Republic v Public Procurement Administrative Review Board & 2 others; Paramax Cleaning Services Limited (Exparte Applicant) (Judicial Review Miscellaneous Application E193 of 2024) [2024] KEHC 14676 (KLR) (Judicial Review) (7 October 2024) (Judgment)

Neutral citation: [2024] KEHC 14676 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E193 OF 2024

JM CHIGITI, J

OCTOBER 7, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

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

KENYATTA INTERNATIONAL CONVENTION CENTRE .. 2ND RESPONDENT

ACCOUNTING OFFICER, KENYATTA INTERNATIONAL CONVENTION CENTRE ..... 3RD RESPONDENT

AND

PARAMAX CLEANING SERVICES LIMITED ..... EXPARTE APPLICANT

JUDGMENT

1. The Application that is before court for determination is the Notice of Motion dated 29th August, 2024 wherein the applicant is seeking for:

    1. An order of certiorari do issue to remove this Honourable Court and quash the decision by the Kenya Development Corporation, the findings, decision and directives of the decision and directives of the Public Procurement Administrative Review Board contained in the decision made and dated 14th August, 2024 indicating that the ground 2 of the Preliminary Objection dated 26th July, 2024 be upheld and that the request for review dated 23rd July, 2024 be struck out.

2. An order of mandamus compelling the 1st Respondent to conduct the Applicant's review on merit basis.

3. An order of Mandamus, directed to the 2nd and 3rd Respondents herein respectively, to complete the procurement process of Tender No. KICC/66/2023-2024 to 2024 -2025.

4. The cost of this application be provided for.

2. The application is supported by the verifying affidavit of Davis Omori.

The Applicant's Case

3. In responding to the invitation to tender No. KICC/66/2023-2024 to 2024 -2025 for the provision of cleaning & garbage collection services the Applicant submitted its bid on the 25th day of March, 2024.

4. The 2nd Respondent reached a decision on 10th July, 2024 to terminate the procurement process due to the detection of material governance issues upon receiving complaints from bidders leading to the filing of the Request for Review dated 23rd July, 2024.

5. In swift response The 2nd Respondent filed a preliminary objection dated 26th July, 2024 raising a point that the board did not have jurisdiction to entertain the review as the termination of procurement is not subject to review and that the pleadings were in any event in the name of a law firm where the sole proprietor is deceased.

6. The 1st Respondent thereafter made orders on 14th August, 2024, that:

a. Ground 2 of the Respondent's Preliminary Objection dated 26th July, 2024 be and is hereby upheld.

b. The Request for Review dated 23rd July, 2024 be and is hereby struck out.

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

7. The Applicant is concerned that despite the Applicant changing advocates in the midst of the proceedings the board still proceeded to arrive at a determination that the firm of Gicheru & Company Advocates could not legally draw, file or institute the Request for review before them.

8. The Applicant is concerned that the 1st respondent herein failed to appreciate the fact that the Applicant had two firms and counsel on record and thus representation as to the key issues was paramount.

9. The Applicant believes that the 1st Respondent was clothed with the jurisdiction to hear and determine the review application as the same was drawn by a validly practicing advocate with a current practicing certificate.

10. It is further its case that The 1st Respondent misled itself by venturing by a preliminary objection that required proof as there were factual issues that required proof as to whether the said firm of Ms. Gicheru & Co. Advocates was totally wound up or not as the counsel mandated to do so who was equally on record ironed the same out by asserting that the firm was still a going concern and not wound up yet.

11. The Applicant argues that the administrative action was against the constitutional rights of the Ex-Parte Applicant and the rules of natural justice.

12. The Public Procurement Administrative Review Board's decision was, in those circumstances, illogical and unreasonable, ultra vires and ought to be declared a nullity for having been arrived at without giving the Applicant a fair and due process of his right to be heard before condemnation. It is its case that a litigant should not suffer from the wrongs of his counsel.

13. It is its case that one of the documents attached to the Preliminary Objection was a search from the LSK database showing that the advocate that duly drafted the said review application was a duly practicing lawyer, and in line with Section 34B of the *Advocates Act* would easily demonstrate that the validity of the documents ought not to have been affected.

14. Section 34B (1) A practising advocate who is not exempt under section 10 and who fails to take out a practising certificate in any year, commits an act of professional misconduct.

    (2) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practising certificate.

