



**Republic v Public Procurement Administrative Review Board; Galana Oil
Kenya Limited & 2 others (Interested Parties); Rubis Energy Kenya PLC
(Exparte Applicant) (Judicial Review Miscellaneous Application E016 of 2023)
[2023] KEHC 3703 (KLR) (Judicial Review) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E016 OF 2023**

**JM CHIGITI, J
APRIL 14, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD RESPONDENT**

AND

**GALANA OIL KENYA LIMITED INTERESTED PARTY
KENYA POWER & LIGHTING COMPANY PLC INTERESTED PARTY
THE ACCOUNTING OFFICER, KENYA POWER & LIGHTING COMPANY
PLC INTERESTED PARTY**

AND

RUBIS ENERGY KENYA PLC EXPARTE APPLICANT

JUDGMENT

Brief Background

1. Pursuant to leave of court granted on 2nd March 2023, the ex parte Applicant by a Notice of Motion dated 2nd March 2023 brought under Section 175 of the Public Procurement and Disposal Act, 2015 (herein after referred to as “the Act”) and Sections 7 and 8 of the Fair Administrative Act No.4 of 2015 – sought the following:



1. An Order Of Certiorari to remove into the High Court for purposes of quashing the decision of the Public Procurement Administrative Review Board, the Respondent herein, made on the 23 February 2023 and delivered on 24th February 2023, wherein it made the following orders:
 - i. Cancelling and/or terminating in their entirety the procurement proceedings of the 3rd Interested Party's Tender Number KPI /9A.3/01/005/22-23 for the supply and Delivery of Low Sulphur Diesel to Off-Grid Power Stations.
 - ii. Ordering the 3rd Interested Party to commence a new procurement process for the Supply and Delivery of Low Sulphur Diesel to Off-Grid Power Stations within fourteen (14) days of the date of making the decision (23rd February 2023).
 - iii. Each party shall bear its own costs in the Request for Review.
 2. An Order Of Mandamus do issue compelling the 2nd and 3rd Interested Parties, Kenya Power And Lighting Company Plc and the Accounting Officer, Kenya Power And Lighting Company Plc to execute and actualize the performance of the contract for the Supply and Delivery of Low Sulphur Diesel to Off-Grid Power Stations with Rubis Energy Kenya Plc, the successful Bidder;
 3. That the costs of these proceedings be provided for.
2. To support the said Notice of Motion, the Applicant filed a Verifying Affidavit, and a Statutory Statement/Declaration evenly dated 1st March 2023 and a Supplementary Affidavit dated 16th March 2023.

The Applicant's Case

3. The ex-parte Applicant's case is that: (i) it was denied the opportunity to be heard in breach of rules of natural justice, and infringement of Article 50 of *the Constitution*, by the Respondent, despite pleading to be heard orally vide its email to the Respondent dated 20th February 2023. (ii) The Respondent acted in violation of the rules of natural justice, in condemning the Applicant unheard. (iii) That the Respondent referred to due diligence not being conducted despite there being no material before it, to support the same, thereby showing biasness. (iv) The Respondent, in its impugned decision dated 23rd February 2023, granted orders not pleaded in the application for review dated 1st December 2022. (v) The impugned decision was arrived at without giving parties a chance to submit before rendering an adverse order against the Applicant, contrary to the sua sponte rule. (vi) The Respondent, framed an issue that it had not been called upon to consider the determination of which culminated in a decision on a Request for Review not before it, and which the Applicant herein and the 2nd and 3rd Interested Parties were not afforded an opportunity to be heard thereon.
4. The Ex parte Applicant argues that the Respondent, acted ultra vires and/or contra statute in shifting the burden of proof from the Interested Parties to the Applicant, whereas it was the 1st Interested Party whom made allegations in requesting for the Review. That the Respondent failed to act impartially as an arbiter, when considering the Request for Review filed by the 1st Interested Party.
5. The Ex parte Applicant is aggrieved that in granting the orders in the impugned decision of 23rd February 2023, the Respondent offered preferential treatment contrary to *the Constitution* by initiating a fresh process, with the same being solely aimed at giving the 1st Interested Party an undue advantage. That the Ex parte Applicant is further aggrieved that the 1st Interested Party all along, under the guise



of exercising a right for Review, deliberately and consciously suppressed its pricing schedule which is a material document/disclosure in the tender.

