



**Republic v Public Procurement Regulatory Debarment Committee & 2 others; Kisii Teaching and Referral Hospital (Interested Party); Babs Security Services Limited (Exparte) (Application E130 of 2021) [2023] KEHC 22525 (KLR) (Judicial Review) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22525 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION E130 OF 2021  
J NGAAH, J  
SEPTEMBER 25, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PUBLIC PROCUREMENT REGULATORY DEBARMENT COMMITTEE .... 1<sup>ST</sup> RESPONDENT**

**PUBLIC PROCUREMENT REGULATORY BOARD ..... 2<sup>ND</sup> RESPONDENT**

**PUBLIC PROCUREMENT REGULATORY AUTHORITY .... 3<sup>RD</sup> RESPONDENT**

**AND**

**KISII TEACHING AND REFERAL HOSPITAL ..... INTERESTED PARTY**

**AND**

**BABS SECURITY SERVICES LIMITED ..... EXPARTE**

**JUDGMENT**

1. The motion before court is dated 4 October 2021. The applicant seeks judicial review orders of certiorari and prohibition. The prayers for these orders have been phrased as follows:
  1. An order of certiorari to remove the proceedings and the decision of the 1<sup>st</sup> respondent dated 15<sup>th</sup> September, 2021 to the High Court for the purposes of being quashed.



2. An order of prohibition to prohibit the 3<sup>rd</sup> respondent from publishing and forwarding to the cabinet secretary the details of the ex parte applicant and the corresponding period of debarment for gazettelement.”
2. The application is expressed to be brought under Article 23 (3) (f) and 165(6) and (7) of *the Constitution* and Order 53 Rule 3 of the Civil Procedure Rules.
3. It is based on a statutory statement dated 29 September 2021 and an affidavit sworn on even date by Isaac Muchiri Wambui in verification of the facts relied upon.
4. According to these documents, on 7 May 2021, the interested party invited tenders for provision of security services. The tender was more particularly described as “Tender for Provision of Security Services (No. KTRH/19/2021-2023).
5. Among the mandatory conditions stipulated in the tender document which the tenderers were to comply with was the requirement of their membership with an association called Protective Security Industry Association. According to the applicant, this requirement was unreasonable because membership in this association is voluntary and it was also contrary to section 55(1) and 60(2) of the *Public Procurement and Asset Disposal Act*, 2015 and the *Private Security Regulation Act*, 2016.
6. The applicant three notifications on the outcome of the procurement process. One of them was dated 22 June 2021 according to which the applicant was informed that its tender was none-responsive because the Protective Security Industry Association certificate which the applicant provided was invalid. According to the applicant, it was a stranger to this particular certificate and it denied having presented it as one of its bid documents.
7. On 25 August 2021, the applicant received the 1<sup>st</sup> respondent’s notice of intended debarment and directions. Enclosed in this letter was a copy of a Protective Security Industry Association certificate number 790 dated 3 January 2021 which the applicant claims to have had no knowledge of.
8. According to the applicant, the 1<sup>st</sup> respondent had no basis or evidence to come to the conclusion that there was a prima facie case for debarment and its finding that there was such a case was illogical. Nevertheless, on 27 August 2021, the applicant filed a response to the 1<sup>st</sup> respondent’s notice of intended debarment and directions and contested the facts of the intended debarment.
9. Thereafter, the 1<sup>st</sup> respondent gave the applicant a notice of 7 days to appear before it for debarment hearing. However, the 1<sup>st</sup> respondent did not hold a debarment hearing and therefore it did not take any evidence from the parties so as to make a report of findings or recommendations to the 2<sup>nd</sup> respondent.
10. On 21 September 2021, the applicant received from the 1<sup>st</sup> respondent a final decision dated 15 September 2021 purporting to debar the applicant for a minimum of 3 years. The applicant contends that the notice was not given promptly and no reason was given for the delay in communicating to the applicant.
11. It is sworn that in the absence of a debarment hearing, the applicant was denied the opportunity to cross-examine members of the interested party’s tender committee, the procurement directorate and evaluation committee and the IT service manager on the source of the Protective Security Industry Association certificate number 790 dated 3 January 2021.
12. It is the applicant’s contention that the 1<sup>st</sup> respondent’s decision was illogical because it was made without consideration of any cogent evidence on the source of the impugned certificate.



