REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. E323 OF 2025

REPUBLIC…….APPLICANT

VERSUS

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD……1ST RESPONDENT

SINTECNICA ENGINEERING S.R.L. IN JOINT VENTURE WITH STEAM S.R.L……...2ND RESPONDENT

THE ACCOUNTING OFFICER, KENYA ELECTRICITY GENERATING COMPANY(KENGEN)……..3RD RESPONDENT

KENYA ELECTRICITY GENERATING COMPANY PLC (KENGEN)……4TH RESPONDENT

AND

ELC ELECTROCONSULT S.P.A……..EX PARTE APPLICANT

JUDGMENT

1. This Judgment determines the ex parte applicant's substantive notice of motion dated 13th October 2025, which application was filed pursuant to leave of this court granted on 9th October, 2025. The application is brought under the provisions of Order 53 Rules of the Civil Procedure Rules, Sections 8 and 9 of the Law Reform Act and Section 175 of the Pubic Procurement and Asset Disposal Act,2015.

2. The application seeks judicial review order of Certiorari to remove into this court for purposes of quashing, the 1st respondent's decision dated and delivered on 26th September 2025 in PPARB Application No.62 of 2025. The Said application is verified by the affidavit of **Marco Righini** sworn on 7th October 2025 and a statutory statement dated 7th October, 2025.
3. The grounds upon which the application is predicated are that:
    i. *The Public Procurement Administrative Review Board (1st Respondent) vide a Decision of 26 th September, 2025 in Application No. 62 of 2025 for Consulting Services for Olkaria VII Geothermal Power Project issued several orders among them that the 3rd Respondent to re-convene the Tender Evaluation Committee in the subject tender and direct it to carry out technical and financial re-evaluation of only responsive tenders including completion of the procurement process and making an award of the Tender within thirty [30] days.*
    ii. *The 1st Respondent in the Decision of 26 th September, 2025 committed a fundamental misdirection and/or a fundamental error and acted in excess and in absence of jurisdiction by purporting to sit on appeal of its own previous decision in Application No. 38 of 2025 dated and delivered on 24 th April, 2025 and for failing to note that it lacked the requisite jurisdiction to entertain the Request for Review by dint of the provisions*

of section 4 (2) (f) of the Public Procurement and Asset Disposal Act, 2015 since the tender in issue was between the Government of Kenya and multinationals or foreign entities.

iii. Time being cast on stone on matters procurement, it is fair and just that the motion herein be admitted to pave way for hearing of the same.

4. The ex parte applicant's case is that it was a bidder in an international tendering process by KenGen being Tender No. KGN-BDD-016-2024 for Procurement of Consultancy Services for Olkaria VII Geothermal Power Project which tendering process was a subject of a previous Request for Review Application No.38 of 2025 between the same parties and that the same was heard and a decision rendered on 24th April 2025.
5. That although the ex parte applicant did not participate in Request for Review Application No. 38 of 2025 due to late service of pleadings upon it by the 1st respondent, in its decision of 24th April, 2025, the 1st respondent made several orders among them, that the procuring entity re-convenes the Tender Evaluation Committee and re-evaluate tenders that progressed to the Technical Evaluation stage in line with the evaluation criteria contained in the Tender Document as read with the Act and Regulations, 2020.
6. According to the ex parte applicant, pursuant to the Review Board's directions in the Decision of 24th April,2025 in Request for Review Application No. 38 of

2025, a re-evaluation was done for the subject tender by the Procuring Entity's Evaluation Committee and thereafter, a written communication dated 7th May, 2025 was made by the Procuring Entity to the effect that the exparte applicant's bid was successful for the subject Tender No. KGN-BDD-016-2024 for Procurement of Consultancy Services for Olkaria VII Geothermal Power Project. That the ex parte applicant then legitimately awaited to be invited for relevant negotiations and execution of a contract.

7. The ex parte applicant states that on 11th June, 2025, it learnt that the 2nd respondent being dissatisfied with the Notification of Award dated 7th May, 2025 once again preferred a second Request for Review dated 20th May, 2025 in Application No. 62 of 2025 and that the said application having been heard, a decision of the Public Procurement Administrative Review Board was sent to their email addresses on 11th June, 2025.
8. It is asserted that upon learning about the decision, the ex parte applicant instructed counsel to challenge the same by way of judicial review since the exparte applicant had been condemned unheard. Counsel is said to have filed Judicial Review No. E170 of 2025 which was thereafter consolidated with Miscellaneous Judicial Review No. E071 of 2025 and the same were heard and determined vide a judgement delivered on 1st August, 2025. In the said judgement, the honourable court is said to have quashed the 1st respondent's

decision and ordered a re-hearing of the Request for Review before the 1st respondent, within seven (7) days.

9. That the 2nd respondent being dissatisfied by the High Court's decision, preferred an appeal to the Court of Appeal vide **Civil Appeal No. E630 of 2025, Sintecnica Engineering S.R.L in & joint venture with Steam S.R.L v ELC Electroconsult S.P.A & 3 Others** wherein upon hearing, the Court of Appeal rendered its judgement on 5th September, 2025. The ex parte applicant states that in the said judgement, the Court of Appeal referred the matter back to the 1st respondent to re-hear the Request for Review *de novo* hence the Request for Review Application No. 62 of 2025.

10. It is also the ex parte applicant's case that after the Court of Appeal's decision referring the matter back to the 1st respondent, the 1st respondent directed the 2nd respondent to re-serve all the pleadings that had been filed in Application No. 62 of 2025 and the same was done. Subsequently, that the matter was heard by the 1st respondent with all parties participating and that a decision to that effect was sent to the parties on 26th September, 2025.

11. According to the ex parte applicant, among the orders made by the 1st respondent on 26th September, 2025 was that the procuring entity re-convene the Tender Evaluation Committee in the subject tender and direct the Tender Evaluation Committee to carry out technical and financial re-evaluation of only

responsive tenders including completion of the procurement process and making an award of the Tender within thirty days.

12. The ex parte applicant's further claims that the 1st respondent's decision of 26th September, 2025 automatically disqualified the ex parte applicant on the issue of financial statements and that in doing so, the 1st respondent purported to re-open the issue of financial statements which issue had already been determined in Application No. 38 of 2025 and which decision was neither appealed nor reviewed by any of the parties. It is the ex parte applicant's contention that in re-opening the issues, the 1st respondent sat on appeal of its own prior decision which is an exercise in excess of jurisdiction.

13. The ex parte applicant also alleges that the 1st respondent also assumed jurisdiction which it did not possess since the subject tender was one between the Government of Kenya and Multilateral agencies among them European Investment Bank (EIB) bringing into focus the provisions of section 4 (2) (f) of the Public Procurement and Asset Disposal Act, 2015.

14. The exparte Applicant also filed a further affidavit sworn by Marco Righini, in response to the replying affidavit.

15. In the affidavit, it is deposed in reiteration that the issue of financial statements was conclusively dealt with by the 1st respondent in its decision in Application No. 38 of 2025 dated and delivered on 24th April 2025.

16. That financial statements were only considered once, during the pre-qualification stage and that there was no issue of financial statements at the technical stage. It is further deposed that the 1st respondent's decision in Application No.62 of 2025 dated 26th September 2025 was in excess of jurisdiction since its act of revisiting the issue of financial statements was res judicata as it had been fully litigated and a decision made in Application No.38 of 2025. According to the Applicant, this decision was neither appealed nor reviewed by any body and that decision remained binding on all parties.

17. It is urged that the term ***de novo*** only applied to the previous decision in Application N.62 of 2025 dated and delivered on 11th June 2025, and did not extend to re-opening its previous decision in Application No.38 of 2025.

18. The Applicant states that at paragraph 5 of the Court of Appeal decision in Civil Appeal No. E630 of 2025 dated 5th September 2025 at paragraph 29, the court observed that there was nothing on record to show that the decision of the Review Board in Application No.38 had been appealed as the appeal before it had arisen out of Application No.62 of 2025.

19. According to the exparte Applicant, a judicial or quasi-judicial body is not necessarily bound by its previous decision and that the same does not extend to re-opening a matter that has been fully conclusively litigated and no appeal preferred against that decision. It is also stated that paragraphs 223 to 225 of the 1st Respondent's decision amounted to judicial craft and innovation to introduce extraneous issues which had been settled and no appeal or review preferred against those findings.

20. The exparte applicant maintained that irregularities and misapprehension of evidence are grounds for review or appeal of the said decision and not re-litigating the same issues in a new cause or suit and thus the 1st respondent's findings in Application No. 62 of 2025 dated and delivered on 26th September 2025 that its findings in its earlier decision in Application No. 38 of 2025 dated and delivered 24th April, 2025 were *per incuriam* was in excess of jurisdiction.

21. The exparte Applicant also states that Cabinet News dated 29th July 2025 contained in its annexures confirms that the subject tender was one between the Government of Kenya, European Investment Bank (EIB) and Government of Japan through the Japan International Cooperation Agency (JICA).

The 1st Respondent's response

22. The 1st respondent filed a replying affidavit sworn on 21st October 2025 by Philemon Kiprop who introduces himself as the Secretary of the 1st respondent.

It was deposed that the ex parte applicant's notice of motion challenging the 1st respondent's decision dated 26th September 2025 rendered in PPARB Application No. 62 of 2025 is an appeal against the 1st respondent's decision and is being disguised as a judicial review application.

23. That on 3rd April 2025, Sintecnica Engineering S.R.L in Joint Venture with Steam S.R.L, the 2nd Respondent herein, filed a Request for Review Application No. 38 of 2025 dated 3rd April 2025 before the 1st respondent and a judgment delivered by the 1st respondent on 24th April 2025 where the Review Board allowed the applicant's Request for Review dated 3rd April 2025, nullified and set aside the letters of notification of intent to award Tender No. KGN-BDD-016-2024 issued on 21st March 2025 and directed the 3rd respondent to reconvene the Tender Evaluation Committee to re-evaluate tenders that reached the technical evaluation stage in accordance with the tender documents, the Act, and the 2020 Regulations.

24. It is further stated in deposition that the Review Board further ordered the 3rd respondent to conclude the procurement process, including making an award, within 21 days of its decision, and directed that each party bear its own costs.

25. That once again, the 2nd respondent herein filed on 21st May 2025 a Request for Review Application No. 62 of 2025 dated 20th May 2025 before the 1st respondent seeking for declarations that the Accounting Officer and Procuring

Entity breached Articles 10, 27, 201, 227, and 232 of the Constitution, various provisions of the Public Procurement and Asset Disposal Act and Regulations, and sections of the Engineers Act and Regulations.

26. That the 2nd respondent also sought a declaration that the Accounting Officer and Procuring Entity failed to comply with the Board's earlier decision in PPARB Application No. 38 of 2025 – Sintecnica Engineering S.R.L in JV with Steam S.r.l v KenGen & 2 Others. It was further prayed that the Board do declare the ex parte applicant's bid non-compliant with the technical and financial evaluation criteria, annul the subsequent award to ex parte applicant, and direct that Tender No. KGN-BDD-016-2024 be awarded to the 2nd respondent as the lowest responsive evaluated bidder. That in the alternative, the 2nd respondent herein sought an award of EUR 16,792,425.00 as damages for loss of business. The application also sought costs of the proceedings and any other appropriate relief.

