Republic v Public Procurement Administrative Review Board; Accounting Offcicer of Judiciary & 3 others (Interested Parties); Specicom Technologies Ltd (Exparte) (Application E085 of 2024) [2024] KEHC 10617 (KLR) (Judicial Review) (6 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10617 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E085 OF 2024

J NGAAH, J

SEPTEMBER 6, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... RESPONDENT

AND

ACCOUNTING OFFCICER OF JUDICIARY ..... INTERESTED PARTY

JUDICIARY ..... INTERESTED PARTY

INCREATE TECHNOLOGIES LIMITED ..... INTERESTED PARTY

INTERGRATED SUPPLIES & CONSULTANCY LIMITED .... INTERESTED PARTY

AND

SPECICOM TECHNOLOGIES LTD ..... EXPARTE

JUDGMENT

1. Before court is the applicant's motion dated 26 July 2024. It is expressed to be brought under Articles 10, 47 and 227 of the Constitution; Sections 7, 8,9,10 and 11 of the Fair Administrative Action Act,

2015; Sections 8 and 9 of the Law Reform Act, cap. 26; and, Order 53 Rule of the Civil Procedure Rules, 2010. The applicant seeks the following orders:

> "1. An order of Certiorari to remove into the High Court and quash the Respondent's decision dated 9th July 2024 in Public Procurement Administrative Review Board Application No. 54 of 2024 in respect of Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years.
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> 2. An order of Mandamus directing the Respondent to hear and determine on merit Request for Review Number 54 of 2024 challenging the award of the tender to the 3rd and 4th Interested Parties."

The applicant also seeks the order that the costs of this application be borne by the respondent and interested parties.

2. The application is based on a statutory statement dated 24 July 2024 and an affidavit verifying the facts relied upon sworn on even date by Mr. Henry Kamau who has sworn that he is the applicant's chief executive officer.

3. According to the applicant, the 2nd interested party advertised a tender described as "Tender No.: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Pints) Under Framework Contract for a period of Two (2) years, renewable annually (once) Subject to Satisfactory Performance." I will henceforth refer to the tender simply as "the tender". As the description of the tender denotes, the tender was to run for a period of two (2) years but renewable for a one-year term, subject to satisfactory performance of the tender. The applicant was amongst the tenderers but its tender was unsuccessful for the reason that certain documents described as SD 1and SD2 were not signed by the donnee of the power of attorney.

4. The applicant challenged the 1st interested party's decision in request for review no. 42 of 2024. On 30 May 2024, the respondent set aside the 1st interested party's decision of the intention to award the tender and directed the 1st interested party to issue all tenderers with a fresh notification that complied with section 87 of the Public Procurement and Asset Disposal Act. Being dissatisfied with this decision, the applicant filed in this Honourable Court judicial review application no. E130 of 2024 challenging the decision. In a judgment delivered on 26 July 2024, and for reasons given in that judgment, I dismissed the application with costs.

5. In the meantime, the 1st interested party complied with the respondent's decision in request for review number 42 of 2024 and issued to the applicant a notification of intention to award dated 31 May 2024 informing it that its tender was unsuccessful and further indicated that Lots 1 and 2 of the tender had been awarded to the 3rd and 4th Interested Parties respectively.Amongst other requirements in the Tender document, the Technical Evaluation Criteria required the tenderer to provide a valid Manufacturer's Authorization Form (MAF) and one (1) year standard warranty for all devices and software if the bidder was not a manufacturer.

6. The notification of intention to award indicated that the 3rd and 4th Interested Parties offered Cisco devices and software. It was, therefore, a requirement for the said interested parties to submit MAFs and requisite warranty letters from Cisco showing that they were 'authorized channel partners' and, therefore, legally authorized by the manufacturer to represent the manufacturer in selling

their products, services and solutions and conforming with all the legal, security and regulatory requirements.