13. It is also alleged that by the barring the applicant, the 1<sup>st</sup> respondent exceeded its powers to hold debarment hearings, record its findings and make recommendations to the 2<sup>nd</sup> respondent.
14. As far as the 2<sup>nd</sup> respondent is concerned, the applicant contends that it abdicated its statutory responsibility by failing to review the mandate of the 1<sup>st</sup> respondent's decision with respect to its delegated authority, operations and reporting mechanisms.
15. Pauline Opiyo swore a replying affidavit on behalf of the 3<sup>rd</sup> respondent. She has stated that the 3<sup>rd</sup> respondent is a regulatory authority established under section 8 of the *Public Procurement and Asset Disposal Act, 2015* and it has the statutory mandate to ensure that procurement procedures prescribed by the Act are complied with.
16. The 3<sup>rd</sup> respondent executes its mandate through its regulatory board under section 41 of the Act as read with regulation 22 of the Public Procurement and Asset Disposal Regulations, 2020 in proceedings to debar any person who flouts section 41 of the Act.
17. In exercise of this mandate, the 3<sup>rd</sup> respondent received a request for debarment from the interested party dated 12 July 2021. The request was filed with the 3<sup>rd</sup> respondent on 15 July 2021.
18. The request for debarment was considered by the 1<sup>st</sup> respondent in accordance with regulation 22 (5) (a) and (b) of the regulations which provides that upon receipt of a request for debarment, the board shall analyse the case within 30 days to determine whether there is a prima facie case for debarment. If the analysis establishes such a case, the board shall issue a notice of intended debarment to the party against whom the debarment proceedings are instituted requiring him or her to file a written response with the board.
19. After the analysis of the request for debarment, the 1<sup>st</sup> respondent found that there was a prima facie case and issued a notice of intended debarment dated 10 August 2021 to all the parties involved with the direction that

“the respondent is granted fourteen (14) days from the date of service of this notice and directions to file and serve its written response. Upon service of the said response or in default thereof, the applicant herein shall file and serve the respondent with submissions together with further response(s) (if any) within seven (7) days. The respondent shall thereafter file and serve its reply submissions within 7 days of service of the submissions by the applicant. The committee shall thereafter consider the filed pleadings and submissions and issue its decision”.
20. In compliance with the directions given, the applicant and the interested party, filed the necessary documents which were then considered by the 1<sup>st</sup> respondent and a final decision made on 15 September 2021.
21. The 3<sup>rd</sup> respondent has denied the allegation that the 1<sup>st</sup> respondent did not have evidence to analyse and make a determination. To the contrary, the 1<sup>st</sup> respondent considered the bid document which was produced by the interested party and in particular, the mandatory requirement no. 7 according to which bidders were to be registered members of Protective Security Industry Association. The basis of the interested party's case was that the applicant provided a certificate of registration with Protective Security Industry Association which was found to be a forgery. The certificate was held to be a forgery because it was disputed by the Protective Security Industry Association and also because the applicant was not a paid up member of the Association. In coming to its determination, the 1<sup>st</sup> respondent