6. The Ex parte Applicant contends that the Respondent erred in hearing and rendering the orders, in its impugned decision, notwithstanding the fact that the 1st Interested Party was a non-responsive tenderer seeking preferential treatment considering none of the other 4 unsuccessful tenderers lodged any application for review. The Ex parte Applicant is of the view that the Respondent acted Contra statute, as the 1st Interested Party had not attached its pricing schedule which is a basic requirement of any tender, as provided by Section 135(6) of the *Public Procurement and Asset Disposal Act*.
7. The Ex parte Applicant further argues, that in arriving at the impugned decision, the Respondent applied a subjective test as opposed to an objective test given that five bidders successfully submitted their bids without demur, thus since the Interested Party failed to submit their bid, the impugned decision elevated the 1st Interested Party's claim to preferential treatment status.
8. The Ex parte Applicant is also aggrieved by the Respondent's non-compliance with the Judgment in JR. E188/2022- Republic v Public Procurement Administrative & Galana Oil Kenya Limited & KPLC Ex Parte Rubis Energy Kenya PLC. The Applicant is convinced that the Review Board's (Respondent's) decision of 23rd February 2023 is identical to the decision of 22nd December 2022, whereas the latter was successfully impugned in JR. E188/2022.
9. In the circumstances, the Applicant is of the strong view that the acts undertaken by the Respondent cannot amount to afresh reconsideration.
10. The Applicant is also concerned that the Respondent ignored the plea by the Applicant's Counsel to be heard orally, given the findings in the Judgment - as directed in JR. E188/2022 Judgment of 3rd February 2023.

The 2nd and 3rd Interested Parties' Case

11. The 2nd and 3rd Interested Parties, in supporting this judicial review Application, averred that the Respondent acted unreasonably by considering extraneous matters, and consequently: (i) nullifying the Letter of Notification of Intention to Award issued to the ex-parte Applicant, (ii) cancelled the procurement proceedings (iii) ordered a re-advertisement, and (iv) commencement of a new procurement process in the subject tender without taking into account exculpatory evidence adduced by the 2nd and 3rd Interested Parties, thus jeopardising the operations of the 2nd and 3rd Interested Parties. They are of the view that the Respondent acted unreasonably by failing to appreciate that the matter before it was purely about planning, time management, and the wrongdoing by the 1st Interested Party.
12. On irrationality, the 2nd and 3rd Interested Parties are of the view that the Respondent by failing to make sufficient enquires as to the basis of why it was only the 2nd Interested Party who had challenges with submitting its bid, and by failing to make sufficient enquiries pursuant to Section 67(3)(e) PPADA with regard to pertinent information on time of service of Request for Review, and time on the issuance of Letters of Intention to Award acted irrationally.
13. Additionally, they feel that the Respondent ignored relevant matters in arriving at its decision, and considered irrelevant issues, by insisting that the alleged system error was on the 2nd Interested Party's e-procurement system side, while completely ignoring the deliberate actions on the computer system of the 1st Interested party.
14. The 2nd and 3rd Interested Parties are of the view that the Respondent acted against its own rules and procedure when the Respondent's Acting Secretary allegedly issued a letter and a Notification of



Appeal, to the 2nd and 3rd Interested Parties via email. According to Section 168 PPADA, Regulations 205 PPADR and clause 2 and 3 of PPARBA Circular No. 2 of 2020, it's the mandate of the Respondent's Secretary to serve the 2nd and 3rd Interested Parties.

15. They are aggrieved that the Respondent denied the 2nd and 3rd Interested Parties a fair hearing, by ignoring and disregarding the 2nd and 3rd Interested Parties responses, evidence, submissions, and the authorities cited on weighty questions of law and fact.
16. They are of the view that the Respondent granted reliefs that were not sought by the 1st Interested Party illegally and thus condemned the 2nd and 3rd Interested Parties unheard; and proceeded on a wrong interpretation of the law in directing the 2nd and 3rd Interested Parties to re-advertise the subject tender.
17. They believe that the Respondent abused its power by assuming jurisdiction over the Request for Review, when it did not possess any by assuming the role of the 2nd and 3rd Interested Parties in determining the nature and scope of the e-procurement requirements, which role it does not possess; in failing to consider relevant matters, considering extraneous matters, making insufficient enquires and taking into account irrelevant factors, and by shifting that burden of proof to the 2nd and 3rd Interested Parties whereas the burden was on the 1st Interested Party.
18. According to them, the Respondent acted ultra vires in interrogating and finding that the Letter of Award to the ex-parte Applicant was issued un-procedurally; and that the Respondent failed to appreciate that the grounds upon which the Request for Review was founded did not fall within the ambit of the PPADA.
19. According to the 2nd and 3rd Interested Party, the process leading to the decision of 23rd February, 2023 was in the circumstances illegal, unlawful, and marred with procedural improprieties.

