REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC APPLICATON NO. E154 OF 2025

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015
AND
IN THE MATTER OF: CIVIL PROCEDURE RULES, ORDER 53
AND
IN THE MATTER OF: THE CONSTITUTION OF KENYA (2010) ARTICLES
2, 10, 22, 23, 24, 25, 27, 28, 32, 36, 38, 47(1) & (2), 48, 50,159,165, 258, 259 AND 260;
AND
ALL OTHER ENABLING PROVISIONS OF THE LAW
AND
IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015
AND
IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

REPUBLIC ………………………………………………….. APPLICANT

-VERSUS-

THE JUDICIARY OF KENYA ……………………….1ST RESPONDENT

THE ATTORNEY GENERAL ………………………………..2ND RESPONDENT

AND

CANARIES HOLDINGS LTD ………………. EX-PARTE APPLICANT

RULING ON PRELIMINARY OBJECTION DATED 24/11/2025

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1. The applicant vide chamber summons dated 21st November, 2025 seeks from this Court the following prayers:

    i. *Spent*

    ii. *This Honourable Court be pleased to grant the Ex parte Applicant leave to apply for an order of certiorari to bring into this Honourable Court for purposes of being quashed the entire decision of THE JUDICIARY OF KENYA, the Respondent herein, in re-advertising the tender for the completion of Habaswein Law Courts.*

    iii. *This Honourable Court be pleased to grant the Ex parte Applicant leave to apply for an order of mandamus to compel the Respondent to cancel the advert dated 11th November 2025.*

    iv. *An Order of Mandamus do issue compelling the Respondents to accord the Applicant fair hearing and resolve the issues relating to the existing contract.*

    v. *The leave sought do operate as a stay of the entire decision of THE JUDICIARY OF KENYA, the Respondent herein in the advert dated 11th November 2025, re-*

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advertising the tender for the completion of Habaswein Law Courts.

vi. *Any other orders as the Court may deem fit to grant.*

vii. *The cost of this Application be provided for.*

2. The application is predicated on the grounds contained in the statutory statement and verified by the affidavit sworn by ABDIHAKIM A. ADAN.

3. The facts surrounding the application is that the Applicant was awarded the tender for the construction of Habaswein Law Courts after a competitive process, following which a contract dated 8th December 2022 was formally executed. Thereafter, the Applicant mobilized to site, deployed labour, equipment and materials, and commenced works. The applicant claims that it has completed the excavations and the steel reinforcement to raft foundation and related basement works for the structure.

4. That on or about February 2025, the Applicant and the Respondent have held meetings to discuss the prospects of the completion of the project due to budgetary constraints facing the contracting authority, upon which the Applicant wrote a letter dated 17th March 2025 to the Respondent

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reminding the Respondent of the effect of the budgetary constraints on the project timelines and the continued losses on the company. The Applicant further requested the Respondent to confirm the availability of funds considering earlier requests for payments processing were delayed for a significant period.

5. That the Respondent via a letter dated 3rd April 2025 confirmed that they could only pay for the value of works done for the concreting of the raft foundations of the project this financial year. That the Applicant informed the Respondent the extended period required to complete the project in light of the ongoing budgetary constraints and the need to extensively engage on this issue.
6. That the Applicant further communicated its readiness to complete the minimal assignment of casting of raft foundations via an email dated 16th June 2025, in which the Respondent was notified of the date of concreting and the need to urgently provide concurrence to proceed from their technical team on the planned works and confirmation of the Respondent's ground team to supervise the exercise, but

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that the Applicant is yet to receive any communication on their last communication or any termination of their contract.

7. The applicant contends that at no time did the Respondent invoke or comply with the statutory procedures for termination or cancellation of the contract under sections 63, 135, 139 and 153 of the PPADA, 2015 and the contract document.
8. It is alleged that the Respondent instead recently issued an advert dated 11th November 2025 in the MyGOV advertisement platform for the proposed completion of Habaswein Law Courts and set the tender deadline as 25th November 2025, without communication or justification, amounting to an unlawful constructive termination of the subsisting contract, yet the Applicant is in possession of site and continues to incur significant site expenses including labour costs, machinery maintenance costs, security and other expenses necessitated by the ongoing project obligations.
9. The Applicant claims that it has completed other substantial works which no payment has been made and that the

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Respondent indicated were to be considered in a subsequent certificate of payment as and when funds are available.