- also considered the correspondence between the interested party and the Protective Security Industry Association.
22. The 1<sup>st</sup> respondent is also said to have been guided by the law in its deliberations and determination. In particular, it was guided by the provisions of section 41 of the Act which outline the grounds for debarment. According to section 41 (1) (d) of the Act, the board is entitled to debar a person from participating in procurement or asset disposal proceedings on the ground that the person has, in those proceedings, given false information about his or her qualifications.
  23. As far as the rules of evidence are concerned, it has been sworn that the 1<sup>st</sup> respondent is not bound by the strict rules of evidence and procedure. Rather, it is independent in making its decisions on how to proceed with the disposition of the different matters before it depending on the dynamics of each case.
  24. Accordingly, the 1<sup>st</sup> respondent's notice of intended debarment and directions dated 10 August 2021 directed that the debarment application would be disposed of by way of written dispositions instead of viva voce evidence. The notice was specific that

“in view of the Ministry of Health directive on the safeguards to be observed to curb the spread of Covid-19 pandemic, this committee shall consider this matter on the basis of the pleadings and written submissions filed by the parties and virtually where necessary.”
  25. As far as the communication of the debarment decision to the applicant is concerned, it has been sworn that the decision was communicated promptly and, in any event, the applicant has not expressed any prejudice which was occasioned upon it as a result of the manner and time when the debarment decision was communicated.
  26. According to Opiyo, the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted within their mandate and in accordance with section 41 of the Act and that they did not exceed their powers in any manner as alleged by the applicant. There is, therefore, nothing which is not procedural or is otherwise unlawful with the conduct of the respondents in the impugned debarment proceedings as to invite this Honourable Court to fault the proceedings.
  27. It has been urged that where *the Constitution* has allocated certain powers and functions to various bodies and tribunals, these bodies should be left to discharge their mandate as long as they comply with the law.
  28. Only the applicant made oral submissions in this application. Its learned counsel, Mr. Gachuba, urged that in reaching its decision, the 1<sup>st</sup> respondent flouted regulation 22 (5), paragraphs e,f, and i of the Public Procurement and Asset Disposal Regulations and also Article 47 of *the Constitution* as read with section 4(1) of the *Fair Administrative Action Act*, No. 4 of 2015. According to the learned counsel, the 1<sup>st</sup> respondent's decision was tainted by procedural unfairness to the extent that it was no accorded opportunity to cross-examine the interested party's witnesses.
  29. It was also urged that the applicant was not given any notice of the hearing of the debarment proceedings.
  30. On this same question of procedural unfairness, it was urged on behalf of the applicant that the 1<sup>st</sup> respondent did not comply with regulation 22(5) of the regulations. Although the decision was made on 15 September 2021, it was not until 21 September 2021 that it was communicated to the applicant.
  31. On the issue of illegality, it was urged that the decision was made by a committee of the board. According to the applicant, the 1<sup>st</sup> respondent could only make recommendations and not debar the applicant. By debarring the applicant, the 1<sup>st</sup> respondent usurped the powers of the 2<sup>nd</sup> respondent.



32. The 1<sup>st</sup> respondent is also alleged not to have considered relevant facts and, in that regard, acted contrary to regulation 80 of the regulations.
33. According to the statutory statement, the grounds of judicial review upon which reliefs are sought are those illegality and procedural impropriety. These two grounds together with the ground of irrationality were defined and explained 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.

By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By “irrationality” I mean what can by now be succinctly referred to as “*Wednesbury* unreasonableness” (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. 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.”

