



**Republic v Public Procurement Administrative Review Board & 2 others; Royal Taste Kitchen Limited (Exparte); Urth Café Limited (Interested Party) (Application E217 of 2024) [2024] KEHC 13840 (KLR) (Judicial Review) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13840 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW  
APPLICATION E217 OF 2024**

**J NGAAH, J  
NOVEMBER 8, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD .... 1<sup>ST</sup>  
RESPONDENT**

**ACCOUNTING OFFICER, KENYA NATIONAL EXAMINATION  
COUNCIL ..... 2<sup>ND</sup> RESPONDENT**

**KENYA NATIONAL EXAMINATION COUNCIL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ROYAL TASTE KITCHEN LIMITED ..... EXPARTE**

**AND**

**URTH CAFÉ LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. The applicant’s application is a motion dated 30 September 2024 expressed to be brought under Article 47 of the *Constitution*; Sections 4, 7 and 9 of the *Fair Administrative Action Act* No. 4 of 2015; Section 175 of the *Public Procurement and Asset Disposal Act*, 2015; Regulation 222 of the Public Procurement



and Asset Disposal Regulations, 2020; and, Order 53 Rule 1 of the Civil Procedure (Amendment) Rules, 2020. The applicant seeks the following orders:

- “1. That an order of certiorari be and is hereby issued to bring into this Honourable Court for purposes of quashing the Notification of Intention to Award dated 5 July 2024 awarding the Tender No. KNEC/ONT/20232024/07 Tender for Provision of Catering and Event Setup Services to the interested party
  2. That an order of certiorari be and is hereby issued to bring into this Honourable Court for purposes of quashing the 1<sup>st</sup> respondent’s administrative decision dated 16 September 2024 in PPARB Application No. 65/2024 of 12 July 2024;
  3. That an order of mandamus be and is hereby issued compelling the 1<sup>st</sup> respondent to rehear and determine the Request for Review filed in PPARB Application No. 65/2024 of 12 July 2024;
  4. That an order of prohibition be and is hereby issued restraining the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from awarding Tender No. KNEC/ONT/20232024/07 Tender for Provision of Catering and Event Setup Services to the Interested Party herein and/or executing any procurement contract with the Interested Party pursuant to the said Tender.
  5. That such further and/or other appropriate orders and/or reliefs that the Honourable Court may deem just and expedient to grant in the circumstances of the case.”
2. The application is based on a statutory statement dated 26 September 2024 and an affidavit verifying the facts relied upon, sworn on even date by Ms. Emily Kerubo who has introduced herself in the affidavit as a director of the applicant.
  3. According to Ms. Kerubo, on 2 September 2024, this Honourable Court (Chigiti, SC., J.) handed down a judgment in a judicial review application no. HCJRMISC/E096/2024; Urth Caffe Limited vs. Public Procurement Administrative Review Board and Kenya National Examination Council & 2 Others. In that judgment, the learned judge quashed the 1<sup>st</sup> respondent’s decision rendered on 2 August 2024 in a request for review registered as application no. 65 of 2024 and remitted the application for re-hearing and determination by the Public Procurement Administrative Review Board, the 1<sup>st</sup> respondent in these proceedings. (I will refer to the 1<sup>st</sup> respondent hereinafter also as “the review board”). The review board had, among other orders it granted, awarded the tender to the applicant.
  4. At paragraph 199 of Chigiti, J’s judgment, the learned judge made a finding that the review board’s decision did not meet the requirements in section 167 (1) of the Public Procurement and Asset Disposals Act, 2015 (hereinafter “the Act”) to the extent that the applicant had failed to plead or disclose that it had suffered or risked suffering any loss or damage due to alleged breach of duty by the procuring entity.
  5. And in paragraph 227 of the judgment, the learned judge held that that the review board is a specialized central independent body mandated to review, hear and determine tendering disputes and, therefore, was best placed to rehear and determine the issue as to whether the procuring entity should be compelled to execute the procurement contract with interested party, following the Notification of Intention to Award dated 5 July 2024.



