



**Republic v Public Procurement Administrative Review Board; Kenya Roads Board & 3 others
(Interested Parties); Lavington Security Limited (Exparte Applicant) (Judicial Review Application
E182 of 2024) [2024] KEHC 14897 (KLR) (Judicial Review) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 14897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E182 OF 2024
JM CHIGITI, J
OCTOBER 8, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD RESPONDENT**

AND

KENYA ROADS BOARD INTERESTED PARTY

**THE ACCOUNTING OFFICER, KENYA ROADS BOARD INTERESTED
PARTY**

VICKERS SECURITY INTERESTED PARTY

HOUNSLOW SECURITY LIMITED INTERESTED PARTY

AND

LAVINGTON SECURITY LIMITED EXPARTE APPLICANT

JUDGMENT

1. The application that comes up for hearing and determination is the one dated 27th August 2024 wherein the Applicant is seeking for: -
 1. An Order of Certiorari to bring into this Honourable Court for purposes of being quashed the entire decision of The Public Procurement Administrative Review Board, the Respondent herein, in Application Number 71 of 2024, dated 12th August, 2024.



2. An order of Prohibition to prohibit and/or restrain the 1ST & 2nd Interested party from awarding the tender and/or signing any contract with the 3rd Interested Party herein in respect to Tender Number KRB/T/12/2023-2023 for the provision of private security service at KRB Headquarters. (hereinafter the “Tender”)
3. An order of Mandamus compelling the Respondent to re-hear and determine the Request of Review Number 71 of 2024 on merits.
4. Cost incidental to the Application be in the cause.

The Applicants case;

2. The application is supported by the Verifying Affidavit of Raymond Koech, the Manager of the Exparte Applicant.
3. The Applicant participated in the preparation of the tender document Tender Number KRB/T/12 for the Provision of Security Services.
4. On 12TH August ,2024 in the Respondent made a decision in respect of the subject tender in respect of the Applicant`s request for review 71/24.
5. The request for review was lodged by the applicant upon receiving a regret letter from the 1st Interested Party.
6. The main contention by the Applicant in the Request for review 71 of 2024 before the Respondent was that there was a breach of the procurement process leading to the unjustified award of the tender to the 3rd interested party herein.
7. The reasons advanced by the procuring entity to award the tender to the 3rd Interested party is contested and the evaluation criteria ought to have been as per the tender document.
8. It is its case that for the 1st and 2nd Interested parties to declare the Applicant`s bid unsuccessful, on nonfactual and unsupported reason and the failure of the Respondents to determine the issue conclusively is a clear manifest of the Respondent`s failure to act in a fair, transparent, accountable and credible manner as required by Articles 10, 47, 201 and 227 of *the Constitution*.
9. The applicant believes that the evaluation committee did not conduct the evaluation of the bids submitted in accordance to the tender document.
10. The Respondents` failure to uphold the constitutional and statutory imperatives that underpin the public procurement regime, the terms and conditions of the tender document renders the whole procurement process a nullity.
11. The Respondents failing to determine the issues before it and acting against the laid down laws and procedures, to tilt the scales to enable them to endorse a sham procurement process and act in breach of the provisions of law Thereby greatly prejudicing the Applicant`s fair chance of winning the bid.
12. It is its case that the Respondent fell in error of the law by finding that it was bound by the rules of Evidence contrary to the express provision of Regulation 218 of the public procurement and Asset Disposal Regulation 2020.
13. It is its case that the Respondent fell in error of law by stating that it lacked jurisdiction yet it had the jurisdiction to analyze the evaluation process and determine whether it was in compliance with the tender document.



14. The Respondent misconstrued the provisions of Regulation 203 of the public procurement and Asset Disposal Regulation 2020 in so far as to the form of a Request for Review application.

