



Republic v Public Procurement Administrative Review Board & 2 others; Lesan Caterers Limited (Interested Party); Royal Taste Kitchen Limited (Exparte Applicant) (Miscellaneous Civil Application E052 of 2023) [2023] KEHC 19685 (KLR) (Judicial Review) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19685 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS CIVIL APPLICATION E052 OF 2023**

JM CHIGITI, J

JULY 6, 2023

BETWEEN

REPUBLIC APPLICANT

AND

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

**THE ACCOUNTING OFFICER, NATIONAL SOCIAL SECURITY FUND
(NSSF) 2ND RESPONDENT**

NATIONAL SOCIAL SECURITY FUND (NSSF) 3RD RESPONDENT

AND

LESAN CATERERS LIMITED INTERESTED PARTY

AND

ROYAL TASTE KITCHEN LIMITED EXPARTE APPLICANT

JUDGMENT

Brief Background

1. Pursuant to leave of court granted on 23rd May 2023, by a Notice of Motion dated 26th May, 2023 the Applicant sought for orders:

- 1) That this Honourable Court be pleased to grant the Ex-parte Applicant Judicial Review Orders, to wit: -



- a) An Order of Certiorari to bring to the Honourable Court for purposes of being quashed the decision of the 1st Respondent dated 9th May 2023 delivered in Ex-parte Applicant's PPARB Request for Review Application No. 25 of 2023, Royal Taste Kitchen Limited Vs. The Accounting Officer National Social Security Fund & 2 Others and more particularly the finding that the 2nd and 3rd Respondents conducted the second due diligence exercise in compliance with the subject tender document and section 83 of [Public Procurement and Asset Disposal Act](#) (PPADA).
 - b) An Order of mandamus to compel the 1st Respondent to review the impugned decision as shall be directed by the findings of the court herein and on the basis of the correct analysis of the subject tender document and fair application of the law.
 - c) In the alternative, an Order of mandamus to compel the 2nd Respondent to issue the Ex-parte Applicant with a letter of award and a procurement contract in respect of Tender No. NSSF/SCM/C/2/3/14:2022-2023; Tender for Provision of staff tea services (Reserved for Women).
 - d) An Order of prohibition restraining the 2nd and 3rd Respondents from undertaking any further procurement proceedings subject matter of this suit and/or entering into and executing a procurement contract with the Interested Party.
- 2) A declaration that the 2nd Respondent's conduct of the second due diligence exercise is an abuse of the procurement process and their power and in contravention of the provisions of Section 80(2) & 83 of PPADA and Article 227 (1) of [the Constitution](#).
 - 3) That this Honourable Court be pleased to issue such other or further relief as the Honourable Court may deem just and expedient to grant.
 - 4) That the costs of and incidental to this application be provided for.
2. The Application was supported by a Statutory Statement and a Verifying Affidavit sworn by Emily Kerubo Kamau, and both dated 19th May 2023.

The Applicant's Case

3. The Applicant's case is that, its aggrieved – and now seeks review of the decision - by the decision of the 1st Respondent dated 9th May, 2023 and delivered on even date in Public Procurement Administrative Review Board (PPARB) Request for Review Application No. 25 of 2023, Royal Taste Kitchen Limited Vs. The Accounting Officer National Social Security Fund & 2 Others, with respect to TENDER NO. NSSF/SCM/C/2/3/14:2022-2023; Tender for Provision of Staff Tea Services (Reserved for Women) hereinafter referred to as “the subject tender”.
4. According to the Applicant, the impugned decision: is a contravention of Article 227(1) of [the Constitution](#); is unlawful for contravening section 3, 80(2), and 83 of the [Public Procurement and Asset Disposal Act](#) (PPADA) - herein after referred to as “the Act” -; failed to consider and determine the relevant considerations arising from the existing and determined contractual Agreements between the Applicant and its referees in the subject tender; failed to take into account relevant factual depositions filed in PPARB Request for Review Application No. 25 of 2023 and which were made by representatives of the Applicant's referees, and also failed to take into account the 2nd and 3rd Respondents act of establishing and developing a due diligence form contrary to the criteria set out in the subject tender document - thereby arriving at an erroneous decision on the question of conduct