6. In remitting application No. 65 of 2024 to the review board, Chigiti, J. ordered that the application be heard within seven days. Accordingly, the review board reconsidered the applicant's Request for Review and delivered its decision on 16 September 2024, within the timeline prescribed by the learned judge. According to the applicant, the seven-day period was the period within which the application was to be heard afresh and determined and that time started running when the review board was seized of this Honourable Court's order.
7. Against this background the applicant has sworn that:
  - “9. That the applicant contends that the 1<sup>st</sup> respondent therefore fell into no error of law in dismissing the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and interested party's preliminary objections, raised on the basis that the 1<sup>st</sup> respondent had no jurisdiction to determine the applicant's Request for Review as the same was being considered outside of the timeline envisaged in the orders of this Honourable Court given on 2 September 2024 in HCJRMISC/E096/2024.”
8. The decision in which the preliminary objections were dismissed and which is the subject of impeachment in this application is the review board's decision that was rendered after the fresh hearing of application no. 65 of 2024 as ordered by Chigiti, J. What I gather from the paragraph quoted above is that preliminary objections were raised against the hearing of the application afresh apparently because the review board set in motion the hearing of the application after the elapse of seven days after the judgment of Chigiti, J. was delivered. The applicant supports the dismissal of the preliminary objections.
9. That notwithstanding, the applicant contests the review board's decision because:
  - “...at paragraphs 105 and 111 of its administrative decision, the 1<sup>st</sup> respondent noted this Honourable Court's finding in HCJRMISC/E096/2024: that the applicant had failed to plead in its Request for Review that it had suffered or was at the risk of suffering loss and damage arising from the breach complained of; and that the applicant therefore lacked the requisite locus standi under Section 167 (1) of the PPARB Act; had not been challenged and was therefore uncontested, by reason of the fact that no party had preferred an appeal to the Court of Appeal against the said Judgment.”
10. The applicant swears that the review board held, erroneously in the applicant's opinion, that it was bound by the decision of Chigiti, J, under the doctrine of stare decisis. According to the applicant, the court erred in holding that, in application no. 65 of 2024, the applicant had not pleaded that it had suffered or risked suffering loss and damage yet in paragraph 18 of that application, the applicant had expressly pleaded that it was likely to suffer loss and damage by way of loss of business opportunity on account of breach of duty by the procuring entity and its chief executive. To quote the applicant:
  - “14. That in arriving at the foregoing finding, the 1<sup>st</sup> respondent failed to consider a relevant fact, that the finding made by this Honourable Court that the applicant had failed to plead in its Request for Review that it had suffered or was at the risk of suffering loss and damage arising from the breach complained of was clearly wrong, and in view of that apparent error, it was not bound by the said finding of this Honourable Court, and the finding could therefore have been legitimately avoided.”



