Republic v Public Procurement Administrative Review Board & another; Celmel Insurance Agency (Exparte) (Application E111 of 2024) [2024] KEHC 13707 (KLR) (Judicial Review) (18 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13707 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E111 OF 2024

J NGAAH, J

OCTOBER 18, 2024

BETWEEN

REPUBLIC .... APPLICANT

AND

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

CHIEF EXECUTIVE OFFICER SOCIAL HELATH SECURITY .... 2ND RESPONDENT

AND

CELMEL INSURANCE AGENCY .... EXPARTE

JUDGMENT

1. The applicant's application is a motion dated 5 November 2024 filed under Articles 10, 27, 47 and 227 of *the Constitution*; Sections 8 and 9 of the *Law Reform Act*, Cap 26; Sections 7, 8, 9, 10 and 11 of the *Fair Administrative Action Act*, 2015; and Order 53 Rule 1 of the Civil Procedure Rules. The applicant seeks the following orders:

   " a) a) An order of Certiorari quashing the 1st Respondent's decision dated 30th August 2024 in Public Procurement Administrative Review Board Application No. 74 of 2024 for Tender No. SHA/001/2024-2025 for the provision of Insurance Services.

   b) An order of Prohibition directed at the 2nd Respondent prohibiting and restraining it from proceeding with or receiving bids from tenderers in respect

of Tender No. SHA/001/2024-2025 pending the hearing and determination of this application or as this honorable court shall direct.

c) An Order of Mandamus be issued directing the 2nd Respondent to terminate Tender No. SHA/001/2024-2025 and re-advertise the same in compliance with the directions issued by this Court, *the Constitution*, Public Procurement and Assets Disposal Act and the Regulations, 2020."

The applicant has also sought for costs of the application.

2. The application is based on a statutory statement dated 4 September 2024 and an affidavit verifying the facts relied upon sworn on even date by Mr. Festus Wanjohi who has introduced himself as the applicant's Chief Executive Officer.

3. According to these documents, Social Health Authority which, I will henceforth refer to as "the procuring entity" advertised and invited bids for a tender for provision of insurance services. The tender was more particularly described as "Tender number SHA/001/2024-2025 for the provision of Insurance Services". I will refer to it as "the subject tender".

4. Mr. Wanjohi has sworn that although the Applicant downloaded the tender, it could not submit a bid because, allegedly, the conditions in the tender did not comply with the requirements of *the Constitution*, the *Public Procurement and Asset Disposal Act*, 2015 and Public Procurement and Asset Disposal Regulations, 2020. I will hereinafter refer to these two legal instruments as "the Act" and "the Regulations" respectively.

5. The Applicant challenged the procuring entity's decision to advertise what the applicant opines is an illegal tender by filing a request for review before the 1st Respondent, being Application No. 74 of 2024. The primary contention in the application was that the Applicant could not submit a tender because the 2nd Respondent included in the tender document what the applicant considered irregular and illegal qualifications which, in effect, locked out the Applicant from participating in the subject tender.

6. In a decision rendered on 30 August 2024, the 1st Respondent dismissed the application. The applicant was aggrieved by the 1st respondent's decision and it is for this reason that it has exercised its rights under section 167(1) of the Act to initiate the instant proceedings.

7. The grounds upon which judicial review reliefs are sought are more or less the facts to which the applicant has deposed in the affidavit verifying facts relied upon. The applicant has not come out categorically to state the heads of judicial review upon which its application is based. However, as much as I can decipher from its statutory statement, illegality and procedural impropriety, appear to be the grounds on which the applicant relies for the judicial review reliefs sought. This I gather from paragraphs 7, 9 to 14 where it is averred as follows:

"7) In arriving at the impugned decision, the 1st Respondent acted unfairly, illogically and procedurally unfair by making reference to issues within the dispute that were never pleaded/submitted on and/or raised by the Applicant and/or Respondent and proceeded to make irrational findings on the said un-pleaded issues.

9) In arriving at the impugned decision, the 1st Respondent acted illogically, illegally and procedurally unfair by placing the burden proof on the Applicant for unsupported/unsubstantiated allegations made by the 2nd Respondent.

10) In arriving at the impugned decision, the 1st Respondent committed an illegality and acted irrationally by incorrectly interpreting the Public Procurement Regulatory Authority Circular No. 03/2023 of 18 May 2023 and acting contrary in its decision. The 1st Respondent failed to exercise its discretion reasonably and in good faith.