- of due diligence by the 2nd and 3rd Respondents; upheld an illegality and deliberate breach of law conducted by the 2nd and 3rd Respondent.
5. The Applicant also stated that subsequent to the 1st Respondent's decision delivered on 9th May, 2023 that now form the subject matter of the proceedings herein, the 2nd Respondent has since issued Notification of Award vide a letter dated 15th May 2023; to which the Applicant is apprehensive that unless this court intervenes, the 2nd Respondent will proceed with the procurement process and execute a procurement contract with the Interested Party.
 6. In advancing their case, the Applicant filed their written submission dated 16th June, 2023 where it was contended that the Applicant had demonstrated instances of irrationality and procedural impropriety on the 1st Respondent's part. Further, that it is critical for this Honourable Court to conduct a merit review to examine facts and evidence presented before it to establish whether the 1st Respondent acted reasonably and fairly in rendering its decision dated 9th May 2023. Reliance was placed on the Supreme Court Judgement in *Praxedes Saisi & 7 others vs Director of Public Prosecution & 2 Others (2023) KESC 6 (KLR)*, and the Court of Appeal decision in *Judicial Service Commission & Another vs Lucy Muthoni Njora (2021) e KLR*.
 7. The Applicant maintained that the 1st Respondent failed to take into account the 2nd and 3rd Respondents act of establishing and developing a different due diligence form was prejudicial to them (Applicant), and contrary to the criteria set out in the tender document.
 8. Notably, the Applicant argued that the 1st Respondent ought to have been satisfied that the 2nd and 3rd Respondents whilst conducting the second due diligence exercise, ought to have limited themselves to verifying the information provided in the signed contracts and/or award letters and/or purchase orders between the Ex-Parte Applicants and its referees, to confirm that indeed the said referees had more than 500 employees for the period commencing 2019 to 2022 in strict compliance of the tender criteria.
 9. The Applicant was of the view that the 1st Respondent failed to take into account the sworn statements provided by the Ex-Parte Applicant's referees which affidavits sought to provide additional information that could not be captured in the arbitrary skeleton due diligence forms; and that these sworn statements merely outlined the correct position and corroborated the findings of the procuring entity's first due diligence report.
 10. The Applicant submitted that the 1st Respondent was biased against it (Applicant) based on the manner in which it sought to analyse the second due diligence report. Further, that based on the fact that the Applicant had met the subject due diligence tender requirements with respect to there (3) referees, and financial bid was lower than that of the Interested party; the 1st Respondent ought to have reached a fair determination that the Applicant is the successful tenderer in accordance with the provisions of section 86 (1) (a) of the Act.
 11. That the 1st Respondent misdirected itself when it found in its decision of 9th May 2023, that the information and explanations contained in the two affidavits introduced in the Request for Review Application were not before the evaluation committee, whereas this was information that was already provided to the procuring entity through copies of signed contracts, copies of award letters and/or copies of purchase orders as part of mandatory tender requirements.
 12. In the main, that the information contained in the 1st due diligence exercise as captured in the impugned decision, cannot be overlooked in the overall analysis of this matter, as it corroborates the fact that the ex-parte Applicant complied with all mandatory tender requirements. However, on the 2nd due diligence, it was the Applicant's position that it (2nd due diligence) exercise, lacked credibility based on



the introduction of a different criterion not recognised and/or provided for by the tender document, through the impugned due diligence forms that did not provide room for the Applicant's referees to elaborate the extent of services provided.

13. The Applicant posited that had the 2nd and 3rd Respondents exercised enough attention and care in carrying out the 2nd due diligence exercise, they would be satisfied that the Applicant indeed met all the mandatory tender requirements; and further that, there would be no need for the sworn statements dated 26th April 2023 to be filed offering any clarifications.
14. To the Applicant, the 1st Respondent misdirected itself in failing to find that the 2nd due diligence exercise was not carried out in accordance with the provisions of article 227 (1) of *the Constitution* of Kenya 2010.