The Respondent's Case

20. The Respondent opposes the judicial review Application. It is the Respondent's case that (in notifying the 2nd and 3rd Interested Parties), it (Respondent) forwarded a copy of the filing of the Request for Review application to the 1st and 2nd Interested party and asked for any responses to the said applications, with any confidential documents, to be submitted to it within five days from 1st December 2022 as a notification.
21. Also captured in the notice was the suspension of the procurement proceedings, for the subject tender, pursuant to Section 168 of the *Public Procurement and Asset Disposal Act* No.33 of 2015.
22. The 2nd and 3rd Interested Parties submitted their response dated 5th December 2022, which response contained confidential documents, pursuant to Section 67(3)(e) of the Act. To the Respondent, receiving the same amounted to according the 2nd and 3rd Interested Parties an opportunity to be heard, by it.
23. The Respondent submits that it secured the ex parte Applicant's contacts from the documents that were submitted by the 2nd and 3rd Respondent. On 7th December 2022, that it notified the ex parte Applicant of the existence of the Request for Review application and forwarded a copy and the Circular No.02/2020 dated 24th March 2020.
24. On 13th December 2022, the Ex parte Applicant, as an Interested Party in the Request for Review application, filed before the Respondent a Replying Affidavit sworn by Ismael Opande, and its written submissions in response to the Request for Review.



25. According to the Respondent, on 16th December 2022, the 2nd and 3rd Interested Parties filed, before the Respondent, their written submissions; while on 19th December, 2022 the 1st Interested Party filed a Supplementary Affidavit sworn by Jude Nthiwa, and written submissions.
26. It was the Respondent's case that the Circular No.02/2020 dated 24th March, 2020 stated that all requests for review applications would be canvassed by way of written submissions, and physical hearings were dispensed with, and that the Respondent would consider the written submissions together with all documentation filed before it, including confidential documents submitted to it pursuant to Section 67 of the Act and render a decision electronically (i.e. via email) by notice to all parties to a review within the statutory period required of twenty-one (21) days provided in Section 171 of the Act. On 22nd December 2022, the Respondent transmitted its decision via email.
27. Being dissatisfied with the Respondent's Decision, the ex parte Applicant moved the High Court, by way of Judicial Review No. E188 of 2022 Republic V Public Procurement Administrative Review Board and 3 Others Exparte Rubis Energy Kenya PLC.
28. Judgment was delivered by Hon. Justice Ngaah Jairus on 3rd February, 2023 wherein the court quashed the Respondent's Decision dated 22nd December 2022, and directed the Respondent to reconsider afresh the Request for Review application within twenty-one (21) days from the date of the said judgment, and further ordered that Ms. Faith Waigwa would not be eligible to participate in the review proceedings.
29. In compliance with the said judgment, the Respondent's set up a panel of three members being QS Hussein Were, Eng. Mbiu Kimani, OGW, and Dr Paul Jilani to reconsider afresh the request for review and issued directions to all parties and their representatives on re-consideration afresh of the Request for Review application.
30. Upon reconsidering afresh each of the parties' cases, documents, pleadings, written submissions, list and bundle of authorities, together with confidential documents submitted to it (Respondent), by the 2nd and 3rd Interested Parties in the Request for Review application, transmitted via email, rendered its Decision dated 23rd February, 2023 making orders in exercise of its powers under Section 173 of the Act.
31. The Respondent denies that it breached the rules of natural justice, by denying the Ex parte Applicant an opportunity to highlight its submissions despite a plea to be heard being communicated to the Respondent on 20th February, 2023. To the allegation that in the Request for Review application, that the Respondent assumed jurisdiction over matters not pleaded and thereby condemned the Ex-parte applicant unheard, the Respondent asserts that it considered all the parties' pleadings and cases which from such analysis it distilled the issues for determination in the Decision dated 23rd February 2023.
32. That the Respondent utilized an objective test and found it just to order the 3rd Interested Party to commence a new procurement process citing that tenders had already been opened in the presence of tenderers' representatives and evaluation conducted. As such, that there was a possibility of the tender sum provided by tenderers being in the public domain, and known to the 1st Interested Party, thus, ordering for the 1st Interested Party to be allowed to submit its tender, at that stage, would undermine the public procurement constitutional principle of competitiveness under Article 227(1) of *the Constitution*.
33. The Respondent maintained that the 1st Interested Party was a candidate, and not a tenderer, in the subject tender as per the interpretation provided under Section 2 of the Act, and considering it (1st Interested Party) did not manage to fully submit its tender after efforts to do so, and as such was not



