



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. E162 OF 2021

(CONSOLIDATED WITH E146 OF 2021)

**IN THE MATTER OF: AN APPLICATION BY KENYA ELECTRICITY
GENERATING COMPANY PLC (KENGEN) FOR LEAVE TO COMMENCE
JUDICIAL REVIEW PROCEEDINGS PURSUANT TO ORDER 53 OF THE
CIVIL PROCEDURE RULES**

AND

**IN THE MATTER OF: THE DECISION OF THE PUBLIC PROCUREMENT
ADMINISTRATIVE RESPONDENT APPLICATION NO.120/2021 CONCERNING
TENDER NO.KGN-BDD-2019 FOR PROCUREMENT OF PLANT DESIGN,
SUPPLY AND INSTALLATION OF OLKARIA UNITS 1,2, AND 3
GEOTHERMAL POWER PLANT REHABILITATION PROJECT.**

AND

**IN THE MATTER OF: IN THE MATTER OF THE PUBLIC PROCUREMENT
AND DISPOSAL ACT AND THE REGULATIONS THEREUNDER**

BETWEEN

REPUBLIC.....APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

THE CONSORTIUM OF TSK

ELECTRONICA Y ELECTRICIDAD S.A. & ANSALDOENERGIA.....1ST INTERESTED PARTY

THE CONSORTIUM OF SPECO III ELECTRIC

POWER CONSTRUCTION COMPANY LIMITED AND ZORLU

ENERJI ELEKTRIK URETİM A.S.....2ND INTERESTED PARTY

EX PARTE KENYA ELECTRICITY GENERATING COMPANY PLC (KenGen)

CONSOLIDATED WITH 146 OF 2021

THE CONSORTIUM OF TSK

ELECTRONICA Y ELECTRICIDAD S.A & ANSALDO ENERGIA.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

THE ACCOUNTING OFFICER,

KENYA ELECTRICITY GENERATING COMPANY PLC.....1ST INTERESTED PARTY

KENYA ELECTRICITY GENERATING COMPANY PLC.....2ND INTERESTED PARTY

THE CONSORTIUM OF SPECO III ELECTRIC POWER

CONSTRUCTION COMPANY LIMITED AND ZORLU

ENERJI ELEKTRIK URETİM A.S.....3RD INTERESTED PARTY

JUDGMENT

1. The ex parte Applicant in **E162 OF 2021** is before this Court vide a Notice of Motion Application dated 3rd November 2021 in which the following orders are sought:

1. **THAT** this Honourable Court be pleased to grant the following Judicial Review Orders:

(a) An order of certiorari to bring into the High Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board (the Respondent herein dated the 21st October 2021 in **Review Application No.120 of 2021** in regard to Tender No.KGN BDD-03-2019 being the Tender for the Procurement of Plant Design, Supply and Installation of Olkaria I units 1,2, and 3 Geothermal Power Plant Rehabilitation Project;

(b) Such further and other reliefs as this Honourable Court may deem just and expedient to grant.

(c) Costs of this application be provided for.

2. The Application is supported by the grounds on its face and a Statutory Statement and Verifying Affidavit sworn by Philip Yego all of which are dated 28th October 2021.

3. The Applicant in **E146 OF 2021** is also before this court vide a Notice of Motion application dated 8th November 2021 seeking the following orders;

(a) **THAT** an order of certiorari be issued removing to the High Court for purposes of quashing the Respondent's decision/findings made in respect of issues **II.b** and **III** found at pages 40-46 of the Respondent's Decision in Public Procurement Administrative Review Board Application No.120 of 2021 and dated October 21,2021.

(b) An order of mandamus be issued against the Respondent compelling it considers and makes a determination on the merits of subject matter, in respect of issues **II.b** and **III** found at pages 40-46 of the Request for Review 120 of 2021 dated 17th October 2021, within reasonable time, considering the pleadings and submissions of the parties therein and apply the provisions of the Public Procurement and Asset Disposal Act No. 33 of 2015 and the instructions to bidders/tenderers in the bid document issued by the Procuring Entity in its determination.

(c) Such further and other reliefs as this Honourable Court may deem just and expedient to grant.

(d) Costs of this Application be borne by the Respondent.

4. The said Application is supported by the grounds on its face, a Statutory Statement dated 3rd November 2021 and a Verifying Affidavit sworn by Jose Luis Herrera Comes also dated 3rd November 2021.

SUMMARY OF FACTS IN E162 OF 2021

5. Mr. Philip Yego in his affidavit averred that he was the Supply Chain Manager of Kenya Electricity Generating Company PLC (Kengen) and that he was aware that on 23rd April 2019 the Applicant through the Kenyan print media and Kengen website invited bids for procurement of Plant Design, Supply and Installation of Olkaria 1 units 1,2, & 3 Geothermal Power Plant Rehabilitation Project. It was deposed that by the closing of the tender on 26th November 2019 a total of 4 firms had submitted their bids as follows:

a) *The consortium of Burham Engineers Ltd, Baoye Group Company Limited and Performance Mechanical Contractors-Bidder No.1;*

b) *The consortium of SEPCO III Electrical Power Construction Co. Ltd and Zorlu Enerji Elektrik Uretim A.S-Bidder No.2;*

c) *Joint Venture of Ansaldo Energia SPA and TSK Electronica Y Electricidad S.A-Bidder No.3; and*

d) *Mitsubishi Toyota Tsusho Corporation, Mitsubishi Hitachi Power Systems Ltd and H-Young & Co (E.A) Ltd-Bidder No.4.*

6. Subsequently, The Respondent appointed the tender evaluation committee in accordance with section 46 of the PPAD Act to evaluate the bids. The said evaluation included in Option A, Single-Stage Two- Envelope Bidding of the Standard Bidding Documents for Procurement. The 2nd Interested Party's bid was found to be the lowest and in conformity with all the eligibility requirements as set out in the tender document and thus the Respondent proceeded to award the tender as provided under **ITB 41.1**.

7. The 1st Interested Party aggrieved by this decision filed for a review (**Request for Review No.210 of 2021**) on 30th September 2021 before the Respondent seeking several orders including re-evaluation. The Ex parte Applicant herein filed a Replying Affidavit sworn on 6th October 2021, a Preliminary Objection dated 4th October 2021 and written submissions dated 15th October 2021. The ex parte Applicant herein contended that the subject procurement proceedings were undertaken out of a Bilateral Loan and as such pursuant to Section 4 (2) (f) as read with Section 6(1) of the PPAD Act,2015 the Board was divested of jurisdiction.

8. Notwithstanding the foregoing, a decision on the Review nullifying the letter of notification of award to the 2nd Interested Party and the notifications of regret to the 1st Interested Party and other bidders was delivered. It was also ordered that the 2nd Interested Party and any other bidder who had made it to the financial stage be re-admitted back to the procurement process and re-evaluated on the financials and the procurement process. The same was to be concluded within 14 days.

9. The deponent deposed that the Respondent usurped the role of the evaluation committee by replacing its decision on financial evaluation. Further that the direction to have the financial re-evaluation conducted within 14 days purported to amend the Bilateral Loan Agreement governing the subject procurement proceedings.