11. The applicant has gone further to contend that in circumstances where the review board anchored its decision on a finding that was “fundamentally flawed due to plain and obvious oversight made by this Honourable Court, it erroneously applied the doctrine of stare decisis and thereby arrived at a decision which was materially influenced by an error of law.”
12. Mr. James Kilaka swore a replying affidavit on behalf of the 1<sup>st</sup> respondent, opposing the application. Mr. Kilaka swears that he is a procurement professional and the acting secretary of the review board and that he heads the board’s secretariat. The secretariat provides administrative services to the board, the board’s committees and the board’s hearing panels.
13. Mr. Kilaka has chronicled the events leading to the board’s impugned decision and, by and large, defended the decision. In particular, the procurement process out of which the initial dispute was lodged before the review board, was in respect of the tender for catering and events set-up services which was described as “Tender No. KNEC/[ONT/2023-2024/07](#) Tender for Provision of Catering and Events Set-Up Services On Two Year Contract.” The first request for review was by the applicant in this proceedings and it was filed as application no. 46 of 2024. The application was successful as the review board directed that the applicant’s bid be re-admitted for re-evaluation at the financial evaluation stage.
14. The applicant’s bid was disqualified for the second time, this time round, at the due diligence stage. Once again, the applicant filed another request for review being application no. 65 of 2024. The applicant was successful as the board ordered that the applicant be awarded the tender. The interested party, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were aggrieved by the applicant’s decision and, therefore, they filed applications for judicial review, being application nos. E096 and E097 of 2024. The two applications were consolidated and file no. E096 of 2024 designated as the lead file.
15. Like the applicant, Mr. Kilaka has sworn that this Honourable Court allowed the application and directed that application no. 65 of 2024 be heard afresh. On the morning of 11 September 2024, when the application was set to be heard, the interested party, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed Notices of Preliminary Objection challenging the jurisdiction of the review board to rehear the Request for Review.
16. On 16 September 2024 the review board rendered its decision. According to this decision, the notices of preliminary objection were dismissed. The review board also struck out the applicant’s request for Request for Review on account of the High Court’s finding that the applicant in the instant application lacked the locus standi to file the Request for Review. The rest of depositions in Mr. Kilaka’s affidavit are in defence of and the reasons for the review board’s decision.
17. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a preliminary objection and a replying affidavit opposing the application. The preliminary objection is on the grounds that the applicant’s application and proceedings are res judicata and offend section 7 of the [Civil Procedure Act](#) Cap 21. According to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the issues raised in this application have been heard and determined by the Honourable Court in the consolidated suit no. 096/2024.
18. By reason of the doctrine of res judicata, this suit is misconceived, incompetent, an abuse of the court process and a nullity. For the same reason, this Honourable Court has no jurisdiction to entertain this suit and, according to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the suit should be struck out with costs to them.
19. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ replying affidavit was sworn by Mr. Nicholas Mangata who has identified himself as the Deputy Director, Supply Chain Management Department of 3<sup>rd</sup> respondent. According to Mr. Mangata, the 2<sup>nd</sup> respondent is the Chief Executive Officer and Accounting Officer of the 3<sup>rd</sup>



- respondent. The latter is in turn a state corporation established under section 3 of the [Kenya National Examinations Council Act](#) No. 29 of 2012 with the statutory mandate to, among others things, set and maintain examination standards, conduct public academic, technical and other national examinations within Kenya at basic and tertiary levels.
20. Like Mr. Kilaka, Mr Mangata has given the history of tender in issue, the procurement process and, the events leading to the various disputes before the review board and this Honourable Court. Mr. Mangata has further sworn that following the review board's decision of 16 September 2024, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents proceeded to oversee Tender: KNEC/[ONT/2023-2024/07](#) for the provision of Catering and Event Set Services on two Year contract, to its lawful and logical conclusion and entered into a contract with the interested party on 1<sup>st</sup> October 2024, since the Notification of Intention to Award had already been issued. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have, therefore, been advised by their counsel, which advice they verily believe to be true, that following the signing of the contract, the dispute over the tender is now beyond the remit of this Honourable Court by dint of Section 167(4) (c) of the Act.
  21. The interested party filed a preliminary objection which is more or less on the same grounds as the objection filed by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. In particular, the interested party has pleaded that the applicant lacks locus standi to commence and continue the instant judicial review proceedings against the subject decision of the review board, having failed to plead or demonstrate that it is itself as "a person aggrieved" by the decision of the review board as contemplated in Section 175(1) of the [Public Procurement and Asset Disposal Act](#).
  22. It is also averred that the Applicant lacks locus standi to commence and continue the instant judicial review proceedings against the subject decision since it had failed to plead or prove itself as "a person aggrieved" by the decision of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents contained in the Notification of Intention to Award dated 5 July 2024 awarding Tender No. KNEC/[ONT/2023-2024/07](#) as contemplated in Section 7(1) of the [Fair Administrative Action Act](#). Finally, the interested party has contended that this Honourable Court lacks jurisdiction to take cognizance of or hear and determine any alleged grievance arising from the Judgment of Chigiti, J. dated and delivered on 2 September 2024 in application no. E096 of 2024 having regard to the provisions of section 175(4) of the [Public Procurement and Asset Disposal Act](#).
  23. A replying affidavit was also filed on behalf of the interested party. It was sworn by Ms. Philomena Karanja who has sworn that she is the managing director of the interested party in the instant application. And, like the respondents, she has also chronicled the events constituting the floating of the tender, the procurement process and the disputes that have arisen out of the tender process. The interested party has also adopted the same posture as the respondents, both in fact and in law, in opposing the applicant's application.
  24. The submission filed by the respective parties largely mirror what the depositions in their affidavits and the averments made in their pleadings.
  25. Of particular interest to the court in a judicial review application such as the one before court is the grounds of judicial review upon which the judicial review reliefs are sought. The grounds constitute the first hurdle which an applicant must surmount because without them, an application for judicial review would be without foundation. Needless to say, the point of entry for a judicial review court to intervene and check the powers of subordinate courts or tribunals or such other bodies whose powers are subject to supervisory jurisdiction of this Honourable Court is the grounds upon which the application is made.