a non-responsive tenderer. The main complaint by the 1st Interested Party was that it could not access the 2nd Interested Party's EProcurement web portal before the submission deadline. Therefore, that the 2nd Interested Party breached its statutory duty under Section 77(4) of the Act requiring it to ensure that the place of submissions of tenders in relation to the subject tender was open and accessible to all prospective tenderers.

34. The Respondent asserts that it did not act ultra-vires by requiring the 2nd and 3rd Interested Parties to prove compliance with provisions of Section 64(1) of the Act which dictate that all communications and enquiries between parties on procurement and asset disposal proceedings must be in writing.
35. In response to the claim that the Respondent's Decision dated 23rd February 2023 was based on a pre-determination of matters as the said decision was an identical, replica and/or carbon copy to the Respondent's decision dated 22nd December, 2022 is unsubstantiated and unfounded. The Respondent states that it was impartial in its decision making, and that nothing had changed from parties' cases, documents, pleadings, written submissions and confidential documents submitted to the Respondent pursuant to Section 67(3)(e) of the Act.
36. It is the Respondent's case that the entire decision making process is legal, valid and binding on all parties to the Request for Review application having been arrived at impartially and after due consideration and interrogation of all documents and information before it that were material in and/or to the Request for Review application.
37. It is further the Respondent's case that the appeal lodged by the Respondent in Nairobi Civil Appeal (Application) No. E061 of 2023 Public Procurement Administrative Review Board v Rubis Energy Kenya PLC & 4 others against the decision of Hon. Justice Jairus delivered on 3rd February 2023 in JR E188 of 2022 in Republic v Public Procurement Administrative Review Board & 3 Others is an appeal against such part of the said decision that found that the Chairperson of the Appellant had some degree of interest in the proceedings before the Appellant which interest she failed to declare in breach of Regulation 212 of Regulations 2020 and was not to an issue for reconsideration by the Respondent in its decision dated 23rd February 2023.
38. The Respondent argues that it served the 2nd and 3rd Respondents with the notification and letter of appeal, the Board's Circular No.02/2020 dated 24th March, 2020 together with a copy of the Request for Review application; and as such the notification of award dated 2nd December 2022 by the 2nd Interested Party was issued un-procedurally and illegally, thus its nullification was justified.
39. That on the comments of the Respondent as to why due diligence had not been conducted, in the Decision dated 23rd February 2023, was what was reported and captured in the Evaluation Report signed by the evaluation committee members on 30th November 2022, and was not an issue for consideration by the Respondent.
40. The Respondent maintains that its decision dated 23rd February 2023 was reasonable, rational, lawful, and without overreaching the Respondent's mandate and jurisdiction.
41. Further, the Respondent reiterated that it observed the rules of natural justice in exercise of its statutory mandate and powers under Section 28 and Section 173 of the Act, respectively, it ensured that all parties to the Request for Review application were granted an opportunity to be heard. According to the Respondent, the Ex parte Applicant failed to demonstrate any elements of illegality, irrationality, procedural impropriety and/or unfairness in the making of the Decision dated 23rd February 2023.