27. The 1st respondent deposes that in its decision of 11th June 2025, it allowed the 2nd respondent's Request for Review dated 20th May 2025, nullified and set aside the letters of notification of intent to award Tender No. KGN-BDD-016-2024 issued on 7th May 2025 in favour of the exparte applicant herein and directed the Procuring Entity, the 3rd respondent herein to reconvene the Tender Evaluation Committee to re-evaluate tenders that reached the technical

evaluation stage in accordance with the tender documents, the Public Procurement and Asset Disposal Act and the 2020 Regulations. That the Review Board further ordered the 3rd respondent herein to conclude the procurement process, including making an award, within 21 days of its decision, and directed that each party bear its own costs.

28. According to the 1st respondent, the parties dissatisfied with its Decision, sought judicial review from the High Court in Nairobi High Court vide Judicial Review Application No. E170 of 2025 as consolidated with Judicial Review Misc. No. E071 of 2025 and the court in its judgment of 1st August 2025 quashed the decision of 11th June 2025 and directed that Application No.62 of 2025 be reheard within 7 days.

29. That the 2nd respondent dissatisfied with the court's judgment filed Nairobi Civil Appeal No. E630 of 2025 and on 5th September 2025 the Court of Appeal affirmed the judgment of the High Court in HCJR No. E170 of 2025 (consolidated with JR Misc. App. E071 of 2025) to the extent that it found a violation of the exparte applicant's right to fair administrative action, and upheld orders 1 and 2 of that judgment. However, that the Court set aside the finding at paragraph 180 of the impugned judgment, remitted PPARB Application No. 62 of 2025 to the Review Board for rehearing before a panel excluding Ms. A. Oeri, Ms. J. M'mbetsa, and Mr. J. Kiptoo. That the Court of

Appeal also directed that the matter be determined within 21 days, and ordered each party to bear its own costs of the appeal.

30. That pursuant to the orders of the Court of Appeal directing the 1st respondent to rehear Request for Review No. 62 of 2025, the 1st respondent issued directions to parties on the rehearing and subsequently, the Request for Review No. 62 of 2025 proceeded to a rehearing *de novo* on 23rd September 2025 as ordered by the Court of Appeal with parties making their respective submissions before the 1st respondent's newly constituted panel.

31. That after hearing the parties *de novo*, the 1st respondent is said to have nullified and set aside the letters of notification of intent to award Tender No. KGN-BDD-016-2024 issued on 7th May 2025 and directed the 3rd respondent herein to reconvene the Tender Evaluation Committee to conduct a technical and financial re-evaluation of only responsive tenders in accordance with the tender documents, the PPAD Act and the 2020 Regulations, while taking into account the findings of the Review Board. That the Review Board further ordered the 3rd Respondent to complete the procurement process, including making an award, within 30 days and to also extend the tender validity period by 30 days pursuant to Section 88 of the Act.

32. That the 1st respondent in reaching its Decision considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of

authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act.

33. It is deposed that from the onset, the 1st respondent was crystal clear that the proceedings in the Request for Review were to commence afresh from beginning as if there had been no trial in the first instance and that this is evident at paragraphs 93 to 119 of its Decision where it considered the first issue on whether the preliminary objections filed by the ex parte applicant and the 3rd and 4th respondents were properly on record for its consideration.

34. According to the 1st respondent, on the question of whether the Request for Review No. 62 of 2025 was time barred, it found that the 2nd respondent, being aggrieved by the 3rd respondent's decision of 7th May 2025 awarding the tender to the ex parte applicant, was required to challenge that decision within the 14-day period prescribed under Section 167(1) of the Public Procurement and Asset Disposal Act and Regulation 203(2)(c)(ii) of the PPAD, 2020 Regulations and that in applying Section 57 of the Interpretation and General Provisions Act, it determined that time began running on 8th May 2025 and lapsed on 21st May 2025, the date when the Request for Review was filed, and therefore held that the review was filed within the statutory timeframe.

35. The 1st respondent also states that it considered the objection by the ex parte applicant and the 3rd and 4th respondents that Request for Review No. 62 of

2025 was not amenable to its jurisdiction, arguing that the procurement was under a bilateral/multilateral arrangement and therefore excluded from the application of the Act under Section 4(2)(f) of the Public Procurement and Asset Disposal Act.

36. That after examining the tender advertisement and documents, the 1st respondent found that the Procuring Entity was receiving financing from the European Investment Bank (EIB) for consultancy services for the Olkaria VII Geothermal Power Project. Also, that the procurement was to be conducted in accordance with the EIB's Guide to Procurement for Projects Financed by the EIB, and that both the Procuring Entity and the Financier had agreed to use the EIB procurement guidelines, adapting the KfW Standard Procurement Document to suit the project.

37. That the 1st respondent keenly examined various clauses of the EIB Guidelines such as Clause 1.3, 1.8 and Annex 7 which were to the effect that a tenderer wishing to challenge a procuring entity's actions can only address its concerns with the procuring entity and/or review bodies under the available national remedy mechanisms.

38. On the issue of *res judicata* it is deposed that after reviewing the law on *res judicata*, the 1st respondent found that Request for Review No. 62 of 2025 arose from the tender proceedings following the orders issued in Request for Review

No. 38 of 2025, where it had been directed that the Evaluation Committee does re-evaluate tenders that progressed to the Technical Evaluation stage in line with the evaluation criteria contained in the Tender Document as read with the Act and Regulations 2020 of the PPAD Regulations and for the procurement process to proceed to its logical conclusion.

39. The 1st respondent noted that the 2nd respondent's counsel argued that the ex parte applicant's financial statements were improperly filed, having been signed by the chief executive officer rather than a qualified auditor and that this issue affected both prequalification and the Technical Evaluation stage.

40. The 2nd respondent is said to have maintained that this could justify automatic disqualification. However, that the 1st respondent also recorded that the ex parte applicant and the 3rd and 4th respondents opposed this argument, contending that the matter of the financial statements had already been conclusively addressed in Request for Review No. 38 of 2025 and should be considered binding.

41. The 1st respondent, it is deposed, found that the issues raised in Request for Review No. 62 of 2025 were distinct from those addressed in Request for Review No. 38 of 2025 and as such, the matter before the 1st respondent raised a distinct cause of action and that the re-assessment of the procurement process in the subject tender is considered a separate and independent action.

42. Further, that it reiterated at paragraph 185 of its Decision that the Request for Review No. 62 of 2025 was proceeding *de novo* which meant that the matter was being tried a new as if it had not been heard before and that the new panel would not concern itself with remarks or clarifications that may have been previously made or sought when Request for Review No. 62 of 2025 was first heard.

43. It is deposed further that the 1st respondent proceeded to point out that a tribunal of coordinate jurisdiction may distinguish a prior decision in circumstances inter-alia where the said prior decision was made *per-incuriam* or it satisfies itself that the decision misapprehended the evidence before it noting that it is a general rule that a court or tribunal is not bound to follow its previous decision where such decision is given *per incuriam* (through inattention to vital, applicable instruments or authority).

44. Further, that the 1st respondent relied on the Supreme Court's case of **Jasbir Singh Rai and Three Others v. The Estate of Tarlochan Singh Rai and Four Others, Sup. Ct. Petition No. 4 of 2012** while further pointing out that a decision *per incuriam* is mistaken, as it is not founded on the valid and governing pillars of law, the relevant decision having not taken into account some specific applicable instrument, rule or authority.

45. The 1st respondent further states in deposition that at paragraphs 189 to 225 of its Decision held that the evaluation in the subject tender was not carried out in accordance with the procedures and criteria for evaluation set out in the Tender Document and Section 80(2) of the Act as read with Article 227(1) of the Constitution.

46. The 1st respondent is further stated to have arrived at its finding after considering the parties' submissions on re-evaluation of the tender and the previous orders in Request for Review No. 38 of 2025, which are said to have specified the evaluation criteria to be applied under ITC Clause 21.1 of Section II – Data Sheet at pages 29 to 31 of Part II – Request for Proposals of the Tender Document as amended by Addendum No. 2 of 24th October 2024.

47. Further, that the 1st respondent noted a conflict between the evaluation criteria and sub-criterion stipulated under Clause 21.2 of Section I – Instructions to Consultants at pages 17 to 18 of Part II – Request for Proposals of the Tender Document and how the same was to be scored and the evaluation criterion and sub-criterion stipulated under ITC Clause 21.1 of Section II – Data Sheet of Part II – Request for Proposals of the Tender Document as amended by Addendum No. 2 dated 24th October 2024 and how the same was to be scored. That as such, the 1st respondent held that the provisions under the Data Sheet prevail over provisions under the Instructions to Consultants.

48. The 1st respondent therefore maintains that it rightfully understood the evaluation criteria to mean, inter alia, that the Technical proposals would be evaluated and scored using the stipulated point system as set out in the Data Sheet whereby scores are indicated as points with an overall score totaling to 100 points, and also, that there is no provision for pro-rating of the scores set out under the data sheet and as such, a bidder would either score the full allocated marks under the Data Sheet or 0.

49. It is stated further that the Review Board reviewed the Re-Evaluation Report and the Evaluation Committee's scoring of the ex parte applicant and the 2nd respondent's technical proposals, noting that the applicant had scored 77.95 points, while the 2nd respondent had scored 92.06 points at the Technical Evaluation stage. Further, that Project Experience points were assigned based on the number of projects, with one qualifying project equaling one point up to the sub-criterion maximum.

50. The 1st respondent is also said to have noted that for key staff competence, scores were prorated based on CV information, using the categorization under Clause 21.2 of Section I – Instructions to Consultants (General Qualifications, General Professional Experience, Specific Relevant Professional Experience) applied to the Data Sheet scores.

51. The Review Board further states that the Evaluation Committee used disaggregated sub-criteria that were not prescribed in the Tender Document or introduced via Addendum, and that no justification was provided for how marks were awarded for each component. An example given by the 1st respondent is that of a Project Manager with a Data Sheet score of 5 which was divided across the categories (General Qualifications 15%, General Professional Experience 25%, Specific Relevant Experience 60%) and further broken down into sub-scores (e.g., University Degree 0.2, Registered Professional 0.25, Specialized Training 0.3). This according to the 1st respondent, illustrated a complex and unsupported prorated scoring method.

52. The 1st respondent also states that based on its observations, it established that the Evaluation Committee improperly introduced extrinsic and undisclosed sub-criteria and adopted a comparative methodology not contemplated in the Tender Document or the Addendum contrary to Section 80(2) of the Act and the explicit terms of the Tender Document. That at paragraph 217 of its Decision, it held that the re-evaluation of the 2nd respondent's and the ex parte applicant's technical proposal was non-compliant with the provisions of the Tender Document and the applicable sections of the Act.