    (3) For the purpose of this section, "legal document" includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring

15. Reliance is placed in the decisions of the;

    1. Court of Appeal Civil Appeal No. 133 of 2009, Nairobi James Gilo versus Republic and The Land Adjudication officer Bondo, Siaya & Busia. By Justices O'kubasu, Githinji and Nyamu. Pages 10 – 14.

    2. Adolf Gitonga Wakahihia & 4 Others versus Mwangi Thiong'o (1982 – 1988)1 KAR 1027, 1030, 1031.

    3. Pashito Holdings ltd. Vesus Paul Nderitu Ndungu & 2 Others. Pages 6, 7, 8.

16. In the case of Republic v Public Procurement Administrative Review Board; Leeds Equipments & Systems Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR, the court observed as follows;

> " The main question to be answered is whether the Respondent erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement. In answering this question, this Court is further guided by the circumstances when a public body shall be deemed to have made an error of law as expounded in Halsbury's Laws of England, 4th Edition at paragraph 77 as follows:
>
> > "There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order.
> >
> > The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed. In certain exceptional cases, the presumption that there is no power or jurisdiction

to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete. A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power."

17. The applicant is convinced that the issue as to whether the 1st respondent had the jurisdiction to hear and determine the review application was well captured and answered by the 1st respondent itself where it admitted that it is well veiled with the jurisdiction.

18. By upholding the preliminary objection, the legitimate expectation of the ex-parte applicant was vitiated as not only had there been a change of advocates which was not opposed by any party but also out of fairness, the advocate who drew the said review application having been a duly licensed advocate ought to have made a different pursuit towards justice rather than violate the ex-parte applicant's right to fair hearing.

19. It invokes Order 9 rule 1 of the Civil Procedure rules which provides:

> " Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by a party in person or by his recognized agent, or by an advocate duly appointed to act on his behalf.
>
> Provided that;
>
> a. any such appearance shall, if the court so directs, be made by the party in person; and
>
> b. where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney- General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act."

20. Order 9 rule 8 provides that:

> " Where a party, having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of appointment..."

21. It argues that it is apparent that the above provisions of the law make it mandatory for an advocate to file a notice of appointment as evidence of authority to appear or act on behalf of a party.

22. It is its case that the failure on the part of the 1st Respondent's Advocate to file a Notice of appointment renders whatever had been filed before any notice of appointment is lodged to be incompetent and

The Replying affidavit sworn by James Kilaka should thus be expunged from the Record as it was not properly filed.

23. The Court of Appeal decision in Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd . [1969] E.A. 696. of preliminary objections, Law, JA in that case said (p.700):

> " So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

And to the same effect Newbold, P stated (p.701):

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection.
>
> A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

A preliminary objection, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence.

Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.

24. It is the Applicants case that The 2nd and 3rd Respondents in this instance filed a Preliminary objection and attached to it was a screenshot of the Law Society of Kenya Advocate's portal, a copy of an official search, CR13 from the Business Registration Services and its receipt, to give it validity before the 1st Respondent.

25. The filing of the said annexures to the preliminary objection was clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the 2nd and 3rd Respondents' very detailed further memorandum of response, which memorandum led to annexure of two letters as evidence in support of the preliminary objection.

26. The Notice of Preliminary Objection dated 26th July, 2024 raised by the 2nd and 3rd Respondents cannot pass the test as a procedurally-designed preliminary objection. It is accompanied by documentary evidence, which means its evidentiary foundations are not agreed and stand to be tested.

The 1st Respondent's Case;

27. The 1st Respondent opposes the Application dated 29th August, 2024 via a Replying Affidavit sworn by Mr. James Kilaka on 29th August 2024.

28. It is its case that The Review Board has power to determine Preliminary Objections raised in regards to any Request for Review presented/filed before it under Regulation 209(4) of the Public Procurement and Asset Disposal Regulations 2020.

29. The 1st Respondent argues that in arriving at the impugned decision on 14th August, 2024, the Review Board lacked jurisdiction to hear and determine the Request for Review owing to the fact that the same was filed in the name of a deceased Sole Practitioner trading in the name and style of Gicheru and Company Advocates.

30. Reliance is placed on the case of Viktar Maina Ngunjiri and 4 Others Versus the Attorney General and 6 Others [2018] eKLR at Page 78 where the court held that the change of Advocates does not in itself cure defective pleadings.

31. It is its case that the ex-parte Applicant ought to have withdrawn/ sought to expunge all pleadings filed in relation to Request for Review Application No. 70 of 2024 in the first instance upon realization that the same had been drawn on an account of a deceased/non- existent Advocate.

