 2nd respondent thus, recommended that the 1st Respondent should re-engage the relevant stakeholders in order to develop a revised CPD structure that would accommodate structured and unstructured trainings without creating undue advantage to some trainers. The 1st Respondent was advised to borrow from the design and structure of CPD structures of comparable professional bodies such as the Law Society of Kenya and the Institute of Certified Public Accountants.

21. As far as the question of delay in feedback on the approval of training materials is concerned, the 2nd respondent noted that the delay was not deliberate but a logistical issue which could be resolved by having an annual trainer's calendar approved by the 1st Respondent so as to create certainty and stability. The 1st Respondent approved an annual CPD calendar with an all-inclusive training schedule whose consolidation was undertaken through input from various stakeholders with facilitators drawn from various consultancy firms.

22. Upon request by the 1st Respondent, the 2nd Respondent on 4 July 2022 approved the resolution that the concerned stakeholders, including the Applicant engage in negotiations with a view to resolving the matter amicably through alternative dispute resolution. Consequently, the 1st Respondent's council convened a meeting with the accredited consultants, including the Applicant's Managing Director, Christopher Oanda, on 26 July 2022. A joint subcommittee of representatives of the consultants and the 1st Respondent was formed to look into the issues raised in the advisory of 4 April 2022 on the way forward.

23. The subcommittee met several times and tabled a report to the Council of the 1st Respondent which adopted some short-term recommendations on some of the issues such as recognition and publishing of accredited courses offered by licensed firms. It was agreed that the 1st Respondent would publish on its website accredited training offered by licensed firms and the licensed firms would be requested to submit their annual training calendars for approval to allow them to market their courses. This would also be published on the website.It was also resolved, upon the recommendation of the sub-committee that the review of the policy and stakeholder engagement would be held in abeyance until January 2023 as the council elections were ongoing and vacancies had been announced. This would allow the Council to have a smooth transition into office before embarking on the review process. This recommendation was approved by the 2nd Respondent vide a letter dated 30 November 2022.

24. Following the 2nd Respondent's recommendation, the 1st Respondent conducted a benchmarking exercise on comparable professional bodies such as the Law Society of Kenya, the Institute of Human Resource Management and the Engineers Board of Kenya and tabled a report to the Council and the 2nd Respondent.

25. On 10 March 2023 the 1st Respondent submitted a report on the short-term recommendations made by the Council. The 2nd Respondent took note of the implementation status of the recommendations and urged the new council to revert on the revision of the policy. The Council elected a task force comprised of three council members, two member representatives and two representatives from accredited firms to undertake the review of the CPD and Accreditation policies on 14 April 2023.

26. The 2nd Respondent granted the 1st Respondent and the joint taskforce a further period lapsing on 30 September 2023 within which time the taskforce was to undertake the review and table a report to the 2nd Respondent. In the intervening period, the 1st Respondent was engaging in consultations with the stakeholders.

27. All these, according to the 1st respondent, go to show that, contrary to the allegations of the Applicant, the 1st Respondent has demonstrated good faith in resolving the matter amicably and implementing the 2nd Respondent's recommendations.

28. It has been sworn further on behalf of the 1st respondent that since the CPD policy has been declared null and void in the constitutional petition, any claim or action based on it or its provisions cannot be entertained by this Honourable Court. As a matter of fact, the 1st Respondent has communicated to its members the High Court decision and has not sought to implement the policy at all in the wake of the judgment.

29. Again, following the judgment in the constitutional petition, the 1st Respondent has taken steps to ensure that a revised CPD policy is enacted subject to public participation. In this regard, the 1st Respondent published the draft Supplies Practitioners Management (Continuous Professional Development Programmes) Guidelines, 2024 and invited the public to submit comments on the draft guidelines and attend public consultation workshops in line with the requirements of section 5 of the *Statutory Instruments Act*, cap. 2A.