53. That the 1st respondent reviewed the ex parte applicant's tender documents and noted that its financial statements for 2020–2022 were unsigned and uncertified,

in contrast to the 2nd respondent's financials, which were audited and accompanied by independent audit reports. This non-compliance with the certification requirements under the tender documents and Section 80 of the Act, it is stated, rendered any evaluation of the ex parte applicant unlawful.

54. It is further stated by the 1st respondent that it found that strict application of the tender terms made the ex parte applicant ineligible to proceed beyond the prequalification stage and that any evaluation or re-evaluation conducted was voided by operation of the law. The 1st respondent states that the Review Board's prior decision in Request for Review No. 38 of 2025 was considered *per incuriam* and not binding.

55. The 1st respondent states that its decision in Request for Review No. 62 of 2025 dated 26th September 2025 was lawful, procedurally fair, rational and consistent with the Constitution, the Act, the Regulations 2020 and the Fair Administrative Action Act. The 1st respondent denies the allegation by the exparte applicant that the impugned decision exceeded the Review Board's mandate and that the said decision upheld procurement integrity and properly considered all evidence and legal requirements.

The 2nd Respondent's response

56. The 2nd respondent filed a replying affidavit sworn on 16th October 2025 by Matteo Quaia who introduces himself as the Director and Chief Executive

Officer of Steam S.R.L, a party to the Joint Venture between Sintecnica Engineering and Steam S.R.L.

57. In the affidavit the 2nd respondent contends that the issues around the financial statements that the 2nd Respondent brought up in PPARB Application Number 62 of 2025 during the re-hearing revolved around the technical stage and not the Pre-qualification stage where the issue was extensively dealt with in PPARB Application Number 38 of 2025.

58. Further, that in any case, the 1st respondent, in its Decision in PPARB Application Number 38 of 2025, recommended that the Procuring Entity conducts due diligence which was to include probing into the financial statements of the tenderers as they are crucial in determining a successful tenderer.

59. It is also the 2nd respondent's case that the financial statements submitted by the Ex-Parte Applicant including its Balance Sheets are not Balance Sheets but Draft Balance Sheets made by the Interested Party itself. The 2nd respondent also contends that this was also one of the observations that were made by the 1st Respondent, differently constituted, during the re-hearing and determination of the Application Number 62 of 2025 as it observed in its decision dated 26th September, 2025 that the financial statements submitted by the ex parte applicant did not meet the conditions set out in the tender document.

60. According to the 2nd respondent, this is because under the Italian Law, a Draft Balance Sheet only becomes an approved and formal Balance Sheet, once it is approved by the Board and deposited to the Chamber of Commerce, thereby rendering them as actual financial statements that could then be certified by an auditor.

61. That contrary to the averments by the ex parte applicants that the issue of financial statements was conclusively dealt with by the 1st Respondent in its decision in Application No. 38 of 2025 directed the 3rd and 4th Respondents to conduct effective due diligence and confirm that the financial documents submitted by the ex parte applicant were submitted to the Italian Chamber of Commerce, thereby rendering them as actual financial statements that could then be certified by an auditor.

62. That since the 2nd respondent was not privy to the confidential documents submitted by the 3rd and 4th Respondents to the 1st Respondent, it had no knowledge of the observations made by the Review Board that in fact the financial statements submitted by the ex parte applicant in its bid were not certified by an auditor, contrary to the mandatory requirement in the Tender Documents.

63. It is deposed that therefore; the ex parte applicant cannot allege that the 1st Respondent making an observation from the ex parte applicant's bid as

submitted to the 3rd and 4th Respondents which was outrightly contrary to the requirements of the Tender Documents and which would have otherwise been unknown to the 2nd Respondents, amounts to sitting on Appeal of its own decision.

64. According to the 2nd respondent, the decision of the 1st respondent in PPARB Application No. 38 of 2025 on the issue of the financial statements as contained in paragraphs 127 and 128 therein indicate that the 3rd and 4th respondents deliberately misrepresented and falsely swore that the ex parte applicant's financial statements had been certified by a reputable auditor when, in fact, they had no insignia or certification by an auditor as found in the 1st respondent's impugned decision. This, it is contended, was illegal, unjustifiable and done to prejudice the 2nd respondent's bid, despite it being fully compliant and the only responsive bid.

65. The 2nd respondent further deposes that the 1st respondent is not bound by its own decision, if it is of the opinion that the decision was marred with irregularities and a misapprehension of the evidence before it, especially those that would end up costing tax payers millions and as such the position held by the ex parte applicant that the PPARB acted as a Court sitting on appeal is wrong, misguided and misplaced.

66. It is also the 2nd respondent's contention that a Court or Tribunal is not bound to follow its decision and it may depart from the decision if it was made *per incuriam* or where there was an oversight or misapprehension of the evidence.

67. That in any case, PPARB Application No. 62 of 2025 was lodged following the 2nd respondents' being aggrieved with the re-evaluation of the tenders and not the initial evaluation that culminated to PPARB Application No. 38 of 2025. Further, that the causes of action are, therefore, distinct as the two processes are different thus the ex parte applicant's allegation that the 1st respondent lacked jurisdiction and purported to sit on appeal is misplaced.

68. According to the 2nd respondent, the 1st respondent had the requisite jurisdiction to hear and determine PPARB Application No. 62 of 2025 and that the allegation by the ex parte applicant that the jurisdiction of the 1st respondent is ousted by dint of Section 4 (2) (f) of the Public Procurement and Asset Disposal Act, 2015 is baseless and only meant to mislead this Court.

69. The 2nd Respondent also states that the Review Board had the requisite jurisdiction to hear and determine PPARB Application No. 62 of 2025. That contrary to the argument that the PPARB lacked jurisdiction to hear and determine the Application Number 62 of 2025 by an alleged agreement between the Government of Kenya and Multilateral agencies, the 1st respondent was and is still clothed with jurisdiction to hear the Request for Review as the subject

tender was to culminate into a Contract signed between the Employer, who was defined as Kenya Electricity Generating Company, the 4th respondent herein, and the Consultant, who was to be the successful bidder.

70. Further, that prima facie look at the Contract as contained in the tender documents reveals that the 4th respondent is the employer while the consultant refers to whoever would be the responsive and successful bidder to provide services to the employer.

71. It is also deposed that the Contract also reveals that the laws applicable are the Kenyan Laws, as such that it is, therefore, misleading for the applicant to indicate that the tender is an arrangement between the Government of Kenya and Multilateral Agencies. The 2nd respondent contends that in any case, what was in dispute in PPARB Application No. 62 of 2025 was the evaluation process carried out by the 3rd and 4th Respondents herein.

72. The 2nd respondent also states that, the EIB Guidelines provide that a tenderer who wishes to challenge a procuring entity's actions can only do so under the available national remedy mechanisms. It reiterated that the 1st respondent, therefore, had the requisite jurisdiction to hear and determine PPARB Application No. 62 of 2025 contrary to the applicant's allegations.

73. The 2nd respondent further contends that in an application seeking judicial review of an administrative decision, one must demonstrate to the Court how

the decision sought to be reviewed is irrational, marred with illegalities and procedural illegalities to the extent that it is detrimental to the party seeking review is or a threat to justice.

74. The 2nd respondent further deposes that the ex parte applicants have failed to demonstrate any illegalities, irrationalities and procedural malafides committed by the 1st respondent to the detriment of any bidder and or resulting in a miscarriage of justice or abuse of the law.

75. It is deposed that 1st respondent, in its decision of 26th September, 2025, was fair, it acted legally and within the ambits of its jurisdiction and statutory provisions as regards the substance of the review before it. Further, that the decision was wholly anchored on the provisions of the law, tender documents and the order issued on 5th September,2025 by the Court of Appeal in Civil Appeal No. E630 of 2025.

The Applicant's submissions

76. The ex parte applicant filed written submissions dated 22nd October 2025. It is submitted relying on the holding in the case of **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300** where the Court stated that judicial review is not concerned with the merits of the decision but rather, the process within which the decision was made.

77. The exparte applicant reiterated that the financial capability statements and the filing of the same with the Italian Chamber of Commerce was conclusively dealt with in Application No. 38 of 2025 in the decision dated and delivered on 24th April, 2025, which decision was neither reviewed nor appealed thus binding on all parties.

78. On *res judicata*, it was submitted that section 7 of the Civil Procedure Act prohibits a court or tribunal from trying a suit or issue in a matter that has been directly and substantially been in issue in a former suit between the same parties. Reliance was placed on the Supreme Court case of **Dina Management Ltd v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)** where the Supreme Court is said to have addressed the doctrine of *res judicata*.

79. Further submission was that in attempting to justify its decision, the 1st respondent purported to state that its previous decision was *per incuriam* and thus it was not bound by that decision. The ex parte applicant's contention on this assertion is that to say the least, the 1st respondent in so finding was engaging in what is termed as **judicial craftsmanship**. It relied on the case of **Sawe v Ekaterra Tea Kenya PLC & 2 others [2024] KEHC 13241 (KLR)** where the Court is said to have held that a court of law ought not to sanctify an incompetent suit through judicial craftsmanship.

80. The ex parte applicant maintains that as seen at page 5 of the Cabinet News of 29th July 2025, the last paragraph states that the project would be undertaken in partnership with the Government of Japan and the European Investment Bank. This, according to the exparte applicant, shows that the Tender clearly fell under the provisions of section 4(2)(f) of the Public Procurement and Asset Disposal Act,2015. The ex parte applicant relies on the case of **Republic v Public Procurement Administrative Review Board & 2 Others ex parte Kenya Power and Lighting Company [2019] eKLR** where the Court is said to have held that under section 4(2)(f) of the Public Procurement and Asset Disposal Act, the key factor is whether the procurement is conducted "*under*" that is, in accordance with a bilateral agreement between the Government of Kenya and a foreign government or agency. Such procurements according to the decision relied on, are exempt from the provisions of the PPAD Act.

81. It is submitted that the lack of a signed agreement could not clothe the 1st Respondent with the jurisdiction to deal with the request. Further, that this is for the reason that the correspondences between the Government of Kenya and EIB confirm that the process of signing an agreement was yet to crystallize.

82. According to the ex parte applicant, being a European Investment Bank funding, funds could only be released once a successful bidder had been identified and the contract signed. Therefore, that the agreement could only

come in at the tail end of the process. That it was therefore wrong for the 1st respondent to assume jurisdiction which it lacked.

The 1st Respondents' submissions

83. The 1st respondent filed written submissions dated 28th October 2025. It maintains that the impugned decision was rendered lawfully, fairly and within its statutory mandate under Section 173 of the Public Procurement and Asset Disposal Act (PPADA). It also submits that the applicant's challenge anchored on alleged excess of jurisdiction, res judicata and non-applicability of the PPADA under Section 4(2) is misconceived both in law and in fact.

84. In response to the allegations that the Board sat on appeal of its own decision, the Board explains that **Request for Review No. 62 of 2025** was a *de novo* rehearing ordered by the Court of Appeal in **Civil Appeal No. E630 of 2025**, whose judgment of 5th September 2025 directed a fresh rehearing before a different panel.