32. Their move of changing Advocates from Gicheru and Company Advocates to MGM LLP Advocates was unethical and it amounted to an abuse of the court process as the defective pleadings were still on record.

33. In addition to the foregoing, the Respondent argues that the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies. It is not the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches a conclusion which is correct in the eyes of the court.

34. It is its case that, this being a judicial review case, this court is not empowered to venture into correcting the decision of the Review Board on the merits (whether wrong or correct) since this is the work of the Court of Appeal and not the Court exercising judicial review jurisdiction.

35. Korir J in the case of Republic V Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR set out the established reach of judicial review in Kenya thus;

> " The reach of judicial review is now well established. In the case of COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935Lord Diplock summarized the scope of judicial review thus: -
>
> "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 are subject to control by judicial review.
>
> The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety."……..
>
> 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.

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."

36. In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means least he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals.

37. The Court of Appeal in Grain Bulk Handlers Limited V J. B. Maina & Co. Ltd & 2 Others [2006] eKLR summarized the purpose of judicial review by stating that:-

> "Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions."

38. As observed by Lord Diplock in the already cited Civil Service Unions V Minister for The Civil Service case, the court can quash the decision if the same is so unreasonable to the extent that a reasonable tribunal addressing its mind to the facts of the case would not have arrived at such a decision. In doing so, I submit, the court will have descended into the arena of decision-making. For a court to justify such action it must be clearly obvious that the decision is truly and obviously unreasonable.

39. Reliance is also placed in Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, it was held while citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and an Application by Bukoba Gymkhana Club [1963] EA 478 at 479 that:

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to

be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

40. In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that;

> " The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power"

41. The High Court in Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR held that:

> " The purpose judicial review proceedings are to ensure that the individual is given fair treatment by the authority to which he has been subjected and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court".

42. In addressing the prayer for certiorari, it urges this Honourable court to be persuaded by the findings by the High Court; in Republic v Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited where Majanja J. quoting with approval the decision of Githua J in Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of [2012] eKLR as follows;

> " It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates."

43. The Court of Appeal in Kenya Pipeline Company Limited V Hyosung Ebara Company Limited & 2 Others (2012) eKLR drew the boundaries for reviewing the decisions of the Review Board as follows:

> " The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity...S.98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procuring entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the review board is obviously better equipped that the High Court to handle

disputes relating to breach of duty of the procuring entity .it follows that its decision in matters within its jurisdiction should not be lightly interfered with.

Having regard to the wide powers of the Review Board we are satisfied that the High court erred in holding that the Review Board was not competent to decide whether or not the 1st respondent's tender had met the mandatory conditions. The issue whether or not the 1st Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it.

In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1stRespondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of natural justice of that the decision was irrational. The Judicial review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly"

The High Court erred in essence in treating the Judicial Review Application as an appeal and in granting review orders on the grounds which were outside the scope of Judicial Review jurisdiction".

44. The 1st Respondent prays that this court adopts similar view as the Court of Appeal in the case above.

45. Further, in order for an applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the applicant must demonstrate that there is indeed a mistake that goes to the jurisdiction of the tribunal.

46. In Republic Vs Kenya Power & Lighting Company Limited & Another [2013] e KLR the learned Judge quoting a decision of the Court of Appeal stated:

> " The Board considering all the arguments of the Applicant and made findings on each of these issues. The Board may have been wrong in its decision but this Court would be usurping the statutory function of the Board were it to substitute its own views for those of the Board"

47. In the matter of Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR the court stated at paragraph *59* stated that: -

> " An administrative functionary that is vested by statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary."

48. The 1st Respondent argues that it acted in good faith and that in the event this Honourable Court is inclined to uphold the ex-parte applicant's prayers, then the Respondent should not be condemned to pay costs.

The 2nd and 3rd Respondents case;

49. They oppose the application through the Replying Affidavit of James Mbugua Mwaura who restates the facts of the case as follows;

a. The 3rd Respondent advertised tender No.KICC/66/2023-2025 for provision of cleaning and garbage collection at the Kenyatta International Convention Centre (hereinafter referred to as the "Tender") on 18th March 2024.

b. Five bidders submitted bid documents which were received, opened and registered.

c. While the evaluation process was ongoing material governance issues were detected having received complaints questioning the governance process of the proceedings.

d. Upon careful consideration, the procurement proceedings for the tender were cancelled due to the material governance issues that were detected in accordance to Section 63(1)(e) of the PPADA.