30. On 2 January 2024, the 1st Respondent published a regulatory impact statement for the proposed CPD guidelines, 2024. The 1st Respondent has adopted various approaches to publicize the draft Guidelines and receive input from its stakeholders such as the Applicant. These approaches include issuance of a notice inviting submissions on the draft Guidelines and the Regulatory Impact Statement from members of the public through an advertisement in two newspapers of nationwide circulation; holding physical meetings with supplies practitioners, select stakeholders and the general public; and, publishing the Regulatory Impact Statement in the Kenyan Gazette. Other measures are writing letters and emails to supplies practitioners and other stakeholders requesting input on the draft Guidelines and Regulatory Impact Statement within a specified time and publication of the draft Guidelines and the draft Regulatory Impact Statement on the 1st respondent's website and other platforms.

31. Following these measures, public consultation workshops were carried out in various parts of the country as per the schedule in the public notice and the Regulatory Impact Statement. The Applicant and other stakeholders have had ample opportunity to submit their comments, feedback and proposals on the proposed guidelines which the 2nd respondent directed the 1st respondent to address in its letter dated 4 April 2022. In the meantime, the 1st respondent waived registration requirements for 2024 for a period of three months lapsing on 31 March 2024.

32. Like the 1st respondent, the 2nd and 3rd respondents also opposed the applicant's application and to that end filed a replying affidavit sworn by Mr. Adano W. Roba who introduced himself as the acting managing director general of the 2nd respondent.

33. Mr. Roba has sworn thatthe 1st respondent received a complaint from the applicant to the effect that the 1st respondent was engaging in anti-competitive conduct by introducing CPD policy aimed at stifling competition and creating an undesirable monopoly.

34. On 17 October, 2022, when parties appeared for oral submissions before the 2nd respondent, the 1st Respondent apprised the 2nd respondent that it had established a sub-committee to review the issues raised on the proposed amendments to the impugned CPD Guidelines, and remedial actions were recommended to ensure the said Policy was in conformity with the *Competition Act*. The 2nd respondent, having made observations and pursuant to its mandate under section 9(1) (n) of the *Competition Act* and, taking into account the need to promote and enforce compliance with the Act, advised the 1st respondent on a number of issues to be implemented.

35. The 1st Respondent had informed the Applicant that it was not in a position to implement all the findings and recommendations of the sub-committee. According to the 1st respondent's opinion which the 2nd respondent found to be reasonable and justifiable, the delay to implement its advisory of 4 April 2022 had been actuated by the need to subject the CPD Guidelines to public participation. Also, the 1st respondent was undergoing a transition at the time and, therefore, there was a limited capacity for effectively undertaking a stakeholder review process. The 2nd respondent appreciated that, in the meantime, the 1st respondent had proposed interim measures pending the review of the CPD guidelines. As far as enforcement of compliance with its directives are concerned, it has been sworn on behalf of the 2nd and 3rd respondents that it is bound by section 5(4) of the *Competition Act* according to which government agencies cannot be held to be criminally liable or be subjected to criminal penalties or fines. The applicant, it is contended, failed to provide any proof of the loss or damage it was incurring as a result of the interim measures that had been put in place pending the review of the guidelines.

36. The applicant and the 1st respondent have, in their submissions, largely rehashed the depositions made in their respective affidavits. I could not find the 2nd and 3rd respondents' submissions on the case tracking system portal and, therefore, I will proceed on the assumption that they did not file their submissions.

37. As I have stated in the past in applications such as the instant one, and to the extent that it is relevant in the determination of this application, the point of entry for a judicial review court to intervene and check the powers of subordinate courts or tribunals or such other bodies whose powers are subject to judicial review, is the grounds upon which the application for judicial review reliefs is made. Order 53 Rule 1(2) of the Civil Procedure Rules states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

> (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).
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> And Order 53 Rule 4(1) of those rules states unambiguously that at the hearing of the motion, no grounds should be relied upon except those specified in the statement accompanying the application for leave.

38. The grounds to which reference has been made in these provisions of the law have not been left to speculation. They were enunciated in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control

by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> " My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
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> 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.
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> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

39. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and may grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality, as a further ground for judicial review, has been developed.

40. Since they form the foundation upon which the application for judicial review is based, these grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.

41. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, Judicial Review Handbook, at Paragraph 34.1 states as follows:

> " The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

42. The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are, more or less, in pari materia with our own Order 53 of the Civil Procedure Rules, 2010. The point is, however, clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity. It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built.