10. It was averred that the ex parte Applicant lodged the Judicial Review proceedings on grounds that the Bilateral Agreement referred to is the Loan Agreement No.KE-P33 dated 16th March 2018 through which JICA agreed to extend a line of credit to the tune of Ten Billion Seventy-Seven Million Japanese Yen. Under Article III, Section 2 as read with schedule 4 section 1 of the said agreement. Procurement of the goods and services was to be financed out of the loan and was to be in accordance with the Guidelines for procurement under Japanese ODA loans.

11. It is the applicant's case that long after the procurement had commenced, JICA and the Republic of Kenya entered into a subsidiary/on lent loan agreement dated 17th April 2020 and similarly under Article 10.1 the procurement was subject to the Guidelines for procurement under the Japanese ODA loans. The Respondent therefore ignored the import, purport and objects of the Bilateral Loan Agreement dated 16th March 2018 and instead relied on Clause X 10.2 of the subsidiary/on lent agreement dated the 17th April 2020 to arrogate jurisdiction to itself.

12. Mr Yego averred that there have been numerous judicial pronouncements resting with the decision of the Court in **Republic v. Public Procurement Administrative Review Board; ex parte Kenya Power and Lighting Company PLC [2019] eKLR** where it was held that if the procurement is between the Republic of Kenya and a Foreign Agency the Respondent's jurisdiction is ousted.

13. In addition, it was deposed that the Respondent erroneously found that there was a lacuna on the dispute resolution mechanisms despite it being provided for under ITB 42.5 and the principle that jurisdiction can only be conferred by written law and not judicial craft. Additionally, it was deposed that the Respondent also purported to rely on **Review Application No.141 of 2020 Riang International Group Limited vs. The Accounting Officer Rift Valley Water Works Development Agency and Central Rift Valley Water Works Development Agency** where the Procuring entity failed to demonstrate the existence of a Bilateral Agreement.

14. Further that the decision was irrational as Section IV of the ITB provided Schedules 1 to 4 comprising of forms BF 13 to BF 16 requiring that the bidders provide rates and bills for the major components of works. It was averred that the 1st Interested Party lumped together its bid prices under schedule No.1 to 4 and that in view of the above a clarification was sent to the 1st Interested Party on 26th October 2020 in which the party responded by sending a revised price schedule which was contrary to **ITB 29.1**.

15. It was deposed that under **ITB 29.1** a clarification is only to confirm arithmetic errors discovered by the ex parte Applicant and in

responding to the same, a bidder should not alter the price schedule initially submitted in the financial proposal and as such having submitted a financial proposal that did not meet the said threshold the ex parte Applicant had no option but to reject the 1st Interested Party's financial proposal as non-responsive.

16. It was deponed that the Respondent contended that there was no provision making it mandatory to fill in each portion of the itemized price and as such failure to provide unit prices was inconsequential as sub-totals for each schedule was sufficient. Further, that the 1st Interested Party had re-submitted its price schedule and that although some of the items that had not been itemized had been filled the total bid price had not changed.

17. It was deposed that the Respondent failed to consider provision 18.3 on providing a breakdown of the prices in the manner and details called for in the price schedules and provision 12.1 of the ITB on completing the price schedule using the relevant forms. It was argued that the Applicant will never be able to tell how the figures provided as sub-totals were arrived at and this would compromise the implementation of the project to the standards envisaged. It also leaves the ex parte Applicant with no assurance that the items will be provided or work executed.

18. In conclusion it was averred that the Respondent acted unreasonably within the Wednesbury's principle of unreasonableness and the said conduct amounts to breach of the Applicant's legitimate expectation and fair administrative action as provided under Article 47 of the Constitution. It was deposed that the impugned decision is ultra vires its statutory mandate and if orders sought are not granted the decision will be executed without regard to the ex parte Applicant's rights.

RESPONSE

Respondent

19. The Respondent filed a Replying Affidavit dated 18th November 2021 sworn by Stanley Miheso, a Senior Officer of the Public Procurement Administrative Review Board. He deponed that upon analysing the provisions of the PPAD Act against those of the Loan Agreement between JICA and the Government of Kenya, the Respondent found that it had jurisdiction to hear and determine the merits of Review 120 of 2021.

20. It was deponed that section 10 of the ODA guidelines governed the relationship between JICA and the borrower (Government of Kenya) and that it does not cover third parties. The agreement sanctioned the creation of an executing agency (the ex parte Applicant herein) and the Government of Kenya and that a separate agreement could be entered into. The deponent averred that the subsidiary agreement did not oust the jurisdiction of the Act as it made reference to the applicability of the borrower's local procurement laws.

Interested Party

21. The Interested Party herein filed a Replying Affidavit dated 10th November 2021 and sworn by Jose Luis Herrera Comes. Mr Herrera averred that the Respondent conducted extensive legal research on the applicable law and legal principles as evidenced in paragraph 16 to 40 of the decision and that in reaching this analysis it considered the authorities presented before, confidential reports, the lent-on agreement dated 17th April 2020 and the Guidelines for procurement under the Japanese ODA loans and the Bidding Document.

22. Further that the Respondent properly exercised its discretion in applying parliament's intent and the principles of law apparent from judicial precedents to the instant set of facts and that the ex parte Applicant did not identify the nature and character of any obligations attached to the Republic of Kenya under the Bilateral Agreement that would warrant its assertions.

23. The deponent averred that the Respondent legally and regularly exercised its jurisdiction as per section 27,167 and 175 of the Act and that it faulted the ex parte Applicant herein for failing to evaluate the 1st Interested party's bid based on the sub total and final total price as provided for under the 1st Interested Party's bid documents contrary to sections 79(1) and 80 (2) of the Act. The 1st Interested Party financial bid having been disqualified and clarifications sought and submitted to a biased procuring entity, it would have been impossible to compare the 1st Interested Party's bid against those of the others.

24. It was argued that the Respondent had not usurped powers of the technical committee as the ex parte Applicant had testified that the consultants' services during the Technical Evaluation stage were terminated on 15th October 2020 and yet the financial evaluation commenced on 16th October 2020. Further that the 1st Interested Party had not been disqualified technically or financially as its bid had not been evaluated and therefore once the same is evaluated the evaluation committee and financier will exercise their respective roles.

25. Mr Herrera deposed that from numerous admissions by the ex parte Applicant and the procuring entity, parties had departed from the stipulated evaluation criteria by allowing the winning bidder to substitute its Bid Security. It was contended that it is not permissible for a bid with a deviation from the mandatory requirements to be modified so as to conform to the specifications stipulated in the bidding documents as it affects fairness, transparency and competition. In conclusion it was deponed that the ex parte Applicant's findings and determinations were materially influenced by an error of law and that they were contrary to sections 79,80(2),167 of the PPAD Act and Articles 10 & 227 of the Constitution,2010.

SUBMISSIONS.