The 1st Respondent's Case

15. In response, the Respondents opposed the Application. The 1st Respondent filed their Replying Affidavit dated 8th June 2023 and sworn by James Kilaki; while the 2nd and 3rd Respondents filed their Replying Affidavit dated 7th June 2023 and sworn by Rose Mary Oluoch.
16. The 1st Respondent averred that the Applicant, in their first (1st) Request for Review dated 24th February, 2023 under PPARB Application No. 12 of 2023 challenged the decision of the 2nd Respondent in respect of the subject tender.
17. In the end, the 1st Respondent in its decision dated 17th March, 2023, inter alia:
 - a) Nullified and set aside the Letter of Notification of Intention to Award dated 13th February 2023 issued to the successful tenderer, to the Applicant, and to other unsuccessful tenderers;
 - b) Ordered the 1st Respondent to direct the Evaluation Committee to conduct due diligence on the Interested Party and all other responsive tenderers at the Technical Evaluation Stage in accordance with section 83 of the Act and Tender Document while taking into consideration the findings and comments in the decision - within Fourteen (14) days from the date of that decision; and
 - c) further ordered the 1st Respondent to proceed with the procurement process of the subject tender to its logical conclusion - within twenty-one (21) days from the date of the decision - while taking into consideration the findings of the Board in that decision.
18. Subsequently, that the Applicant, in its second (2nd) Request for Review which was dated 18th April, 2023 commenced the proceedings before the 1st Respondent in PPARB Application No. 25 of 2023 in respect of the subject tender, challenging the manner in which the 3rd and 4th Respondents implemented the Decision of the 1st Respondent in PPARB Application No. 12 of 2023.
19. The Applicant stated that on 18th April, 2023 the 1st Respondent sent a Notification of Appeal to the 3rd and 4th Respondents inviting them to file a response to the 2nd Request for Review, which responses were filed on 24th April, 2023. Further, that on 24th April, 2023 the 1st Respondent sent a notice to all the tenderers who had participated in the subject tender requesting them to file their responses to the 2nd Request for Review; however, that none of the tenderers filed any document or made a representation in response to the 1st Respondent's invitation.
20. That on 28th April, 2023 the 1st Respondent sent a notice for an online hearing of the 2nd Request for Review indicating that the Request would be heard through an online hearing on 3rd May 2023 at 12:00 noon. Additionally, that on 3rd May, 2023 at noon, when the 2nd Request for Review came



- up for an online hearing, the Ex-parte Applicant and the 3rd and 4th Respondents were represented by their respective Advocates.
21. That the 1st Respondent gave an opportunity to all the Advocates present to present their respective Client's case and reserved the 2nd Request for determination on or before 9th May, 2023.
 22. The 1st Respondent stated that subsequent to the online hearing, it (1st Respondent) retreated to prepare its Decision which was delivered on 9th April 2023 - by sending a copy of the same by email to Advocates appearing for each of the parties in the matter. That in its Decision, it (1st Respondent) partially allowed the Ex-parte Applicant's Request for Review.
 23. The 1st Respondent asserted that in exercise of its powers under section 173 of the Act, in its Decision dated 9th May, 2023, it considered the following issues for determination - which emanated from parties' cases, documents, and pleadings - as follows:
 - i. whether the Respondents conducted due diligence in compliance with the Tender Document, Section 83 of the Act and this Board's finding in Request for Review No. 12 of 2023?
 - ii. whether the Notification of Intention for Award dated 4th April 2023 meets the threshold prescribed under Section 87(3) of the Act read with Regulation 82 of the Regulations 2020?
 - iii. what orders should the Board grant in the circumstances?
 24. That in determining the first issue it (1st Respondent) considered for determination, the 1st Respondent in its Decision dated 9th May 2023 considered the parties' respective representations and found that the 2nd and 3rd Respondents conducted due diligence in accordance with the Tender Document, Section 83 of the Act as read with Regulation 80 of the Regulations 2020, and the Board's finding in the 1st Request for Review.
 25. Further, that in determining the second issue it (1st Respondent) considered for determination the 1st Respondent in its Decision dated 9th May 2023 considered the parties' respective representations and found that the 2nd and 3rd Respondents did not comply with the provisions of Section 87 of the Act read with Regulation 83 of the Regulations when notifying the tenderers of the outcome of the procurement process, and that the Notification of Intention to Award dated 4th April 2023 did not meet the threshold required under section 87(3) of the Act as read with Regulation 82(3) of the Regulations 2020.
 26. According to the 1st Respondent, the instant Application is an appeal against the 1st Respondent's Decision dated 9th May 2023, being disguised as a Judicial Review Application, to which this court is beseeched to dismiss the Application before it for want of jurisdiction to sit on an appeal.
 27. The 1st Respondent maintained that its decision dated 9th May 2023 was reasonable, rational, lawful, fair, within mandate/jurisdiction, and observed rules of natural justice.
 28. That, conversely, the Applicant has failed to demonstrate any elements of illegality, irrationality, procedural impropriety and/or unfairness in the manner in which it (1st Respondent) considered and interrogated the evidence, documents, pleadings, and information before it, in arriving at its Decision dated 9th May 2023; and in the manner parties to the Request for Review were notified of the completion of the review of Request for Review application by the 1st Respondent.
 29. The 1st Respondent sought for the Notice of Motion dated 26th May 2023 to be dismissed with costs; and that in the event, this Honourable Court finds that the instant Application is merited, that the matter be referred back to it (1st Respondent) for determination.