10. The applicants claims that the re-advertised tender is scheduled to close on 25th November 2025, presenting imminent risk that the Respondent may unlawfully proceed to evaluate and award a parallel contract, in violation of constitutional and statutory principles including: Article 10 on rule of law, transparency and accountability; Article 47 on fair administrative action, Article 227 on fairness and equity in public procurement; Sections 4,5,6, and 7 of the Fair Administrative Action Act; Sections 63, 135,139 and 153 of the PPADA; the doctrine of legitimate expectation and the legal principle against irrational and arbitrary administrative conduct.

11. It is further alleged that the Respondent violated and continues to violate the provisions of Section (4) of the Fair Administrative Action Act by not affording the Ex-Parte Applicant the right and opportunity to be heard which failure adversely affected the rights of the Ex-Parte Applicant.

12. That therefore, unless the orders sought are granted, the Ex-parte Applicant stands to suffer irreparable loss and

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damage and that it is in the best interest of justice and fairness for this application to be heard urgently and that no one will suffer irreparable damage.

13. The applicant therefore asserts that the actions by the respondents are in abuse of discretion and error of law and are arbitrary, irrational and biased and should be quashed.

14. When the matter came up before me under certificate of urgency on 21/11/2025, I did not certify it as urgent. I however directed the applicant to serve the respondent forthwith for interpartes directions on 25th November, 2025.

15. On 24th November, 2025, the respondent filed a notice of preliminary objection to the chamber summons contending that:

    i. *The court is devoid of jurisdiction to entertain the application*

    ii. *The application as filed offends the provisions of section 9(2) of the Fair Administrative Action Act*

    iii. *The application is fatally defective, premature, incompetent and an abuse of the court process and ought to be struck out with costs to the respondent.*

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16. The parties' counsel agreed to immediately canvass the preliminary objection and the was argued orally on 25th November, 2025 with Mr. Akach submitting for the applicant while Mr. Munene Wanjohi submitted for the respondents in support of the notice of preliminary objection.

17. Mr. Munene submitted, reiterating the grounds in the preliminary objection, emphasizing that the application offends section 167(1) of the PPADA and section 9(2) of the Fair Administrative Action Act. Further, that there being a contract between the parties, the applicant ought to have moved to the Commercial Division of the High Court and that there are other available remedies for the applicant but not Judicial review. Further, that no administrative decision was taken by the judiciary capable of judicial review remedy.

18. On behalf of the applicant, Mr. Akach opposed the preliminary objection submitting that the issue of there being a contract between the parties was not in the Preliminary objection. That section 167(1) of the PPADA only applies to tenderers or candidates in a procurement process to move to the review Board but that in this case, the exparte applicant already has an existing contract and ongoing works in

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respect of the tender that the 1st respondent is advertising afresh. He relied on the case of **Amazon Transporters Ltd v PPARB and 2 others and Jenigo enterprises Ltd. Misc. E025 of 2025** at paras 74 -84 where this Court explained section 167(1) and 167 (4) (c) of the PPADA and on what can go to the review Board and what can go to judicial review.

19. Counsel submitted that the administrative decision is the retender advertisement by the judiciary when there is an existing contract between the parties hence the matter is for judicial review not for the Review Board. He urged the court to dismiss the preliminary objection.

20. In a rejoinder, Mr. Munene submitted that a preliminary objection can be raised either orally or in writing and that the issue of a contract is a point of law. He defined a candidate as per the PPADA as a person who has collected documents from the procuring entity. That there is attender notice which automatically gives the applicant locus to approach the Review Board. He prayed that the preliminary objection be allowed as prayed with costs to the respondent.

<u>Analysis and Determination</u>

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21. I have considered the preliminary objection raised by the respondents and the response thereto in the oral submissions and the applicable law. The issue for consideration is whether the preliminary objection is merited and if so, what orders this court should make.