26. The Application was canvassed by way of written submissions. The ex parte Applicant herein filed written submissions dated 24th November 2021 in which 4 issues were identified for determination as follows: Whether the Respondent's jurisdiction to hear the Request Review No.120 of 2021 was ousted by Section 4(2)(f) as read with Section 6(1) of the Public Procurement and Asset Disposal Act 2015;If

the Court finds in the negative, whether the decision by the Respondent was irrational; In respect of JR E146 OF 2021 whether a Review lodged with the Respondent on the issue of winning bidder's bid security was time barred and whether the Application merits the prayers sought.

27. Learned counsel for the ex parte Applicant submitted that according to the minutes in relation to the discussions held by parties prior to the execution of the subsidiary loan agreement dated the 17th April 2020 there seemed to be consensus as to the procurement procedure. Counsel related the said scenario to the case of **Republic v Public Procurement Administrative Review Board & 2 Others ex parte Kenya Power & Lighting Company [2019] eKLR** where the court held that there being evidence of an agreement between the Government of Kenya and the Nordic Development Fund and the provisions of the tender advertisement, clearly stating that the World Bank Guidelines on Procurement for Goods and Services would apply to the tender the Respondent's jurisdiction was ousted in accordance to Section 4(2)(f) as read with Section 6(1) of the PPAD Act,2015.

28. It was contended that if the Subsidiary Loan Agreement provided for the application of the PPAD Act 2015 and Regulations 2020 it would be contrary to the provisions of section 6(1) of the PPAD Act and would conflict with the obligations of the Republic of Kenya arising from the Agreement hence the terms of the main Loan Agreement should prevail. The terms of the subsidiary loan were no less favourable than those of the main loan agreement. Counsel contended that the impugned decision is illegal having been made without jurisdiction and to buttress this argument cited the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others** where the Court emphasised on the importance of jurisdiction.

29. Counsel also cited the case of **Republic vs. Public Procurement Administrative Review Board & Another ex parte The Accounting Officer, Kenya Electricity Transmission Company Limited; Judicial Review Application No. E071 of 2021** where **Ngaah J** held as follows:

“it follows that when those clauses relating to procurement in the multinational loan agreement between the Republic of Kenya and the African Development Bank are read together with sections 4(2)(f) and 6(1) of the PPAD Act and Article 2(5) and (6) of the Constitution, the inevitable conclusion that one is bound to come to is that the procurement process for the subject tender was not subject to the Act...”

30. On the second issue for determination, it was contended that the usurpation of the evaluation committee's duty resulted to an irrational finding, and that the Respondent having acted ultra vires rendered a decision that was incurably defective, unreasonable and illegal.

31. On the third issue, counsel cited the unreported case of **Total Security Surveillance Limited vs. The Governor/ The Accounting Officer Central Bank of Kenya & 2 Others, Application No.91 of 2021** where the court held that although the provisions of the law allow for a request for review to be made at any stage it was not the intention of the framers for a dissatisfied tenderer to wait until the end of a procurement process to raise issues which it was well aware of much earlier in the procurement process. It was submitted that the court ought to find that the decision by the Respondent not to consider the 2nd Interested Party's bid security time barred has a legal basis in the circumstances of the case.

32. On the final issue counsel cited the case of **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroje Civil Appeal No.266 of 1996** where the Court discussed the instances when an Order of Prohibition and Certiorari can issue. It submitted that a Certiorari order quashing the impugned decision and a Prohibition order prohibiting the Respondent from acquiring jurisdiction over the tender ought to be issued. Furthermore, the Applicant in E146 of 2021 has also failed to demonstrate the Respondent's lack of jurisdiction to hear the complaint on the bid security, and as a result, the requests sought in the motion dated 8th November 2021 are unjustified and should be dismissed.

33. In conclusion it was submitted that the preamble of the Loan Agreement sums up the objective of the Japanese Government and that the decision taken by the Respondent betrays this objective. Counsel urged the court to quash the said decision and restate the law as provided under section 4(2)(f) as read with Section 6(1) of the PPAD Act,2015.

34. The Respondent herein also filed written submissions dated 29th November 2021 in which two issues were identified for determination as follows; Whether the Applicants are entitled to the orders sought and whether the Respondent had the requisite jurisdiction to hear and determine disputes arising from the subsidiary loan agreement. The provisions of Section 173 of the Act on the Powers of the Respondent was cited and the case of **Republic v. Public Procurement Administrative Review Board ex Parte Kenya Power and Lighting Company Limited; Energy Sector Contractors Association & another [2020] eKLR** quoted to buttress this submission.

35. It was contended that contrary to the assertions of learned counsel for the Applicant section 6(1) of the Act does not oust the jurisdiction of the Respondent and to support this argument counsel cited the case of **Republic v. Public Procurement Administrative Review Board & 2 others ex Parte Coast Water Services Board & another [2016] eKLR** where the court held as follows;

“The question however, is whether there was a conflict between the provisions of the Act and the conditions imposed by the donors. In my view, even assuming there was such a conflict, section 6(1) does not deprive the Board of the jurisdiction to entertain a matter that falls within its jurisdiction. What section 6(1) provides is that where there is a conflict between the provisions of the Act and the terms and conditions of the donor in instances of negotiated grants or loans the Board in determining the dispute ought to take into account the fact that those terms and conditions supersede the provisions of the Act. In my view the Board's jurisdiction would only be ousted if the terms and conditions of the agreement expressly excluded the application of the repealed Act.”

36. It was contended that this Court has on several occasions determined that despite a project being financed by funds from a donor, the Board or Court is not deprived of oversight and supervisory jurisdiction to hear and determine the dispute pursuant to the provisions of Section 4(2) of the Act.

37. It was submitted that the court in **Okiya Omtata Okoiti & 2 Others vs. The Attorney General & Others [2014] eKLR** held as follows;

“This fact is undisputed and being so it follows that the terms and conditions of the loan as negotiated would be applicable in the event there is a conflict with the Public Procurement and Disposal Act. The issue that I must therefore address my mind to is whether there is a conflict between the terms of the loan with Exim Bank and the provisions of the Public Procurement and Disposal Act. I am clear in my mind that there is no conflict at all. I say so, because the Act has laid down procedures to be followed in public procurement of goods and services. In particular, it demands the use of open tendering in procurement with set down procedures and requirements and matters which ought to be evaluated as well as the notification of successful parties and the unsuccessful parties. I have already stated elsewhere above the conditions which the Government of Kenya had to satisfy before the financing of the SGR project. They include the following; the finances required would be met by the Chinese Government and that the mode of procurement of the SGR project had to be in line with the conditions made by Exim Bank; i.e. the 4th Respondent had to be awarded the contract.”

38. Learned Counsel submitted that the principles and values enshrined in public procurement processes must be met as dictated by the Constitution. To support this argument counsel cited the cases of **Republic vs. Public Procurement Administrative Review Board & 2 others Ex- parte Coast Water Services Board & Another [2016] eKLR** and **Republic v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & another (Interested Parties) [2020] eKLR**.

39. Counsel also placed reliance on the case of **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** where the court held as follows;

“Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public...The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However, the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant.”