Respondents case;

15. James Kilaka swore a Replying Affidavit in opposition of the Ex-parte Applicant's Notice of Motion dated 27th August, 2024.
16. It is the Respondent's case that the application is an appeal against the Respondent's Decision dated 12th August 2024 with respect to the findings of the Respondent on the Request for Review No. 71 of 2024 and is being disguised as a judicial review application and the court lacks jurisdiction to hear and determine an appeal.
17. On 25th July 2024, the Ex parte Applicant herein filed a Request for Review Application No. 71 of 2024 dated 25th July 2024 before the Respondent seeking the following orders:
 - a. Declaring that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015 and Article 47 and 227 of the Constitution.
 - b. The notification letter dated 11th July 2024 be quashed.
 - c. That the award and the entire procurement proceedings in TENDER NUMBER: KRB/T/12/2023-2024 be nullified in its entirety.
 - d. That the 1st and 2nd Respondents be directed to re-admit the Applicant's bid and carry out fresh evaluation of the bids submitted in accordance with the dictates of the Public Procurement and Assets Disposal Act and the Tender Document.
 - e. The Applicant be awarded the tender number KRB/T/12/2023-2024.
 - f. Costs of the Request for Review be awarded to the Applicant.
18. The 1st and 2nd Respondents filed a Notice of Preliminary Objection on 7th August 2024.
19. On 8th August 2024, the 3rd Interested Party filed and served its Grounds of Opposition and Affidavit in Support of the Grounds of Objection sworn on 8th August 2024.
20. The Applicant did not file any submissions in response to the Preliminary Objection raised by the 1st and 2nd Interested Parties and this was well noted by the Respondent at paragraph 71 of its Decision dated 12th August 2024 in Request for Review No. 71 of 2024. Neither did the 3rd and 4th Respondents herein.
21. On 12th August 2024, the Respondent made the following final orders with respect to Request for Review No. 71 of 2024:
 - a. The Request for Review dated 25th July 2024 and filed on even date be and is hereby struck out for want of jurisdiction.
 - b. The Procuring Entity is hereby ordered to proceed with the procurement process with respect to Tender No. KRB/T/12/2023-2024 for Provision of Private Security Services at KRB Headquarters to its logical conclusion.
 - c. Each party shall bear its own costs in the Request for Review.



22. It is its case that The Respondent took note of the fact that a preliminary objection had been raised by the 1st and 2nd Interested Party challenging the Ex parte Applicant's locus standi before the Board in view of the fact that the Ex parte Applicant's affidavit accompanying the Request for Review No. 71 of 2024 and in Support of the same had been deponed by a stranger to the procuring proceedings who had no authority to initiate the instant Request for Review.
23. The Respondent in addressing the 1st and 2nd Respondent's Preliminary Objection, took note of the fact that a preliminary objection consists of a point of law which has been pleaded or arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of a matter and that it was trite for it to only act where it has jurisdiction and as a matter of procedure enquire into a question of jurisdiction that may have been raised prior to taking any further steps in the Request for Review No. 71 of 2024.
24. The Respondent proceeded to make a determination on whether the Statement in Support of the Request for Review sworn by Raymond Koech on 25th July 2024 offends Section 37(2) of the Company's Act, and if in the affirmative, whether the Applicant has locus standi before the Board in view of the provisions under Regulation 203(2)(b) of Regulations 2020.
25. The Respondent properly interpreted the provisions of Regulation 203(2)(b) of Regulations 2020.
26. It refers this Honourable Court in its Judgment dated 27th September 2023 in Judicial Review No. E113 of 2023 Republic v Public Procurement Administrative Review Board & another Ex parte Trident Insurance Company Limited took cognizance of the holding in Republic v Public Procurement Administrative Review Board & another Ex Parte Intertek Testing Services (EA) Pty Limited & Authentix Inc; Accounting Officer, Energy and Petroleum Regulatory Authority & another where it was established that the Respondent is a quasi-judicial body empowered to apply the law and legal principles within its mandate and that all common law doctrines are applicable in our jurisdiction and by the Respondent in its decision making process.
27. The legal principle or doctrine of locus standi is applicable in proceedings lodged before the Respondent as a quasi-judicial body and a party must have the locus standi to appear and be heard before the Respondent as stipulated under Section 167(1) of the Act as read with Regulation 203(2)(b) of Regulations 2020 and this was clearly laid out at paragraphs 73 to 94 of the Respondent's decision dated 12th August 2024 in Request for Review No. 71 of 2024.
28. It is its case that the failure to enclose the Authority to Act/Board Resolution rendered the Ex parte Applicant's Request for Review No. 71 of 2024 as fatally defective and bad in law and as such, the Respondent was divested of its jurisdiction to delve into the merits of the matter by virtue of the absence of a competent Request for Review.
29. The Applicant at all times prior to the hearing had the opportunity of filing the Authority to Act/Board Resolution before the Respondent rendered its Decision but it did not even bother to respond to the Preliminary Objection raised by the 1st and 2nd Interested Parties pertaining the issue of locus standi.
30. The provision for an Authority to Act or Board Resolution as contemplated under Section 37(2) of the *Companies Act* ensures that a person capable of taking up responsibility is involved from the onset in a suit and the requirement of the person's consent/authority is intended to rule out situations where a party's name is dragged in a suit without his/her authority which addresses the issue of likelihood of denial of responsibility/liability arising in the event adverse orders are made by the court.