43. Against this background, I must state that I have struggled to single out any of the judicial review grounds in the applicant's statement. A substantial part of what has been stated as the grounds for which relief is sought constitute what has been deposed in the applicant's affidavit. It is only in paragraphs 18 and 19 of the original statutory statement, under the head of the 'grounds for which relief is sought' that the applicant stated that the 1st respondent's conduct is ultra vires its mandate. In those two paragraphs, the applicant has averred as follows:

> " 18. Thatthe actions of the Institute of descending into the supply chain management training and development market as a market player are ultra vires the mandate given to it by law.
>
> 19. Thatby implementing the CPD Policy, the Institute acts ultra vires its mandate under the law as an industry regulator by involving itself and undertaking CPD trainings in competition to professionals it has licenced to practice which is akin to a referee fielding his own team playing in the same league where the referee officiates the matches."

I would have taken this to mean that the judicial review ground for which relief is sought is that of illegality. But in the amended statement, these paragraphs were deleted and, therefore, the court is left to speculate the judicial review ground or grounds upon which the application is based. This, the court cannot do.

44. Assuming that I am wrong and that the applicant's application is hinged on all or any of the known grounds for judicial review, the crux of the application would appear to be what the applicant contents is the failure or refusal on the part of the 1st and 2nd respondents to enforce what it describes as the 2nd respondent's "directive' contained in the 2nd respondent's letter dated 4 April 2022 addressed to the 1st respondent. In the prayers in the motion the applicant has stated that the letter is dated 4 April 2023

but a copy of the letter exhibited to the affidavit sworn in verification of the facts relied upon is dated 4 April 2022.

45. In that particular letter, the 2nd respondent highlighted the fact that it is a state corporation established under section 7 of the *Competition Act* No. 12 of 2010 and that its mandate is to promote and safeguard competition in the national economy and protect consumers from "unfair and misleading market conduct". The letter also cited section 9(1)(j) and (n) of the *Competition Act* on the 2nd respondent's investigatory mandate. Reference was also made to section 5 of the Act on the entities that are subject to the Act. Against this background the letter proceeded to state the 2nd respondent's role in the complaint made by the applicant against the 1st respondent as follows:

> " Cognizant of its mandate, the Competition Authority of Kenya (the Authority) has been investigating allegations by Global Procurement Academy that the Kenya Institute of Supplies Management (KISM) is engaging in anti-competitive behaviour by introducing CPD policy aimed at stifling competition and creating an undesirable monopoly."

46. As to what the specific complainant complaint was, the letter stated as follows:

> " The complainant alleged that:-
>
> i. That there is a non-competitive conflict of interest by KISM, which is a regulator of practitioners in the purchasing and supplies management field in Kenya.
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> ii. That KISM had employed tactics aimed at rendering the training programs of licensed professional firms unattractive in favor of only those of the Institute. He noted that the action was driving licensed trainers out of business, compelling them to close shop, sack staff and create KISM as a monopoly from which members will have no recourse."

47. The 2nd respondent then made certain findings the basis upon which it proceeded to 'advise' the 1st respondent on the actions needed to be taken. The 2nd respondent noted as follows:

> " i. That KISM re-engages its stakeholders especially the accredited Supplies Practitioners/firms to develop a revised CPD structure which will accommodate both structured and unstructured trainings without creating undue advantage to some trainers thus impeding competition. The design and manner of such structured and unstructured CPD programs can borrow from policies developed by other recognized professional bodies such as the Institute of Certified Public Accountants of Kenya (ICPAK) and the Law Society of Kenya (LSK) which have tailored the CPD hours without advantaging the regulator or disadvantaging the external trainers but rather create a broader and diversified CPD training program portfolio to the members.
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> ii. While it noted that the alleged delayed feedback on the approval of training materials submitted by accredited procurement firms/consultants may not be deliberate, the Authority finds this to be a logistical issue which can be addressed by having an annual trainer's calendar approved by KISM to create certainty, level playing ground and stability for both potential trainees and the KISM members. Additionally, for emerging trainings, it would be prudent to

publicize (inform through KISM website) the Council meetings calendar to create certainty on the timeliness and approval of training programs.

iii. Given that KISM is both a regulator and a trainer as per the SPMA Act, the revision of the CPD policy will address the issues raised at i and ii above.