85. Consequently, that the 1st respondent was fulfilling a judicial directive, not reopening its own decision. The 1st respondent submits that a *de novo* hearing nullifies prior findings and allows reconsideration of all issues. The Review Board further submits that it was entitled to depart from the earlier panel's findings after discovering, through confidential documents, that the exparte

Applicant's financial statements were unaudited and uncertified contrary to Clause 2.2(e)(v) of the Tender Document.

86. In support of its position, the 1st respondent Review Board relies on the case of **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others, Petition No. 4 of 2012**, where the court is said to have held that a tribunal of coordinate jurisdiction may depart from an earlier decision where that decision was made *per incuriam* or on a misapprehension of facts.

87. On the contention by the applicant that reconsidering the issue of financial statements contravened the doctrine of *res judicata*, the Review Board submits that Section 7 of the Civil Procedure Act applies only where there is a final decision between the same parties on the same issues. It is argued that since the Court of Appeal's order in Civil Appeal No. E630 of 2025 nullified the earlier decision and directed a fresh hearing, there was no existing decision to ground a plea of *res judicata*.

88. It is further submitted that moreover, the Review Board's finding arose from newly examined confidential documents under Section 67(3)(e) of the PPADA**,** which revealed unaudited statements submitted by the exparte applicant, a material irregularity justifying review. The 1st respondent also relies on the case of John **Florence Maritime Services Ltd & Another v Cabinet Secretary for Transport & Infrastructure & 3 Others [2015] eKLR,** where the Court of

Appeal is said to have held that the doctrine of *res judicata* should be applied cautiously and only where the earlier decision was final and involved the same issues; and that the doctrine cannot be relied upon to obstruct justice or to shield an illegality.

89. It is submitted that Section 4(2) of the PPAD Act exempts certain categories of procurements from the direct application of the Act, including those involving funding from bilateral or multilateral development partners where such partners' express procurement guidelines are inconsistent with the provisions of the PPADA. That after examining EIB's financing documents for the Olkaria VII Project**,** the Board found no inconsistency as the EIB guidelines expressly subjected disputes to national procurement laws. The Bank's correspondence is said to have confirmed that the PPARB retained jurisdiction.

90. The Review Board additionally submits that accepting the applicant's interpretation would immunize large portions of public spending from oversight, contrary to Articles 201 and 227 of the Constitution. It relies on **Republic v PPARB & Another ex parte Kenya Power & Lighting Company Ltd [2019] eKLR**, where the Court is said to have affirmed that donor-funded procurements remain subject to the PPADA unless a clear and express inconsistency is demonstrated.

91. The Review Board relies on **Pastoli v Kabale District Local Government Council [2008] 2 EA 300**, to argue that no illegality, irrationality or procedural impropriety has been demonstrated and urges this Court to uphold the 1st respondent's decision and dismiss the applicant's notice of motion.

The 2nd Respondent's submissions

92. The 2nd respondent filed written submissions dated 27th October 2025. It is submitted therein that a court of law or any tribunal exercising judicial authority can only exercise jurisdiction to the extent given to it by law and conversely, that once the court or tribunal establishes that it lacks jurisdiction to handle a matter, it must down its tools and proceed no more. To support this position, the 2nd respondent relies on the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**. Further reliance is also placed on the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR**.

93. According to the 2nd respondent, the 1st respondent is a creature of statute owing to the provisions of section 27 (1) of the Public Procurement and Asset Disposal Act. Further, that section 28 (1) of the Act provides for the functions and powers of the review Board.

94. On the ex-Parte Applicant's allegations that the 1st Respondent lacked Jurisdiction by dint of Section 4 (2) (f) of the Act to hear and determine PPARB

Application No. 62 of 2025 as the tender was a bilateral agreement between the Government of Kenya and a Multilateral Agency, European Investment Bank (EIB) and that the 4th Respondent was merely an implementing agency, it was submitted that it is clear from the onset, that the dispute herein is one of procurement for consultancy services for Olkaria VII Geothermal Power Project. Thus, that under Section 28 of the PPADA, the Board is the institution with the mandate to handle such disputes.

95. The 2nd respondent also submits that it is clear from the Tender Documents that the tender in question was between the 4th respondent on the one hand, which is not the Government of Kenya or a government entity, and the ex parte applicant and the 2nd respondent on the other, both of whom are neither government entities nor a foreign Government

96. According to the 2nd respondent, EIB was only a financier of the project and was, therefore, not part of this tender. The 2nd respondent relies on **Miscellaneous Application No 402 Of 2016 (Consolidated with Misc. Application No. 405 of 2016), Republic v. Public Procurement Administrative Review Board & Another Ex Parte Athi Water Service Board & Another [2017] eKLR** where the Court is said to have pronounced itself on the import of Section 4 (2) (f) of the PPADA, 2015 and stated that for an exemption under the said section 4(2)(f), one of the parties must be the

Government of Kenya while the other party must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency.

97. It is submitted that the 4th respondent is a body corporate with perpetual succession and is not the Government of Kenya, thus Section 4 (2) (f) of the Act does not apply in the procurement process that is subject of in these proceedings.

98. Further, that in any event, what was in dispute in PPARB Application No. 62 of 2025 was the evaluation process carried out by the 3rd and 4th Respondents herein, who are not foreign Government Entities or multilateral Agencies.

99. The 2nd respondent submits that the Act gives effect to Article 227 of the Constitution and therefore section 4 (2) (f) of the Act cannot be read and considered in isolation of Article 227 of the Constitution. The section, it is submitted, can also not be read in isolation of the provisions of section 6 (1) of the same Act. It relied on **Republic vs Public Procurement Administrative Review Board and 2 Others Ex-Parte Coast Water Services Board and Another (2016) eKLR** where the Court is said to have held numerous times, that these provisions read together do not deprive the 1st respondent of jurisdiction.

100. It is the 2nd respondent's submission that the 1st respondent is the first port of call in the event of a dispute in as far as tendering and public procurement processes are involved. That the 1st respondent is the body that is obligated to correct any infraction of the rules and address any grievances presented to it by any 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.

101. On the issue of financial statements, it is submitted that this issue was pleaded and raised before the 1st respondent during the hearing of PPARB Application No. 62 of 2025 and, therefore, the Board was under obligation to deal with and make a determination on it as this was an entirely different cause of action.

102. It is the 2nd respondents' position that the decision of the 1st respondent in PPARB Application No. 38 of 2025 on the issue of the financial statements as contained in paragraphs 127 and 128 therein indicates that the 3rd and 4th respondents deliberately misrepresented and falsely swore that the ex parte applicant's financial statements had been certified by a reputable auditor when, in fact, they had no insignia or certification by an auditor as can be found in the 1st respondent's impugned decision. That this act of the 3rd and 4th respondents was illegal, unjustifiable and done to prejudice the 2nd Respondents' bid, despite it being fully compliant and the only responsive bid.

103. That 1st respondent in its Decision of 26th September, 2025, did not annul the entire procurement process or evaluation of the bid and neither did it award the tender to the 2nd Respondent. Further, that the 3rd and 4th respondents' allegation that the 1st respondent pre-determined the winner and simply asked the Procuring Entity's Evaluation Committee to rubberstamp the winner is misguided and far from the truth.

104. The 2nd respondent reiterates that the 1st respondent, in reaching the Decision of 26th September, 2025 in PPARB Application No. 62 of 2025, was fair, acted legally and within the ambits of its statutory powers as regards the substance of Review before it as it was informed by what was submitted to it by both the ex parte applicants and the 2nd respondent and it was only after proper scrutiny of all documentation and submissions by parties before it that it arrived at the impugned Decision.

105. The 2nd respondent relies on the case of on **Accounting Officer, Kenyatta International Convention Centre & Another v Public Procurement Administrative Review Board; Paramax Cleaning Services Limited & Another (Interested Parties) [2025] KEHC 6031 (KLR)** where the Court in determining whether the Respondent therein acted illegally, irrationally and beyond its statutory mandate by annulling the award of a Tender directing that the 1st interested party be awarded the contract is said to have observed that the

Review Board has broad discretionary powers to uphold fairness, integrity and finality in procurement processes and this includes directing the issuance of a Notification of Award to the most compliant bidder.

106. It is the 2nd respondent's submission that judicial review is concerned not with the merits of the decision, but with the decision-making process itself as was held in **Municipal Council of Mombasa v Republic & Umoja Consultants Limited Civil Appeal No. 185 of 2001 (2002) eKLR**. The 2nd respondent also relies on **Republic v Public Procurement and Administrative Review Board & Another; Dochar Construction and Trade Inc Ltd (Interested Party) Ex Parte Xtreme Engineering Services Limited [2019] eKLR** on the nature of judicial review.

107. The case of **Cortec Mining Kenya Limited vs. Cabinet Secretary, Attorney General & 8 Others [2015] eKLR** where the Court of Appeal is said to have discussed the judicial review remedy of certiorari was relied on. The 2nd respondent also relies on the case of **Republic v The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 Others [2013] eKLR** for the grounds that one must satisfy for judicial review orders to issue.

108. The 2nd respondent submits that the ex parte applicant has failed to demonstrate to this Court that the decision by the 1st respondent was tainted with illegality, irrationality, or procedural impropriety to warrant grant of the orders sought.

Further reliance is placed in the cases of **Pastoli v Kabale District Local Government Council & Others (2008) 2 EA 300** and **Republic v Public Procurement Administrative Review Board & 2 Others; Medvision Equipment (Exparte); Royale Online Limited (Interested Party) [2022] KEHC 18100 (KLR).**

109. It also relies on the case **of OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 Others (2017) eKLR Civil Appeal No. 28 of 2016** where the Court is said to have stated that in considering a judicial review application, the Court must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions regarding whether there was or there was no sufficient evidence to support the decision of the public body concerned.

110. According to the 2nd respondent, this court's jurisdiction in reviewing of procurement disputes is limited to the procedure and not necessarily on the merits of the case. The 2nd respondent relies on the case of **Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others [2012] eKLR** where the Court is said to have expounded on the jurisdiction and powers of the Review Board.

111. The 2nd respondent contends that the current application's vague nature is a veiled attempt to relitigate a procurement dispute that was decided by a competent Board and that the Court should decline that invite. To support this position, reliance is placed on the case of **Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Rongo University [2018] eKLR** where the Court is said to have held that the grant of orders of certiorari, mandamus, and prohibition is discretionary, which discretion must be exercised cautiously, sparingly and judiciously.

Analysis and Determination

112. From the pleadings, affidavits, and submissions of the parties, the following issues emerge for determination:

    i. ***Whether the 1st respondent (PPARB) had jurisdiction to hear and determine Application No. 62 of 2025 in light of the alleged multilateral funding arrangement.***

    ii. ***Whether the Request for Review No. 62 of 2025 was res judicata in view of the Board's earlier determination in Application No. 38 of 2025***

    iii. ***Whether the ex parte applicant is entitled to the orders sought.***

    iv. ***What orders should this court make, including for costs, if any?***

Whether the 1st respondent (PPARB) had jurisdiction to hear and determine Application No. 62 of 2025 in light of the alleged multilateral funding arrangement

113. The ex parte applicant contends that the 1st respondent lacked jurisdiction to entertain PPARB Application No.62 of 2025 on grounds that the subject procurement was financed under an arrangement between the Government of Kenya and multilateral agencies, hence falling under the exemption provided in section 4(2)(f) of the Public Procurement and Asset Disposal Act, 2015.