7. The applicant enquired from Cisco on 6 June 2024 whether it had issued MAFs and warranties to the 3rd and 4th interested parties authorising them to participate in the tender as a Cisco partner. Cisco wrote back to the applicant on 12 June 2024 and stated that the 3rd and 4th interested parties were not certified Cisco channel partners and, therefore, were not entitled to purchase and resell Cisco products or services. Armed with this information, the applicant protested the award of the tender to the 3rd and 4th interested parties on the ground that the said interested parties were not authorised to purchase and resell Cisco products or services. The applicant's protest was contained in a letter dated 13 June 2024.

8. The applicant followed the protest with a request for review of the 1st interested party's decision filed before the respondent as application no. 54 of 2024. In its decision rendered on 9 July 2024, the respondent struck out the request for review on the ground that the same was filed outside the 14-day statutory timeline contrary to provisions of section 167 of the Public Procurement and Asset Disposal Act and regulation 203 (2) of the regulations made under the Act. Accordingly, the respondent held, it was divested of jurisdiction to hear and determine the request for review.

9. The applicant is aggrieved by the respondent's decision, hence this application. According to the applicant, the respondent failed to interpret section 167(1) of the Act correctly. Contrary to the respondent's holding, it is the applicant's case that the request for review was filed within time because the decision, the subject matter of the request for review, was communicated through the 1st interested party's letter dated 31 May 2024 and served upon the applicant on 4 June 2024. The applicant contends that the request for review was filed on 11 June 2024, well within the fourteen-day period prescribed by section 167 of the Act.

10. The 1st and 2nd interested parties filed a replying affidavit opposing the application. It was sworn on their behalf by Mr. Jeremiah Nthusi, the judiciary's director of supply chain management services. According to Mr. Nthusi, the Judiciary invited sealed bids from eligible tenderers through the national open tender competitive method on 22 February 2024 for Tender No. JUDIOT/048/2023-2024 for the Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Pints) Under Framework Contract for a period of Two (2) years, renewable annually (once) Subject to Satisfactory Performance.

11. At the closure of the tender, more particularly on 7 March 2024, the 2nd interested received bids from the the applicant and fourteen other tenderers whose bids were duly recorded and evaluated strictly in accordance with the law and the Tender Document. At the preliminary evaluation stage, it was noted that the applicant submitted mandatory Self Declaration Forms (Form SD1 and SD2) which were made and signed by two separate people. According to the 1st and 2nd interested parties, this was not the proper way to depose and sign a self declaration and, for this reason, the applicant's bid was declared non-responsive at the preliminary stage.

12. At the conclusion of the evaluation, the 1st and 2nd interested parties settled on the 3rd and 4th interested parties as the successful bidders and sent to all bidders its Letters of Notification of Intention to Award the tender to the two successful bidders.The applicant, being aggrieved by the decision of the 2nd interested party to award the tender to the 3rd and 4th interested parties, lodged a request for review No. 42 of 2024 before the respondent. The request for review was founded on the grounds, inter alia, that the 2nd interested party did not comply with the law in declaring the applicant's bid non-responsive at the Preliminary Stage of evaluation on the basis that its statutory declaration forms were not properly filled and signed; and, that the letters of Notification of Award issued by the 2nd interested party to the bidders at the conclusion of evaluation process did not comply with the law.

13. In its decision dated 30 May 2024, the respondent allowed the request for review to the extent that the notifications of the intention to award the tender were found to be not in accordance with the law. The respondent dismissed the contention that the 2nd respondent wrongfully declared the applicant's bid as non-responsive at the preliminary stage. The respondent then directed the 2nd interested party to issue fresh Letters of Notification of Award to the applicant clarifying the reasons why its bid had been rejected, and to proceed with the tender process accordingly. On its part, the 2nd interested party complied with the decision and directions of the respondent and issued the fresh Notification of Award to the applicant.