In view of the foregoing and the need to ensure sustained competition in the provision of Continuous Professional Development trainings in the supply chain management industry, the Authority advises that the above issues be implemented by KISM, and the institute reverts on the level of compliance to the observed areas of competition within a month from the date of this letter and not later than 5th May, 2022."

48. The letter was signed by one Boniface Makongo on behalf of the 2nd respondent's director general. As earlier noted, the date of the letter to which reference has been made in the prayers in the motion is different from the one appearing in the copy exhibited to the applicant's affidavit. That being the case, the letter referred to in the prayers of the motion is non-existent.

49. But if it was to be assumed the copy of the letter exhibited to the applicant's affidavit and which is dated 4 April 2022 is the letter to which the application refers, questions that arise are, first whether, the issues raised in that letter were sub judice and subsequently, whether they are now res judicata in view of the constitutional petition and the subsequent judgment delivered in that petition. The second question is whether the 2nd respondent's 'advice' would be capable of being enforced and if so whether the 2nd respondent could enforce it assuming that the 1st respondent had neglected, ignored or refused to comply with the advice. Last but least, is the question whether this Honourable Court can intervene by way of judicial review and enforce the 2nd respondent's advice.

50. As to whether the applicant's complaint to the 2nd respondent was sub judice and subsequently res judicata, one need not look any further than the applicant's own submissions at paragraphs *16*,*17*, *18* and *19* where it has been submitted as follows:

"16. Your Lordship, shortly after filing and serving upon the Respondents with the substantive Application, we learnt about the Judgment delivered by Hon. Lady Justice H.J. Ong'undi in Nairobi Constitutional Petition *E023 of 2021* Okiya Okoiti Omtatah v Kenya Institute of Supplies Management & 3 others on 22nd September, 2023. The said Judgment came to the knowledge of the Applicant's Advocates on record after being annexed in the 1st Respondent's Replying Affidavit dated 13u, October, 2023.

17. The said Judgment was delivered after the Applicant had been granted leave to file the substantive Application and, therefore, only became aware of the Judgment after filing the substantive Application, hence, the Applicant could not apply for joinder as an interested party in the Petition.

18. Your Lordship, the said Judgment dealt with some of the issues raised in the Applicant's Statutory Statement and Substantive Application to wit:

(a) The Petitioner's Locus Standi in the Petition;

(b) The legality of the provision of CPD training by the 1st Respondent to its members in view of the *Supplies Practitioners Management Act* No. 17 of 2007;

(c) Whether the impugned CPD Policy was subjected to public participation;

(d) The legality of the appointment of one James Kaloki as the acting Chief Executive Officer of the 1st Respondent; and

(e) Whether the Petitioner's legitimate expectation and constitutional rights under *the constitution* had been violated.

19: While the said Judgment dealt with some of the issues raised in this Judicial Review Application, it, however, did not determine all the issues raised in the Judicial Review Application herein and, therefore, the Applicant's Amended Statutory Statement and substantive Application still raises triable issues on certain aspects to wit:

a. Compliance with the decision of the 2nd Respondent herein issued on 4th April, 2022;

b. Enforcement of the decision of the 2nd Respondent herein issued on 4th April, 2022;

c. The issue of arbitrary refusal and inordinate delay created by the 1stRespondent in the review and accreditation of programs submitted to it for approval; and

d. The issue of the 1st Respondent arbitrarily refusing and/ or causing inordinate delay in the accreditation of programs submitted to it by the Applicant for approval."

51. It is apparent from the applicant's own submissions that the issues raised in the instant application were addressed in the constitutional petition whose pendency the applicant was ignorant of, or so it is alleged, until such a time that the respondents had filed their response to his application.

52. What the applicant has singled out as issues which the constitutional petition did not address are issues that emanated from the implementation of the 1st respondent's impugned CPD policy and which was central to the constitutional petition. The applicant's complaint to the 2nd respondent was as a result of the 1st respondent's impugned policy and nowhere is this clearer than in the 2nd respondent's letter of 4 April 2024 in which the 2nd respondent was categorical of the genesis of the applicant's complaint. In that letter the 2nd respondent noted:

> "Cognizant of its mandate, the Competition Authority of Kenya (the Authority) has been investigating allegations by Global Procurement Academy that the Kenya Institute of Supplies Management (KISM) is engaging in anti-competitive behaviour by introducing CPD policy aimed at stifling competition and creating an undesirable monopoly."(Emphasis added).