40. It was submitted that the Applicant is not entitled to the orders sought as it has failed to prove that the Respondent’s jurisdiction was ousted by the Loan Agreement and that the said application should be dismissed in its entirety with costs.

41. The Interested Party herein filed composite written submissions dated 29th November 2021. Learned counsel for the Interested Party submitted that there are two issues for determination as follows; whether the procurement under TENDER NO. KGN-BDD-03-2019 musters the ouster provisions of section 4(2) (f) and 6(1) of the Act and whether the 1st Interested Party's challenge to the 2nd Interested Party's evaluation of its Bid Security and Bid Document was time-barred.

42. Counsel began by citing section 2 of the PPAD Act which defines what public procurement entails and submitting that a procurement exercise undertaken by a public body utilizing public funds, including loans, is a public procurement subject to the provisions of the Act. It was submitted that the court in **Republic vs. Public Procurement Administrative Review Board & 2 Others ex parte Kenya Power & Lighting Company [2019] eKLR** extensively dealt with the interpretation of the ouster clause. Similarly, Justice Odunga in **Republic vs. Public Procurement Administrative Review Board & Another ex parte Athi Water Service Board & Another [2017]** also expressed himself on the said ouster clause.

43. It was contended that Section 4(2)(f) is a conditional clause and that for a public procurement to satisfy the said provisions a party must prove the existence of a procurement subject to the terms of a bilateral agreement between the government of Kenya and foreign Government/entity and terms of the bilateral agreement including the dispute resolution clauses therein.

44. Learned counsel submitted that the Respondent has a duty to interrogate the terms of bilateral agreements for existence of contractual terms prescribing express provisions of the applicable jurisdiction and choice of law in resolving either a dispute between the two parties therein being international private entities or procurement disputes resulting from the procurement. It was submitted that the ex parte Applicant has selectively applied the principles laid out in **Republic vs. Public Procurement Administrative Review Board & Another ex parte Athi Water Service Board & Another supra**.

45. Counsel went ahead to reproduce the contents of Article III General: Schedule 5 of the Bilateral Agreement Terms, Article X clause 10.1 and 10.2 of the Subsidiary Agreement and Section 1.01 (2) to (5) of the ODA Guidelines which delimits the rights and obligations of signatories as distinct from any rights and obligations or remedies ascribed to or available to third parties. It was submitted that the Bilateral Agreement expressly provided that the procurement would be in accordance with the ODA guidelines and as such disputes under the guidelines are subject to the Bidding Document which makes reference to the PPAD Act 2015 as being applicable.

46. It was contended that the facts in the **Republic vs. Public Procurement Administrative Review Board & Another ex parte Athi Water Service Board & Another supra** are distinguishable from the facts herein as in the said case the agreement included an arbitration clause with the Permanent Court of Arbitration as the choice of jurisdiction. Counsel submitted that in the instant case no dispute resolution clause was provided and as such the Respondent in conformity with the principles set in **Republic vs. Public Procurement Administrative Review Board & Another ex parte Athi Water Service Board & Another supra** examined and ascertained that the intent of the parties to

the Bilateral Agreement was for the PPAD Act to apply in resolving disputes.

47. It was argued that the ex parte Applicant entered into the Subsidiary Agreement which specifically identified the Act and the Regulations therein as being applicable and that it made conscious decisions to apply the Act while evaluating bidders as per the provisions of section 78 and 79, seeking clarification in compliance with section 81, Issuing letters of regret and notification as per section 87 and adopting international tendering and competition, a procurement process recognized under the Act.

48. The case of **Republic vs. Public Procurement Administrative Review Board & 2 Others ex parte Coast Water Services Board & Another supra** was also cited where the court held as follows;

“The question however, is whether there was a conflict between the provisions of the Act and the conditions imposed by the donors.....section 6(1) provides...that where there is a conflict between the provisions of the Act and the terms and conditions of the donor in instances of negotiated grants or loans the Board in determining the dispute ought to take into account the fact that those terms and conditions supersede the provisions of the Act ... in my view the Board’s jurisdiction would only be ousted if the terms and conditions of the agreement expressly excluded the application of the repealed Act.”

49. Learned counsel submitted that the ex parte Applicant is purporting to enforce rights under a contract to which it was not privy to and it has failed to show what interest and rights will be prejudiced if the Act is applied and that it has instead generalized allegations that do not satisfy the evidential threshold under section 107 of the Evidence Act.

50. On whether the 1st Interested Party’s challenge of the 2nd Interested Party’s evaluation of its Bid Security and Bid Document as being time-barred, it was submitted that section 167(1) of the Act, is clear that a cause of action accrues when a procuring entity breaches a duty imposed on it by the Act or the Regulations and only then does the question of time limitation mature. Further that it sets a condition precedent; a Procuring Entity’s failure to discharge its mandate as a precondition to a dissatisfied bidder instituting Judicial Review proceedings with the Respondent under section 167. It was argued that the functions of the procuring entity are undertaken by its officers as established under sections 44 as read with sections 45,85,87(2),84 as read with section 47 and 46 and as read with section 79 and 80 of the Act who act as the juridical persons/ agents.

51. Learned counsel submitted that the court in the case of **The Engineers Board of Kenya vs. Jesse Waweru Wahome & Others** emphasized on the need for a holistic interpretation of statute and that units established under the Act as constituting functional components of a procuring entity and their corresponding duties reflect the procedural elements of public procurement.

52. The case of **Republic vs. Public Procurement Administrative Review Board & 2 Others ex parte International Research and Development Actions Ltd [2017] eKLR** was also cited where the court held as follows;

"To my mind, failure by the" procuring entity "to have regard to mandatory provisions of the Act concerning procurement procedures...violated the purpose of the Act which is clearly stated in Section 2...I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives...Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence.....Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudiceThe job in my view was not complete or done by just coming up with the mathematically lowest bidder on top of the pile. The integrity of reaching there is equally important to this court. In many cases it is procedural propriety which is the stamp of fairness.”

53. It was deponed that where a written law prescribes a series of steps to be undertaken by a public officer to satisfy specific outcomes, strict adherence to the procedure as set out is mandatory. To buttress this argument counsel cited the case of **Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**.

54. The deponent submitted that the Public Procurement and Accounting Officer (PPCO) is the principal officer tasked with ensuring public procurement complies with the law and that Section 84 of the Act mandates the Head of procurement to prepare a professional opinion after reviewing the tender evaluation report which includes the results of the preliminary evaluation, the technical evaluation results, and reasons why any tenders were rejected.

55. The Accounting Officer has a duty to approve the evaluation report prepared by the evaluation committee and to ensure procurement proceedings satisfy the dictates of transparency, openness, accountability, fairness. Counsel cited **PPARB Application No. 16 of 2020, Papaton Security Services Limited v. The Accounting Officer, Kakamega County Water and Sanitation Company & Another and Public Procurement Administrative Review Board Application No. 86/2019** where it was held that the Accounting Officer may order a re-evaluation process to ensure that the Evaluation Committee complies with its functions.