30. Conversely, the 1st Respondent filed their written submissions dated 26th June 2023, opposing the Applicant's case. It was their submissions that it (1st Respondent) in arriving its final orders, that they considered all the issues of determination which emanated from parties, cases documents, and pleadings.
31. That it (1st Respondent) also found that the Procuring Entity did not comply with the provisions of Section 87 of the Act read with Regulation 83 of the Regulations when notifying the tenderers of the outcome of the procurement process; and that the Notification of the Intention to Award did not meet the threshold required under section 87(3) of the Act.
32. The 1st Respondent maintained that it exercised its mandate with jurisdiction as per Section 173 of the Act (The *Public Procurement and Asset Disposal Act*). The 1st Respondent acted in a manner consistent with the criteria set out in the Tender Document, as read together with the Act and directed the 2nd and 3rd Respondent to comply with the Provisions of Section 87 of the Act.
33. The Respondent argued that this judicial review application is a review of the merits of the decision of the 1st Respondent. In other words, that the Applicant is seeking to have the High Court to overturn the decision of the 1st Respondent. That this is improper because the High Court does not have the authority to overturn decisions of administrative bodies on the merits. The High Court can only review administrative decisions to ensure that they were made in accordance with the law. Therefore, the Application should be dismissed; as a consideration of the merits of the decision will only serve as an appeal and not judicial review remedies. Relied on the cases of R v Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] and Republic v Judicial Service Commission Ex-parte Pareno [2007] 1 KLR.
34. Further, that judicial review orders are discretionary in nature, as a result, the applicant's application for an order of mandamus, irrespective of whether he has met the requisite grounds, is not guaranteed. Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another [2018] eKLR case was relied on.
35. The 1st Respondent conceded that this case falls under the class to which judicial discretion may apply; and that Judicial Review ought not to be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates. That the 1st Respondent through their Affidavit dated 8th June 2023 has succinctly the procedure they used to conduct the due diligence required by Section 83 of the Act (*Public Procurement and Asset Disposal Act*).
36. It was their submission that the 1st Respondent acted according to rules of natural justice - as they followed the procedure. That this is a ground upon which the court could exercise its judicial discretion in dismissing the instant Application. The 1st Respondent beseeched this court to dismiss the Application with costs - on the grounds that the Applicant has failed to demonstrate any elements of illegality, irrationality, procedural impropriety, in the manner in which the 1st Respondent considered and interrogated the evidence, documents, pleadings, and information before it, in arriving at its decision dated 9th May 2023 and in the manner the parties to the request for review were notified of the completion of the review application.

The 2nd and 3rd Respondent's Case

37. In further opposition to the Application, on their part, the 2nd and 3rd Respondents contended that during the fresh due diligence exercise pursuant to the findings of the Board in Application Number 12 of 2023, the 3rd Respondent conducted the evaluation and comparison using the procedures and