The 1st Interested Party's Case

42. In opposing the judicial review Application, the 1st Interested Party argues that the Notice of Motion application is not competent and ought to be struck out as the grounds and relief sought would entail a substantive review of the merits of the impugned decision, and it calls for the court substituting its own decision for that of the Respondent which would be beyond the scope of judicial review jurisdiction; and an order of mandamus does not relate to any specified statutory duty or obligation on the part of the 2nd and 3rd Interested Parties, therefore the same cannot as a matter of the law issue.
43. The 1st Interested Party maintains that the 2nd and 3rd Interested Parties had been notified by both the Respondent and the 1st Interested Party of the filing of the Request for Review on 1st December, 2022 and that by virtue of the provisions of Section 168 of the *Public Procurement and Asset Disposal Act, 2015*, the procurement proceedings subject of the said Request for Review stood suspended pending its finalization.
44. It is the 1st Interested Party's case that the Notification of Intention to Award the tender, issued to the Ex-parte Applicant and dated 2nd December, 2022 (which it [Applicant] effectively seeks to have the Honourable Court reinstate and give effect to) was issued in defiance of the directions of the Respondent and in contravention of the provisions of Section 168 of the *Public Procurement and Asset Disposal Act, 2015*.
45. That the propriety or otherwise of issuance, by the 2nd and 3rd Interested Parties to the Ex-parte Applicant, of the Letter of Notification of Intention to Award Tender dated 2nd December, 2022 was, a matter left for prosecution by the parties, and taking into account provisions of Section 173 of the *Public Procurement and Asset Disposal Act, 2015*, it was perfectly within the Respondent's jurisdictional purview, as a consequence of which it (Respondent) was perfectly entitled to grant the reliefs set out therein, that the ex-parte Applicant now complains of.
46. Contrary to what is suggested by the Ex-parte Applicant, the order of the High Court issued in JR E 188 of 2022 did not direct the manner and procedure under which the Respondent was to re-consider the 1st Interested Party's Request for Review before it, or bar any other member of the Respondent other than its chairperson from participating in the said reconsideration.
47. The 1st Interested Party concedes that it presented its request for review before the Respondent in the capacity of prospective bidder, as it did not tender in the subject procurement proceedings. Also, that the 1st Interested Party had not sought any relief for evaluation of its bid by the Respondent, who lacks such authority, it was not material and/or necessary for the 1st Interested Party to place before the Respondent its pricing schedule that it had been unable to upload onto the e-procurement system/portal of the procuring entity. And having not participated in the opening of subject tenders, the 1st Interested party could not be said to have sight of the pricing by others or that it has gained any undue advantage over other tenderers.
48. The 1st Interested Party's position was that the Respondent took into account and considered all the material placed before it on equal footing, and the claim that the ex-parte Applicant was denied the opportunity to be heard is without any basis; and the allegations of bias as mounted against the Respondent are misconceived.

Issues for Determination:

49. Upon considering the Notice of motion dated 2nd March 2023, the Statutory statement dated 1st March 2023, the Verifying Affidavit of Mr. Ishmael Opande dated 1st March 2023, the Supplementary



Affidavit of Mr. Ishmael Opande dated 16th March 2023, the Written Submissions dated 21st March 2023 and the case digest/ list and bundle of Authorities dated 21st March 2023; the Respondents' Replying Affidavit of Mr. James Kilaka dated 8th March 2023, Written submissions dated 22nd March 2023; The 1st Interested party's Replying Affidavit of Mr. Jude Nthiwa dated 14th March 2023, Written submissions dated 22nd March 2023; and the 2nd and 3rd Interested parties' Replying Affidavit of Mr. Joash Imapa dated 16th March 2023 and the Written Submissions dated 16th March 2023, I have identified the following as the issues for determination:

- i. Whether the Respondent in its decision dated 23rd February 2023 complied with the judgement as delivered by Justice Ngaah in Judicial Review Number No. E188 of 2022 on 3rd February 2023.
- ii. Whether the Review Board's decision directing the procurement process be terminated and re-advertised under a new procurement process was ultra vires, illegal, irrational and/or tainted with procedural impropriety; and,
- iii. Whether the Applicant has established the legal threshold for the grant of the judicial review orders sought.