12) By the said impugned decision, the 1st Respondent improperly fettered its discretion by failing to exercise powers conferred on it under section 173 of the Act and therefore acted ultra vires the Act.

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

14) The impugned decision is misconceived, erroneous and an illegality having been rendered based on the erroneous interpretation of Sections 3 and 157 of the Public Procurement and assets Disposal Act, as read together with Articles 27 and 227 (1) of *the Constitution*."

8. The respondents have opposed the application and, in that regard, they have filed replying affidavits. The 1st respondent's affidavit has been sworn by Mr. James Kilaka who has introduced himself in the affidavit as a procurement professional and the Acting Secretary of the 1st Respondent. He states that he also heads the 1st Respondent's secretariat.

9. Mr. Kilaka admits that the applicant challenged the procuring entity's decision of advertising the subject tender. After all the parties to the request for review had been heard, the respondent delivered its decision on 30 August 2024 dismissing the application. To be precise, the 1st respondent's orders were as follows:

" 1. The Request for Review dated 9th August 2024 be and is hereby dismissed.

2. The Respondent be and is hereby directed to proceed with Tender No. SHA/001/2024-2025 for Provision of Insurance Services to its logical conclusion in accordance with the provisions of *the Constitution* of Kenya, 2020, act and Regulations 2020 and the Tender Document.

3. Each party shall bear its own costs in the Request for Review."

10. The rest of the affidavit is largely in defence of the 1st respondent's decision and, Mr. Kilaka has, more or less, reproduced the salient parts of the decision including the issues identified for determination and the 1st respondent's determination of those issues. That being the case, it has been contended on the 1st respondent's behalf thatApplicant has failed to single out any issue that it raised in the impugned proceedings that the 1st Respondent failed to address in its decision.

11. In the ultimate, it is contended that the Applicant has not provided proof of illegality, irrationality, procedural impropriety or unfairness in the manner in which the Respondent considered and interrogated the pleadings and the evidence with which it was presented.

12. Mr. Elijah G. Wachira swore a replying affidavit in which he identified himself as the acting chief executive officer of the 2nd respondent and, in that capacity, he is charged with the day to day running

of the activities of the procuring entity in accordance with the provisions of section 14 of the Social *Health Act*.

13. According to Mr. Wachira, the subject tender was prepared in accordance with the specifications provided by the User Department and the Standard Tender Document for Provision of Insurance Services published by the Public Procurement Regulatory Authority. The subject tender was advertised on 2 August 2024 but before any tender was received, the procurement proceedings were suspended as a result of the request for review proceedings filed before the 1st respondent by the applicant.

14. Contrary to the applicant's allegations, the requirements of the tender as captured in the tender document were consistent with *the Constitution*, the Act and Regulations. The tender was also consistent with Public Procurement Regulatory Authority Circular No. 3 of 2023 of 18 May 2023 on procurement of Insurance Services.

15. Mr. Wachira has also sworn that the procuring entity has adequate internal technical capacity with requisite expertise and experience to undertake brokerage services and, therefore, it was not necessary for it to invite bidders for provision of these services. Further, in the event the 2nd Respondent requires brokerage services in future, it shall advertise for the same.

16. Both the applicant, on the one hand, and the respondents, on the other hand, agree on what I consider to be facts material to the instant application. These facts are that the procuring entity floated a tender for provision of insurance services. The applicant contested the tender by way of a request for review which it filed before the 1st respondent under section 167(1) of the *Public Procurement and Asset Disposal Act* which reads as follows:

> 167. Request for a review
>
> (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.

The Request for review was dismissed.

17. In considering the applicant's case, my attention has been drawn to paragraph 6 of the applicant's affidavit verifying the facts relied upon with specific reference to the case that was before the 1st respondent. In that paragraph the applicant swore that:

> "6. The crux of the application is that the Applicant was unable to submit a tender because the 2nd Respondent included in the tender document irregular and illegal qualifications that locked out the Applicant from participating in the subject tender."

18. In the proceedings before the 1st respondent, the applicant submitted on what it regarded as "irregular and illegal qualifications" as follows:

> "It is our submissions that the tender document as prepared is discriminative against the Applicant and other Insurance Industry Players. To begin with, it was never disclosed to

the Applicant and other brokers that the reasons why the Tender Document as floated is only limited to Insurance Companies to the exclusion of pother Insurance Industry service players. The Respondent has over the last so many years, floated tenders that are open to all Insurance Industry Players including brokers and agents. In the Respondent's response No logical reason has been issued by the Respondent in response to this.