- criteria set out in the Tender Documents, thus adhering to Section 80 (2) of the Act, and further in accordance with the findings of the Board during the first review.
38. That as per the findings of the Board, in Application Number 12 of 2023, the first due diligence was unsatisfactory as it was conducted by way of telephone calls and emails; therefore, the Board directed that the fresh due diligence be conducted by way of site visits to verify the information provided by the referees under due diligence forms.
 39. The 2nd and 3rd Respondents averred that in the Application for review, by way of a further affidavit, the Ex-parte Applicant herein purported to introduce sworn statements which constituted new/ fresh evidence that were not availed to the Evaluation Committee during the fresh conduct of due diligence.
 40. That the board's decision was fair and in conformity with the law as allowing the Ex-parte Applicant to present new information supplied after due diligence in order to impugn the due diligence exercise would be unreasonable, unfair, and unjust and against the spirit of Article 227 of *the Constitution*.
 41. That the 2nd and 3rd Respondent stated that the Applicant provided five (5) referees whereas the tender document provided for three (3) referees. The 3rd Respondent conducted due diligence on four (4) referees, one above the required three (3); out of which two (2) of the Ex-parte Applicant's referees did not meet the prescribed threshold.
 42. To the 1st and 2nd Respondent, the Applicant's expectation that the 3rd Respondent ought to conduct due diligence on all five (5) of the referees provided is unrealistic and unreasonable in the light of the tender criteria. Therefore, that the 1st Respondent's decision is reasonable, lawful, upheld the public procurement standards, and is in line with the tender criteria - as the 3rd Respondent was only obligated to carry out due diligence on three (3) referees.
 43. The 2nd and 3rd Respondent stated that an application in judicial review jurisdiction has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety; and that in the instant matter, the Ex-parte Applicant has not pleaded with specificity and/or demonstrated the illegality, irrationality, and procedural impropriety of the 1st Respondent's decision - but instead invites the Honourable Court to carry out the procurement exercise by way of due diligence on its own.
 44. Further, in opposing the Applicant's case, the 2nd and 3rd Respondent filed their written submissions dated 26th June 2023, where it was their submission that while discharging its supervisory role and adjudication on judicial review proceedings, this Honourable court does not conduct a fresh trial by going into the merits of the case, but should limit itself (court) to checking for illegality, irrationality, procedural impropriety, and proportionality. Reliance was placed on the Supreme court decision in *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) case.
 45. Further, that for an order of Certiorari to issue, the Applicant ought to have pleaded with specificity and presented enough evidence to show illegality, irrationality, procedural impropriety and proportionality of the Respondent's decision dated 9th May, 2023. That illegality, irrationality, and procedural impropriety has been defined in the locus classicus case of *Pastoli v Kabale District Local Government Council & Others* (2008) 2 EA 300. And, that the instant Application does not meet the criteria/test to merit grant of the orders sought. Relied on the case of *Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited* (2018) eKLR.
 46. The 2nd and 3rd Respondents contended that the starting point is that 1st Respondent, through a decision delivered in Application Number 12 of 2023, the first due diligence was unsatisfactory as it was conducted by way of telephone calls and emails. Consequently, it directed that directed the fresh



- due diligence be conducted by way of site visits to verify the information provided by the referees under due diligence forms. That the Applicant was satisfied with this decision, and thus did not challenge it. That following the directions of the 1st Respondent in the said ruling of Application Number 12 of 2023, the 3rd Respondent conducted fresh due diligence.
47. That whereas the Applicant had now submitted that the due diligence forms introduced different criteria not in the tender document, this issue was not raised before the 1st Respondent. The Respondents stated that due diligence forms were supplied to the Applicant, who upon perusing them, did not object or challenge them; but, rather opted to file affidavits producing more information on the questions asked in the due diligence forms. That the issue was not adjudicated upon by the Respondent, and thus cannot be a ground for review.
 48. That should this Honourable Court peruse the contents of the due diligence forms, it will establish that the said forms only sought to establish that the tenderers met the requirements of the tender specifically satisfactorily serving more than 500 persons in an organization.
 49. It was posited that it is undisputed that the obligation of conducting due diligence on tenderers is on the Evaluation Committee of the procuring entity; and that neither this court nor the 1st Respondent can purport to conduct such due diligence. That Section 76 (2) of the Act forbids modification of bids and/or supply of more documents and/or information after the tender submission deadline; as such, that the Affidavits introduced more information, and thus a modification of the bids post tender submission deadline.
 50. That the Applicant invited the 1st Respondent to conduct due diligence, which is a preserve of the Evaluation Committee. That in an effort to convince the 1st Respondent that they met the requirements of the tender documents, the Applicant availed new information (in form of affidavits, bank statements etc.) to the Board, which information was not provided to the Evaluation Committee at the due diligence stage, and neither were part of the Applicant's bid document.
 51. To the Respondents, the Applicant was then asking the Board, to evaluate the tender based on the new information and make a finding that the Procuring Entity (who was not provided with the information brought before this Honourable Board), did not make a proper decision. That the 1st Respondent upheld the law properly by disregarding the new information provided. In any event, that the said information was contradictory to what was established in the due diligence.
 52. The 2nd and 3rd Respondents submitted that the Applicant has not made a case to justify the grant of (prayers sought) mainly, an order quashing of the 1st Respondent's decision dated 9 May, 2023. Also, that the Application is frivolous and filed out of bad faith, arguable case presented.
 53. In the end, that the Applicant has not shown that the 1st Respondent's decision was based on illegality, irrationality, procedural impropriety, and proportionality; and thus that the Application be dismissed with cost.
 54. From the pleadings and the submissions of the parties, following are the issues for determination:
 - i. Whether due process was followed by the Review Board in arriving at the decision.
 - ii. Whether the application is an appeal disguised as a judicial review application.
 - iii. Whether the applicants have made out a case deserving the orders of judicial review as sought.