Analysis and Determination

50. The first issue seeks to answer the question on the propriety of the board's decision dated 23rd February, 2023. It calls for an examination of whether or not the board in the impugned decision herein, followed the directions of the court as espoused in the judgement dated 3rd February, 2023.
51. The Applicant raises a concern that it was denied an opportunity to be heard.
52. The Respondent via its email dated 20th February, 2023 was categorical that it would proceed to reconsider a fresh the request for review by Galana Oil Kenya Ltd.
53. The email was also clear that the hearing would be in accordance with the directions issued by the board in its Circular No. 2/2020. The said circular was shared with all the parties including the Ex parte Applicant.
54. I have noted that the Ex parte Applicant does not say it did not receive the circular. Indeed, the Ex parte Applicant complied with the circular save for the fact that it wrote an court to the Respondent on 20th February, 2020 requesting to be allowed to appear virtually for highlighting of the submissions filed therein.
55. I have looked at the Respondent's circular dated 24th March, 2020 and in particular direction which reads as follows:

“6.

All Requests for Review applications shall be canvassed by way of written submissions and physical hearings of the same are hereby dispensed with. The PPARB shall consider the written submissions together with all documentation filed before it including confidential documents submitted to it pursuant to Section 67 of the Act and render a decision electronically (i.e. via email) by notice to all parties to the Review within the statutory period required of 21 days.”

56. The Ex parte Applicant did not challenge the circular at all. In fact, the Ex parte Applicant filed its submissions in compliance with the said directions. The only unique entry that has generated



the dissatisfaction on the part of the Ex parte Applicant is the fact that it wanted to highlight its submissions.

57. I take note that the circular is binding on the parties and the same did not make nor provide for highlighting of submissions. This simply means that the Respondent could not depart from the express provisions of its own circular.
58. I do not find anything wrong in what the Respondent did. In my view, the Ex parte Applicant was accorded the right to a fair hearing within the ambit of the circular.
59. This is in keeping with the dictates of Article 50 of *the Constitution*. The Respondent ensured that due process envisioned in the *Fair Administrative Action Act* was complied with in so far as giving the Applicant a fair hearing.
60. This court has also considered the question whether or not the Respondent complied with the judgment dated 3rd March, 2023 by Justice Ngaah, wherein the court directed the Respondent to reconsider a fresh the request for review by Galana Oil Kenya within 21 days by a reconstituted board.
61. I am in agreement that to reconsider means to take up a matter again with a view to altering or reversing it. This is in line with the Black's Law Dictionary, The Chamber's English Dictionary and the Oxford English Dictionary as submitted by the Ex parte applicant.
62. However, the fact that the Respondent was directed to reconsider did not in any way mean nor imply that the Respondent was under a duty to arrive at any particular finding. The Respondent had the duty to exercise its discretion in whichever way it wanted to so long as the same was exercised judiciously.
63. The Respondent arrived at a decision and it cannot be faulted in the event it reconsiders, a matter again and arrives at the same finding it had arrived at before. The Review Board had the liberty to totally or partially alter or even reverse its earlier finding. There is no harm in that so long as the decision is arrived at based on the evidence before it.
64. A party who is aggrieved by the findings of the Review Board in the circumstances has the liberty to lodge an appeal before the appropriate court that has the powers to relook at the evidence while sitting as an appellate court and not as a judicial review Court. This court lacks the powers to do that.
65. The Applicant's has a right to natural justice and a right to be heard by a fair and impartial tribunal as enshrined and guaranteed under Article 50 of *the constitution*
66. The Respondent defended its decision dated 3rd February, 2023 and pleaded that it was independent of its earlier quashed decision of 22nd December 2022.
67. The Board's power is donated by Section 28(1) as read with Section 167 of the *Public Procurement and Asset Disposal Act* which provides:
 - (1) The functions of the Review Board shall be—
 - a. reviewing, hearing and determining tendering and asset disposal disputes; and
 - b. to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.While, Section 167 provides that:
 1. Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within



fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

2. A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract:

Provided that this shall not apply to tenders reserved for women, youth, persons with disabilities and other disadvantaged groups.

3. A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.
4. The following matters shall not be subject to the review of procurement proceedings under subsection (1)—
 - (a) the choice of a procurement method;
 - (b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and
 - (c) where a contract is signed in accordance with section 135 of this Act.

68. This court is alive to the caveat that it should not usurp the mandate of the bodies or tribunals falling under its supervision. Moreover, the decision of the court that was delivered on 3rd February, 2023 restrained from pre-empting the outcome of the reconsideration by the board.