56. It was argued that in this case, the Head of Procurement and Accounting Officer failed to analyze the appropriateness of the evaluation report, and as a result, the Procuring Entity committed a systemic breach of duty. The 1st Interested Party would have no reason to pursue if the Head of Procurement and the Accounting Officer carried out his duties and triggered internal remedial actions that subjected the 2nd Interested Party’s bid to re-evaluation. Furthermore, the units must carry out their responsibilities in accordance with the procedures to avoid the Procuring Entity’s acts being contaminated with illegality. Counsel argued that a public body’s refusal to consider relevant facts constituted a fatal flaw in its operation, which is a well-established principle in public administrative law. To support this argument Counsel cited the decision in **Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24**.

57. Learned counsel argued that the Accounting Officer’s approval of the 2nd Interested Party’s proposal as responding as statutorily compliant cannot be questioned. The process’s integrity is crucial, and if there is a dispute, the court must guarantee that enough time is given to investigate. The Court in **Republic v Public Procurement Administrative Review Board & another Ex-Parte Kleen Homes Security Services Limited [2017] eKLR** expressed itself as follows;

"Adjudication of disputes is a constitutional mandate which courts cannot escape". Integrity, transparency, and accountability are national values and principles of governance espoused in Article 10 of the Constitution.

58. It was submitted that the 1st Interested Party's request for Judicial Review was a call to action for the Respondent to ensure that it accords sufficient time to investigate whether the process was done in a transparent, accountable and fair manner and that the Respondent having fettered its jurisdiction irregularly and unlawfully denied the 1st Interested Party its constitutional right to fair administrative action.

SUMMARY OF FACTS IN E146 OF 2021

59. The Notice of Motion application herein is supported by a verifying affidavit dated 3rd November 2021 sworn by Mr. Jose Luis Herrera Cames. The deponent averred that the Applicant herein moved the Respondent herein to review the 1st and 2nd Interested Parties' decision in **Tender No.KGN-DD-03-2019**. The Applicant sought the following orders;

*(a) That the decision of the Procuring Entity to award **Tender No.KGN-DD-03-2019** for procurement of Plant Design, supply and Installation of Olkaria I units 1,2, and 3 Geothermal Power Plant Rehabilitation Project to the Consortium of SEPCOIII Electrical Power Construction Company Limited and Zorlu Enerji Uretim A.S and any contract already signed, in that regard, be annulled;*

(b) The Accounting Officer's Letters of Regret to the unsuccessful bidders in the Tender No. KGN-BDD-03-2019 for the Procurement of Plant Design, Supply and Installation of Olkaria I Units 1,2 &3 Geothermal Power Plant Rehabilitation Project be cancelled and set aside;

(c) The Procuring Entity be directed to reinstate the Applicant's Financial Proposal and the Board to direct the Tender Evaluation Committee to re-evaluate the Applicant's Financial Proposal including the clarifications submitted by the Applicant on October,28 2020 in accordance with Section 80(2) of the Act and conclude the evaluation within thirty days;

(d) The costs of the request for review be borne by the Respondent/Procuring Entity.

60. Mr. Herrera averred that the Respondent on 21st October 2021 gave the following orders;

(a) The Procuring Entity's Letters of Notification addressed to all Tenders dated 17th September 2021 with respect to Tender No.KGN-BDD-03-2019 for procurement of Plant Design, supply and Installation of Olkaria I units 1,2, and 3 Geothermal power plant are hereby nullified and set aside.

(b) The Procuring Entity is hereby directed to re-admit the Applicant's tender and all tenders that had made it to the Financial Stage, and to conduct a re-evaluation of the tenders including the Applicant's tender at the Financial Evaluation Stage.

(c) Further to order No.2 above, the Procuring Entity is hereby directed to proceed with the Procurement process to its logical conclusion within Fourteen (14) days from the date of this decision, taking into consideration the Respondent's findings in this case.

(d) Given that the subject procurement process has not been concluded, each Party shall bear its own costs in this Request for Review.

61. It was deposed that the Applicant herein was generally content with part of the Respondent's decision except for the findings and determinations made in respect to issues **II.b** and **III** at pages 40-46 of the Decision as the Respondent failed to take into consideration relevant considerations, the findings and determinations were contrary to sections 79,80(2) and 167 of PPAD Act and Article 10 and 227 of the Constitution of Kenya,2010 and that they were unreasonable, violate the legitimate expectations of the Applicants and are unfair.

62. Learned counsel submitted that the Respondent erred in interpreting section 167(1) of the PPAD Act and that the Respondent's interpretation of procedural elements of written law is subject to constitutional tenets of Article 159(2)(d) that places emphasis on the rendering justice over procedural technicalities. It was contended that the Respondent failed to appreciate that the Applicant herein challenged both the technical and financial evaluation of the 3rd Interested Party's bid, within 14 days from the date of notification of award.

63. Additionally, it was submitted by recognizing non-compliance with sections 79 and 80 of the Act, as well as the committee's failure to evaluate the Interested Party's Bid Security in accordance with sections 46 and 76 of the Act, 2015, the Respondent sanctioned an illegal and biased evaluation process for the benefit of the 3rd Interested Party, which is contrary to the principles of openness, fairness, and equitable treatment of all bidders. In light of this, it was argued that the Impugned Decision should be reviewed as requested, and the Orders sought in the application granted.

RESPONSES

64. The Respondent herein filed a Replying Affidavit dated 18th November 2021 sworn by Stanley Miheso, a Senior Officer of the Respondent herein. In his affidavit Mr. Miheso averred that the Applicant herein was seeking orders to set aside the decision of the 1st and 2nd Interested parties herein to award the contract to the 3rd Interested Party herein.

65. The Applicant raised several issues in this case, including whether the Applicant's concerns were time-barred under section 167(1) of the Act, to which the Respondent responded that a request for review should be made within 14 days of the date of the breach. The Applicant also questioned the technical and financial evaluation of the 3rd Interested Party's original tender, to which the Respondent responded that

the 2nd Interested Party used the two-envelope tender method and that the Party's bid was made public in front of tenderers' representatives, including those of the Applicant. It was argued that the Applicant should have filed a complaint with the Respondent within 14 days of the 16th of October 2020, rather than waiting until the notification letters were sent out, and that as a result, the complaint was time barred and in breach of section 167.

66. The 1st and 2nd Interested Parties herein also filed a Replying Affidavit dated 24th November 2021 sworn by Vincent Mamboleo, the Acting Supply Chain Director of 2nd Interested Party herein. Mr. Mamboleo reiterated the contents of Mr. Philip Yego's verifying affidavit dated 28th October 2021 in support of the motion in JR E162 of 2021 and in addition averred that the Respondent is the central independent Procurement Appeals and Review Board whose functions are denoted under section 28 of the Act as reviewing, hearing and determining tendering and asset disposal disputes.