Analysis And Determination

55. The grounds for granting of judicial reviews orders were well discussed in the Ugandan case of Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300, that:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).”

56. The court further stated that,

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

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re an Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

57. It was the Applicant’s position that 2nd due diligence exercise, lacked credibility based on the introduction of a different criterion not recognised and/or provided for by the tender document, through the impugned due diligence forms that did not provide room for the Applicant’s referees to elaborate the extent of services provided.
58. According to the 1st Respondent, the instant Application is an appeal against the 1st Respondent’s Decision dated 9th May 2023, being disguised as a Judicial Review Application, to which this court is beseeched to dismiss the Application before it for want of jurisdiction to sit on an appeal.
59. The 2nd and 3rd Respondent averred that, as per the findings of the Board, in Application Number 12 of 2023, the first due diligence was unsatisfactory as it was conducted by way of telephone calls and emails; therefore, the Board directed that the fresh due diligence be conducted by way of site visits to verify the information provided by the referees under due diligence forms.
60. The 2nd and 3rd Respondents averred that in the Application for review, by way of a further affidavit, the Ex-parte Applicant herein purported to introduce sworn statements which constituted new/ fresh evidence that were not availed to the Evaluation Committee during the fresh conduct of due diligence.



61. That the board's decision was fair and in conformity with the law as allowing the Ex-parte Applicant to present new information supplied after due diligence in order to impugn the due diligence exercise would be unreasonable, unfair, and unjust and against the spirit of Article 227 of *the Constitution*.
62. The 2nd and 3rd Respondents stated that the Ex-parte Applicant has not pleaded with specificity and/or demonstrated the illegality, irrationality, and procedural impropriety of the 1st Respondent's decision - but instead invites the Honourable Court to carry out the procurement exercise by way of due diligence on its own.
63. The Applicant argued that the 1st Respondent ought to have been satisfied that the 2nd and 3rd Respondents whilst conducting the second (2nd) due diligence exercise, ought to have limited themselves to verifying the information provided in the signed contracts and/or award letters and/or purchase orders between the Ex-Parte Applicants and its referees, to confirm that indeed the said referees had more than 500 employees for the period commencing 2019 to 2022 in strict compliance of the tender criteria.
64. The Applicant is seeking to have the High Court to overturn the decision of the 1st Respondent. That this is improper because the High Court does not have the authority to overturn decisions of administrative bodies on the merits. The High Court can only review administrative decisions to ensure that they were made in accordance with the law. Therefore, the Application should be dismissed; as a consideration of the merits of the decision will only serve as an appeal and not judicial review remedies
65. The first due diligence was unsatisfactory as it was conducted by way of telephone calls and emails. Consequently, it directed the fresh due diligence be conducted by way of site visits to verify the information provided by the referees under due diligence forms. That the Applicant was satisfied with this decision, and thus did not challenge it.
66. The Respondents stated that due diligence forms were supplied to the Applicant, who upon perusing them, did not object or challenge them; but, rather opted to file affidavits producing more information on the questions asked in the due diligence forms. That the issue was not adjudicated upon by the Respondent, and thus cannot be a ground for review. It is this court's finding that an analysing and coming up with a decision pegged on fresh affidavits containing more information at this stage would have occasioned untold prejudice to the other parties who had no room or opportunity to interrogate the said evidence. This would amount to a violation of the other tenderers right to fair administrative action as guaranteed under Article 47 of *The Constitution*.
67. Section 76 (2) of the PPAD Act forbids modification of bids and/or supply of more documents and/or information after the tender submission deadline. The Affidavits introducing more information, would have led to an illegal modification of the bids post tender submission deadline. I find that the 1st Respondent upheld the integrity of the due diligence process in the way it handled the issue of the additional affidavits and the 1ST Respondent did not act illegally as to warrant the issuance of the judicial review orders that the Applicant is seeking.
68. Had the 1st Respondent dealt with the issue of the additional affidavits differently, then that would have offended and generate a due diligence process that would go against the spirit of Article 227 (1) of *The Constitution* which provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost- effective. Had the respondent allowed the process to go as requested by the Exparte Applicant, then the exercise would have ended up being unfair to the others.