69. The Respondent submitted that it considered the same written documents that were earlier presented to it, and came up with the now impugned decision 3rd February 2023. This was the only material that the Respondent was expected to consider in arriving at the outcome. To that end, it is safe to answer the first issue in the affirmative.

70. This Court is guided by the case of *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) where the Supreme court held as follows:

“In order for the court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly “in the circumstances of the case”, without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in *Judicial Service Commission & another v Lucy Muthoni Njora*, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of *the Constitution*



which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.

“Be that as it may, it is the court’s firm view that the intention was never to transform judicial review into full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to do so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah*, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.”

71. The Applicant relied on the case of *Morgan et al vs United States* to advance its case on what amounts to a hearing. I agree with that part of the judgment. However, it must be noted that the Applicant submitted and accepted the Respondent’s structure and framework of what amounts to a hearing in the circular and in particular direction 6 and the Ex parte Applicant cannot fault the circular at this point in time.
72. I have noted that the Ex Parte Applicant complied with the said circular save for the fact that the Ex parte Applicant wanted to bend the directions at the 11th hour when it requested to be allowed to highlight its submissions. It is my finding that the Respondent exercised its discretion within the dictates of the circular in failing to allow the Applicants request. It did not act illegally.
73. I am also in agreement with the ratio in the case of *Onyango vs. AG (1986-89) EA456*. However, I must not hesitate to state that in the instant case, the Respondent did not offend the rules of natural justice. The Respondent disregarded the Ex parte Applicant’s request to highlight its submissions on the basis of the terms and limitations of the circular that the Ex parte Applicant had willingly subjected itself to.
74. In any event, looked at from a different perspective, had the Respondent allowed the Exparte Applicant to highlight its submissions then the Respondent would have acted ultra vires direction 6 of the circular. By extension all the other parties who had filed their submissions would have been denied the right to equal benefit of the procedure thereby offending them the equal protection and benefit of the law as guaranteed under Article 27 of *The Constitution*.
75. Unlike what transpired in the case of *Dhakeswari Cotton Mills Ltd v. Commissioner of Income tax, West Bengal 1955*, the Ex parte Applicant in this case was under a duty to follow a very strict procedure so as to access a fair trial which the Ex parte applicant embraced without any reservations. The only problem was that the Ex parte Applicant wanted to bend the rules of the game to suit its case in requesting to be allowed to avail an avenue that was foreign to the review process as set out by the Respondent.



76. The Respondent had a duty to protect, promote and fulfil the rule of law under Article 20 of *the Constitution* which it did in denying the Ex parte Applicant the special procedure in the highlighting of submissions.
77. It is my finding that the Respondent had the liberty to exercise its discretion in the manner it did and it cannot be faulted. I have come to the conclusion that the Ex parte Applicant has not made out a case that would persuade this court to grant the prayers sought.
78. On the second issue, this court is guided by Section 173(e) of the *Public Procurement and Asset Disposal Act* which the Respondent invoked in making its orders reads as follows: -
- “Upon completing a review, the Review Board may do any one or more of the following —a...d, e. order termination of the procurement process and commencement of a new procurement process.”
79. A plain reading of Section 173(e) of *Public Procurement and Asset Disposal Act* shows that the Board has powers to give directions to order termination of the procurement process and commencement of a new procurement process. The board acted within its powers and after an elaborate analysis reached the conclusion and directed how the procurement was to be done.
80. This court finds no grounds upon which to review the decision. I concur with the decision in Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Ex parte Kenya Power and Lighting Company Limited [2019] eKLR where Mativo J while relying on the decision in Paul Kiplagat Birgen & 25 Others v Interim Independent Electoral Commission & 2 Others {2011} eKLR held as follows;
- “A Judicial Review court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the body. Where a body is granted wide decision-making powers with a number of options or variables, a judicial review court may not interfere unless it is clear that the choice preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, a Judicial Review court may not interfere only because it favours a different option within the range...”
81. This court is guided by the Supreme Court decision in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, wherein it provided that a court sitting in a judicial review can delve into merits in exceptional cases.
82. The court must therefore defer to the Board’s (Respondent’s) mandate to make decisions on merit in review of public procurement processes. It is my finding that the Board’s decision was not ultra vires, illegal, irrational and/or tainted with any procedural impropriety.
83. In order to determine the 3rd issue, I am guided Republic v Public Procurement Administrative Review Board & 3 others ex parte Techno Relief Services Limited [2021] eKLR where the court stated;
- “Judicial review has now also been entrenched as a constitutional principle pursuant to the provisions of Article 47 of *the Constitution*, which provides for the right to fair administrative action, and Section 7 of the *Fair Administrative Action Act* in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.
- In addition, it was emphasized by the Court of Appeal in Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others, (2016) KLR that Article 47 of