The following clauses in the Tender Document, as submitted above demonstrate that the Tender Document unlike previous tender document by the Respondent, has deliberately locked out Insurance Brokers:

a) Under Clause 4.1 Eligible Tenderers have been defined as Only Insurance service providers registered by Insurance Regulatory Authority are eligible to tender and sign contracts;

b) Under Section Ill of the Tender Document, MR13 provides for quotations from Insurance Service Providers/Underwriters;

c) Under Stage Two on Technical Requirements Evaluation, the Tender Document provides, that:

   i. The Insurance Company must have been in existence for not less than 5 years;

   ii. The Insurance Company must have undertaken at least ten (10) similar assignments with premium turnover or not less than 30 million;

d) Stage Two on Technical requirements and specifically evaluation provides that it is only underwriters/Insurance Companies who should provide professional indemnity cover and not Insurance Brokers, the Insurance Companies/ Underwriters shall submit documentary evidence indicating that the premium underwritten over the last two years was at least 30,000,000.00 per year.

This in our humble submissions (sic) that the Tender Document is discriminatory flies in the face of Article 227 of *the Constitution* as read with Article 27 of *the Constitution*…"

19. On its part, the 1st respondent captured the applicant's contentions and identified one main issue for determination as follows:

"

"49. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

I. Whether the Tender Document in the subject tender bears provisions that are discriminatory and in breach of the provisions of *the Constitution* of Kenya, 2010, Act and Regulations 2020?"

The other issues was on who should bear the costs of the application.

20. In addressing the primary question, the 1st respondent considered the provisions of *the Constitution*, the Act and the Regulations. In particular, the 1st respondent considered section 58 of the Act which provides, inter alia, that an accounting officer of a procuring entity shall use standard procurement and asset disposal documents issued by the Public Procurement Regulatory Authority in all procurement

and asset disposal proceedings; section 60 of the Act which enjoins an accounting officer of a procuring entity to prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and, in addition, allow for fair and open competition among those who may wish to participate in the procurement proceedings; and, section 70 on the Standard Form Documents issued by the Public Procurement and Asset Disposal Authority and which section 58 of the Act makes reference to. Still on the subject of standard form documents, the applicant considered regulation 68 of the Regulations on the nature and form of standard tender documents.

21. After considering these provisions, the 1st respondent concluded, among other things, that the law requires the Accounting Officer of a Procuring Entity in consultation with the relevant user departments to prepare the specific requirements in a Tender Document and that the requirements to be provided in such a document must give a correct and complete description of what is being procured.

22. With particular reference to *the Constitution*, the 1st respondent invoked Article 227 thereof and noted that *the Constitution* embraces fairness, equity, transparency, competition and cost-effectiveness as principles of public procurement. These principles, the 1st respondent noted, are replicated in section 3(b) of the Act.

23. The respondent then cited several authorities including decisions by this Honourable Court and appellate court on what discrimination entails. One of the decisions which the 1st respondent cited was its own decision in an application in which the party named as the applicant was the same applicant in the instant suit and, apparently, the applicant had challenged the procurement process on grounds similar to those in support of the instant application; that the requirements in the tender document had been orchestrated to lock the applicant out of the tender.

24. It is worth quoting here what the 1st respondent said at paragraph 69 of its decision. It noted as follows:

> " 69. This Board in PPARB Application 54 of 2023; Celmel Insurance Agency v The Managing Director, Kenya Electricity Generating Company Plc had the following to say on the very subject of discrimination in respect of an insurance tender:
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> 111. From the foregoing, it is our considered view that the specific requirement of a Tender Document are within the preserve of a Procuring Entity and such discretion is vested on the Procuring Entity provided that it ensures the requirements of the Tender Document allow for competition amongst tenderers who are qualified and wish to participate in the tendering process. Where a legitimate reason exists as to why the Procuring Entity opts to set certain requirements and criteria in a tender document, this cannot amount to discrimination provided that the provisions of *the Constitution* and the Act are observed while setting the said requirements and criteria.
>
> 112. We are therefore not persuaded by the Applicant's submission that the Tender Document as drafted is discriminative and aims to stifle competition. There is no evidence that insurance brokers and underwriters cannot come together under a joint venture as envisioned under Clause 4 of Section I- Instructions to Tenderers at page 5 of the Tender Document and tender in the subject tender. This would certainly afford tenderers a higher chance of being awarded the subject tender noting for instance that in providing a scoring criteria at the

Technical Evaluation Stage the differentia is in the scoring where every tender as submitted is scored depending on how to meet the pass mark of 75% to proceed for financial evaluation, the objective of the Procuring Entity to award the subject tender to a tenderer who is able to meet its obligations and handle the value of its assets and insurable interest would be met."