34. In this matter, I am only concerned about whether the 1<sup>st</sup> respondent’s decision dated 15 September 2021 is tainted by illegality and procedural impropriety which, as noted, are the grounds upon which the applicant seeks reliefs for certiorari and prohibition.
35. In considering whether the applicant deserves the exercise of this Honourable Court’s discretion in its favour, the questions that must be asked, as of necessity, are first, whether, in coming to its decision, the 1<sup>st</sup> respondent understood correctly the law that regulates its decision-making power and whether it gave effect to it. If it did not, the decision would be tainted by illegality.
36. Secondly, it is necessary to consider whether the 1<sup>st</sup> respondent observed rules of natural justice or acted with procedural fairness towards the applicant in the proceedings that culminated in the impugned decision.
37. The answer to those questions revolve around the legal mandate of the 3<sup>rd</sup> respondent and the prescribed procedure for the conduct of its business in execution of its mandate.
38. Of the three entities named as respondents in this suit, the 3<sup>rd</sup> respondent is the only entity that can sue and be sued in its own name. It is established under section 8 of the *Public Procurement and Asset Disposal Act*. Its capacity to sue and to be sued is expressed in section 8(1) (a). These provisions read as follows:
  8. The Public Procurement Regulatory Authority
    - (1) There is established an authority to be known as the Public Procurement Regulatory Authority which shall be a body corporate with perpetual succession and a common seal and shall in its corporate name, be capable of—
      - (a) suing and being sued;
39. The Authority’s functions are stipulated in section of the 9(1) of the Act. They are nineteen functions listed in this section but the list is not exhaustive because section 9(1)(s) is to the effect that besides the listed functions, the Authority shall perform such other functions and duties as are provided for under the Act and any other relevant law.
40. The function relevant to the dispute before court is listed in section 9(1) (h). The Authority’s function here is expressed as:
  - (h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review.
41. No doubt the complaint against the applicant before the 3<sup>rd</sup> respondent and the latter’s action on the complaint culminating in the decision that is now the subject of these proceedings must have been informed by this provision of the law.
42. According to section 10 (1) of the Act, the management of the Authority vests in a board known as the Public Procurement Regulatory Board. Its functions are listed in section 12 of the Act and, generally speaking, they are all calculated to enable the board execute the Authority’s mandate. Section 10 (2) is also of relevance to the issues at hand because it empowers the board to delegate its functions or powers to a committee or to any other agent of the Authority. It reads as follows:

10.



- (2) Subject to this Act, the Board may, by resolution either generally or in any particular case, delegate to any committee of the Board or to any member, officer, employee or agent of the Authority, the exercise of any of the powers, or the performance of any of the functions or duties of the Board under this Act.
43. One of the committees to which the board has delegated some of its powers and functions is the debarment committee. According to regulation 22 paragraph 4, the debarment committee established by the board is empowered to hear and determine debarment requests that have been submitted to and admitted by the Authority. The paragraph reads as follows:
- (4) The Board shall constitute a debarment committee to hear and determine debarment requests that have been submitted to the Authority.
44. Up to this point, it is apparent that the only entity capable being sued is the 3<sup>rd</sup> respondent. The board and the debarment committee have no standing of their own as to be named in this suit as independent parties. They are at most, functional arms or components of the Authority.
45. More importantly though, is the understanding that, contrary to the applicant's submissions, the debarment committee validly exercises delegated authority and was therefore competent to hear and determine the complaint lodged against the applicant by the interested party. In other words, the debarment committee was validly seized of debarment request and the proceedings that ensued.
46. Talking of debarment, it is provided for under section 41 of the Act. According to this section, the board shall debar any person from participating in procurement or asset disposal proceedings on any of the grounds listed in this provision of the law. Under subsection (4), a debarment under section 41 shall be for a specified period of time of not less than three years.
47. As far as the procedure for initiating and conducting debarment proceedings are concerned, subsection (5) states that the procedure is prescribed by the regulations. Indeed, regulation 22 prescribes, among other things, how a requests for debarment ought to be made and the manner the proceedings will take. Considering that the question of propriety of the procedure adopted by the debarment committee has been brought to the fore and, in my humble view, is the linchpin around which the applicant's application revolves, it is necessary that I reproduce the entire regulation here; it reads as follows:

22.

- (1) A request for debarment may be initiated—
- (a) by the accounting officer of a procuring entity, or any other person with knowledge of facts that may support one or more grounds for debarment;
  - (b) by the Director-General on his or her own motion based on findings from investigations, inspections, or reviews; or
  - (c) on the recommendation of a law enforcement agency with an investigative mandate.
- (2) Where the request for debarment is initiated through the recommendation of a law enforcement agency with an investigative mandate, or by an investigator duly appointed by the Authority on its own motion, the Board shall notify the person of the intended debarment and provide details of the findings of the investigator or law enforcement agency.
- (3) The request for debarment shall be made in the format provided in the First Schedule.