114. The 2nd respondent, on the other hand, contends that the tender in issue was governed by the Public Procurement and Asset Disposal Act, 2015 and the applicable national laws since the procuring entity Kenya Electricity Generating Company (KenGen) was the employer under the tender and that the contract expressly subjected itself to Kenyan law. Further reliance is place don the European Investment Bank Procurement Guidelines, which provide those challenges to procurement processes shall be pursued under national remedy mechanisms.

115. This is not the first time this issue has been raised before the court. In **JR No.E170 consolidated with JR Misc. No E071 of 2025,** the 3rd and 4th respondent's argued that the Board lacked jurisdiction to entertain the matter and therefore the decision of 11th June 2025 ought to be quashed.

116. The court in its judgment of 1st August 2025 at paragraph 180 found as follows:

"On another front, it is this court's finding that by dint of Section 4(2) (f) of

PPADA 2015 the 1st Respondent lacked jurisdiction to entertain the matter and therefore the Decision of 11th June 2025 ought to be quashed….."

117. In the judgment of the Court of Appeal in **Civil Appeal No.E630 of 2025** arising out of an appeal against the above judgment the honourable Judges of Appeal stated as follows:

"36. Addressing this facet of the appeal, there are two competing arguments touching on the jurisdiction of the Review Board. On the one hand is the appellant's and Board's argument that the Request for Review was filed within the 14-day statutory timeline and that the Review Board was not barred from handling the dispute by section 4(2)(f) of the PP&AD Act. On the other hand, is the 1st, 2nd, and 3rd respondents' argument that the application by the appellant before the Review Board was lodged out of time and that, in any event, the Review Board was barred by section 4(2)(f) of the PP&AD Act from entertaining the appeal.

37. In addressing these dual issues, the learned Judge held as follows:

"180. On another front, it is this court's finding that by dint of section 4(2) (f) of the PPADA 2015 the 1st Respondent lacked jurisdiction to entertain

the matter and therefore the Decision of 11th June 2025 ought to be quashed and that the request for Review was filed on 21st May 2025 which was a period of 15 days from the date of Notification of Award and hence outside the 14 days' Statutory period provided for under section 167 of the PPADA 2015 which is a specialized Act thus rendering the Review Board's Decision of 11th June 2025 invalid for want of Jurisdiction and ought to be quashed."

38. The learned Judge proceeded to hold that:

"181. In any event, the court has already made a finding that there was an infraction of the Applicant's right to fair hearing. An analysis of these entries will not alter the consequences of the denial of the right to fair hearing which are set out in the orders issued at the end of the judgment."

(Emphasis ours)

39. In our view, there is doubt as to whether the learned Judge made definite findings as to the jurisdiction of the Review Board to handle the appellant's Request for Review. Despite paragraph 180 of the judgment alluding to the Court's finding that the Review Board lacked jurisdiction by virtue of section 4(2)(f) of the PP&AD Act and filing of the request for review outside the prescribed timelines, paragraph 181 of the judgment dispels such a finding. The learned Judge at paragraph 181 indicates that

any analysis on the issue of jurisdiction will not alter the finding on the infringement of the 1st respondent's right to a fair hearing.

40.Our understanding of the learned Judge's holding is further reflected in paragraphs 183 and 185 of the judgment as follows;

> ***"183.It is this court's finding and I so hold that the 1st Respondent offended the Applicant's right to fair hearing thereby rendering a decision illegal owing to the procedural impropriety thereby inviting this court to intervene by issuing an order of certiorari as sought."***
>
> ***184….***
>
> ***Disposition;***
>
> ***185.The Applicant has demonstrated to the satisfaction of this court that its case falls within the principles of the grant of the orders of judicial review and the court is satisfied that the Application has merit."***

41. The final orders of the High Court remitted the matter to the Review Board for rehearing. We do not, therefore, think that the learned Judge would have made a finding of lack of jurisdiction by the Review Board and at the same time remit the matter for fresh hearing. We cannot speculate how the contents of paragraph 180 found themselves in the judgment, considering that the learned Judge was clear that his determination was based on the finding that the 1st

respondent's right to a fair hearing had been violated. Be that as it may, and for avoidance of doubt we will allow the appellant's appeal and cross appeal of the 1st respondent against this finding and set aside the learned Judge's finding that the Review Board lacked jurisdiction. This will allow the Review Board to exercise its adjudicatory powers de novo over the appellant's Request for Review in its entirety without any hinderance .Even as we find so, we affirm the holding of the learned Judge in paragraph 181 of the Judgment."

118. The final orders of the Court of Appeal affirmed the High Court's finding on the violation of the right to fair administrative action, set aside the finding that the Review Board lacked jurisdiction and remitted Application No. 62 of 2025 to the Review Board for determination by a newly constituted panel within 21 days, with each party to bear its own costs.

119. In the absence of a clear determination on the issue of jurisdiction in the prior proceedings, it is the duty of this Court to examine and affirm whether or not the 1st respondent had the requisite jurisdiction to hear and determine the matter in accordance with the law and the procedural requirements applicable to the tender process.

120. Section 4(2)(f) of the Public Procurement Asset Disposal Act states as follows;

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.

121. The 1st respondent in its decision of 26th September 2025 extensively between paragraphs 143-173 dealt with the issue of whether or not a dispute arising from **Tender No. KGN-BDD-016-2024** fell within its jurisdiction.

122. According to the Review Board, both the respondents and interested party in the Request for Review objected to the hearing and determination of the Request for Review before the 1st respondent on grounds that the procurement process under review was an arrangement between the Government of the Republic of Kenya and a bilateral/multilateral agency by dint of section 4(2)(f) of the Act.

123. In response, the applicant in the Request for Review contended that the Board had jurisdiction as the subject tender was to culminate into a contract signed between the employer and consultant. The 1st respondent in its decision further observed that the applicant's position was that it was misleading for the interested party to indicate that the tender was an arrangement between the Government of Kenya and multilateral agencies. Further that according to the applicant, the project was

not entirely funded by the European Investment Bank but jointly with the Government of Kenya using public funds.

124. The 1st respondent at paragraph 148 of its decision continues to observe that the import of Section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020 is that the Act is not applicable in procurement and asset disposals under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, foreign agency, foreign entity or multilateral agency.

125. The Board further states that additionally, where any such bilateral or multilateral agreements is financed through negotiated loans for the procurement of goods, works or services, *the Act is not applicable where such aforementioned agreements specify the procurement and asset disposal procedures to be followed*. That it is imperative to note that for Section 4(2)(f) of the Act to apply, one of the parties to a procurement and asset disposals undertaken in accordance with the terms of a bilateral or multilateral agreement must be the Government of Kenya.

126. The 1st respondent from paragraphs 150 of its decision sets out decisions of the High Court where the courts have addressed what kind of agreements are exempted under section 4(2)(f) of the Public Procurement and Asset Disposal Act. To begin with, the Review Board relies on **Miscellaneous Application No. 402 of 2016 (Consolidated with Misc. Application No. 405 of 2016) Republic**

vs. Public Procurement Administrative Review Board & another Ex parte Athi Water Service Board & Another [2017] eKLR where according to the Review Board, the Court held that in making a determination on such issues, the sole consideration is who the parties to the procurement are. Further, that for a procurement to be exempted under section 4(2)(f), one of the parties must be the Government of Kenya and that the other party must be either a Foreign Government, Foreign Government Agency, Foreign Government Entity or multi-lateral agency.

127. According to the 1st respondent, the Court is said to have also observed that the rationale for such provision is clear; the Government of Kenya cannot rely on its procurement Law as against another government as such procurements can only be governed by the terms of their bilateral or multilateral agreement. In its finding, the court held that Athi Water Services Board being a Parastatal with a common seal, with power, in and by its corporate name to sue and be sued, was not the Government of Kenya and as such, the procurement was not exempted under section 4(2) (f).

128. The Court is said to have also observed that the other parties were neither a Foreign Government, Foreign Government Agency, Foreign Government Entity or multi-lateral agency.

129. The Review Board also relies on the decision in **Judicial Review Application No.181 of 2018, Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kenya Power & Lighting Company [2019] eKLR** where Nyamweya J (as she then was) is said to have held that under section 4(2)(f) of the PPADA, what is exempted from the Act is a procurement carried out in accordance with a bilateral agreement between the Government of Kenya and a foreign government or agency, not merely any procurement by the Government itself.

130. Further, that the provision applies only where the procurement is expressly governed by such an agreement. Consequently, that the PPARB was required to satisfy itself that section 4(2)(f) did not apply before assuming jurisdiction, since it operates as an evidential ouster clause. According to the court the Board had erred by equating the exemption to any project funded through a loan or grant involving the Government of Kenya, instead of determining whether the procurement was actually undertaken pursuant to the terms of a bilateral treaty or agreement.

131. The 1st respondent at paragraphs 154 and 155 cites two other High Court decisions where the courts are said to be in consonance with the finding of Nyamweya J (as she then was) in the above decision.

132. The Review Board further at paragraph 156 of its decision observes that it must first address its mind to the operative words under Section 4 (2)(f) of the Act read together with Regulation 5(1) which words are (a) procurement under a bilateral agreement and (b) inapplicability of the Act where a bilateral agreement is financed through negotiated loans and specifies the procurement procedure to be followed.

133. In the subsequent paragraph 157 of its decision, the Review Board sets out a part of the Tender Advert which reads as follows:

> ***"Kengen is in the process of receiving financing from European Investment Bank (EIB) and intends to use part of the funds thereof for payments towards Consultancy Services for Supervision and Management of the Olkaria Geothermal Power Project.***
>
> ***Kengen now invites interested applicants to submit their proposals for Consultancy Services for the Olkaria VII Geothermal Power Project.***
>
> ***…***
>
> ***Eligibility***
>
> ***These services will be procured under the Financiers Guidelines "Guide to Procurement for projects financed by the EIB available online on EIB's website https://www.eib.org/en/publications/guide-to- procurement.htm***

The Eligibility criteria for EIB financing are specified in the Financier's guideline. Firms originating from all countries of the world are eligible to tender for works and services contracts. Pursuant to its Sanctions Policy, the Bank shall not provide finance, directly, or indirectly, to or for the benefit of an individual or entity that is subject to financial sanctions Imposed by the EU, either autonomously or pursuant to the financial sanctions decided by the United Nations Security Council on the basis of article 41 of the UN Charter, Sanctioned Applicants will not be Eligible.