53. It follows that the applicant cannot purport to isolate the question of the implementation of the 2nd respondent's advice from the impugned policy. Without this policy there would be no basis for the applicant's complaint to the 2nd respondent and, therefore, the question whether there was any need for 'advice' that was to be implemented by either the 1st or the 2nd respondent or by both of them would also have not arisen.

54. That said, this court nullified the impugned policy and the evidence that a new policy that would address the concerns raised by the applicant and which, admittedly were also raised in the petition, is in the works, has not been controverted. This is apparent from paragraph 36 and 37 of the 1st respondent's affidavit where it has been sworn as follows:

> " 36. Consequent to the judgment delivered on 22nd September 2023, the 1st Respondent has taken steps to ensure that a revised CPD policy is enacted subject to public participation. In this regard, the 1st Respondent published the draft Supplies Practitioners Management (Continuous Professional Development Programmes) Guidelines, 2024 and invited the public to submit comments on the draft guidelines and attend public consultation workshops in line with the requirements of section 5 of the *Statutory Instruments Act*. (The public notice is on page 113 to 114 of the exhibit)
>
> 37. On 2nd January 2024, the 15[1] Respondent published a regulatory impact statement for the proposed CPD guidelines, 2024. (page 115-133 of the exhibit). The 15[1] Respondent has adopted various approaches to publicize the draft Guidelines and receive input from its stakeholders such as the Applicant. These approaches included:
>
> a) Issuing a notice inviting submissions on the draft Guidelines and the Regulatory Impact Statement from members of the public through an advertisement in two newspapers of nationwide circulation;
>
> b) Holding physical meetings with supplies practitioners, select stakeholders and the general public;
>
> c) Publishing the Regulatory Impact Statement in the Kenyan Gazette;
>
> d) Writing letters and emails to supplies practitioners and other stakeholders requesting input on the draft Guidelines and Regulatory Impact Statement within a specified time; and
>
> e) Publicizing the draft Guidelines and the draft Regulatory Impact Statement on the Institute's website and other platforms."

55. There is proof, and it has not been denied, that these initiatives have been taken. The requisite notice inviting submissions or memoranda on what I understand to be the guidelines of the new CPD policy has been made and consultative workshops have been undertaken in various parts of the country. The stakeholders, who would include the applicant, have had the opportunity to air their views that, no doubt, ought to be considered in the final document.

    These actions by the 1st respondent are consistent with and form the basis of public participation which the court, in the constitutional petition, found to be lacking in the 2021 CPD policy.

56. Against this background there would be no basis of compelling the 1st and 2nd respondents to comply with what has been couched by the 2nd respondent as an "advice" in its letter of 4 April 2022. For whatever it is worth, the "advice" given by the 2nd respondent, may be incorporated in the new CPD policy or the guidelines whose formulation is underway.

57. But even if it was to be assumed that the development of the CPD policy or guidelines is not in the pipeline, I would still be hesitant to issue an order compelling the 1st and 2nd respondents to enforce the purported advice. I say so because the deliberations on the applicant's complaint culminating in the letter of 4 April 2022 in which the so-called advice was communicated were made when a suit in which the issues raised in the compliant was pending for determination before the Constitutional Division of this Honourable Court.

58. The judgment delivered in High Court Constitutional Petition *No. E023 of 2021* shows that the suit was filed on or about 18 January 2021 and judgment delivered on 22 September 2023. A letter by the 2nd respondent dated 23 March 2021 addressed to the 1st respondent suggests that the applicant's complaint was initiated on or around the same date, after the suit had been filed. In its response to the 2nd respondent's letter, the 1st respondent brought to the 2nd respondent's attention the pending constitutional petition in which the question of the constitutionality of the CPD policy which, as noted, is the policy out of which the applicant's complaint arose was central and was pending for determination.