25. Upon analysing the court decisions and its own decisions on the same subject, the 1st respondent came to the conclusion that discrimination constitutes a failure to treat all persons equally without reasonable distinction and that discrimination which *the Constitution* does not allow is that which is unjustifiable and without any rational basis. The 1st respondent also held that not every differentiation amounts to discrimination and that for a claim on the ground of discrimination to succeed, the claimant must provide proof there is either direct or indirect discrimination.

26. Further, where a Procuring Entity has a legitimate reason in stipulating a specified requirement in its Tender Document, this does not constitute discrimination. And where a Tender Document permits suppliers to submit their bids under joint ventures, an interested supplier cannot claim that a tender requirement is discriminatory simply because the supplier finds difficulty in complying with the specified requirement. With this analysis, the 1st respondent considered each of the requirements in the tender document that the applicant alleged to be discriminatory and determined what they entailed.

27. On the specific question whether the procuring entity required the services of insurances brokers, the 1st respondent noted that they did not require such services and in so determining, the 1st respondent accepted the submissions of the procuring entity's counsel. The 1st respondent held as follows:

"82. Counsel for the Respondent Mr. Kutto, argued that the Procuring Entity in the subject tender had the internal expertise that could adequately guide it on its insurance needs and thus did not require the expertise of insurance brokers or agents in the procuring of insurance services. That this is what informed its move to seek out interested suppliers of insurance services without an intermediary. We note that this submission was not controverted by the Applicant in its rejoinder submissions or responses.

83. The Board has looked at the circumstances obtaining in the present case and finds that the Respondent's justification for its specification in the tender document that it required documents from insurance companies is a reasonable and/or rational explanation for the exclusion of intermediaries for this particular tender. We say so appreciating that the Procuring Entity is a statutory department charged with the responsibility of ensuring the provision of healthcare services to contributors of the Social Health Insurance Fund.

By its very function it deals with players in the health sector including medical health insurance service providers. The rebuttable presumption in the event is that the Procuring Entity bears reasonable knowledge and understanding on the handling of medical insurance matters. Indeed, the Board notes that brokers and insurance agents are defined under section 2(1) of the *Insurance Act* as follows;

"agent" means a person, not being a salaried employee of an insurer who, in consideration of a commission, solicits or procures insurance business for an insurer or broker;

"broker" means an intermediary involved with the placing of insurance business with an insurer or reinsurer for or in expectation of payment by way of brokerage commission for or on behalf of an insurer, policyholder or proposer for insurance or reinsurance and includes a medical insurance provider;

84. From these definitions, it is immediately evident that brokers and agents cannot be classified as one and the same with insurers. A further examination of the *insurance Act* additionally shows that the two sets of players in the insurance industry under different regulatory checks for licensing and operation and accordingly cannot be said to be of the same category as to justify the argument that they should be treated as of the same category. In the circumstances, we accept as reasonable the uncontroverted submission by the Procuring Entity that it believes it can obtain the services required directly from an insurer using its internal capacities. No evidence of direct discrimination or conduct evincing indirect discrimination has been established by the Applicant as regards the tender specifications to warrant the reliefs sought in the Application."

28. The 1st respondent further considered circular no. 03/2023 to which reference has been made by the applicant and came to the conclusion that the tender requirements were consistent with the circular and, in any event, it had not been suggested that that the requirements in the Tender Document varied with the provisions of the *Insurance Act* or other applicable laws. The 1st respondent then concluded that the requirements in the tender document were not discriminatory and, in particular, they were not in breach of *the Constitution*, the Act and the Regulations.