14. The applicant challenged the decision of the respondent in this Honourable Court in application no. E130 of 2024 but, as noted, the application was dismissed on 26 July 2024. In the meantime, upon receiving the fresh Notification of Award issued by the 2nd interested party pursuant to the decision application no. 42 of 2054, the applicant lodged a fresh request for review before the respondent, being application no. 54 of 2024. In that application, the applicant challenged the award of the tender to the 2nd and 3rd interested parties on the grounds that the 2nd and 3rd interested parties did not submit genuine Manufacturer Authentication Forms which were mandatory requirements in the tender. The respondent determined and dismissed this latter request for review on 9 July 2024. The respondent's decision was sent to parties via e-mail on even date. The applicant contends that the instant application ought to have been filed on or before 23 July 2024 since according to law, the application is to be filed within 14 days of the date of the respondent's decision. The applicants application having been filed on 24 July 2024 was thus filed outside time.

15. Apart from being caught by limitation of time, the applicant's application was also struck out in limine because the request was res judicata and sub judice. The issues raised in application no. 54 of 2024 , according to the applicant, had been raised and determined, or ought to have been raised for determination, in application no. 42 of 2024. The respondent also opined that, determining application no. 54 of 2024 when this Honourable Court was seized of a judicial review application challenging the respondent's decision in application no. 42 of 2024, would expose the respondent and the this Honourable Court to embarrassment if they reached conflicting decisions arising from challenges to the same tender.

16. According to the 1st and 2nd interested parties, the respondent was well within its right to raise the issue of jurisdiction on its own motion and to determine it without necessarily inviting submissions from the parties. Again, the respondent did not incorrectly interpret the provisions of Section 167(1) of the Public Procurement & Asset Disposal Act as alleged by the applicant or at all to the extent that the respondent found that the second request for review was filed out of time.

17. I have considered the submissions filed by the parties in support of the positions with respect to the application before court. A substantial part of these submissions is made up of what parties have averred in their respective pleadings and deposed in affidavits sworn in support of or in opposition to the application.

18. To begin with, in determining this application, I need state at the very outset that 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) 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).

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.

19. 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.
>
> 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."

20. 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.

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.

21. 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."

22. 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.

23. 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 the facts that would, ordinarily, be verified by an affidavit. The closest the applicant has come to stating the grounds is what it is contained in paragraphs 12, 13, 14, 15 and 16 of the statement under the head of "grounds for the reliefs sought". In those paragraphs, the applicant has stated as follows:

> " 12) The Applicant is aggrieved by the 1st Respondent's decision and seeks to invoke the supervisory jurisdiction of this honorable court because in arriving at the impugned decision, the Respondent failed to correctly interpret the provisions of section 167 (1) of the Act.
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> 13) The Respondent failed to exercise its discretion reasonably and in good faith by failing to invite the parties to submit on whether the request for review

was time barred since the 1st and 2nd Interested Parties had not challenged the Board's jurisdiction to entertain the request for review.

14) By the said impugned decision, the Respondent improperly fettered its discretion by failing to exercise powers conferred on it under section 173 of the Act and therefore acted ultra vires the Act.

15) The 1st Respondent's conduct amounts to breach of the rule of law, the Applicant's legitimate expectation and fair administrative action under Articles 10 and 47 of the Constitution as read together with the provisions of the Fair Administrative Action Act.

16) The impugned decision is misconceived, erroneous and an illegality having been rendered based on the erroneous interpretation of section 167 (1) of the Act as read together with Article 227 (1) of the Constitution."

24. Even then, it is not easy to tell from these pleadings which of the grounds of judicial review the applicant's application is based. The applicant has, in a way, 'thrown everything to court' and left it to make out what these grounds are. Considering that Order 53 Rule 4(1) of the Civil Procedure Rules expressly states that no grounds should be relied upon except those specified in the statement accompanying the application for leave, the applicant's application would fail because it is not open to the court to speculate the grounds of judicial review for which relief is sought.

25. That said, my understanding of what has been presented as grounds for judicial review is that the applicant is, more or less, questioning the merits of the respondent's decision rather than the process by which the decision was reached. When the applicant says, for instance, that " the Applicant is aggrieved by the 1st Respondent's decision and seeks to invoke the supervisory jurisdiction of this honorable court because in arriving at the impugned decision, the Respondent failed to correctly interpret the provisions of section 167 (1) of the Act", there should be no doubt that it is appealing against the decision in an application that has been camouflaged as a judicial review application.