e. Vide letters dated 10th July 2024 all the bidders were notified about the cancellation of the tender and the reasons for the cancellation as per Section 63(4) of the PPADA.

f. The Applicant challenged the cancellation of the tender vide a Request for Review Application 70 of 2024 before the 1st Respondent.

g. In response to the Applicant's Request for Review Application, their Advocates on record the firm of Kihara and Wyne Advocates filed a notice of preliminary objection, memorandum of response, further memorandum of response and submissions. The preliminary objection was based on two grounds, that is:

    a. The Board had no jurisdiction to entertain the review as termination of procurement was not subject to review.

    b. The pleadings were in the name of a law firm where the sole proprietor is deceased.

h. The 1st Respondent rendered its decision on 14thAugust 2024 wherein it upheld ground 2 of the preliminary objection and struck out the Request for Review.

i. The Applicant dissatisfied with the decision of the 1stRespondent instituted the instant judicial review proceedings.

j. It is his case that the 1st Respondent correctly found that suits cannot be commenced in the names of persons who are deceased.

k. It believes that The 1st Respondent correctly found that the firm of Gicheru & Co. Advocates could not legally institute the request for review, the sole proprietor having passed away on 26th September 2022.

l. The fact that the Applicant changed its Advocates in the midst of the proceedings did not sanitize the request for review as the same was incurably bad, null and void ab initio and the firm of MGM LLP Advocates which took over the matter could not take over a nullity.

m. It is immaterial that the request for review was brought bona fide and in ignorance of the death of the sole proprietor.

n. It is its case that the 1st Respondent's decision can only be disturbed if the decision is tainted with illegality, irrationality and procedural impropriety.

o. It is further argued that the Applicant has not demonstrated that the 1st Respondent's decision is tainted with illegality, irrationality and procedural impropriety.

Analysis and Determination;

This court has to determine whether or not the Applicant is entitled to the orders sought.

50. In the case of Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300, it was held that:

> " In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also, Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).
>
> Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by BukobaGymkhana Club [1963] EA 478 at page 479 paragraph "E".
>
> Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

51. The Court of Appeal decision in Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd . [1969] E.A. 696. of preliminary objections, Law, JA in that case said (p.700):

> " So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

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A preliminary objection, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence.

Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.

52. The 2nd and 3rd Respondents in this instance filed a Preliminary objection and attached to it was a screenshot of the Law Society of Kenya Advocate's portal, a copy of an official search, CR13 from the Business Registration Services and its receipt, to give it validity before the 1st Respondent.

53. The filing of the said annexures to the preliminary objection was clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the 2nd and 3rd Respondents' very detailed further memorandum of response, which memorandum led to annexure of two letters as evidence in support of the preliminary objection.

54. The 1st Respondent should have proceeded with the hearing of the review on the basis of a rebuttable presumption that the advocate was alive until it was proven otherwise. The 1st Respondent should not have rejected the pleadings of an innocent litigant.

55. The Applicant introduced a new advocate who the Respondent should have given audience in the alternative in the interest of promoting access to justice as opposed to upholding the preliminary objection.

56. It is this court's finding that the 1st Respondent misdirected itself by venturing into a preliminary objection that was based on an issue that required proof given that there were factual content that required a rebuttal or proof as to whether or not the counsel was alive or not and whether his law firm that operated in the name of Ms. Gicheru & Co. Advocates was totally wound up or not.

57. Had the 1st Respondent given the Applicant an opportunity to explain the issue of the advocate in a proper hearing away from a preliminary Objection approach, then it would have satisfied itself that the applicant was not to blame for the challenges around the legal representation issue and that the applicant was entitled to counsel and Legal representation.

58. This right to natural justice has now been elevated to a fundamental right in *the Constitution* of Kenya 2010 at Article 47 thereof. Under the fundamental principles of the right to fair hearing and fairness a litigant should not suffer from the wrongs of his counsel.

59. The 1st Respondent case that in arriving at the impugned decision on 14th August, 2024, the Review Board lacked jurisdiction to hear and determine the Request for Review owing to the fact that the same was filed in the name of a deceased Sole Practitioner trading in the name and style of Gicheru and Company Advocate is misplaced.

60. The foregoing is a case of procedural impropriety and in particular the failure to act fairly on the part of the 1st Respondent towards the applicant in the process of taking the impugned decision.

61. It is this court's finding that the 1st Respondent made an error in the law and offended the principles of what amounts to a preliminary objection as settled in the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd . [1969] E.A. 696.