31. The Respondent being thorough in its Decision also took cognizance of arguments raised by the 1st and 2nd respondents pertaining to pagination and compliance of the 3rd Interested Party as can be seen at paragraphs 162 and 163 of its Decision dated 19th July 2024.
32. The Respondent did not in any way deviate from its holding in PPARB Application No. 8 of 2023 *Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another*, a decision upheld by the Court of Appeal Civil Appeal No. E295 of 2023 consolidated with Civil Appeal No. E296 of 2023 *Lake Victoria North Water Works Development Agency v Toddy Civil Engineering Company Limited & others* as alleged by the Ex parte Applicant herein.
33. It argues that the Respondent acted within the confines of *the Constitution*, the Act, Regulations 2020, the Fair Administrative Actions Act and the rule of law in its findings in Request for Review No. 71 of 2024.
34. The Respondent's findings in Request for Review No. 71 of 2024 took into account provisions of Article 227 of *the Constitution*, the Act and Regulation 2020 and as such the Decision dated 12th August 2024 was well reasoned and was neither unlawful, misconceived, erroneous, irrational, nor in violation of the Ex parte Applicant's Legitimate Expectations.
35. The Decision dated 12th August 2024 in Request for Review No. 71 of 2024 was fair, reasonable, rational and lawful without overreaching the 1st Respondent's mandate and jurisdiction.
36. The Ex Parte Applicant has failed to demonstrate any elements of illegality, irrationality, procedural impropriety and/or unfairness in the manner in which the Respondent considered and interrogated the evidence, documents, pleadings, and information before it in arriving at its Decision in Request for Review No. 71 of 2024.
37. At the end of its case, the Respondent argues that in the unlikely event that this Honorable Court finds the Notice of Motion meritorious leading to quashing of the Respondent's Decision dated 12th August 2024, then in the interest of justice, the Honorable Court be pleased to remit the Request for Review application No. 71 of 2024 for re-hearing by the Respondent subject to this Honorable Court's directions noting that the Respondent is the specialized central independent body mandated to review, hear and determine tendering disputes.

Interested Party's case;

38. They filed grounds of opposition dated 29.8.24 raising the grounds that Article 24(1)(d) of *the Constitution* is clear that certain rights or fundamental freedoms in the Bill of Rights may be limited if there is need to ensure that the enjoyment of the rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.
39. It is their case that the Ex parte Applicant while filing Public Procurement Administrative Review Board Application No. 71 of 2024 failed to obtain proper authorization to file the same on behalf of a company as a result of which the sworn Statement in support of the Request for Review was fatally defective and bad in law for having been executed contrary to section 37 of the Company's Act.
40. They argue that failure to obtain such authority is not merely a procedural or technical issue as it goes to the roots of the operations of a company and the Request for Review by a person not duly authorized by the company rendered the same incompetent and/or a nullity and could not be entertained the Board.