22. A Preliminary Objection has been defined in the *locus classicus* case of **Mukisa Biscuit Company v Westend Distributor Limited (1969) EA 696** as follows:

> ***"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

23. In **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (2021) KESC 39 (KLR)** the Supreme Court of Kenya held that:

> ***'A preliminary objection consisted of a point of law which had been pleaded, or which arose by clear***

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implication out of pleadings, and which if argued as a preliminary point could dispose of the suit.'

24. In this case, the respondents have raised a preliminary objection concerning jurisdiction of this Court to hear and determine these proceedings. They have cited statutory provisions and also contended that the matter squarely falls within the commercial division of the High Court because it concerns an existing contract between the parties to the contract.

25. In the statutory provisions cited, the respondents contend that the matter falls within the premise of the Public Procurement and Asset Disposal Act hence it should have been filed before the Public Procurement Administrative Review Board (PPARB). Further, that the applicant offends section 9(2) of the Fair Administrative Action Act which mandates exhaustion of alternative dispute resolution mechanisms.

26. In **Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd [1989] 1 KLR** the Court of Appeal had this to say, whether an objection to jurisdiction amounted to a pure point of law for determination in the first instance:

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"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without jurisdiction."

27. Accordingly, I am satisfied that the preliminary objection raised on the basis that this Court lacks jurisdiction is a pure point of law to be taken upfront before delving into any merits and only after the preliminary objection is overruled can the court determine the merits of the case.

28. In this case, the respondents contend that there is no administrative decision taken by the judiciary in readvertising the tender for construction of the Court house at Habaswein and that if there was any such decision then

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the forum for resolution is the PPARB since the tender has been readvertised. The applicant on the other hand submits that the applicant is not a candidate in the readvertised tender and that there is an already existing contract between the parties yet the 1st respondent is readvertising for the same project which is ongoing although facing budgetary challenges, an issue the parties had discussed with a view to resolving, according to the pleadings by the applicant.

29. In resolving this first ground, I must reproduce what section 167 of the Public Procurement Asset Disposal Act (PPADA) as a whole provides, to avoid selective reading and reliance on statutory provisions and it is as follows:

> ***167. Request for a review***
>
> ***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the***

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alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract: Provided that this shall not apply to tenders reserved for women, youth, persons with disabilities and other disadvantaged groups.

(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

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(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and

(c) <u>where a contract is signed in accordance with section 135 of this Act.</u>

30. In the **Amazon Transporters Limited v Public Procurement Administrative Review Board & 2 others; Jennygo Enterprises Limited (Interested Party) (Miscellaneous Application E025 of 2025) [2025] KEHC 4664 (KLR) (Judicial Review) (9 April 2025) (Judgment),** this Court, citing many other binding decisions of the Court of Appeal, comprehensively held as follows, concerning jurisdiction of the PPARB under section 167 (1) of the PPADA:

75. This in my view forms the other critical issue for consideration. The issue has been canvassed by the parties. Section 167(4)(c) of the PPADA provides that once a procurement contract is signed, the Review Board loses its jurisdiction to hear a review unless the contract was signed outside the tender's validity period.

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76. In the present case, the contract was signed on 14th August 2024, within the validity period of the tender. The Applicant's contention is that the Board's dismissal of its Request for Review, based on the contract being signed, was erroneous. The Applicant argues that despite the signing of the contract, the Review Board still had the jurisdiction to examine whether the contract was legally valid, particularly in light of alleged non-compliance with statutory procurement requirements.

77. This Court finds merit in the Applicant's argument, particularly given the jurisprudence espoused in Public Procurement Administrative Review Board v Four M Insurance Brokers Limited & 3 others supra where the court also observed as follows:

" On the second limb of jurisdiction relating to the existence of a signed contract, we note that the learned Judge of the superior Court held as follows on this issue:- "… 217. In Republic vs.

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Public Procurement Administrative Review Board exparte Madison General Insurance Kenya Limited; Vice Chancellor Kenyatta University & Another (Interested Parties) (2022) eKLR where Justice Ngaah held as follows:- "it could be that indeed the contract was invalid, but in my humble view, considering the provisions of Section 167(4)(c) once a contract has been signed, the appropriate forum before which the question of validity of a signed contract can be determined is this Honorable Court. It does not necessarily follow that an aggrieved party is left without a remedy merely because a contract is signed. Grievances arising out of a signed contract will certainly be addressed but not before the Public Procurement Administrative Review Board. They will be addressed before the court which only has the jurisdiction to determine such disputes related to the alleged grievances." 2

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78. The Board lacked jurisdiction to hear and determine the application by the 2nd Respondent under Section 167(4) of the Act, to entertain the application given that there was already a signed contract – signed on 2nd October 2023, between the ex-parte Applicant and the 3rd and 4th Respondent.