62. The 1st Respondent fell into an error of law as enunciated in the case of Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR) where it was held 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.... "

63. In the case of CFC Stanbic Limited versus John Maina Githaiga & Another [2013] eKLR the Court of Appeal made the following observation:

> " On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant."

64. It is this court's finding that in arriving at the impugned decision, the 1st Respondent violated the Ex-Parte Applicant's right to fair hearing.

65. The Public Procurement Administrative Review Board's decision was, illogical and unreasonable, ultra vires and ought to be declared a nullity for having been arrived at without giving the Applicant a fair and due process of his right to be heard as a result of the demise of its advocate.

66. In the case of Lee G Muthoga V Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nai 236 of 2009, it was held that:

> " It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight."
>
> In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel."

67. Section 34B

(1) A practising advocate who is not exempt under section 10 and who fails to take out a practising certificate in any year, commits an act of professional misconduct.

(2) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practising certificate.

68. The fact that a sole proprietor is deceased does not mean that he did not have a valid practicing certificate at the time he went to be with the Lord.

69. The fact that he was a sole proprietor does not mean that the law firm died an instant death upon the demise of counsel. The firm might have active associates who can prosecute pending briefs. Pending litigation doesn't die with the sole proprietor.

70. There are a lot of legal steps that take place culminating in the winding up of the firm and transferring the clients and files to other law firms upon the demise of a sole proprietor.

71. No doubt striking out pending suits as a result of the demise of a sole Propriety is a breach of innocent litigants right to Fair Administrative Action Article 47 and 50 of *the Constitution*.

72. The fact that a sole proprietor is deceased does not mean that the pleadings that counsel had filed before their demise should be thrown out of the court.

73. In some instances, like is the case here, a litigant can appoint a new law firm to act for him in place of the deceased sole proprietor.

74. The whole unfortunate situation around the representation in this suit and the demise of counsel was way beyond the Applicants control.

75. In the case of Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR it was held that:

> " 207. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4th Edition, 2001 Reissue, of Halsbury's Laws of England the authors at page 212, paragraph 92 explains the concept behind the development of the principle as follows:
>
> > "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.
> >
> > The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker."

76. When the Applicant approached the deceased counsel to file the administrative review, it had a legitimate expectation that it would get full representation during the tender process. This was never to be. The 1st Respondent took away the right through the impugned ruling.

77. The impugned decision does not accord with the right to access justice as guaranteed to the Applicant under Article 48 of *the Constitution*. The applicant has also sought for an order for Mandamus.

78. According to The Black's Law Dictionary, 9th Edition defines Mandamus as: "a writ issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act."

79. Mandamus is a remedy of last resort which is granted in exceptional circumstances, and, where an applicant has no other remedy.

80. In the case of R (Regina) v Dudsheath ex parte Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C.J. said:

> " It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it."

81. Having found that the 1st Respondent acted illegally and or in breach of the law this court is persuaded that the applicant has no other available remedy to enforce its rights to access to justice under Article 48 of *The Constitution*.

82. The only avenue that it has left towards the realization of its legitimate expectation to participate in the procurement process through counsel is by way of a writ of Mandamus.

83. Article 27 (1) of *The Constitution* provides that, "Every person is equal before the law and has the right to equal protection and equal benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms."

84. By issuing an order of Mandamus as prayed, then the applicant's right to equal benefit if the law as guaranteed under Article 27 of *The Constitution* will have been promoted.

85. It is my finding and I so hold that the Applicant is entitled to the order of Mandamus as sought.

Disposition:

86. The applicant has made out a case for the grant of the orders sought. The applicant has demonstrated that the review board committed an error of law. The board had the jurisdiction to determine the review.

Order;

1. An order of certiorari to remove to this Honourable Court and to quash the decision by the Kenya Development Corporation, the findings, decision and directives of the decision and directives of the Public Procurement Administrative Review Board contained in the decision made and dated 14th August, 2024 indicating that the ground 2 of the Preliminary Objection dated 26th July, 2024 be upheld and that the request for review dated 23rd July, 2024 be struck out is hereby issued.

2. An order of mandamus compelling the 1st Respondent to conduct the Applicant's review on merit basis is hereby issued.

3. The review shall be concluded within seven days of today's date.

4. An order of Mandamus, directed to the 2nd and 3rd Respondents herein respectively, to complete the procurement process of Tender No. KICC/66/2023-2024 to 2024 -2025 after order 3 above is complied with is hereby issued.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2024.

.....

J. M. CHIGITI (SC)

JUDGE