67. It was deponed that in view of the procurement proceedings herein the Respondent does not have jurisdiction pursuant to section 4 (2) (f) as read with section 6(1) of the Public Procurement and Asset Disposal Act, 2015. Further that whenever the Respondent is properly and completely seized of an Appeal it is called upon to apply the Act, Regulations and any other written law. Mr. Mamboleo deponed that the details that were read out in respect of the bid security were the identity of bidders, the bid security of each bidder, the bid security amount, the validity periods and the financial institution issuing the bid security.

68. The Applicant was aware that the 3rd Interested Party herein had submitted a bid security issued by Deutsche Bank AG-Abu Dhabi Branch on behalf of the Consortium on 26th November 2019 and that the 3rd Interested Party's bid had passed the technical evaluation stage on 16th October 2020. In addition it was deponed that the 3rd Interested Party's bid ought to have been challenged timeously in accordance with section 167 (1) of the Act and as such the Respondent correctly applied the law.

69. In conclusion it was averred that the Application herein is an appeal disguised as a Judicial Review application as the Applicant herein seeks to challenge the merits of the impugned part of the decision. Additionally, the Respondent is a specialized Tribunal with special technical expertise and know-how and its decision ought to be final unless the Review Board acts in excess of its jurisdiction. It was deponed that in the interest of justice and fairness the instant application ought to be dismissed with costs.

Submissions

70. The Applicant herein filed composite written submissions dated 24th November 2021 which submissions have been summarized herein above.

71. The Respondent herein filed written submissions dated 29th November 2021 in which three issues were identified for determination as follows; Whether the Respondent's decision was materially influenced by an error of law, is irrational and unreasonable; whether the findings by the Respondent violated the legitimate expectations of the Applicant and are unfair and whether the Applicants are entitled to the orders sought.

72. Learned counsel submitted that the Applicant herein has not established that the Respondent acted unreasonably, irrationally or with misapprehension of the law. To buttress this argument counsel cited the Ugandan case of **Pastoli vs. Kabale District Local Government and Others [2008] 2 EA 300** where the court addressed its mind on the scope of Judicial Review. In addition, counsel also cited the case of **Republic vs. Public Procurement Administrative Review Board Ex parte Giant Forex De' Change Limited & 2 Others [2017] eKLR**.

73. It was submitted that the Applicant herein intends to have this court substitute the decision that was arrived at procedurally by the Respondent with its own. In further discussing the scope of judicial review, counsel cited **Judicial Review, Law Procedure and Practice by Peter Kaluma** at Page 46, **Municipal Council of Mombasa v. Republic & Umoja Consultants Ltd [2002] eKLR** and **Republic vs Public Procurement Administrative Review Board & Another ex parte Selex Sistemi Integrati [2008] KLR 728**.

74. On the second issue for determination learned counsel submitted that section 173 of the Act does not provide for the Respondent to go beyond its jurisdiction and Applicant's assertions that the Respondent's decision violated its legitimate expectation are unfounded. Counsel cited the case of **Republic vs Public Procurement Review Board & 2 others ex parte Numerical Machining Complex Limited [2016] eKLR** where the Court held that the power to substitute the decision of a procuring entity cannot be unlimited and that it must be exercised lawfully.

75. In addition, counsel also cited the case of **Republic vs Public Procurement Review Board & 2 Others ex parte MIG International Ltd & Another [2016] eKLR** where the Court held as follows;

"..... the Board ought not to have stepped into the shoes of the Procuring Entity and made a decision awarding the tender to the interested party without considering the bids by the other bidders. The primary duty of considering the bids in order to determine whether they are in accordance with the tender documents rests on the Procuring Entity and therefore where the Entity has not made a decision thereon, the Board cannot step in and make such a decision."

76. On the circumstances under which a legitimate expectation arises counsel cited the case of **Republic vs. Kenya Revenue Authority Ex parte Universal Corporation Ltd [2016] eKLR**. It was further submitted that the only legitimate expectation was that the Respondent would make a determination of the request for review and notify the parties of the findings, which was done. To buttress this argument counsel cited the case of **Gregory Kitonga Wambua & 2 Others vs. County Government of Kiambu [2019] eKLR**.

77. On whether the Applicants are entitled to the orders sought, counsel submitted that the Respondent's decision does not meet the threshold of unreasonableness and irrationality and neither was it arrived at through procedural impropriety. In supporting this argument counsel cited the case of **Republic vs Public Procurement Review Board Ex parte Giant Forex Bureau De' Change Limited & 2 Others [2017]**

eKLR. In conclusion counsel submitted that the application herein ought to be dismissed in its entirety with costs.

78. The 1st and 2nd Interested Party also filed composite written submissions dated 29th November 2021 referred to above in this decision.

DETERMINATION

79. I have considered the pleadings, the affidavit evidence and learned submissions by counsel in the consolidated applications, I find that 3 issues crystalize for determination as follows; whether the Respondent's jurisdiction to hear Request for Review No. 120 of 2021 was ousted by section 4(2)(f) and section 6(1) of the Public Procurement and Asset Disposal Act of 2015, whether the Respondent's decision challenged in JR. Miscellaneous Application E146 of 2021 was illegal, in error of law, irrational and or unreasonable, whether the applicant in Jr E 146 lodged its Request For Review within the timelines set in law and based on findings on the issues above, whether the Applicants herein have established grounds for grant of the orders sought.

80. In answering the issues flagged out, the court is alive to the breadth and scope of its jurisdiction under judicial review as espoused in **Pastoli v Kabale District Local Government Council & Others {2008} EA 300**. The key elements for the court to lookout for are illegality, irrationality or procedural impropriety in the decision or act complained of. In that case the court held:

“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 takne 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 Bukoba Gymkhana 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.”

81. I proposed to deal with the question of jurisdiction first as the same speaks to the authority of the Respondent to have undertaken the impugned proceedings in Review Application No. 120 of 2021. The Respondent's jurisdiction to entertain the matter is challenged on the basis of the ouster clauses found under section 4(f) and 6(1) of the Act.

82. On what constitutes jurisdiction of a court, the court in **Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd [1989] KLR1** stated as follows:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

83. The Supreme Court of Kenya in **Samuel Macharia & Another v Kenya Commercial Bank Limited and 2 others [2002] eKLR** explained the source of a court's jurisdiction with clarity.

The Court stated:

“(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers

power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

84. The Statutory provisions that are central to the determination of the question of jurisdiction are section 4(f) and 6(1) of the Act. I reproduce them here;

“4. Application of the Act

(2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies.

(f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations.

“6. Conflicts with international agreements

(1) Subject to the Constitution, where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail.

85. The purpose of these exemptions was clearly elucidated in the case of **Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kenya Power & Lighting Company [2019] eKLR** where the court held as follows:

“This exemption is in line with the legal position that the enforcement of international agreements is governed by international law, and in particular the law relating to treaties, and even though many of the functions of such agreements may be analogous to those of domestic law, their efficacy is not judged in the same manner as domestic law because they operate between parties on an international level and are more likely to result in difficulties of interpretation and enforcement. The main purpose of the section is to avoid subjecting foreign countries and agencies to domestic law, and to facilitate international comity and co-operation with such foreign countries and agencies.”