- (4) The Board shall constitute a debarment committee to hear and determine debarment requests that have been submitted to the Authority.
- (5) For purposes of section 41(5) of the Act and this regulation, debarment procedures shall be as follows—
  - (a) upon receipt of a request for debarment, the Board shall analyze the case within thirty days to determine whether there is a prima facie case for debarment;
  - (b) if the analysis establishes a prima facie case for debarment, the Board shall issue a notice of intended debarment to the party, who shall be the subject of the debarment proceedings requiring him or her to file a written response with the Board;
  - (c) the notice of intended debarment issued under paragraph (b) shall contain the grounds of debarment, a brief statement of the facts in support of debarment and the consequences that may arise from the debarment;
  - (d) the respondent shall within fourteen days of receipt of a notice of intended debarment, file a written response with the Board;
  - (e) where the facts of the intended debarment are contested, the debarment committee shall within twenty-one days of receipt of the response in paragraph (d) hold a debarment hearing to determine the disputed facts;
  - (f) a seven (7) days' notice shall be given to the parties to appear before the debarment committee;
  - (g) the debarment committee shall prepare a report of its findings and recommendations, and make a determination on the request for debarment within thirty days from the date of hearing;
  - (h) where the request for debarment is approved, such debarment shall be for a period of not less than three years;
  - (i) the decision to debar a person shall promptly be communicated to the parties involved in the debarment proceedings;
  - (j) after the expiry of twenty-one days from the date of the debarment decision, the Authority shall publish the details of the person debarred and the corresponding period of debarment;
  - (k) the Authority shall forward the details of the debarred person to the Cabinet Secretary for gazette.
- (6) A decision to debar a person shall not relieve the debarred person of the obligations under any contract entered into with a procuring entity before the debarment.
- (7) Debarment of a person shall also apply to the successor in interest of the debarred person and where the debarred person is a company or partnership, the debarment shall apply to the directors and partners of that company or partnership.
- (8) Where a person is debarred from participating in procurement proceedings under section 41 of the Act, the debarment shall extend to any legal entity in which the debarred person has a controlling interest.



49. The interested party, as the procuring entity initiated the debarment proceedings as it is entitled to under regulation 22. (1) (a). There is no dispute, and it has not been suggested that the request for debarment was not made in accordance with the format provided in the First Schedule to the Act as required under paragraph (3). No doubt, the debarment committee that disposed of the request for debarment was constituted by the board in accordance with paragraph (4).
50. Pauline Opiyo swore that upon receipt of the request for debarment, the debarment committee analysed the case within thirty days and determined that there was a prima facie case for debarment. The board then issued a notice of intended debarment to the applicant requiring it to file a written response.
51. A copy of the notice exhibited to the applicant's affidavit shows that it contained what can properly be regarded as the grounds of debarment, a brief statement of the facts in support of debarment. However, it did not state the consequences that may arise from the debarment. Considering that this is a mandatory requirement under regulation 22(5)(c) I would opine that this omission vitiated the notice.
52. Nonetheless, the applicant filed its response within fourteen days of receipt of a notice of intended debarment.
53. It is contested that the debarment committee set down the dispute for hearing as required under regulation 22 (5) (e) considering that the facts were contested. The applicant claims that he was never heard. I will return to this issue in due course.
54. The seven days' notice to be issued to parties before appearing before the committee required under paragraph 5(f) is directly linked to the requirement for hearing under paragraph 22(5) (f) and therefore I will deal with the two of them together.
55. The debarment committee's decision dated 15 September 2021 would fit the description of the report contemplated under paragraph 22(5)(g). It was made within the prescribed timeline and the punishment meted against the interested party is consistent with the sentence prescribed in paragraph 22 (5)(h).
56. From the evidence available, the decision was communicated to the applicant almost week after it was made. Indeed, I agree with the applicant that the Authority could have done much better but I would not consider a delay of six days to be inordinate in the circumstances. In any event, the applicant has not demonstrated that it suffered any prejudice as a result of the delay.
57. The rest of the paragraphs in regulation 22 are more about the events after the conclusion of the debarment proceedings and are not really in issue in this application. It is also worth noting that when the court granted leave to file the instant motion, the leave was to operate as stay of any further action on the Authority's determination until this suit has been heard and determined.
58. So, on the face of it, the procedural requirements under regulation 22 were largely complied with. However, for reasons that will become apparent in due course, the few aspects of that regulation that were not are, in my humble view, fundamental enough to taint the entire process and ultimately the resultant decision.
59. One of the applicant's contentions that has drawn my attention is that it was not given an opportunity to cross-examine the interested party on a document which the applicant is alleged to have forged and which was the basis of the request for debarment. On the one hand, the interested party claimed that the document which was described as certificate no. 790 from Protective Security Industry Association