29. I have reproduced parts of the 1st respondents decision as much as they are relevant to these two important points; first, that the 1st respondent addressed itself to all the issues with which it was presented in the applicant's request for review and, second, that that it is the same issues and arguments that the applicant has escalated to this Honourable Court for the court's determination. As much as the applicant's application is stated to be based upon the judicial review grounds of illegality and procedural impropriety, the applicant appears aggrieved not necessarily by the process by which the impugned decision was reached but by the decision itself and to that extent it has, in no uncertain terms, urged this Honourable Court to weigh in on the merits of the 1st respondent's decision. For the avoidance of doubt, it has been submitted on behalf of the applicant as follows:

"11) In its request for review; the main contention of the Applicant was that the tender document was discriminatory against the insurance brokers who are equally insurance service providers. For instance, clause 4.1 of the tender document imposed an unlawful restriction that only registered underwriters are eligible to bid while at the same time providing that a winning candidate will be given an opportunity to register with the Insurance Regulatory Authority at a later stage. This requirement unfairly locks out the Applicant and other insurance brokers from participating in the bidding process.

12) Being a public entity, the 2nd Respondent is required to adhere to the provisions of *the Constitution*. Indeed, the 2nd Respondent is duty bound to ensure that the tender document and it polices complied with the standard set in Article 10 of *the constitution* namely human dignity, equity, equality, human rights, non-discrimination, good governance, integrity, transparency and accountability.

13) Because the request for review was alleging contravention of the Constitutional provisions, this Honourable court is required to inquire into the merits of the decision of the 1st Respondent. See the Court of Appeal decision in Sicpa SA *v Public Procurement Administrative Review Board & 2 others (Civil Appeal E474 of 2024*) (2024] KECA 939 (KLR) (2 August 2024) (Judgment)."(Emphasis added).

30. So, the applicant is clear that rather than consider the process by which the decision was reached, this Honourable Court ought to dwell on the merits of the decision. The question I am faced with, therefore, is whether as a judicial review court, the court has the jurisdiction to take the path that the applicant wants it to take.

31. Sicpa SA *v Public Procurement Administrative Review Board & 2 others (Civil Appeal E474 of 2024*) (2024] KECA 939 (KLR) which the applicant has cited in support of the argument for consideration of the merits of the 1st respondent's decision is a case I decided before it was escalated to the Court of Appeal. In that case, both this Honourable Court and the Court of Appeal addressed the same question on the limits of a judicial review court entertaining merits of an impugned decision. No doubt, it is for this reason that the applicant has found it a proper case to augment its position.

32. To the extent that it is relevant to the question at hand, I will adopt my reasoning in in that case in this judgment. I begin by saying that weighing on the merits of the 1st respondent's decision would, to a greater degree, involve evaluation of the evidence and coming to my own factual conclusions. To be precise, I cannot come to the conclusion that restricting the tender to insurers or underwriters to the exclusion of insurance brokers was a proper decision for the procuring entity to make without inquiring into the evidence of whether insurance services can be provided independent of insurance brokerage services. Secondly, and more importantly, it will require me to look beyond the decision of the 1st respondent and interrogate the procuring entity's decision to prescribe certain requirements in the tender document as necessary requirements to be complied with by the prospective tenderers. If I was to do take this direction, I would, in effect, be assuming jurisdiction which I do not have. Section 175 (1) of the Act, is categorical that it is the 1st respondent's decision that would be subject to judicial review and not the procuring entity's decision. This section reads as follows:

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties. (Emphasis added).

33. For these reasons, I would be reluctant to assume appellate jurisdiction in an application that has been camouflaged as a judicial review application. I reject the invitation by the applicant to evaluate the evidence afresh and make my own factual findings. I also reject the invitation by the applicant to interpret the law differently from the interpretation given to it by the 1st respondent with a view to substituting the latter's decision with my own. That is not the province of a judicial review court.

34. As I noted in the Sicpa case (supra), judicial review is more about the interrogation of the process of reaching a decision rather the merits of the decision. If this was not the case, there would be no need for distinguishing appellate jurisdiction from judicial review jurisdiction.

35. One of the cases that is oft-cited in arguing that the scope of judicial review has expanded and, apparently, the breadth to which a judicial review court can now go in interrogation of the merits of a decision, in the wake of the enactment of the *Fair Administrative Action Act*, 2015, is the Supreme Court case of Saisi & 7 others *v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019*

(Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment). In that case the 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." (Emphasis added).