26. This is obvious from Order 53 Rule 1(2) which states in rather peremptory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:
- (2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).
27. And Order 53 Rule 4(1) states, also unambiguously, that no grounds should be relied upon except those specified in the statement accompanying the application for leave.
28. These grounds have not been left to conjecture or speculation. They were defined and explained in the English decision of English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as “the grounds upon which administrative action is subject to control by judicial review”. These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

“My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.” That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

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

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court’s exercise of this role, resort I think is today no longer needed to Viscount Radcliffe’s ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court’s reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. “Irrationality” by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.



I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.”

29. The court will intervene, and may grant the remedy for judicial review if any of these grounds of judicial review is proved to exist. But as Lord Diplock suggested, the list of grounds is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.
30. To the extent that Order 53 Rule 4(1) of the Civil Procedure Rules states categorically that no grounds should be relied upon except those specified in the statement accompanying the application for leave, it is mandatory that the grounds must be set out clearly in clear and unambiguous terms so that the court, and the respondent or respondents, in the application are not left to speculate the grounds of judicial review upon which the application is based.
31. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, *Judicial Review Handbook*, at Paragraph 34.1 states as follows:

“The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to ‘throw everything’ including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court.”
32. The ‘new order’ referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in *pari materia* with our own Order 53 of the Civil Procedure Rules, 2010. The point is, however, clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity. It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built.
33. In the instant application, the applicant has largely reproduced the facts in the statement and the depositions in affidavit verifying the facts relied upon as the grounds of judicial review for which judicial review reliefs are sought. The closest the applicant has come to singling out the grounds as defined and explained in the *of Council of Civil Service Unions versus Minister for the Civil Service* (*supra*) case is in paragraphs 19, 20, 22 and 23 of the statutory statement where it has been pleaded as follows:

“(19) In the circumstances where the 1<sup>st</sup> respondent anchored its decision on a finding that was fundamentally flawed due to the plain and obvious oversight made by this Honourable Court, it erroneously applied the doctrine of stare



decis and thereby arrived at a decision which was materially influenced by an error of law.

(20) By purporting to rely on the general rule of the doctrine of stare decisis which permitted it to avoid being bound by a decision which laboured under the handicap of apparent error, the 1<sup>st</sup> respondent arrived at the Decision which was disproportionate to not only the Applicant's interests, but also affected and infringed on its right to fair administrative action i.e. right to a legitimate expectation that the issues would be determined judiciously as guaranteed under Article 47 of the Constitution.

(22) In addition to the above, as an administrative authority with the mandate of making judicious decisions, the administrative decision of the 1<sup>st</sup> respondent is not rationally connected to the purpose for which it was taken, to wit, doing justice to all the parties before the 1st Respondent; and to the information before the 1<sup>st</sup> respondent, to wit, that the applicant had in fact pleaded at paragraph 18 of its Request for Review that it was likely to suffer loss and damage by way of loss of business opportunity on account of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents illegal, unfair and unlawful actions.

(23) The 1<sup>st</sup> respondent's administrative decision is irrational and unfair. A reasonable board properly addressing itself to paragraph 18 of the applicant's Request for Review could never have arrived at such an unreasonable conclusion, almost in defiance of logic and acceptable judicial standards."

34. There is a hint of the grounds of illegality, irrationality and legitimate expectation in these averments; however, for the reasons I have given, it is not for the court to scour the applicant's pleadings in search of the grounds for judicial review and, neither is it entitled to speculate these grounds in any particular application. The applicant has the obligation to identify and specify, accurately, the grounds for judicial review upon which his application is based.