purporting to show that the applicant was a member of this association was among the documents which the applicant presented in its bid for the subject tender.

60. On the other hand, that applicant denied being privy to this document contending that it presented a certificate from another association-the Kenya Security Industry Association showing that the applicant was a member of this association. As I understand the applicant, the certification of its membership to the Kenya Security Industry Association was sufficient enough to meet the mandatory requirement in the tender document according to which bidders were required to prove their membership to the Protective Security Industry Association.
61. The resolution of this dispute on facts would squarely fall under regulation 22(5) (e) of the regulations. This particular paragraph reads as follows:
  - (e) where the facts of the intended debarment are contested, the debarment committee shall within twenty-one days of receipt of the response in paragraph (d) hold a debarment hearing to determine the disputed facts.
62. According to the 3<sup>rd</sup> respondent, a “hearing” was held in accordance with this regulation. And how was the hearing conducted? The answer to this question is found in paragraph 14 of the affidavit of Pauline Opiyo. She swore as follows:
  14. That it is in view of the above that in its Notice of Intended Debarment and Directions dated 10<sup>th</sup> August, 2021 and produced herein as annexure “PO 1” that the 1<sup>st</sup> respondent thought it prudent when it directed that the debarment application herein would be disposed by way of written submissions as against viva voce evidence. In paragraph 6 of the Notice of Intended Debarment, the 1<sup>st</sup> respondent directed that, “In view of the Ministry of Health directives on the safeguards to be observed to curb the spread of Covid-19 pandemic, this committee shall consider this matter on the basis of the pleadings and written submissions filed by the parties and virtually where necessary”.
63. The question that arises is whether by relying on written submissions without according the applicant an opportunity to cross-examine the interested party, the 3<sup>rd</sup> respondent can be said to have accorded the applicant procedural fairness.
64. In answering this question, I must start by stating that fair hearing or the right to be heard does not necessarily connote oral hearing.
65. In their book, *Judicial Review of Administrative Action*, 5<sup>th</sup> Edition at page 437, para 9-012 to 9-013, De Smith, Woolf & Jowell have addressed this point and stated as follows:

“A fair ‘hearing’ does not necessarily mean that there must be an opportunity to be heard orally. In some situations, it is sufficient if written representations are considered...Although the general position is that if a person is entitled to be heard, then prima facie he is entitled to put his case orally, there have been a number of contexts where the courts have held that the requirements of fairness have been satisfied by an opportunity to make written representations to the deciding body.”
66. In *Bushell versus Secretary of State for the Environment* (1981) AC 75 Lord Diplock warned against applying to procedures involved in the making of administrative decisions concepts that are



appropriate to the conduct of ordinary civil litigation between private parties. The learned judge noted at paragraph 97B-D of the judgment as follows:

“To over-judicialise’ the inquiry by insisting on observance of the procedures of our court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair. It would, in my view, be quite fallacious to suppose that at an enquiry of this kind the only fair way of ascertaining matters of fact and expert opinion is by the oral testimony of witnesses who are subjected to close examination... Such a procedure is peculiar to litigation conducted in courts of justice that follow the common law system of procedure...”