…"

134. The Review Board at paragraph 158 of its decision observes that the Tender Document reveals that the procurement process would be carried out in a single stage, three envelope (prequalification, technical and financial) International Competitive Bidding. That the tender documents issued to prospective bidders comprised of (a) Part I Prequalification for Consultancy Services for Olkaria VII Geothermal Power Project and (b) Part 2 Request for Proposals (RFP) for Consultancy Services for Olkaria VII Geothermal Power Project.
135. The Review Board at paragraphs 159 and 160 of its decision then notes as follows:

"159. We note that the Preface under Part I Prequalification for Consultancy Services for Olkaria VII Geothermal Power Project in the subject tender reads:

> ***"The Kenya Electricity Generating Company PLC (KenGen, referred hereafter as "Employer") and The European Investment Bank (EIB) ,the financier for the Consultancy Services Contract for the Olkaria VII Geothermal Power Project have agreed to use EIB procurement guidelines and adapt the format of The KfW Standard Procurement Document "Standard Bidding Documents for Consulting Services", customized to suit the Olkaria VII Geothermal Power Project procurement process."***

160. Additionally, the Preface under Part 2 Request for Proposals (RFP) for Consultancy Services for Olkaria Geothermal Power Project reads:

> ***"The Kenya Electricity Generating Company PLC (KenGen, referred hereafter as "Employer")and The European Investment Bank (EIB),the financier for the Consultancy Services Contract for the Olkaria VII Geothermal Power Project have agreed to use EIB Guide to procurement (https://www.eib.org/en/publications/guide-to-procurement.htm)and adapt the format of the Kfw Standard***

Procurement Document "Standard Bidding Documents for Consulting services" and "Standard Contracts Consulting Services" customized to suit the Olkaria VII Geothermal Power Project procurement process.

…."

136. The Review Board as paragraph 162 of its decision further states that the respondents while stating that the subject tender was the Government of Kenya's commitment to advancing renewable energy initiative to meet the Country's electricity demand, it also stated that the respondents had also annexed to the replying affidavit of Vincent Nyamweya Mamboleo Kengen's letter dated 4th July 2024, C.S. Treasury's letter dated 26th September 2024 and a letter from the European Investment Bank dated 7th March 2025.

137. The Review Board also observed that the Procuring Entity had sought financing from the European Investment Bank (EIB) through the National Treasury to cover a funding gap of USD 147.5 million for the project. The EIB's letter of 7th March 2025 showed that the concessional loan would be granted to the National Treasury and then on-lent to KenGen. Therefore, the financing was between the Government of Kenya and the EIB, making the tender fall under a bilateral agreement. Consequently, the procurement was

required to be conducted in accordance with the EIB's *Guide to Procurement for Projects Financed by the EIB* ("EIB Guidelines").

138. The Review Board noted the purpose of the EIB Guidelines as indicated at page 1 and reiterated that the purpose of the Guidelines was to inform promoters of projects financed by EIB in whole or in part, of the arrangements for procuring works, goods and services required for the said project.

139. It stated that Clause 1.3 of the Guidelines provided guidelines for respective roles of the Bank and the promoters and from it that it was clear that the rights and obligations of the promoter in relation to tenderers for works, goods or services furnished for a project were governed by the local legislation and tender documents published by the promoter and not the EIB Guidelines.

140. As regard complaints, the Board referred to Clause 1.8 of the Guidelines which is said to have provided that in the case of any public procurement, such review procedures are normally provided through the competent national remedy mechanisms. The Board also relied on Annex 7 of the EIB Guidelines which provided for complaints against promoters and also restated that complainants who wish to challenge a promoter's action or decision should address their concerns to the promoter and/or the relevant review bodies which are normally national remedy mechanisms.

141. In concluding on this issue, the Review Board at paragraph 172 observed that whereas the subject tender was undertaken under a bilateral agreement entered into by the Government of Kenya and EIB, EIB Procurement Guidelines were to be used and that as such, the procurement related complaints against the procuring entity as the promoter were to be pursued under the available national remedy mechanisms.

142. The Review Board then found and held that the Act was applicable in the procurement proceedings in the subject tender, and also that the Review Board had jurisdiction to entertain the matter.

143. From the above exposition, this Court fully agrees with the 1st respondent's reasoning and conclusion on this issue. The Review Board carefully analyzed Section 4(2)(f) of the Public Procurement and Asset Disposal Act as read with Regulation 5 and the relevant case law, correctly observing that the exemption therein applies only to procurements undertaken under a bilateral or multilateral agreement between the Government of Kenya and a foreign government or agency, where such agreement expressly stipulates the procurement procedures to be followed.

144. In the present case, although the project was financed through a concessional loan from the European Investment Bank (EIB) to the Government of Kenya through the National Treasury, the funds were on-lent to KenGen, a parastatal

body corporate, with its own legal personality and operational autonomy. The resulting procurement was therefore undertaken by KenGen as the employer and promoter of the project, rather than by the Government of Kenya itself.

145. Accordingly, the Review Board rightly held that the mere fact that financing originated from a bilateral loan did not of itself render the procurement exempt under section 4(2)(f) unless the bilateral agreement prescribed an alternative procurement regime supplanting the Act.

146. This Court further concurs with the Review Board's interpretation of the European Investment Bank Procurement Guidelines, which, while prescribing standards and procedures for financed projects, expressly recognise the application of domestic review mechanisms for resolution of procurement disputes.

147. As stated by the 1st respondent in its decision, Clause 1.8 and Annex 7 of the EIB Guidelines directs those *complaints against promoters be pursued through competent national remedy mechanisms* and in this case, the Public Procurement Review Board established under the Public Procurement Asset Disposal Act, which is a national legislation on all public procurements. It follows therefore, that the EIB Guidelines did not oust the jurisdiction of the 1st respondent; rather, they endorsed it as the appropriate forum for handling grievances arising from the subject procurement process.

148. Accordingly, I find and hold that the 1st respondent was possessed of and it correctly exercised jurisdiction to hear and determine the Request for Review Application No. 62 of 2025, and that the procurement, though financed under a bilateral loan arrangement, remained subject to the provisions of the Public Procurement and Asset Disposal Act and the oversight of the national review system.

Whether the Request for Review No. 62 of 2025 was res judicata in view of the Board's earlier determination in Application No. 38 of 2025

149. The ex parte applicant has also claimed that the 1st respondent lacked jurisdiction to entertain **PPARB Application No. 62 of 2025** because the issues raised therein, particularly regarding the authenticity and certification of its financial statements had been conclusively determined in **PPARB Application No. 38 of 2025**. The Applicant invokes the doctrine of *res judicata* under section 7 of the Civil Procedure Act.

150. The 1st and 2nd respondents oppose this contention, maintaining that the subsequent application was based on a distinct cause of action and that this was the re-evaluation undertaken by the Procuring Entity pursuant to the Review Board's earlier orders. They submit, arguing that *res judicata* does not apply

where the second proceeding arises from a fresh administrative action or decision taken after the first determination.

151. I observe that this very issue was also canvassed before the 1st Respondent as seen from paragraph 174 of its decision. In its analysis, the Review Board relies on the case of **Attorney General & Another v. ET [2012] eKLR** where the court is said to have underscored the importance of courts being vigilant against attempts by litigants to circumvent the doctrine through presenting previously decided issues as new claims or by introducing additional parties or slightly modified causes of action.

152. The Review Board at paragraphs 180 and 181 of its decision observes as follows:

"180.The Board observes that the instant Request for Review stems from the tender proceedings resulting from the orders issued by the Board in PPARB Application No.38 of 2025 in which the Board had directed that the Evaluation Committee re-evaluate tenders that progressed to the Technical Evaluation stage in line with the evaluation criteria contained in the Tender Document as read with the Act and Regulations 2020 and for the procurement process to proceed to its logical conclusion.

181. In view of the foregoing, the Board finds that the issues raised in the instant Request for Review are distinct from the addressed in PPARB

Application No.38 of 2025. The instant Request for Review does not operate as res judicata, as it arises from a distinct cause of action namely, the re-evaluation of the procurement proceedings in question. The Board finds that the fresh evaluation has given rise to new proceedings, thereby rendering the prior judgment inapplicable to the current review process. The re-assessment of the procurement process is considered a separate and independent action, unbound by the prior determination. As we further determine hereinafter, in the event of a claim of non-compliance with the Board's decision in the previous proceedings, the same would only be of persuasive value to the Board in so far as the current proceedings are concerned but cannot be said to fetter or hamstring this Board in independently determining the current dispute. Accordingly ,this limb of preliminary objection fails. We so hold.

153. The question therefore is whether the doctrine of *res judicata* is applicable in the circumstances of this case as raised by the exparte applicant.

154. The philosophy behind the principle of res judicata is that there has to be finality and that litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. The principle of *res judicata* applies when a litigant attempts to file a subsequent lawsuit on the

same matter, after having received a judgment in a previous similar matter between the same parties and over the same subject matter or cause of action.

155. Section 7 of the Civil Procedure Act, 2010 provides that:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

156. The Supreme Court of Kenya in **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)** observed thus on the doctrine of *res judicata:*

"For res judicata to be invoked in a civil matter the following elements had to be demonstrated:

1. there was a former judgment or order which was final;

2. the judgment or order was on merit;

3. the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

4. there had to be between the first and the second action identical parties, subject matter and cause of action.

4. The doctrine of res judicata was based on the principle of finality which was a matter of public policy. The principle of finality was one of the pillars upon which the judicial system was founded and the doctrine of res judicata prevented a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensured that litigation came to an end, and the verdict duly translated into fruit for one party, and liability for another party, conclusively."

157. Equally, the Court of Appeal in **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR,** held *inter alia* that the doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being hounded by issues and suits that have already been determined by a competent court.

158. In **Christopher Kenyariri v Salama Beach [2017] eKLR**, the court laid out the ingredients to be satisfied when determining *res judicata* thus:

"...the following elements must be satisfied...in conjunctive terms;

a. The suit or issue was directly and substantially in issue in the former suit;

b. ***Former suit between same parties or parties under whom they or any of them claim***

c. ***Those parties are litigating under the same title***

d. ***The issue was heard and finally determined.***

e. ***The court was competent to try the subsequent suit in which the suit is raised."***

159. As was further observed in **Njangu v Wambugu (Nairobi HCCC No. 2340 of 1991, unreported),** if parties are allowed to endlessly litigate the same issue, it would defeat the purpose of the doctrine *res judicata*.

160. Applying the above principles as espouse din judicial pronouncements to these proceedings, I observe that the Review Board's first decision in Application No. 38 of 2025 annulled the initial evaluation and directed the Procuring Entity to conduct due diligence afresh, including verifying the tenderers' financial statements. That decision did not finally determine the evaluation process. Rather, it created a fresh administrative step whose outcome could itself be challenged if conducted contrary to the law or to the Review Board's directions.

161. The subsequent Application No. 62 of 2025 arose after the Procuring Entity had carried out the re-evaluation and issued new notifications of award. The cause of action was thus distinct, relating to alleged irregularities in that new evaluation, not to the earlier process.