the Constitution as read with the grounds for review provided by Section 7 of the *Fair Administrative Action Act*, reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.

23. The standards of merit review set out in Section 7 (2) of the Act are as follows:

- (2) A court or tribunal under Subsection (1) may review an administrative action or decision, if -
 - (a) the person who made the decision-
 - (i) was not authorized to do so by the empowering provision;
 - (ii) acted in excess of jurisdiction or power conferred under any written law;
 - (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
 - (iv) was biased or may reasonably be suspected of bias; or
 - (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action or decision was procedurally unfair;
 - (d) the action or decision was materially influenced by an error of law;
 - (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
 - (f) the administrator failed to take into account relevant considerations;
 - (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
 - (h) the administrative action or decision was made in bad faith;
 - (i) 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;
- (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
- (k) the administrative action or decision is unreasonable;
- (l) the administrative action or decision is not proportionate to the interests or rights affected;
- (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;
- (n) the administrative action or decision is unfair; or
- (o) the administrative action or decision is taken or made in abuse of power

24. From the above provisions I have no doubt that this court has jurisdiction to review the decisions of subordinate courts and quasi-judicial bodies, of which the Respondent is one. It is also inaccurate and one-dimensional to classify this court's review jurisdiction as being limited to the decision making process of an administrative body or subordinate court, as it is evident that the court can also review the merits of a decision in judicial review. The applicable restraints in the exercise of its judicial review jurisdiction are that the court must be careful not to usurp and interfere with the matters entrusted to an administrative body or subordinate court to decide in the first instance, as its jurisdiction is supervisory. In addition, the court cannot substitute its decision or preferred outcome with that of the said bodies or courts, hence the restrictions on the extent of merit review that can be undertaken in judicial review.

25. Coming to the permissible merit review, firstly, as shown by the applicable standards of review in Section 7 of the *Fair Administrative Action Act*, the legality of decision making extends beyond merely the process, and include aspects of reasonableness, proportionality and fairness of the decision. Secondly, the merit review by a judicial review court may extend to correcting any errors made by a decision making body as to the existence of precedent facts, and in the application and interpretation of the law, in reviewing the legality of the decisions, and if the bodies have acted within their powers. Hence the remedies available to a judicial review court in this regard of



quashing illegal decisions and requiring public bodies to apply the correct law and procedure.”

84. The Ex parte Applicant has not satisfied the court that the Respondents 23rd February 2023 decision was ultra vires, un-procedural, unlawful, illegal, breached rules of natural justice, or marred with procedural impropriety.
85. Having failed to persuade the court that there was an illegality or a procedural impropriety in the procedure that was adopted by the Respondent, this court is unable to issue the mandamus order as sought. I am guided by the cases of R vs Public Procurement Administrative Review Board, Ex parte Giant Forex Bureau De' Charge Ltd and 2 others and the case of R vs. National Employment Authority and 3 others Ex parte Middle East Consultancy Services Ltd (2018) ECLR, and the case of Kenya National Examination Council vs. R, Ex parte Geoffrey Gathenji Njoroge and 9 others (1997) eCLR.
86. The Ex parte Applicant was under a duty to demonstrate to the court that the Respondent's decision or the acts complained of were tainted with illegality, irregularity and procedural impropriety as set out in the case of Pastoli v. Government Council and Others (2008) 2EA. The Applicant did not demonstrate the illegalities, irregularities and the procedural improprieties in this case and the Order of Certiorari or Mandamus can't issue.

Order:

87. Flowing from the above analysis, I have arrived at the finding that the Notice of Motion application dated 2nd March 2023 lacks merit and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

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J. CHIGITI (SC)

JUDGE