And in *Mahon versus Air New Zealand Ltd* (1984) AC 808, 821A Lord Diplock noted that

“the technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice.”

67. Finally, in *Furnell versus Whangarei High Schools Board* (1973) AC 660 Lord Morris had this to say at page 679G:

“It has often been pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules... Natural justice is but fairness writ large and juridically. It has been described as ‘fair play in action’. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker LJ in *Russell versus Duke of Norfolk* (1949) 1 ALL ER 109 at 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.”

68. What these authorities point to is the conclusion that natural justice principles are entirely contextual and the question whether the requirements of natural justice have been satisfied by the procedure adopted in any given case depends very much on the facts and circumstances of the case in point.

69. So what are the peculiar circumstances of this case?

70. First and foremost, it appears the reference to “hearing” in the regulations means oral hearing. It has been noted that under regulation 22(5) (e), where the facts of the intended debarment are contested, the debarment committee shall within twenty-one days of receipt of the respondent’s response hold a debarment hearing to determine the disputed facts. In my humble view, there is no more appropriate way to determine contested facts than calling for oral hearing where the evidence of the parties can be tested by way of cross-examination.

71. The conclusion that oral hearing is what is contemplated in debarment proceedings is further cemented by rule 22 (5) (f) which states that:

(f) a seven (7) days’ notice shall be given to the parties to appear before the debarment committee;

72. The seven days’ notice referred to in the foregoing is the notice to parties to appear before the debarment committee for hearing. And it is logical to assume, that the “appearance” here is by parties in person or by their duly appointed representatives. And when they appear, their appearance is not cosmetic—they appear so that they can participate in the debarment proceedings either by way of giving evidence or by cross-examining or being cross-examined on the evidence presented or for such like purposes. I must not be mistaken to be saying that parties cannot make written representations. Indeed, they can but when they do, the burden is on the debarment committee to ensure that the purpose



for which regulation 22(5)(e) was made has been served. In other words, no party should be left to feel that he was not accorded a fair hearing or an opportunity to be heard and therefore his position was prejudiced because he could not participate in the proceedings in the manner contemplated under regulation 22(5)(e) and (f) of the regulations.

73. In the instant case, I am not persuaded that the debarment committee discharged this burden.
74. I note that the debarment committee mentioned the Ministry of Health directives on curbing the spread of the covid pandemic as the reason or one of the reasons that informed its decision to restrict itself to pleadings, affidavits and submissions filed by the parties in considering the case before it.
75. There is no doubt that the directives by the Ministry of Health on mitigation measures to curb the spread of covid were important, but I must add that they could not stand in the way of oral hearing where one was necessary. Oral hearings could still be held subject to observance of certain protocols of health designed to limit physical contact and the spread of the foul virus.
76. Apart from the requirement in the regulations for the oral hearing, my evaluation of the circumstances in this case is that it is the kind of case that called for that sort of hearing. I say so because three notifications on the outcome of the procurement process were given to the applicant. Each of these notifications gave different reasons as to why the applicant's bid failed or was found to be non-responsive. It is only in one notification that the applicant was informed that the certificate it presented was invalid. In the notification dated 15 June 2021, the procuring entity wrote and informed the applicant as follows:

RE: Provision Of Security Services

We refer to your tender and regret to inform you that following evaluation, the tender is unsuccessful. It is therefore not accepted because:

- you were ranked the 2<sup>nd</sup> lowest responsive bidder.

The successful bidder was M/S Secureman Services Limited who quoted a tender sum of Kshs. 10,800,000.00 (Kenya shillings Ten Million Eight Hundred Thousand only) per annum.