36. In what I suppose was the Supreme Court's emphasis that a judicial review court ought not be tempted to interrogate the merits of the impugned decision, the court noted at paragraph 76 of its decision as follows:

> "(76) Be that as it may, it is the Court's firm view that the intention was never to transform judicial review into to 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 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."

37. This is the position the Court of Appeal adopted in an earlier decision of *Energy Regulatory Commission v S G S Kenya Limited & 2 others (2018) eKLR Civil Appeal No. 341 of 2017* where it held as follows:

> "In a judicial review matter, the Court's mandate is limited to procedural improprieties, and extends not to the merits of a decision. The Board had been duly mindful of its own earlier decision in Avante International INC v. IEBC (Review No. 19 of 2017): it took into consideration the nature and weight of the opinion on technological change, which the 1st respondent had acted upon; and the Board's reasoning exhibited a fidelity to practicality and to good sense. Consequently, the Judge ought to have shown greater deference to the Board's decision, and should have been more circumspect in its view of such a decision, bearing in mind the specializations of the Board."

38. The court further cited its own decision in *OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others (2017) eKLR Civil Appeal No. 28 of 2016* where it was held:

> "Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See *Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Misc. Civil Appl. No. 374 of 2006*. In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. See East African Railways Corp. vs. Anthony Sefu Far-Es-Salaam (1973) EA 327."

39. At the risk of sounding repetitive, I noted in Sicpa case (supra) that a judicial review court will not let every decision pass only because its jurisdiction is limited to interrogating the process rather than the merits of a decision. Where it is obvious and apparent on the face of the record that the decision cannot be justified on the basis of the material presented before the subordinate court or tribunal or any other public body whose decision is the subject of judicial review proceedings, the court will not fold its hands and sit back on the pretext that it is only concerned about the process. A decision that is glaringly unsupported by the evidence or blatantly contrary to law will be impeached. In such a case, the decision will not stand, not necessarily because it is unmerited but because it is impeachable on grounds of illegality or irrationality, as the case may be. It would be the kind of decision that no reasonable tribunal, given the same facts or circumstances, would reach.

40. In Biren Amritlal Shah & anor vs. Republic & 3 others (2013) eKLR the Court of Appeal did not rule out the possibility of interfering with the decision of a tribunal in judicial review proceedings albeit in very exceptional circumstances. In that case it was held:

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

41. In my opinion, having considered all the issues represented in the material with which it was supplied, any other person, would, in all probability have reached the same decision that the 1st respondent

reached. The responded not only considered the evidence before it but it also interpreted and applied the law as it understood it. Of course, whether this court agrees with the 1st respondent's evaluation of the evidence and interpretation of the law is not a relevant question.

42. One other decision that is worth of mention is the Supreme Court's decision in Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) in which the court held that in a case where it is alleged that fundamental rights have been violated, the court has a lee-way of interrogating the merits of the decision. The Court held as follows:

> " 87. With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under *the Constitution* if it limits itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the Jirongo and Praxedes Saisi cases speaks succinctly to this issue. That is also why, the question below is pertinent to the present appeal."

43. Thus, when a party approaches a court under the provisions of *the Constitution*, no doubt, by way of a constitutional petition, the court is under an obligation to undertake a merit review of the case without any limitation. On the other hand, in the case where a party brings a judicial review suit under the provisions of Order 53 of the Civil Procedure Rules, the court is restricted to the process and manner in which the decision complained of was reached and not the merits of the decision. I note, in his submissions, counsel for the applicant appreciates this distinction and has submitted thus:

> " 13) Because the request for review was alleging contravention of the Constitutional provisions, this Honourable court is required to inquire into the merits of the decision of the 1st Respondent."

44. With due respect to the learned counsel, I understand the Supreme Court to say that the dual approach applies only in circumstances where one has a choice to make between filing a judicial review application or a constitutional petition. A tribunal such as the 1st respondent, or any other tribunal for that matter, is deficient of either of these jurisdictions. In other words, a tribunal would not entertain a judicial review application or a constitutional petition. And even if the applicant was to argue that he has alleged contravention of several provisions of *the Constitution*, what is before court is a judicial review application and not a constitutional petition.

45. For reasons I have given, I am not satisfied that there is any merit in the applicant's application. It is hereby dismissed with costs. Orders accordingly.

SIGNED, DATED AND UPLOADED ON THE CTS ON 18 OCTOBER 2024

NGAAH JAIRUS

JUDGE