86. It is contended for the ex parte applicant that the Respondent ignored the import, purport and objects of the Bilateral Loan Agreement dated 16th March 2018 and instead relied on Clause X 10.2 of the subsidiary/on lent agreement dated the 17th April 2020 to arrogate jurisdiction to itself to hear and determine the Review Application. The Bilateral Agreement referred to is the Loan Agreement No.KE-P33 dated 16th March 2018 through which JICA agreed to extend a line of credit to the tune of Ten Billion Seventy-Seven Million Japanese Yen.

87. The Agreement Under Article III, Section 2 as read with schedule 4 section 1 states that the procurement of the goods and services was to be financed out of the loan and was subject to the Guidelines for procurement under Japanese ODA loans. The deponent deposed that long after the procurement had commenced, JICA and the Republic of Kenya entered into a subsidiary/on lent loan agreement dated 17th April 2020 and similarly under Article 10.1 the procurement was subject to the Guidelines for procurement under the Japanese ODA loans. This according to the Applicant meant that the procurement proceedings were not within the jurisdiction of the Respondent pursuant to Section 4(2) (f) as read with Section 6(1) of the PPAD Act, 2015.

88. In response to this the Respondent contends that it was acting within its jurisdiction as the main loan agreement only provided for a dispute mechanism to govern the relationship between JICA and The Government of Kenya and that the same did not apply to third parties such as the Executing Agency and Tenderers. The Respondent also argued that a reading of the main agreement indicated that it recognized and sanctioned the creation of an executing agency and as such a separate agreement could be entered into.

89. The Respondent contended that the subsidiary Agreement entered into by the borrower and the Republic of Kenya under Article 10.2 allowed for the application of local procurement laws.

90. The main loan agreement which is the subject of the proceedings herein is Loan Agreement **No.KE-P33** dated **16th March 2018** which at the preamble reads as follows:

“LOAN AGREEMENT NO. KE-P33, DATED MARCH 16 2018 BETWEEN THE JAPAN INTERNATIONAL COOPERATION AND THE GOVERNMENT OF THE REPUBLIC OF KENYA

On the basis of the Exchange of Notes between THE GOVERNMENT OF JAPAN and THE GOVERNMENT OF THE REPUBLIC OF KENYA dated March 16,2018 concerning a Japanese loan to be extended with a view to “promoting the economic stabilization and development efforts of the Republic of Kenya”

“the JAPAN INTERNATIONAL COOPERATION AGENCY (hereinafter referred to as “JICA”and the GOVERNMENT OF THE REPUBLIC OF KENYA (hereinafter referred to as the “Borrower”) herewith conclude the following Loan Agreement (hereinafter referred to as the “Loan Agreement”, which includes all agreements supplemental hereto).

91. Further Schedule 4 Section 1 of the said agreement reads as follows:

“Section 1 Guidelines to be used for procurement under the Loan;

Procurement of all goods and services, except consulting services to be financed out of the proceeds of the Loan shall be in accordance with the Guidelines for Procurement under the Japanese ODA Loans dated April 2012(hereinafter referred to as the “Procurement Guidelines”)

A quick reading of schedule 4 will show that at every stage of the procurement process, the procuring entity was to submit relevant document for review and concurrence by JICA. This is as seen in schedule 4 section 3 which provide for JICA’s review of decisions relating to procurement of goods and services (except consulting services)

92. I find it necessary to highlight schedule 4(3)f to show that this procurement was outside the purview of the local procurement laws. Section provides;

“Before sending a notice of award to the successful bidder, the borrower shall submit to JICA, for JICA’s review and concurrence, the analysis of bids and proposal for award 9when the step stipulated in (e) above is taken, ‘analysis of bids’ shall be read hereafter ‘analysis of price proposals’ the borrower shall submit to JICA, for JICA’s reference such other documents related to the award, such as tender documents as JICA may reasonably request. When JICA has no object to the said documents, JICA shall inform the borrower accordingly”

93. It needs no emphasis that the review and concurrence by JICA was certainly under the Guidelines for Procurement under Japanese ODA loans April 2012. The Respondent’s jurisdiction does not include and/or extend to the interpretation and application of those rules.

94. The Subsidiary Agreement under Article X at 10.1 and 10.2 provides as follows:

“10.1 Procurement of all goods and services to be financed out of the Loan shall be in accordance with the Guidelines for Procurement under Japanese ODA Loans dated April 2012(hereinafter referred to as the “Procurement Guidelines”) and as stipulated in Schedule 4 of the Main Loan Agreement.

“10.2 The Company shall respect the principles of competition and transparency, pursuant to internationally recognized and Japanese ODA loans recommended standards for the award and making of contracts, in particular concerning information and pre-selection of potential suppliers, the content and publication of tender specifications, the evaluation of offers and the award of contracts. The Company shall, where necessary take steps to adapt locally applicable provisions concerning the public procurement to such principles in particular the Public Procurement and Disposal Act,2015 and the Regulations made thereunder and any amendments.”

95. In addition, the Bid Data Sheet also expressly provided that the Guidelines that were to be applied were those under the Japanese ODA Loans published in 2012.

96. In rendering its determination in Review Application No.120/2021, the Respondent made the following findings:

a) That the Main Agreement between the Government of Kenya and JICA did not oust the Application of Kenya Procurement Laws;

b) The ODA guidelines allow for Application of Local rules of the borrower for resolution of disputes between the borrower and the third party;

c) By dint of the Subsidiary Agreement and as permitted in the Main Agreement, the Executing and Procuring entity is the Respondent and not the Government of Kenya; and as stated in the bidding documents consequently the procurement was conducted by the Respondent who is bound by the Laws of Kenya and does not fall under the cover Section 4(2) (f).

97. The Respondent went ahead to state that;

“whereas the Bilateral Agreement between JICA and the Government of Kenya and the ODA Procurement Guidelines identify the appropriate procedure, the same are silent on how the executing agency and bidder shall resolve disputes concerning the procurement processes. Absent such clarity, bidders dissatisfied with the actions of the executing agency find no refuge under the Bilateral Agreement. To the Board’s mind an instance where both the executing agency and bidders lack an appropriate conflict resolution forum could not have been the intention of the parties to the Bilateral Agreement and the Drafters of the Act and specifically section 4(2) (f) and 6(1). The Board relinquishing its mandate as suggested by the Respondents would amount to leaving the public to proverbial wolves. It is worth mentioning that there is an overriding objective on this tribunal to secure the public’s interests in public procurement.”

98. A reading of the Respondent’s findings shows that the Board in assuming jurisdiction solely relied on Article X 10.2 and ignored the provisions of Article II and Schedule 4 of the Main Agreement. However noble or well-meaning the intentions of the Respondent in an attempt to protect perceived adversity to the public, had it taken into account Article II Section 2 and schedule 4 of the agreement herein, it would have found that its jurisdiction had been ousted, the agreement herein being a clear bilateral agreement between the government of Kenya and a foreign entity on clear terms spelt out in the agreement. As stated in Samuel Macharia and Another v Kenya Commercial Bank Limited supra, a court of law (or a tribunal) can only exercise jurisdiction as conferred by the Constitution or the law. A court cannot expand its jurisdiction through judicial craft or innovation.