However, this notification does not reduce the validity period of your tender security. In this regard, we request you to look at the provisions regarding the tender security, signing of contract and performance security as stated in the instructions to tenderers.

Pursuant to public procurement and disposal (amendment) regulations 2015, you have been given 14 days appeal window from the date of this letter.

We thank you for the interest shown in participating in this tender and wish you well in all your future endeavors.

Yours faithfully,

Signed

Chief Executive Officer

Kisii Teaching & Referral Hospital.

And in the letter dated 22 June 2021, the same author wrote to the applicant on the same subject as follows:

RE: Regret Letter



The subject matter refers.

Following due diligence carried out pursuant to public procurement and disposal (amendment) regulations 2015, 83 (1) on the tender for provision of security services to KTRH, we regret to inform you that your company was unresponsive because:

1. The Protective Security Industry Association (PSIA) certificate you provided was invalid.

Your firm was therefore non-responsive.

We thank you for the interest shown in participating in this tender and wish you well in all your future endeavors.

Yours faithfully,

Signed

Chief executive officer

Kisii Teaching & Referral Hospital

Finally, in the letter dated 28 June 2021, the procuring entity wrote to the applicant and informed it as follows:

RE: Termination Of Procurement Process For Provision Of Security Services To Ktrh Tender Number KTRH/19/2021-2023.

The subject matter refers.

We are writing to notify you about the termination of the above-mentioned tender because it was non-responsive.

Pursuant to [Public Procurement and Asset Disposal Act](#) 2015, you have been given fourteen (14) days' appeal window from the date of this letter.

We thank you for the interest shown in participating in this tender and wish you well in all your future endeavors.

Yours faithfully,

Chief Executive Officer

Kisii Teaching & Referral Hospital

None of these notifications made reference to the other.

77. According section 87 of the [Public Procurement and Asset Disposal Act](#), at the conclusion of the procurement process, the procuring is required to notify the successful bidder that his or her bid is successful. At the same time the procuring entity inform the unsuccessful bidders of the failure of their bids and the reason or reasons for the failure. This section reads as follows:

87.

- (1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.
- (2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.



- (3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.
- (4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security. (Emphasis added).

78. According to this provision of the law, in particular section 87(3), only one letter or notification is sufficient to inform an unsuccessful tenderer that its bid was unsuccessful. It is not provided and, neither is it suggested, that the procuring entity would issue multiple notifications with different reasons for the failed bid to an unsuccessful bidder.
79. This judgment is obviously not about the award made to the successful bidder, but I bring out these issues to demonstrate the fact of issue of three notifications each with its own reason for failure of the applicant's tender was not just contrary to section 87 (3) of the Act but it is a relevant fact which the debarment committee ought to have considered but did not consider. Had the debarment committee considered this fact, it probably might have come to the conclusion that an oral hearing was the most appropriate course for the determination of the question why the three notifications were necessary and, for our purposes, the circumstances under which one of the notifications turned out to be basis for a request for debarment and debarment proceedings against the applicant.
80. In the ultimate, I am satisfied that the 3<sup>rd</sup> respondent's decision is tainted on the grounds of illegality and procedural impropriety. As far as illegality is concerned, the debarment committee may have understood correctly the law that regulates its decision making power, but I am not satisfied that it gave effect to it. I have given my reasons why I am inclined to conclude that the debarment committee did consider relevant matters. As for procedural impropriety, I am persuaded that the debarment committee did not strictly observe and apply the regulations on conduct of the debarment proceedings and, in any event, procedural unfairness was visited upon the applicant to the detriment of its case in response to the allegations levelled against it by the procuring entity.
81. For these reasons, I hereby allow the applicant's application in terms of prayers 1 and 2. Parties will bear their respective costs. It is so ordered.

**SIGNED, DATED AND DELIVERED IN NAIROBI ON 25 SEPTEMBER 2023**

**NGAAH JAIRUS**

**JUDGE**