35. But if I have to give the applicant the benefit of the doubt and proceed on the assumption that it is the grounds of illegality, irrationality and procedural impropriety that form the basis of his application, the next question is whether the impugned decision is tainted on any of these grounds.

36. As far as I gather from the applicant's application, its grievances do not necessarily stem from the review board's decision. The decision by which the applicant is aggrieved is the judgment of this Honourable Court which found, as a fact, that the applicant had not pleaded having suffered or risked suffering loss and damage as a result of breach of duty by the procuring entity. At paragraph 199 of the judgment, the court held that:

"199. It also this court's finding that the decision by the 1<sup>st</sup> respondent did not meet the requirements provided under Section 167 (1) of the PPAD Act to the extent that the 2<sup>nd</sup> interested party failed to plead or even disclose whether it suffered or risked suffering any loss or damage due to a breach of duty imposed."

37. The 2<sup>nd</sup> interested party to which reference has been made was established in the proceedings before the review board to be the applicant in the instant application. It was, as noted, the applicant in the request for review before the review board, being application no. 65 of 2024. Section 167(1) which is at the center of the applicant's grievances 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.

38. The Court of Appeal has interpreted this provision of the law to mean that the candidate or tenderer seeking administrative review must, in his application, plead to have either suffered or risk suffering loss or damage as a result of breach of duty on the part of the procuring entity. The Court so held in *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & Others (2019) eKLR; Mombasa Civil Appeal No. 131 of 2018*. In that case, which was an appeal on a decision of this Honourable Court (sitting at Mombasa) arising from a constitutional petition against the decision of a procuring entity, the court held as follows:

“It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;

The court then quoted section 167(1) and held that:

“It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that section 167(1) was designed of keep out. The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.” (Emphasis added).

39. In the wake of the Court of Appeal’s determination, a candidate or a tenderer who has not pleaded suffering or risked suffering loss and damage as a result of breach of duty by the procuring entity has no locus standi to seek administrative review of the procuring entity’s decision. In Black’s Law Dictionary, 10<sup>th</sup> Edition, “locus standi” is defined as follows:

“The right to bring an action or to be heard in a given forum”

40. Thus, a person who has not pleaded loss and damage that he has suffered or risks suffering cannot bring an action for administrative review or, has no right to be heard. The dilemma that the review board seems to have faced was that although this Honourable Court held the applicant as having no locus standi to bring or to be heard in application no. 65 of 2024, the court still ordered the review board



to rehear the application and make a determination. The court's holding in this respect is found in paragraph 227 of its judgment where it expressed itself as follows:

“227. The 1<sup>st</sup> respondent is the specialized central independent body mandated to review, hear and determine tendering disputes. I am of the view that the 1<sup>st</sup> respondent will be best placed to rehear and determine this issue and this court will not grant this order.”

The court then made the order, amongst other orders, that:

“4. The Request for Review application No. 65 of 2024 is hereby remitted for rehearing and determination by the 1<sup>st</sup> respondent within 7 days.”

41. So, if the applicant was not entitled to lodge application no. 65 of 2024 and neither could it be heard in that application for want of locus standi, the review board was left with limited options of what it could do with the applicant's application once it was remitted by the Court. It opted to down its tools which, in the circumstances, was the most logical and reasonable course it could take. It held as follows:

“113. Appreciating the place of precedent and hierarchy of the various dispute resolution forum in the public procurement dispute resolution architecture it would follow that this Board is bound by the findings of the High Court. The Board can therefore do no better than restate that the Applicant failed to plead suffering or being at the risk of suffering loss and damage. It would therefore follow that the Board lacks jurisdiction over the present Request for Review and therefore proceeds to down its tools.

114. In view of the Board's finding on this issue, the Board shall not address any of the other issues it had previously formulated for determination in the matter.”

42. The applicant's gripe with the decision of this Honourable Court and which the review board stated in clear terms that it was binding on it is that, contrary to this Honourable Court's finding that the applicant had not pleaded loss and damage in his request for review, there was indeed such pleading and, as matter of fact, the pleading is captured in paragraph 18 of the request for review. In that paragraph, the applicant pleaded as follows:

“18. The applicant states that it is likely to suffer loss and damage by way of loss of business opportunity on account of the 1<sup>st</sup> and 2<sup>nd</sup> respondent's illegal, unfair and unlawful actions.”