79. Given that the Contract was executed between the Applicant and the 4th Respondent, on 2nd October 2023,theBoard lacked jurisdiction to adjudicate over any request for review filed after the execution of a contract pursuant to the provisions of Section 167(4)(c) of the Act and I so hold…”

80. As already observed, the appellant’s jurisdiction emanates from Section 167(1) of the Act. Section 167(4) provides matters that shall not be subject to the jurisdiction of the appellant and, Section 167(4) (c) of the Act specifically, ousts the appellant’s jurisdiction where a contract is signed in accordance with Section 135

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of the Act. Section 135 in this regard sets out various requirements to be met in the creation and signing of procurement contracts, and an ordinary and purposive interpretation of section 167(4)is that the appellant is required to inquire into whether a procurement contract has been signed in accordance with section 135 of the Act when deciding on whether it has jurisdiction to hear and determine a request for review filed before it in cases where a contract has already been signed, and its jurisdiction is only ousted once this preliminary inquiry establishes that the provisions on creation of a procurement contract under Section 135 of the Act have been met, or where it makes an error as to the existence of this statutory precondition.

81. Indeed in the case of Ederman Property Limited v Lordship Africa Limited & 2 others [2019] eKLR, where a similar question arose as to whether the Appellant had properly declined jurisdiction in a

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case where a contract had been signed, this Court stated thus: -

> ***"…The learned Judge who heard the motion identified as an important question the determination of whether the 2nd respondent committed an error of law when it declined jurisdiction to entertain the application for review because a contract had already been entered into and the application was filed outside fourteen (14) days…***
>
> ***82. The review body is not allowed to consider a review where a contract has been signed in accordance with Section 135 of the Act…..***

31. From the above decision, coupled with a fresh reading of section 167 of the PPADA, it remains binding that once a contract is signed pursuant to procurement process and as wa sin this case whether the contract was being performed by the contractor before it faced financial challenges, then the matter is outside the PPARB. In other words, the Review Board' jurisdiction is ousted completely and the only avenue for the party aggrieved is the Court.

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32. However, the Court in the above case did not prescribe that where a contract was already being performed and a party to the contract fails to perform their part of the bargain or breaches the contract by readvertising the tender for completion of the project, then the aggrieved party must come to this Court by way of judicial review. That understanding in my view would be a mis apprehension of the judgment in the **Amazon Transporters Limited** Case.

33. This leads me to the conclusion that the 1st ground of the preliminary objection fails and it is dismissed.

34. On the question of whether this judicial review Court can determine the dispute between the parties to a contract where the 1st respondent has readvertised an ongoing project for completion yet the contractor is still on site, although the ground was not raised in writing, the applicant raised this issue but went ahead to argue in submission that in any event, it has an existing contract with the 1st respondent and there were ongoing works hence the 1s respondent could not readvertise the tender and that is the gist of these proceedings.

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35. In my view, that question of existence of the contract between the applicant and the Judiciary is not in issue because it is what the applicant pleaded hence the respondents could still raise the objection as to jurisdiction of a judicial review Court where the dispute concerns contractual obligations of parties to a contract. Furthermore, the applicant's counsel submitted at length in response to this issue raised by the respondent's counsel. Additionally, as the respondent's notice of preliminary objection in ground 1 simply stated that the court did not have jurisdiction to hear and determine the matter, the respondents were not tied to any specific jurisdictional issue in their submissions, noting that the issue of the existence of a contract between the parties was not a new matter or issue between the parties.

36. I therefore find the objection to be well taken noting that a point of law especially that touching on jurisdiction of the court can be taken any stage of the proceedings. This is so, considering that jurisdiction is everything without which a court of law has no power to do more, than downing its tools and neither can a court of law arrogate itself jurisdiction that it does not have.