162. In **Republic v Public Procurement Administrative Review Board & 3 others Ex parte Tecno Relief Services Limited [2019] KEHC 496 (KLR) P.N. Nyamweya J** when faced with a similar question on whether the proceedings in the subsequent request for review were *res judicata* observed thus:

> ***"66. In the present application, the 1st Respondent found that the cause of action in the Second Request for Review as regards the 3rd Respondent's bid was the same or similar to the one in the First Request for Review. A cause of action is defined in Black's Law Dictionary, Ninth Edition at page 251 as "a group of operative facts giving rise to one or more bases of suing; a factual situation that entitles one to obtain a remedy in court from another person." The operative facts giving rise to the First and Second Request for Reviews were two separate awards both made by the 2nd Respondent with respect to tender number GF ATM HIV NFM-18/19-O1T) 15 for Supply of Nutritional Supplements to the 3rd and 4th Respondents, which the Applicant claims were made illegally.***
>
> ***67. To this extent, one would not be faulted in concluding that the matters raised in the Second Request for Review would be res judicata, were it not for intervening facts that arose after the First Request for Review,***

which were of the 1st Respondent's own making. The 1st Respondent in this respect in its decision of 26th July 2019 on the First Request for Review annulled the first award, and specifically directed on the manner the second award was to be made by the 2nd Respondent as follows:

"The Procuring Entity is hereby directed to conduct a re-evaluation of all bids received by it in Tender No. GF ATM HIV NFM-18/19-OIT-015 for supply of Nutritional Supplements (II) from the Preliminary Evaluation Stage in accordance with the Mandatory documents listed in Preliminary Examination of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document, including the following mandatory documents:-

a. Minimum number of 3 (three) supply contracts of items within the past 3 years, the tenderer should provide documentary evidence in support of the experience of previous supply (Contracts, Purchase Orders, Reference letters and Contact Details of previous supply contracts (Mandatory)

b. Copies of the tenderer's audited financial statements for the past three fiscal years (Mandatory)

c. Average annual turnover in the last three years at least two times the value of the items offered (Mandatory)

d. Statement of manufacturers manufacturing capacity (Mandatory) and to proceed with the procurement process to its logical conclusion, taking into consideration the Board's findings in this case, including the making of an award within fourteen (14) days from the date of this decision."

68. In the second Request for Review, the ex parte Applicant alleges that there was non-compliance by the 2nd Respondent with the 1st Respondent's directives to re-evaluate all bids in accordance with its stated criteria, as regards the 3rd Respondent's bid. Therefore, the new set of intervening facts created a new cause of action, which arose as a result of the 1st Respondent's own orders. In other words, even though the same set of circumstances may have existed in the First Request for Review as regards the 3rd Respondent's bid, the 1st Respondent's orders of 26th July 2019, which were final and binding, that the 3rd Respondent's bid among others be re-evaluated in line with specified criteria opened the gate for a new cause of action, in the event that there was non-compliance. It is also notable that the complaints raised by the ex parte Applicant's Request for

Review was specifically on the non-compliance by the 2nd Respondent with the 1st Respondent's orders of 26th July 2019.

69.This Court therefore finds that in the circumstances of the Second Request for Review, the 1st Respondent did make an error of law in holding that the doctrine of res-judicata on account of cause of action estoppel applied to the complaints raised by the ex parte Applicant as regards the 3rd Respondent's bid. This is for the reasons that its orders of 26th July 2019 materially changed the context in which the parties were operating after the First Request for Review and created a new cause of action."

163. This Court observes that the factual matrix in the present matter bears significant resemblance to that considered in the decision referenced above. Accordingly, this Court concurs with the 1st respondent's determination that Application No. 62 of 2025 was not rendered *res judicata* by the decision in the earlier Application No. 38 of 2025. This is because, the issues raised in the subsequent application emanated from a distinct set of facts, specifically relating to the re-evaluation process, and thus properly fell within the jurisdiction of the 1st respondent.

164. The Review Board further addressed the issue concerning the ex parte applicant's financial statements. At paragraph 185 of its decision, the Board

observed that the subsequent Request for Review was proceeding *de novo*, meaning that the matter was being heard afresh, as though it had not previously been the subject of adjudication and no prior determination existed. The Board therefore stated that the panel would not be guided by, nor concerned with, any remarks or findings made in earlier proceedings.

165. I note that the Court of Appeal in **Civil Appeal No.630 of 2025** in the appeal arising from the judgment by Chigiti J, SC relating to the same procurement process subject of these proceedings at paragraph 41 observed thus:

> ***""41. The final orders of the High Court remitted the matter to the Review Board for rehearing. We do not, therefore, think that the learned Judge would have made a finding of lack of jurisdiction by the Review Board and at the same time remit the matter for fresh hearing. We cannot speculate how the contents of paragraph 180 found themselves in the judgment, considering that the learned Judge was clear that his determination was based on the finding that the 1st respondent's right to a fair hearing had been violated. Be that as it may, and for avoidance of doubt we will allow the appellant's appeal and cross appeal of the 1st respondent against this finding and set aside the learned Judge's finding that the Review Board lacked jurisdiction. <u>This will allow the Review Board to exercise its adjudicatory powers de novo</u> <u>over the appellant's</u>***

<u>Request for Review in its entirety without any hinderance</u>. Even as we find so, we affirm the holding of the learned Judge in paragraph 181 of the Judgment."

166. The term *de novo* has been defined by the courts severally. Mativo J (as he then was) in the case of **Kenya Anti-Corruption Commission vs. Michael K. Gituto [2015] eKLR** while dealing with *de novo* hearing cited the case of **Sunday Kajubo V. The State (1988) LLJR-SC** and expressed himself as hereunder:

"Starting the case de-novo entails re-calling all the witnesses. "The Latin Maxim "De novo" connotes a 'New', Fresh", a 'beginning', a 'start' etc. In the words of the authors of Black's Law Dictionary, De novo trial or hearing means trying a matter a new, the same as if it had not been heard before and as if no decision had been previously rendered...new hearing or a hearing for the second time, contemplating an entire trial in same manner in which the matter was originally heard and a review of previous hearing. On hearing 'de novo' court hears matter as court of original and not appellate jurisdiction. That a trial de novo could mean nothing more than a new trial. This further means that the plaintiff is given another chance to re-litigate the same matter, or rather, in a more general sense, the parties are at liberty, once more to reframe their case

and restructure it as each may deem it appropriate. The consequence of a retrial order or a de novo (a Venire De novo), is an order that the whole case should be retried or tried a new as if no trial whatsoever has been had in the first instance."

167. Similarly, in **Catherine Wanjiku Kagua vs. Chinga Tea Factory & Another [2016] eKLR** the same Judge expressed himself as hereunder:

"Trial De novo refers to a new trial on the entire case conducted as if there had been no trial in the first instance. De novo is a Latin expression meaning "anew," "from the beginning," "afresh." De novo is a Latin phrase for "anew" which means starting over. The Black Law Dictionary defines a de novo trial thus:-

"A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the instance."

The dictum of Ibrahim Tanko Muhammed, J.S.C in the Nigerian case of Babatunde v Pan Atlantic Shipping and Transport Service is also apposite and is quoted verbatim thus:-

"The Latin maxim "De novo" connotes a "New" "fresh" a "beginning" a "start" etc. In the words of the authors of Black Law dictionary, De novo trial or hearing means trying a matter anew, the same as if it had

not been heard before and as if no decision had been previously rendered … new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was originally heard and a review of previous hearing. On hearing "de novo" court hears matter as court of original and not appellate jurisdiction… that a trial de novo could mean nothing more than a new trial. This further means that the plaintiff is given another chance to re-litigate the same matter or rather, in a more general sense the parties are at liberty, once more to reframe their cases and restructure it as each may deem it appropriate."

From the above definition, for a matter to be tried de novo would mean considering the matter anew, as if it had never been heard. The foregoing makes it clear that a de novo trial should examine the evidence before it afresh. Obviously since a retrial has been ordered and the case is to be heard de novo, the plaintiff must reprove his case as if there has been no earlier trial. It is crystal clear from the above authorities that the plaintiff must prove his/her case afresh though previous evidence in an abortive trial is admissible as long as the ends of justice are met. There is nothing one can add to the above explanation. The fact is very clear that a de novo trial must be started from the

beginning as if a trial had never taken place and the matter decided on its merits. It is also clear that the expression "new trial" trial de novo, 'retrial', 'fresh hearing', 'trial a second time all have the same meaning. Thus, it is my considered opinion that the appellant cannot rely on the earlier evidence but he must adduce fresh evidence and since the issue of liability was resolved I the test case, the only issue the appellant will have to adduce evidence is on the issue of assessment of quantum of damages."

168. Lesiit J (as she then was) in **Julius M'mario M'mauta vs. Republic [2011] eKLR** found that:

"It is clear from the record of proceedings that after the order to have the case heard de novo, no prosecution witness was called. The term de novo means that the case was to begin afresh from the beginning. Black's Law Dictionary, Eight Edition defines trial de novo thus:-

"A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first instance."

After the learned trial magistrate declared that the case was to be heard de novo, it meant that the prosecution was to begin its case from the

beginning. Since no evidence was called by the prosecution after the order for hearing de novo was made, the prosecution could not have established a prima face case on whose basis the appellant was called to answer the charge. The learned trial magistrate misdirected himself for finding a prima facie case was established without calling of any evidence. The learned trial magistrate also misdirected himself when he entered a conviction as the only evidence before him was that by the appellant. The appellant could not have adduced evidence against him. In fact, his defence was that he deemed the charge in the circumstances the entire trial was botched. The conviction entered against the appellant was unsafe and cannot be allowed to stand."

169. The effect of an order for hearing de novo was explained by the Court of Appeal in **Peter Okeyo Ogila v. Rachuonyo Farmers' Co-Operative Union Ltd Civil Appeal No. 79 of 1992**, stating the following:

"Where the Court of Appeal has set aside a Judgement and ordered a fresh hearing de novo by a different Judge, the Judge has to apply his own mind to the matter and decide for himself what would be a fair and reasonable compensation but should not just reproduce the Judgement which had been

set aside and increase it by a small sum to take account of inflation as to do so is impermissible and the Judgement not being his, is a nullity."

170. Subsequently, Odunga J in the case of **John Nduva Mutua v Republic [2019] KEHC 11988 (KLR)** stated as follows:

"The effect of an order for hearing de novo was explained by the Court of Appeal in Peter Okeyo Ogila vs. Rachuonyo Farmers Co-Operative Union Ltd. Civil Appeal No. 79 of 1992 where that Court expressed itself as hereunder:

"Where the Court of Appeal has set aside a Judgement and ordered a fresh hearing de novo by a different Judge, the Judge has to apply his own mind to the matter and decide for himself what would be a fair and reasonable compensation but should not just reproduce the Judgement which had been set aside and increase it by a small sum to take account of inflation as to do so is impermissible and the Judgement not being his, is a nullity."

"From the foregoing decisions it is clear that once an order for hearing de novo is made the hearing must start afresh. Whereas pursuant to the decision of the Court of Appeal in David Mutune Nzongo vs. Republic [2014] eKLR the failure to plead afresh is not fatal to such proceedings, it is clear that the evidence adduced in the earlier trial has no place in the

judgement arising from the proceedings undertaken pursuant to an order for de novo hearing."