59. In the 1st respondent's letter dated 29 March 2021, the 1st respondent wrote and informed the 2nd respondent, inter alia, as follows:

> " Please note that the complaint is pending determination in the High Court at Nairobi under Petition *No. E023 of 2021* between Okiya Omtatah Okoiti vs Kenya Institute of Supplies Management & 4 others."

60. It is rather disturbing to note that despite being informed that a petition relating to the same complaint that had been submitted to the 2nd respondent for investigation was pending for determination in this Honourable Court, the 2nd respondent purportedly proceeded to investigate the complaint and issue a purported advice to the 1st respondent which the applicant is now seeking to enforce. The least the 2nd respondent would have done, once the petition pending before this Honourable Court was brought to the 2nd respondent's attention, was to stay any further action on the applicant's complaint pending the determination of the petition.

61. Further, the applicant's grievances, if any, and the 2nd respondent's representations on the applicant's complaint could be properly made in the Constitutional petition; all the 2nd respondent and the applicant needed to do was to apply to be joined as parties to the petition. Without belabouring the point, the purported proceedings in which the 2nd respondent purported to entertain a complaint that was alive as a constitutional petition before this Honourable Court were a nullity ab initio. At the very least, those proceedings could not stand to section 6 of the *Civil Procedure Act*, cap. 21 that bars a court from proceeding with a trial of suit in which the matter in issue is substantially in issue in a previously filed suit. This section reads as follows:

> 6. Stay of suit
>
> No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

62. Of course, the 2nd respondent is not a court as defined in section 2 of the *Civil Procedure Act* but, by necessary implication, if a court cannot proceed with a trial of any suit or proceeding in which the

matter in issue is directly or substantially in a previously suit, a tribunal of the 2nd respondent's stature or any other tribunal, for that matter, cannot try or proceed with such a suit.

63. Being a nullity, the proceedings before the 2nd respondent with respect to the applicant's complaint and the advice given in the letter of 4 April 2022 cannot be said to have "complemented", as suggested by the applicant in its submissions, the decision in the constitutional petition.

64. Even then what the applicant is seeking to enforce is an "advice" which, in ordinary parlance, the 1st respondent would not be enjoined to take or implement. That what the 2nd respondent issued was an "advice" rather than an order or directive is clear from the 2nd respondent's letter of 4 April 2022. In that letter, the 2nd respondent stated as follows:

> " Having made the above observations and pursuant to the Authority`s mandate under section Section 9(1) (j) and (n) of the Act and taking into account the need to promote and enforce compliance with the Act, we advise as follows..."(Emphasis added).

65. The 2nd respondent then proceeded to list the measures it "advised" that the 1st respondent should take. Section 36 *Competition Act* is clear about the actions the 2nd respondent ought to take after an investigation such as the one purportedly conducted on the 1st respondent's activities. This provision of the law states as follows:

> 36. Action following investigation
>
> After consideration of any written representations and of any matters raised at a conference, the Authority may take the following measures—
>
> (a) declare the conduct which is the subject matter of the Authority's investigation, to constitute an infringement of the prohibitions contained in Section A, B or C of this Part;
>
> (b) restrain the undertaking or undertakings from engaging in that conduct;
>
> (c) direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
>
> (d) impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question; or
>
> (e) grant any other appropriate relief.

66. I am minded that under section 9(n) of the *Competition Act*, the 2nd respondent has, as one of its functions, the duty to advise the government on matters relating to competition and consumer welfare. However, section 36 is clear that where there has been an investigation, as there was in the instant case, only certain actions prescribed in that section can be taken. In my humble view, these are the actions which a party may be compelled to perform for the simple reason that they are statutory duties or obligations. A mandatory order will not issue to compel performance of an "advice" which, by its very nature, the party "advised" has the discretion to either take or reject it.

67. In the final analysis, I come to the conclusion that there is no merit in the applicant's application. For reasons I have given, I hereby hold that the application is fatally defective besides being misconceived and an abuse of the process of this Honourable Court. It is hereby dismissed with costs. Orders accordingly.

SIGNED, DATED AND POSTED ON CTS ON 13 SEPTEMBER 2024

Ngaah Jairus

JUDGE