41. It is their case that the issue of locus standi is a point of law that touched on jurisdiction of the Board to entertain the Public Procurement Administrative Review Board Application No. 71 of 2024 and the Applicant had no the right to appear before and be heard in the Review Board hence the Board lacked jurisdiction to examine the merits or demerits of the Request for Review.
42. It is its case further that the suit seeks to quash the decision of the 1st Respondent delivered on 12th August 2024 striking out the Ex-parte Applicant's request for review number 71 of 2024.
43. The applicant's request for review was fatally defective and the board was correct in striking the same out for failure to demonstrate the requisite authority to institute legal proceedings on behalf of the company.
44. The applicant, a corporate entity, did not bother to file a board resolution authorizing the commencement of this judicial review application.
45. A company, being an artificial legal person, can only act through its organs, primarily the board of directors. The decision to initiate legal proceedings must be expressly authorized by the board through a resolution. This serves as evidence that the company has sanctioned the action.
46. It is their case that without a duly passed board resolution, there was no proof that the applicant's directors authorized the said request for review.
47. The absence of this critical document raises the legitimate question of whether the company itself has properly resolved to bring this application before the court and, the applicant lacks the standing to sue.
48. Reliance is placed in the case of in *Affordable Homes Africa Ltd v Ian Henderson & 2 others* [2004] and *Leo Investments Ltd v Trident Insurance Co Ltd* [2014], the courts found that the absence of a board resolution was fatal to the suits, leading to their dismissal.
49. The same principle should apply in the Applicant's request for review. The Ex-parte Applicant cannot invoke Article 159 of *the constitution* of Kenya 2010 to cleanse its mistake.
50. Reliance also is placed in the case of *Raila Odinga vs. L.E.B.C. &Others* [2013] eKLR, where the Supreme Court held that: -Article 159(2)(d) of *the Constitution* was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.
51. The 2nd Interested Party's Preliminary Objection was unopposed as the ex-parte applicant did not bother to file its submissions opposing the said PO.
52. The applicant having failed to demonstrate the necessary authority to institute its request for review and also defend against the 1st and 2nd Interested Party's PO, the instant suit should be dismissed.
53. In many event it argues that the Applicant's case would still have failed on the merits, as it lacked specificity and failed to meet clear legal requirements.
54. The Applicant's non-compliance with wage laws directly disqualified its bid, and its failure to comply with mandatory wage standards is a substantial flaw that cannot be remedied through judicial review. The wage requirement is not discretionary; it is a legal obligation that all private security firms must adhere to.
55. The Private Security Service Regulation Authority (PSRA) equally issued clear directives that all private security service providers must comply with the Kshs 30,000.00 minimum wage. The Applicant's bid, which falls short of this requirement, cannot be considered valid under the law.



56. The Applicant has failed to provide any substantive evidence to support its allegations of procedural flaws. On the contrary, all the evidence shows that the 3rd Interested Party was awarded the tender in full compliance with procurement laws and regulations, including those relating to wages.
57. By disregarding mandatory wage laws, the Applicant acted in bad faith and is now seeking the intervention of this Honourable Court with unclean hands. Indeed, as held in *Kenya Transport Association v Municipal Council of Mombasa* eKLR, the court reiterated the principle that one who seeks equity must come with clean hands. The Applicant's violation of the law disqualifies it from obtaining the court's assistance.
58. Further, in *Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others* [2004] eKLR, the court emphasized that parties must act equitably before seeking relief. As such, the Applicant, having failed to meet its legal obligations, cannot now seek to benefit from its own wrongdoing by using the court as a tool to challenge a legitimate tender process.
59. They submit that the application should be dismissed with cost.

Analysis and Determination;

60. Upon analyzing the application, the supporting Affidavits, the replying Affidavits, the parties' rival submissions and authorities, the following turn out to be the issues for determination;
1. Whether the absence of a board resolution to sue was fatal.
 2. Whether the applicant is entitled to the orders sought.
61. In *Republic v Firearms Licensing Board & another Ex parte Boniface Mwaura* [2019] eKLR stated that:

“The concept of Judicial Review under *the Constitution* of Kenya is similar to that under *the Constitution* of South Africa where the South African court held in *Pharmaceutical Manufacturers Association of South Africa in ex parte President of the Republic of South Africa & others* that ‘the common law principles that previously provided for the grounds for Judicial Review of public power have been subsumed under *the Constitution* and, insofar as they might continue to be relevant to public power have been subsumed under *the Constitution* and, insofar as they might continue to be relevant to Judicial Review, they gain their force from *the Constitution*. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts...”

Justice Mativo accordingly held that:

“The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy.... section 7 of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8.... Judicial Review is now a constitutional supervision of public authorities involving a challenge to the legal validity of the decision...Courts must develop judicial review jurisprudence alongside the mainstreamed ‘theory of a holistic interpretation of *the Constitution*. Judicial review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes....”

62. With this background this court shall now proceed to deal with the issues for determination.



The 1st issue; Whether the absence of a board resolution to sue was fatal.