171. In **Judicial Review Civil Application 89 of 2014 | Kenya Law Reports 2015 Eric Kibiwot and 2 others versus the DPP and 2 others [2015]** eKLR Odunga J relying on other decisions stated as follows:

86. Submissions were made on behalf of the applicants that in light of the vesting order made in Nairobi High Court Suit No. 90 of 2004 (OS) by which order the applicants were granted vesting orders, the effect of the continuation with the impugned criminal trial would be to risk arriving at a decision contrary to the said vesting order. It is however not in doubt that the said vesting order was set aside by the Court. The effect of setting aside the said order in my view is that the order is non-existence and the position reverted to where the partes were before it was made. The fact that it had been issued is now nolonger here nor there. The effect of granting leave to defend the suit in my view was that the hearing was to commence de novo.

Dealing with such circumstances the Court of Appeal in Peter Okeyo Ogila vs. Rachuonyo Farmers Co-Operative Union Ltd. Civil Appeal No. 79 of 1992 expressed itself as follows:

"The circumstances of this case are somewhat peculiar. The only issue before the Court was what would be a fair and reasonable compensation to award to the appellant for his injuries. Mr. Justice Githinji attempted this by reference to decided cases, he then arrived at a total figure. That judgement was set aside...In those circumstances, Mr. Justice Wambilyanga before whom case for assessment has duty to hear and assess the damages de novo. He has to apply his own mind to the matter and decide for himself, what would be a fair and reasonable compensation. He took some evidence that will enable him to do this. But he did not exercise his judicial function of making his own assessment. He merely reproduced the judgement which had been set aside and increased it by a small sum to take account of inflation. In our opinion, this course is impermissible and the judgement not being his, is a nullity...As this matter has suffered considerable delay, we direct that the fresh hearing shall be done as a matter of urgency."

87. In Nation Media Group Limited vs. Busia Teachers Co-Operative Credit and Savings Society Limited & Another Civil Appeal No. 209 of 2005 the Court Appeal held:

"A consent order having been entered that the trial do start de novo, the superior court's decision not to proceed with the hearing of the suit de novo, and to rely on the previous proceedings taken before the earlier Judge was without jurisdiction, and in breach of the order requiring hearing de novo of the suit before the superior court."

88. What comes out from the foregoing decisions is that where a Court orders that the proceedings start de novo, the Court to which the matter is remitted has to start the hearing afresh. No reference can therefore be made to the orders which were made in the matter which was set aside unless the order setting aside the earlier proceedings was conditional and the conditions were not complied with. Accordingly, I do not agree with the contention that the Court to consider the fact that a vesting order had been made in the previous proceedings."

172. In light of the foregoing jurisprudence, it is beyond doubt that an order directing a rehearing *de novo* requires the adjudicative body to reconsider the dispute afresh, unencumbered by prior findings, remarks, or determinations. In the instant case, the Court of Appeal's directions in **Civil Appeal No. 630 of 2025** expressly authorized the Review Board to ***"exercise its adjudicatory powers de novo… without any hinderance,"*** thereby freeing the Review Board from reliance on, or deference to, conclusions reached in the earlier proceedings.

173. Accordingly, my conclusion on this issue is that the Review Board's decision to disregard previous comments on the ex parte applicant's financial statements and to re-evaluate the matter on its own merits afresh was entirely consistent with the nature of *de novo* proceedings and squarely within the appellate Court's directive in Civil appeal No. 630 of 2025.

174. I therefore find that the Review Board properly applied the law and faithfully complied with the directions of the Court of Appeal in undertaking a fresh, independent determination of the dispute, touching on the exparte applicant's financial statements.

175. The review Board also observed that a tribunal of coordinate jurisdiction may distinguish a prior decision in circumstances where the prior decision was made *per-incuriam* and the Board satisfies itself that the decision misapprehended the evidence before. That it is a general rule that a court or tribunal is not bound to follow its previous decision where such decision is given *per incuriam*, that is, through inattention to vital applicable instruments or authority. In emphasizing this position. the Review Board relied on the Supreme Court case of **Jasbir Singh Rai & 3 Others vs. The Estate of Tarlochan Singh Rai & 4 Others, Sup. Ct. Petition No.4 of 2012.**

176. In the above said case, the Supreme Court aptly discussed decisions arrived at by *per incuriam* as follows:

"7. An obiter dictum statement is one made on an issue that does not strictly and ordinarily call for a decision, and so it is not vital to the outcome set out in the final decision of the case. On the other hand, a decision per incuriam is mistaken, as it is not founded on the valid and governing pillars of law.

8.Comparative judicial experience showed that the decision of a superior Court was not to be perceived as having been arrived at per incuriam, merely because it was thought to be contrary to some broad principle, or to be out of step with some broad trend in the judicial process. The test of per incuriam is a strict one, the relevant decision having not taken into account some specific applicable instrument, rule or authority.

……..

50.For the special role of precedent in the certainty and predictability of the law as it plays out in daily transactions, any departure is to be guided by rules well recognized. It is a general rule that the Court is not bound to follow its previous decision where such decision was an obiter dictum (side-remark), or was given per incuriam (through inattention to vital, applicable instruments or authority). A statement obiter dictum is one made on an issue that did not strictly and ordinarily, call for a decision:

and so it was not vital to the outcome set out in the final decision of the case. And a decision per incuriam is mistaken, as it is not founded on the valid and governing pillars of law.

51.Comparative judicial experience shows that the decision of a superior Court is not to be perceived as having been arrived at per incuriam, merely because it is thought to be contrary to some broad principle, or to be out of step with some broad trend in the judicial process; the test of per incuriam is a strict one – the relevant decision having not taken into account some specific applicable instrument, rule or authority. This position is illustrated by the English House of Lords judgment in Cassell & Company Limited v. Broome [1972] 2 WLR 645, in which the Court of Appeal's perception of Rookes v. Barnard [1964] AC 1129 as being per incuriam was the subject. The relevant passage (per Lord Reid) reads:

"I am driven to the conclusion that when the Court of Appeal described the decision in Rookes v. Barnard as decided per incuriam, or "unworkable," they really only meant that they did not agree with it….

"When this House undertakes a careful review of the law it is not to be described as acting per incuriam or ultra vires if it identifies and expounds principles not previously apparent to the counsel who addressed it or to the

judges and text-book writers whose divergent or confusing expressions led to the necessity for the investigation."

177. Relying on the above decision of the Supreme Court, it is this court's finding that the 1st respondent correctly relied on the case of **Jasbir Singh Rai & 3 Others vs. The Estate of Tarlochan Singh Rai & 4 Others, Sup. Ct. Petition No.4 of 2012** in deciding that it was not bound by its earlier decision which was made per incuriam.

178. In the end, it is this court's finding that the Review Board's determination that PPARB Application No. 62 of 2025 was not barred by *res judicata*, and its independent de novo assessment of the matter, was fully consistent with the law and the appellate Court's directions, including its ability to distinguish prior decisions given *per incuriam*.

Whether the ex parte applicant is entitled to the orders sought

179. The next issue is whether the ex parte applicant is entitled to the orders sought. The Applicant faults the Review Board for allegedly misapprehending the evidence relating to its financial statements and for making findings that contradict its earlier observations.

180. Judicial review, however, is concerned with the decision-making process and not the merits of the decision itself. The Court's remit is limited to determining whether the Board acted within its statutory mandate, observed procedural fairness, and applied the law correctly see **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No 186 of 2001**, and the case of **Meixner & Another vs Attorney General (2005)2KLR 189.**

181. The grounds upon which judicial review orders such as an order of certiorari may be granted were clearly articulated in the Ugandan case ***Pastoli v Kabale District Local Government Council & Others*** **[2008] 2 EA 300** where the court while citing with approval the case of **Council of Civil Unions v Minister for the Civil Service [1985] AC 2 and Re Application by Bukoba Gymkhana Club[1963] EA 478 at 479** held that:

> ***" In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety….illegality is when the decision - making authority commits an error of law in the process of taking or making the Act, the subject of the complaint Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality…irrationality is when there is such gross unreasonableness in the decision taken or act done, that no***

reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards ….. procedural impropriety is when there is a failure to act fairly on the part of the decision – making authority ***in the process of taking a decision. The unfairness may be its none 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 legislature instrument by which such authority exercises jurisdiction to make a decision."***

182. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and grant the remedy for judicial review if any of them is proved to exist. However, the list is by no means exhaustive.

183. The Fair Administrative Action Act, 4 of 2015 has to a greater degree codified these grounds of judicial review. It states in section 7 as follows:

"7. Institution of proceedings.

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-

(a) a court in accordance with section 8; or

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to-

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.

184. Kenyan Courts have on several occasions reaffirmed this position as seen in the Court of Appeal decisions of **Webb Fontaine Group FZ – LLC v Public**

Procurement and Administrative Review Board & 3 others [2020] eKLR, Henry Asava Mudamba v Institute of Certified Public Accountants of Kenya [2015] KECA 171 (KLR) and **Pharmacy and Poisons Board v George Wang'anga & 5 others [2020] KECA 775 (KLR).**

185. The record discloses that and the same has not been controverted by any of the parties that all parties to the proceedings were given an opportunity to be heard and that all the pleadings and evidence adduced before the Board by the parties was considered by it. An example is that from its decision at paragraph 223, the Board considered the confidential documents submitted to it pursuant to section 67 of the Act and noted as follows:

> ***"We say this because the Board has painstakingly perused the confidential documents submitted to it pursuant to section 67 of the Act and noted that from the Interested Parties bid at pages 51 to 66,it submitted its Financial Capacity Statement signed by its Managing Director a Mr. Marco Righini together with balance sheets and profit and loss accounts for years 2022,2021 and 2020. Curiously though, the balance sheets and profit and loss accounts have no insignia or any indication of certification by an auditor or at all as required under 1.Clause 2.2 (e)(v) of Section I-General Provisions (GP) at page 11 of Part I-Prequalification of the Tender Document. There is also no audit report***

for the same. In contrast, the Applicant's Financial Statements for years 2023,2022 and 2021 as submitted at pages 51 of 175 to 73 of 175 are certified by an auditor by the name Dr. Gluseppe Mangano and accompanied by his Independent Audit Report. These are records supplied by the Respondents to the Board and are available to it for verification."

186. In the premises, having considered the record, the submissions of the parties, and the applicable legal principles, it is clear that the ex parte applicant has not demonstrated that the Review Board acted illegally, irrationally, or in breach of procedural fairness. The Review Board afforded all parties a full and fair opportunity to be heard, properly considered the evidence before it and acted within the scope of its statutory mandate.

187. I find no basis to interfere with the Review Board's decision under the principles of judicial review, as the applicant has not established any of the grounds for judicial review under the Fair Administrative Action Act, 2015 or under any other law. I therefore find that the ex parte applicant is not entitled to the orders sought.

188. Consequently, the Judicial review application dated 13th October 2025 is hereby dismissed.

189. I however order that each party shall bear their own costs of these proceedings which have lingered in this Court for a while.

190. This file is closed.

Dated, Signed & Delivered virtually at Nakuru this 20th Day of November 2025

R.E ABURILI
JUDGE