26. It is not in dispute that judicial review jurisdiction is separate and distinct from appellate jurisdiction and neither is an alternate to the other. This distinction has been discussed by David Foulkes in his book Foulkes Administrative Law, 7th Edition. Citing the case of Customs and Excise Commissioners versus J.H. Corbitt (Numismatists) Ltd (1981) AC 22, (1980) 2 2ALL ER 72, the learned author noted as follows:

> " It is to be noted that an appeal lies from, whether to an appellate tribunal or to a court of law, only when and to the extent that statute so provides, and the powers of the appeal body to review, reconsider etc. the decision of the tribunal likewise depend on the statute.
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> To be contrasted with appeal is judicial review. The decision of tribunals, as bodies exercising judicial functions, have always been subject to review by the courts (that is, to judicial review) by means of the order of certiorari. This enables the court to quash a decision on certain grounds. Whereas appeal lies only when and to the extent that statute provides, the court's common law power of judicial review exists unless it is taken away or limited by statute. Thus where no appeal to the court is provided by statute the only possible challenge in the courts is by way of judicial review..." (at p.150-151).

And for avoidance of doubt that judicial review cannot be assumed to be an appeal, Lord Widgery CJ in R versus Peterkin, ex Soni (1972) Imm AR 253 noted as follows:

> "The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere". (Emphasis added).

27. Judicial review would be concerned about the process and not the merits of the decision in issue. That being the case, a judicial review court will not fault the respondent for interpreting section 167(1) of the Act, or any other provision of the law for that matter, because a judicial review court has no jurisdiction to substitute its own opinion for that of a tribunal. Needless to say, it is not part of the purpose for judicial review to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question (see Lord Hailsham in Chief Constable of the North Wales Police versus Evans (1982) 1 WLR 1155 at 1160F).

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

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

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

Lord Hailsham stated in the same case that:

> "The purpose of judicial review is to ensure that the individual receives fair treatment, 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." At page 1161A.

On his part Lord Roskil said in R versus Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd 1982(AC) 617 at 633C that:

> "The court must not cross that boundary between administration whether good or bad which is lawful and what is unlawful performance of a statutory duty."

30. Of course, where the impugned decision is outrightly illegal; in defiance of express provisions of the law or cannot stand to reason or rationality, the court will interfere not necessarily to substitute its own decision with that of the tribunal but because the decision is impeachable on all or any of the grounds

of judicial review. This point was made by the Court of Appeal in Biren Amritlal Shah & anor vs. Republic & 3 others [2013] eKLR where it was stated thus:

> " The learned Judge would only have been entitled to interfere were it the case that there was absolutely no evidence before the Board that would have justified the upholding of the appellant's termination of the tender. In other words, the case should have been so plainly and self-evidently devoid of evidence or basis for termination, as to render upholding of the termination an inexplicable act of capricious irrationality defiant of all logic and reason. It should have been such a decision that no reasonable tribunal, properly directing itself on the case would have arrived at. That is the Wednesbury unreasonableness that would invalidate a tribunal's decision by way of certiorari."

31. Against this background, I find no basis for faulting the respondent's decision questioning the applicant's conduct of filing piecemeal, requests for review, when, after consideration of the material before it, the issues raised in request for review no. 54 of 2024 could, and ought to have been raised in review no. 42 of 2024. For the same reason there is no basis of questioning the respondent's holding that the subsequent request for review by the applicant could or may well have been sub judice considering that this Honourable Court was seized of a dispute initiated by the applicant against the respondent over issues that either arose or could possibly arise in request for review no. 54 of 2024. To quote the respondent at paragraphs 88 and 89 of its decision, it held as follows:

> " 88. Turning to the circumstances in the instant Request for Review, as chronicled hereinbefore, this Board in directing the Respondent to reissue a compliant letter of notification also addressed its mind to and determined the very issue that the Applicant seeks to re-litigate vide the instant application. We have carefully reviewed the re-issued notification letter dated 31st May 2024 and find nothing therein to suggest that the procuring entity undertook a fresh evaluation or indeed made any other decision that would warrant the fresh invocation of the jurisdiction of this Board on the merits of the procurement process. It bears emphasis in this regard that the substantive matters raised by the Applicant to impugn the procurement process were either already raised or ought to have been raised by the Applicant in Application No. 42 of 2024 and are accordingly time barred for the same were the subject of events that occurred well before 31st May 2024 and at best res judicata as the same were heard and determined by a decision of this board in Application No. 42 of 2024 involving both parties as to this Application.
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> 89. furthermore, it has been brought to the attention of the Board that the Applicant has filed a similar application No. HCJR No. E130 of 2024 before the High Court seeking the same or substantially the same reliefs as before us. The Applicant did not contest this allegation and/or submission. As rightly submitted by learned counsel for the Respondent, to entertain the matter under such circumstances exposes this board and the court to the risk of unnecessary embarrassment in the administration of justice should two different orders be issued by the Board and the High Court. For good order in order in the administration of justice in the Circumstances, the logical consequence, of the Applicant's actions in litigating the ,same dispute before different fora is for the inferior court or tribunal (read this Board) to cede jurisdiction to the superior court. We are guided on this decision by the

Supreme Court's recent decision in Law Society of Kenya v Attorney General & another (Petition 4 of 2019) [2019] KESC 16 (KLR) (Civ) (3 December 2019) (Judgment)..."

32. In summary, therefore, even if one was to assume that the applicant seeks judicial review reliefs on all the grounds of judicial review, there is no material before the court to support any of those grounds. To be precise, as far as the ground of illegality is concerned, I am not satisfied that the respondent can be said to have misunderstood the law that regulates its decision-making power or that it did not give effect to it.

33. Similarly, on the ground of irrationality, no material has been provided by the applicant to demonstrate that the 1st respondent's decision 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".

34. And finally, on procedural impropriety, the applicant was given opportunity to be heard before the respondent came to its decision. In particular, there is sufficient evidence in the respondent's decision showing that the applicant was granted opportunity to address and, indeed it did address the respondent on the question of whether its request for review was res judicata and sub judice. This is apparent from paragraphs 36 and 38 of the respondent's decision where the applicant's submissions were captured as follows:

> " 36. As to whether the instant Request for Review is res Judicata, the Applicant submitted that the ground for review in the instant Request for Review is that the Interested Parties did not meet the mandatory requirements under paragraphs 2 and 4 of Stage 2A of the Technical Evaluation Criteria. The Applicant further submitted that the Board in its decision dated 30th May 2024 in Request for Review No. 42 of 2024 quashed the first notification letter on the ground that the Respondents had failed to inform it of the name of the successful bidder in lot 1 and therefore, it was not possible at that point in time for the Applicant to raise the issue raised in the instant Request for Review in Request for Review No. 42 of 2024.
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> 38. As to whether the instant Request for Review is sub Judice, the Applicant submitted that what the Board ought to consider is whether the issue before it in the instant Request for Review and the issue before the High Court, being whether the Board arrived at a correct decision in holding that Forms S01 and 5D2 as submitted by the Applicant did not meet the tender requirements, is the same for the subJudice rule to apply."

35. The questions of res judicata and sub judice obviously provoked the question of whether, if request for review no. 54 of 2024 was res judicata and sub judice, the respondent could assume jurisdiction and dispose of the application on merits. The applicant cannot, therefore, be heard to suggest that it was not given the opportunity to raise the question of jurisdiction to the extent that the question of jurisdiction was intertwined with the question of res judicata and sub judice. Jurisdiction was not just about the timing of the filing of the request for review but it is a question that was intertwined with the concepts of res judicata and sub judice. This point is, however, moot because, as noted earlier, the applicant has not raised the ground of procedural impropriety as one of the grounds upon which its application is based.

36. In the final analysis, I am not satisfied that the applicant's application is a proper one for grant of the reliefs of judicial review. It is hereby dismissed with costs. It is so ordered.

SIGNED, DATED AND UPLOADED ON THE CTS ON 6 SEPTEMBER 2024

NGAAH JAIRUS

JUDGE