63. On 12th August 2024, the Respondent board made the following orders with respect to Request for Review No. 71 of 2024 inter alia that The Request for Review dated 25th July 2024 and filed on even date be and is hereby struck out for want of jurisdiction.
64. It is not in dispute that the Request for Review was supported by the documents of Raymond Koech without a resolution from the company authorizing him to act.
65. The board held that this offended Section 37(2) of the Company's Act, and that the Applicant had no locus standi before the Board in view of the provisions under Regulation 203(2)(b) of Regulations 2020.
66. Unlike the administrative review before the board, in the suit before this court the application is supported by the Verifying Affidavit of Raymond Koech, the Manager of the Exparte Applicant, who is authorized through a board resolution.
67. In the case of *Paragon Electronics Limited v Njeri Kariuki* [2021] eKLR it was held that
- “There is no necessity in law that the resolution must be filed together with the pleadings. Looking at it differently, to require the filing of a resolution alongside the pleading is to elevate procedural technicalities above substantive justice. That goes against the grain in Article 159(2)(d) of *the Constitution*.”
68. In the case of *Kenya Agricultural and Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) the court applied the dicta in the following decision in the case of *East African Safari Air Ltd v Anthony Ambaka Kegode* [2011] eKLR where the Court of Appeal overturned the high court decision [applied by the 3rd Respondent) and held that the proper thing for the High Court to have done was not to strike out the proceedings (for want of authority by the advocate to file suit) but to stay the suit and refer to the shareholders for ratification.
69. In *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR; The Court of Appeal cited the case of *United Assurance co Ltd v Attorney General: SCCA no 1 of 1998* where the Supreme Court of Uganda held that:
- “...it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”
70. In the case of *East African Safari Air Limited v Anthony Ambaka Kegode & another* [2011] eKLR the Court of Appeal held: Cordery's Law Relating to Solicitor states that:
- “Proceedings will not be set aside because the solicitor acted without authority, if the party on whose behalf they were taken adopts what has been done, but ratification of an agent's act can only be effective where, at the time of the act, the principal was himself competent to perform it, or to authorize its performance, and a plaintiff cannot so adopt an action after having apparently repudiated it to the defendant.”



71. Guided by the foregoing it is my finding and I so hold that the board fell into error.
72. In the case of *Henry AsavaMudamba v Institute of Certified Public Accountants of Kenya* [2015] eKLR the Court of Appeal 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...”
73. The board committed an error of law in the process of making the decision the subject of the complaint in so far as the finding that a resolution to sue was necessary and to the extent that the finding that a resolution to sue was necessary is concerned.
74. The applicant also seeks an order to prohibit and/or to restrain the 1st & 2nd interested party from awarding the tender and/or signing any contract with the 3rd Interested Party herein in respect to Tender Number KRB/T/12/2023-2023 for the provision of private security service at KRB Headquarters. (hereinafter the “Tender”).
75. In the case of *Kenya National Examination Council versus Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR, the Court stated the grounds upon which such an order of prohibition may issue as follows;
- “What does an order of prohibition do and when will it issue” It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY&39; S LAW OF ENGLAND, 4th Edition, and Vol.1 at pg. 37 paragraphs 128”.
76. Having found that the board acted illegally, the court finds that an order of prohibition should be issued as prayed.
77. The applicant further sought an order of Mandamus compelling the Respondent to re-hear and determine the Request of Review Number 71 of 2024 on merits.
78. In *Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996*. The Court of Appeal cited, with approval, Halsbury’s Law of England, 4th Edn. Vol. 7 p. 111 para 89 thus:
- “The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”



79. It is this court's finding and I so hold that the applicant has made out a case for the insurance of an order of Mandamus compelling the Respondent to re-hear and determine the Request of Review Number 71 of 2024 on merits.
80. The order that commends itself in the sum totality of the foregoing is to remit the Request for Review Application No. 71 of 2024 for re-hearing by the board since the Respondent is the specialized central independent body mandated to review, hear and determine tendering disputes.

Disposition;

81. The application has merit and the same is allowed.

Order;

1. An Order of Certiorari to bring into this Honourable Court for purposes of being quashed the entire decision of The Public Procurement Administrative Review Board, the Respondent herein, in Application Number 71 of 2024, dated 12th August, 2024 is hereby issued.
2. An order of Prohibition to prohibit and/or restrain the 1st & 2nd Interested party from awarding the tender and/or signing any contract with the 3rd Interested Party herein in respect to Tender Number KRB/T/12/2023-2023 for the provision of private security service at KRB Headquarters. (hereinafter the "Tender") is hereby issued.
3. An order of Mandamus compelling the Respondent to re-hear Application Number 71 of 2024, dated 12th August, 2024 is hereby issued.
4. The rehearing shall be done within seven days of today's date.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2024.

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J. M. CHIGITI (SC)

JUDGE