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37. **The Court of Appeal in Barclays Bank of Kenya vs Pyritic Guards Limited [2015] eKLR had this to say concerning the stage at which a point of law can be raised:**

> ***"It is also trite law that a point of law can be raised at any stage even though not raised before the court of first instance. The Court can also on its own motion raise a point of law at any point and make a determination based on the same even where such point has not been canvassed by the parties. The learned judge did not therefore do anything outrageous by raising the issue of non-compliance with Regulation 79 of Table A of the Companies Act and acting on it."***

38. Neither can parties to a dispute confer jurisdiction to a court. It is the duty of the court to interrogate whether it has jurisdiction to entertain a dispute before it to avoid a situation where it arrogates itself jurisdiction which it does not have. (See The Supreme Court's decision in **Samuel Kamau Macharia & Another v Kenya commercial Bank**

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& 2 Others, SC Application No. 2 of 2011; [2012] eKLR.)

39. On the other hand, a court of law should not decline jurisdiction where it is clear that it is possessed of such jurisdiction to entertain a dispute.

40. In the instant case and from the pleaded facts, it is clear that the applicant is lamenting that the 1st respondent has readvertised a tender for completion of a court house which the applicant is in the process of constructing as agreed between the parties, although it admits that there are financial challenges thereby leading to delay in meeting the completion timeline as agreed in the contract.

41. The question is whether that dispute is one that judicial review Court should entertain. In my view, that is a purely contractual dispute which judicial review cannot resolve.

42. Besides, in as much as judicial review is a constitutional remedy, it is not every time one claims that their rights and, in this case, the rights arise from a contract entered into between the judiciary and the applicant, that they must approach the court by way of judicial review or constitutional petitions. I am fortified on this point by the decision in

Greater Busoga Sugarcane Growers Co-op Union v UDC & Others (Misc. App. No. 129/2024 where the High Court in our neighbouring jurisdiction in Uganda stated, persuasively, that judicial review was not available to enforce private contractual rights against a public body.

43. The Court stated as follows and I find this to be good law that:

"It is settled law in Uganda, as was held in High Court Misc. Cause No. 0003/2016: Arua Kubala Park Operators And Market Vendors' Cooperative Society Limited v Arua Municipal Council, which quoted with approval R v East Berkshire Health Authority Ex Parte Walsh [1984] 3 WLR 818, that the remedy of judicial review is only available where the issue is of breach of "public law", and not of breach of a "private law" obligation. To bring an action for judicial review, it is a requirement that the right sought to be protected is not of a personal and individual nature but a public one enjoyed by the public at large. According to of the text Public Law in East Africa, Ssekaana Musa, 2009, Law

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Africa Publishing, the learned author states, at page 36, that 2 (two) things must be established for judicial review to be available, 1) the body under challenge must be a public body whose activities can be controlled by judicial review, 2) the subject matter of the challenge must involve claims based on public law principles, not the enforcement of private law rights. Public law is the system which enforces the proper performance by public bodies of the duties which they owe the public. On the other hand, private law is concerned with enforcement of personal rights of persons, human or juridical, such as those emanating under property, contract, duty of care under tort and mainly regulates relations between private persons: Arua Kubala Park Operators And Market Vendors' Cooperative Society Limited v Arua Municipal Council. (supra) In Arua Kubala Park Operators And Market Vendors' Cooperative Society Limited v Arua Municipal Council (Supra), the Honourable Mr. Justice Stephen Mubiru held that where a

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relationship is regulated by the law of contract, like in the instant Application, administrative law remedies should generally not be available. The Learned Judge further held that it is important that parties are held to their contractual obligations through ordinary suits and not by invoking public law remedies.

<u>A party should not take advantage of public law simply because it contracted with a public body, and thereby obtain an advantage in the enforcement of that contract, that would otherwise not be available against a non-public body or private person.</u> The subject matter of the claim being pursued in the judicial review application must involve strictly matters of public law not private law. Public bodies (like private bodies) may enter into contracts or commit torts. Individuals may only be seeking to enforce essentially private law rights. Judicial review is not available to enforce purely private law rights. Contractual and commercial obligations are

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enforceable by ordinary action and not by judicial review. See R v Lord Chancellor ex p. Hubbit and Saunders [1993] C.O.D 326."