69. Section 83(1) of the *Public Procurement and Asset Disposal Act* provides that an evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act. (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had a prior engagement.
70. I have looked at the 1st Respondent Affidavit dated 8th June 2023 and The Applicants submissions on the procedure adopted in the 2nd due diligence and I am satisfied that the procedure used to conduct the due diligence was within the dictates of Section 83 of the *Public Procurement and Asset Disposal Act*.
71. The Applicant has not tendered sufficient evidence to prove how the 1st Respondent acted with Procedural impropriety or failure to act fairly while arriving at the impugned decision. The Applicant has not proven any non-observance of the Rules of Natural Justice on the part of the 1st respondent in how it carried out the 2nd due diligence exercise. It is this court's finding that the 1st Respondent adhered and observed procedural rules expressly laid down in The PPAD Act 2015.
72. The 1st Respondent opposed the Application based on the case of R v Kenya Revenue Authority Ex parte Yaya Towers Limited [2008], the court held that judicial review is not about reviewing the merits of a decision, but rather the decision-making process itself. This means that the court will not overturn a decision simply because it disagrees with the outcome. Instead, the court will only overturn a decision if the decision-making process was flawed. For example, the Court might overturn a decision if the decision-maker did not consider all of the relevant factors, or if the decision-maker was biased.
73. However judicial review has since morphed as a result of which in my analysis, I have been guided by the Supreme Courts' finding in the case of Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) the Supreme court held as follows:

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



76. Be that as it may, it is the court's firm view that the intention was never to transform judicial review into 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 specialized 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."

Disposition

74. It is this court's finding that all parties including the Exparte Applicant were allowed to present their respective cases and reserved the 2nd review for determination before the Board on 9th May 2023.
75. This court finds and I so hold that the decision of the Public Procurement Administrative Review Board dated 9th May 2023 delivered in the Ex-parte Applicant's PPARB Request for Review Application No. 25 of 2023, Royal Taste Kitchen Limited v The Accounting Officer National Social Security Fund & 2 Others and more particularly the finding that the 2nd and 3rd Respondents while conducted the second due diligence exercise was in compliance with the subject tender document and Section 83 of *Public procurement and Asset Disposal Act* (PPADA) and Sections 3, 7, 9, 10, 11 and 12 of The *Fair Administrative Action Act* dictates.
76. Section 173 (b) of The *Public Procurement and Asset Disposal Act* mandates the Review Board that:- Upon completing a review, the Review Board may inter alia give directions to the accounting officer of a procuring entity with respect to anything be done or redone in the procurement or disposal proceedings. In directing the 2nd and 3rd Respondent to comply with the Provisions of Section 87 of the Act, the 1st Respondent was within its mandated and reasonably within the Criteria set out in the Tender Document as read together with the Act and it cannot be faulted.
77. The Application within the framework of Order 53 of The Civil Procedure Rules and the same is not an appeal disguised as a judicial review application. However, the applicants have not made out a case deserving the orders of judicial review as sought.
78. From the foregoing, I find that due process was followed by the Review Board in arriving at the impugned decision.



Order

The Notice of Motion dated 26th May, 2023 lacks merit and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH* DAY OF JULY, 2023.

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JOHN CHIGITI (SC)

JUDGE