99. The Board fell into error by placing reliance on review application No. 141 of 2020 **Riang International Group Limited vs The**

Accounting Officer Rift Valley Water Works Development Agency & Central Rift Valley Water Works Development Agency, since, unlike in this case, the procuring entity therein failed to demonstrate the existence of a bilateral agreement.

100. The clear evidence that the Ex parte Applicant was the executing agency of the agreement herein and therefore this was a government to a foreign entity agreement. This distinguishes it from the decision in **Republic vs Public Procurement Administrative Review Board & Another Ex parte Athi Water Services Board & Another and Republic vs Public Procurement Administrative Review Board Ex parte Geothermal Development Company Limited & Another**.

101. In my understanding the said provisions apply to all parties in the procurement process including the Executing Agency and Tenderers. The Subsidiary Loan Agreement was borne out of the Main Agreement as funds remitted to the Government of the Republic of Kenya are what was loaned to the Executing Agency to perform the said rehabilitation and as such the Subsidiary Agreement cannot be said to stand on its own or contain provisions contrary to those in the Main Agreement.

102. I have carefully considered the loan agreement herein. As correctly submitted by counsel for the applicant, the scenario in the instant case is similar to the facts in **Republic v Public Procurement Administrative Review Board & 2 Others ex parte Kenya Power and Lighting Company (2019) eKLR**. The project herein is borne out of a bilateral agreement between the Republic of Kenya and JICA. This is the loan agreement NO. KE-P33. The procurement of goods and services was to be financed out of the loan in accordance with the Guidelines for procurement under the Japanese ODA rules. A subsidiary agreement dated 17th April 2020 between JICA and the Republic of Kenya through the ex parte applicant as the executing agent was entered into. Notably, the subsidiary agreement provides under **Article 10.1** that the procurement shall be under the Japanese ODA loans. Article 12 of the subsidiary agreement provides for the amendments, settlement of disputes and applicable law. Article 42.5 of the Standard Bidding Documents Under Japanese ODA Loans. Provides an unsuccessful bidder with an avenue to raise their grievance.

103. In my considered view, had the intention of the drafters of the agreement been that disputes in the tendering process were subject to the Respondents purview, nothing would have been easier than for the drafters to so state in the agreement. As it turns out, this was a procurement undertaken in the terms of a bilateral agreement that as entered into between the Government of Kenya and a foreign entity, JICA.

104. Nyamweya J (as she then was) in Republic v Public Procurement Administrative Review Board & 2 Others ex parte Kenya Power and Lighting (supra) stated;

“63. In my view, a reading of section 4(2)(f) shows that the operative action is procurement under a bilateral agreement entered into by the Government of Kenya and a foreign Government or Agency, and not procurement by the Government of Kenya. One of the meanings of the word “under” in the Concise Oxford English Dictionary is “as provided for by the rules of”; or in accordance with” The plain and ordinary meaning and contextual interpretation of section 4(2)(f) of the Act is therefore that a procurement that is undertaken as provided for or in accordance with the terms of a bilateral agreement that is entered into by the Government of Kenya and a foreign Government, entity or multilateral agency is exempted from the provisions of the Act.

“64. It was in this respect incumbent upon the respondent to satisfy itself that section 4(2)(f) was not applicable before assuming jurisdiction, especially as the said section was an evidential ouster clause that was dependent on a finding the subject procurement was one that was being undertaken pursuant to a bilateral agreement between the Government of Kenya and a foreign Government or entity. Further, the Respondent made an error in its interpretation of the provision of section 4(2) (f) of the Act when it phrased the issue as follows:

“The main issue that the Board needs to therefore address is whether the mere fact that a particular procurement or procurements are to be undertaken using the proceeds of a grantor a loan where the Government of Kenya is a party can oust the jurisdiction of the Board to hear and determine a dispute relating to the said procurement under the provisions of section 4(2)(f) of the Act indeed under the provisions of the Kenyan Constitution”

“65. The Respondent in its finding equated the requirements of section 4(2)(f) to the use of funding under a loan or a grant where the Government is a party, whereas the section specifically states that the Respondent should satisfy itself that the procurement is not being made pursuant to the terms of a bilateral treaty or agreement between the Government of Kenya and a foreign Government entity or multilateral agency”

105. It was not open to the Respondent to re write the agreement for the parties on the assumption that the same was unconscionable or even unconstitutional. The agreement provided redress avenue for an aggrieved party. All the parties, including the tenderers were aware all the way from the stage of advertisement for the tender to making of the bids that the procurement was in accordance with Guidelines for procurement under the Japanese ODA loans. This was a bilateral agreement between the Government of Kenya and JICA, a foreign entity and was thus exempt from the application of section 4(2)(f) of the Act. Faced with similar circumstances, Ngaah J in Judicial Review Application No. 071 Republic v Public Procurement Administrative Review Board & Another, ex parte The Accounting Officer, Kenya Electricity Transmission Company Limited, stated;

“... it follows that when those clauses relating to procurement in the multinational loan agreement between the Republic of Kenya and the African Development Bank are read together with section 4(2) f and 6(1) of the Public Procurement and Asset Disposal Act and Article 2(5) and 6 of the Constitution, the inevitable conclusion that one is bound to come is that the procurement process for the subject tender was not subject to the Act ...”

[See also Judicial Application E101 of 2021, Republic v Public Procurement Administrative Review board & Another Ex parte Kenya Power & Lighting Company (unreported)]

106. In light of the foregoing, I find and hold that the Respondent acted without jurisdiction in entertaining and determining Review Application 120 of 2021. In consonance with the principles set out in *Pastoli v Kabale District Local Government Council* (supra), the Ex parte Applicant in HC Judicial Review Misc. App no. E162 has ably shown that the process and decision of the Respondent in Review App. No. 120 of 2021 was tainted with illegality. The Respondent acted without jurisdiction ultra vires and contrary to the provisions of a law. This action is amenable for review under judicial review.

107. Following these findings, it is not necessary, to address issues raised as regards the propriety of the decision of the Respondent in Review App. 120 of 2021 as without jurisdiction, the decision was a nullity.

108. With the result that the application in High Court Judicial Review Misc no. 162 of 2021 is allowed. As the decision of the Respondent in Review App. 120 of 2021 is already made, the appropriate remedy is an order of certiorari. For reasons above stated High Court Judicial Review no. 146 of 2021 is dismissed.

109. Accordingly, I make the following Orders;

*(a) An order of certiorari be and is hereby issued to bring into this Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board (the) Respondent herein dated the 21st October 2021 in **Review Application No.120 of 2021** in regard to Tender No.KGN BDD-03-2019 being the Tender for the Procurement of Plant Design, Supply and Installation of Olkaria I units 1,2, and 3 Geothermal Power Plant Rehabilitation Project;*

(b) High Court Judicial Review App. No. 146 of 2021 is dismissed.

(c) Each party is to bear its own costs of the consolidated Applications.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2021.

A. K. NDUNG'U

JUDGE