44. On account that the applicant in seeking to prohibit the 1st respondent from retendering for construction of a courthouse when it has an existing ongoing contract with the applicant, I find that the applicant is seeking enforce a private contract through judicial review which is not permitted in the circumstances of this case. Kemei J in **Daniel Mutisya Kivuva v Machakos Golf Club [2019] KEHC 1262 (KLR)** had this to say, persuasively, in a constitutional petition

"The application seems to be a judicial review camouflaged as a constitutional petition as judicial review is not available to the petitioner. Judicial review is not available to enforce purely private law rights. Contractual and commercial obligations are enforceable by ordinary action and not by judicial review. See R v Lord Chancellor ex parte Hibbit and Saunders [1993] COD 326."

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45. Additionally, since the 1st respondent did not owe any delimited statutory duty to the applicant, the Order of Mandamus as intended is legally untenable. See the Supreme Court decision in ***SGS KENYA LIMITED and ENERGY REGULATORY COMMISSION, PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD and INTERTREK TESTING SERVICES-SC PETITION NO. 2 OF 2019 at para [45].***

46. The South African case of **Ndlovu and Another v Nwaeze and Others (3010/2015) [2024] ZAGPJHC 761 (21 August 2024)** is also instructive and persuasive on this aspect where the Court stated as follows at paragraph 34 of the Judgment:

> ***"[34] It is trite that a decision by a contracting party to cancel a contract concluded between two private parties, cannot form the subject of judicial review – the power of courts to review the lawfulness, reasonableness and procedural fairness of decisions or actions taken by public bodies.***
>
> ***[35] In Strachan v Prinsloo[2] The court held that to determine "if cancellation was justified the other***

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test to apply was whether the plaintiff had failed to perform a vital term, expressed or implied through the agreement the most important factor and in deciding whether such a term was vital was the question whether the defendant would have entered into the agreement in the absence of such term. The plaintiff had in fact failed to perform a vital term. The defendant was therefore justified in terminating the contract."

[36] In my view the cancellation of this contract took effect from the time it was communicated to the Applicants in 2008 June 21[3] which was further affirmed in the 2009 judgment by Makgoka J although not fully ordered. The Applicants were in breach even when the orders were made, and the Judge was of the view that the Third Respondent was entitled to his orders but wanted to give a benefit of a doubt to the Applicants."

47. There is also another jurisdictional aspect to the contract entered into between the applicant and the 1st respondent Judiciary. Although none of the parties alluded to this

jurisdictional issue, this court is not barred from identifying a jurisdictional issue in the matter and determining that issue on its own motion.

48. This position is supported by binding decisions of superior Courts on account that Jurisdiction is everything and every court of law must first determine whether it has jurisdiction before it can make a merit determination of any matter, whether the issue of jurisdiction is raised by the other party or not. This is because the court is deemed to know the law.

49. The Court of Appeal in **Anaclet Kalia Musau v Attorney General & 2 Others [2020] eKLR**- Judges Ouko (P) Nambuye &Koome JJA stated as follows:

"The solitary issue in this appeal is, whether the suit before the high court was statutorily time barred. to demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the the supreme court in the case of nasra ibrahim ibren v. independent electoral and boundaries commission

& 2 others, supreme court petition no. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. it said:

<u>"a jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by odunga j in political parties dispute tribunal & another v musalia mudavadi & 6 others ex parte petronila were [2014] eklr.</u> the learned judge drawing from the court of appeal precedent in owners and masters of the motor vessel "joey" vs. owners and masters of the motor tugs "barbara" and "steve b" [2008] 1 ea 367 stated thus:

"25. what i understand the court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. the court on its own motion can take up the issue and make a determination thereon without the same being pleaded…" (emphasis supplied).

50. Therefore, what is the jurisdictional issue here? The annexed contract, at Clause 20 clearly stipulates that in the event of a dispute, parties will first attempt amicable settlement and where they fail to agree, there is provision for arbitration, a clause which is binding on the parties to the contract. The mode of dispute resolution of the aforesaid contract is at Clause 20.0-20.10.

51. The applicant has not told this Court why it has not resorted to the dispute resolution mechanism stipulated in the contract that it voluntarily entered into with the 1st respondent. A court of law cannot rewrite a contract between the parties by altering the terms thereof. The parties willingly entered into that contract and decided on how to resolve any dispute arising in the course of implementing that contract.