In the face of this pleading the applicant has sworn that:

14. That in arriving at the foregoing finding, the 1<sup>st</sup> respondent failed to consider a relevant fact, that the finding made by this Honourable Court that the Applicant had failed to plead in its Request for Review that it had suffered or was at the risk of suffering loss and damage arising from the breach complained of was clearly wrong, and in view of that apparent error, it was not bound by the said finding of this Honourable Court, and the finding could therefore have been legitimately avoided.

15. That I am advised by the Applicant's Advocate on record which advise I verily believe to be correct, that indeed, the basic rule of stare decisis admits



of exception when the former determination is most evidently contrary to reason; much more if it be clearly contrary to the law and the evidence before an administrative body like the 1st Respondent.

16. That the Applicant therefore contends that in the circumstances where the 1st Respondent anchored its Administrative Decision on a finding that was fundamentally flawed due to the plain and obvious oversight made by this Honourable Court, it erroneously applied the doctrine of stare decisis and thereby arrived at a decision which was materially influenced by an error of law.
17. That by purporting to rely on the general rule of the doctrine of stare decisis which permitted it to avoid being bound by a decision which laboured under the handicap of apparent error, the 1st Respondent arrived at a decision which was disproportionate to not only the Applicant's interests, but also affected and infringed on its right to fair administrative action i.e. right to a legitimate expectation that the issues would be determined judiciously as guaranteed under Article 47 of the Constitution."
43. The applicant's quest, in this application, is effectively an invitation to this Honourable Court to hold that the review board's decision is tainted, as suggested in the statutory statement, because the review board ought not to have been bound by a judgment which, in the applicant's opinion, is flawed both in fact and in law. Certainly, I cannot accept such an invitation for two simple reasons; first, the judgment in application no. E096 of 2024 is a judgment from a court of coordinate jurisdiction and, secondly, I cannot seat on appeal on a judgment from this Honourable Court.
44. Whether this Honourable Court was right in remitting application no. 65 of 2024 to the review board even after it held that the applicant in that application had no locus standi to either file a request for administrative review of the procuring entity's decision or that, for the same reason, it had no right to be heard is not for me to say. It is also beyond me to say whether this Honourable Court was right in making a finding of fact to the effect that the applicant had not pleaded having suffered or risked suffering loss and damage as a result of the infractions by the procuring entity when the applicant's pleadings appear to show the contrary.
45. What I can say with confidence is this: having taken the stance that the judgment of this Honourable Court in application no. E096 of 2024 was flawed, the applicant was enjoined to take advantage of section 175 (4) of the Public Procurement and Asset Disposal Act and lodge an appeal against the decision to the Court of Appeal. This section reads as follows:
  - (4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.
46. It is not open to the applicant to front the decision of the review board as its target in these proceedings when it is apparent from its pleadings and affidavit that the decision which is presented as the source of the applicant's grievances and which ought to have been questioned by way of an appeal is a judgment of this Honourable Court. The review board cannot be faulted merely because it applied, in its decision, the judgment of this Honourable Court.
47. Narrowing down to judicial review grounds, upon which the applicant's application is based, there is no basis for impeaching the review board's decision on any of these grounds. Going by threshold set by Lord Diplock in Council of Civil Service Unions versus Minister for the Civil Service (supra), there is no proof that in coming to its decision, the review board did not understand correctly the law



regulating its decision-making power or that it did not give effect to it. It cannot be said that the review board contravened or exceeded the terms of its decision-making power and neither can it be said that, in coming to the decision it did, the review board was pursuing an objective other than that for which the authority to make the decision was conferred. In short the ground of illegality fails.