52. In **Union Technology Kenya Ltd vs County Government of Nakuru [2017] eKLR,** the High Court reiterated the well-known principle of law that:

> ***"Parties in an agreement/Contract are bound by the mutually agreed and express terms of their agreement. It is not the duty of a court to rewrite the agreement for the parties."***

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53. The Court of Appeal on its part in **Dock Workers Union Limited vs Messina Kenya Limited [2019] eKLR,** held that:

> ***"On the contrary and as rightly held by the learned trial Judge, the parties herein had categorically agreed to refer any ensuing dispute as regards the contract of employment herein to Arbitration. Parties have the freedom to choose the regime of the law they want to be governed under and embody it in their contract of employment which spells out how disputes between them would be resolved, that is perfectly within their rights. The parties entered into the said agreement freely and opted to oust other means of dispute resolution mechanisms other than Arbitration. They cannot turn around and denounce the Arbitration agreement. It is also worth of note that the Constitution of Kenya itself has given prominence to Arbitration by acknowledging it as one the alternative modes of dispute resolution that courts should encourage."***

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54. Whereas the arbitration clause in a contract does not oust jurisdiction of the court and this Court could as well refer the dispute to arbitration by staying these proceedings, as stipulated in section 59C of the Civil Procedure Act and Order 46 Rule 20 of the Civil Procedure Rules, which gives power to courts to refer matters for resolution vide alternative forms of dispute resolution *suo moto,* there is however, a challenge to that approach in this case, where it is patently clear that judicial review would not resolve issues of contractual obligations between the two parties and therefore judicial review court is not the appropriate forum where reference to arbitration in this case should be made.

55. Section 59 C of the Civil Procedure Act provides:

"59C. Other alternative dispute resolution methods

(1) A suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral.

(2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order.

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(3) Any settlement arising from a suit referred to any other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court.

(4) No appeal shall lie in respect of any judgment entered under this section."

56. On the other hand, Order 46 Rule 20 of the Civil procedure Rules, 2010 provides:

"Alternative dispute resolution [Order 46, rule 20]

(1) Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.

(2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution.

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(3) Where a court mandated mediation adopted pursuant to this rule fails, the court shall forthwith set the matter down for hearing and determination in accordance with the Rules."

57. As earlier stated above, even though the arbitration clause in the contract dated 8th December, 2022 which the parties would resort to in case of a dispute between them did not oust the jurisdiction of the court**,** (see Court of Appeal Tunoi JA in **Niazsons (K) Ltd vChina Road & Bridge Corporation Kenya [2001] eKLR** and **Stratogen Limited v County Government of Kisii (Civil Case 1 (E002) of 2021) [2023] KEHC 25071 (KLR) (8 November 2023) (Ruling),** this Court cannot entertain proceedings of a purely civil nature as is the case in the dispute between the parties hereto.

58. It is for that reason that I find that the preliminary objection that the application offends section 9(2) of the Fair Administrative Action Act is not baseless. The section mandates parties to a dispute to first exhaust the internal dispute resolution mechanism before approaching the court for judicial review. And where they feel that the Internal

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Dispute Resolution Mechanism (IDRM) is inefficient and ineffective, they have to apply under subsection 4 for exemption to resorting to the internal dispute resolution mechanism.

59. In this case, there is a contractual clause 20 in the contract dated 8th December, 2023, for arbitration which is governed by a different legislation which is the Arbitration Act such that if the applicant wanted, to obtain interim injunctive reliefs in the matter where the 1st respondent was allegedly breaching the terms of the contract by re advertising the tender for the proposed completion of the Court house at Habaswein Law vide tender number JUD/OT/014/2025-2026 as advertised in the MYGov publication on 11/11/2025, with the tender closing dated being 25.11.2025, the applicant had the remedy of seeking relief from the commercial or court and not by way of judicial review. Judicial review proceedings are neither civil, commercial nor criminal proceedings. They are *sui generis* proceedings.

60. At Clause 20.5, the contract states that:

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"Any claim or dispute between the parties arising out of or in connection with the contract not settled amicably in accordance with Sub Clause 20.0 shall be finally settled by Arbitration."