48. As far as the ground of irrationality is concerned, the review board's decision is not 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. As earlier noted, the review board opted to down its tools following this Honourable Court's judgment that the applicant had no locus standi to file a request for review. Notwithstanding that this Honourable Court had remitted the applicant's application for re-hearing, it would have been an exercise in futility for the review board to hear the application on merits when the applicant was adjudged to have been deficient of locus standi to make and prosecute the application in the first place. I make this remark only to demonstrate the point that it was not irrational for the review board to down its tools.
49. As for the ground of legitimate expectation, it is a ground that arises "where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. In such cases the courts have held that the expectation ought not to be summarily disappointed." (See De smith Woof and Jowell's Judicial Review of Administrative Action, 5<sup>th</sup> Edition para 8-037 at page 417). Lord Diplock laid out the scope of this ground in Council of Civil Service Unions versus Minister for the Civil Service (supra). In that case, the learned judge held that for a legitimate expectation to arise, the decision:

"must affect the other person...by depriving him of some benefit or advantage which either he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

50. It has not been demonstrated that, in the review board's decision, the applicant was deprived of some advantage that the review board had, in the past, permitted him to enjoy and which the applicant expected to continue enjoying. Neither has it been demonstrated that this advantage was withdrawn without the applicant having been given an opportunity to be heard.
51. Before I conclude, I must mention that; the applicant's failures aside, it was not open to the procuring and the interested party to enter into a contract while this suit was pending. I say so because the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have, without any suggestion of remorse, sworn in paragraphs 41 and 42 of their replying affidavit as follows:

"41. That in adherence to Order 2 of the 1<sup>st</sup> Respondent's Ruling delivered on the 16<sup>th</sup> of September 2024, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents proceeded to oversee Tender: KNEC/[ONT/2023-2024/07](#) for the provision of Catering and Event Set Services on two Year contract, to its lawful and logical conclusion and entered into a contract with the interested party on 1<sup>st</sup> October 2024, as the Notification of Intention to Award had already been issued. (Annexed and marked Exhibit 'NM 9' -Copy of the Contract entered into with Urth Caffè Ltd).



42. That I am advised by my Counsel on record, which advise I verily believe to be true, that following the signing of the contract, the matter is therefore beyond the remit of this court by virtue of Section 167(4)(c) of the Act.”
52. The actions by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are obviously contrary to section 175(1) and (5) which are clear that the review board’s decision only becomes final and binding and hence, available to be acted upon if, after fourteen days from the date of delivery of the decision, no application for judicial review has been filed in this Honourable Court or if the Court has not determined the application for judicial review within forty-five days from the date of filing the application. These provisions read as follows:
175. Right to judicial review to procurement
- (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.
  - (2) ...
  - (3) The High Court shall determine the judicial review application within forty-five days after such application.
  - (4) ...
  - (5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.(Emphasis added)
53. It follows that the procuring entity could not have proceeded to enter into a contract within the fourteen-day window for filing of the judicial review application. And once the application was filed, it could not sign the contract when the review board’s decision was subject to interrogation by this Honourable Court. In short, it was not open to either the procuring entity together with its chief executive, on the one hand, and the interested party, on the other hand, to proceed and enter into a contract before the review board’s decision became final and binding in the context of section 175 (1) and (5) of the Act.
54. It is worth noting that under section 175(6) of the Act, a party to the review which disobeys the decision of the review board or this Honourable Court or the Court of Appeal is in breach of the Act and any action by such party, contrary to the decision of the review board or this Honourable Court or the Court of Appeal is a nullity.
55. If the applicant’s application had succeeded, the 2<sup>nd</sup> respondent who, presumably signed the contract on behalf of the procuring would have been held personally liable for any loss or damage ensuing from the nullified contract. This, of course, is besides the contract being declared a nullity. The 2<sup>nd</sup> respondent must be warned that he was treading on a very precarious ground when he signed the contract contrary to section 175(1) as read with section 175(5) of the Act. These provisions are an automatic stay, by operation of the law, of the review board’s decision.
56. In the final analysis, I hold that the applicant’s application is misconceived and an abuse of the due process of this Honourable Court. It is hereby dismissed. I, however, make no orders as to costs. Orders accordingly.

**SIGNED, DATED AND UPLOADED ON THE CTS ON 8 NOVEMBER 2024.**



**NGAAH JAIRUS  
JUDGE**