61. The resort to arbitration was of course subject to the other conditions stipulated under Clause 20 and there having been discussions between the parties, there is nothing on record that barred the applicant from exhausting those mechanisms as stipulated under the contract.

62. The addendum to the contract signed and dated 6/4/2023 shows that the contract was to be performed within 24 months. The applicant avers in its pleadings that it had financial challenges facing the contracting authority leading to the delays and that the applicant was seeking indulgence of the 1st respondent in order to complete the construction. That the 1st respondent proceeded to readvertise the tender for completion of the project. In such circumstances, only a civil or commercial court can examine the evidence on record and determine whether or not there was breach of contract and if so, by who.

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63. In my humble view, the decision taken by the 1st respondent to readvertise the tender for completion of the construction of the court building, within the meaning of the contract is not purely an administrative decision capable of being reviewed by this Court and neither is there a statutory duty imposed on the 1st respondent to cease readvertising the tender for completion of the Court house. The decision hinges on alleged breach of contract. The Supreme Court in **NGO's Co-ordination Board v EG & 4 OTHERS; Katiba Institute [Amicus Curie] [2023] eKLR** stated that:

"…Even when Superior Courts had jurisdiction to determine profound questions of law, the first opportunity has to be given to the relevant persons, bodies, tribunals or other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. It is now firmly established that in cases where there is an alternative dispute resolution mechanism established by legislation, the courts must exercise restraint in exercising their jurisdiction and accord deference to such dispute resolution bodies under

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the doctrine of exhaustion. This court in its previous decisions has settled the jurisprudence regarding the doctrine of exhaustion of administrative remedies."

64. The above decision echoes the *locus classicus* case of Speaker **of the National Assembly v Karume [1992] KECA 42 [KLR]**, where the Court of Appeal stated:

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed".

65. In **Ndiara Enterprises Ltd v Nairobi City County Government [2018] KECA 825 (KLR)** the Court of Appeal was emphatic that exhaustion of remedies is a constitutional imperative unless exempted by the Court on application and in upholding the decision of this Court, it stated as follows:

"Cognizant of the clear procedure for redress provided under the Act, the learned Judge refused to admit jurisdiction in determining the application

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on the basis that where a clear and specific procedure for redress of a grievance is provided, then that procedure should be strictly followed. The Judge cited the cases of The speaker of The National Assembly v Njenga Karume (2008) 1 KLR 425, Mutanga Tea & Coffee Company Ltd v Shikara Ltd & Anor (2015) eKLR for that proposition.

The appellant also alleged that the respondent's refusal or failure to demolish the illegal structures or to approve its plan for a perimeter wall infringed on its constitutional right to fair administrative action. It invoked sections 4, 7, 8, 9 and 11 of the FAA as the basis for which it sought the order of mandamus. However, the Judge noted that the High Court was expressly prohibited by section 9 (2) of the Act from reviewing "an administrative action or decision under the Act unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted."

The Act however gives the High Court power to exempt a person from the obligation to exhaust any

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remedy if the court considers such exception to be in the interest of justice. Faced with that scenario, the learned Judge delivered herself as follows;

"In addition, under Section 9(2) of the Fair Administrative Action Act No. 4 of 2015, (1) the High Court or a subordinate court under Subsection (1) is expressly prohibited from and "shall not" review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under suction (1)

(4) Notwithstanding Subsection (3) the High Court or subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust

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any remedy if the court considers such exception to be in the interest of justice …

64. From the above provisions of the law and decided cases, it is clear that even the Fair Administrative Action Act which the exparte applicant in this case claims has been violated mandates an applicant to show that they have exhausted the alternative remedies available under any other written law or avenue before resorting to court by way of judicial review. However, the onus is on the applicant to demonstrate to the court that there exist exceptional circumstances to warrant his or her exemption from resorting to the available remedies; and on application for such exemption.

65. In this case, no doubt, the applicant had an avenue for ventilating its grievances where the respondent refuses to approve the building plans. There is no evidence that the applicant lodged any such complaint or appeal to the Liaison Committee, the National Liaison Committee and or to the High Court. The Physical Planning Act provides elaborate

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mechanisms for resolution of disputes relating to approval of development plans and therefore no party is permitted to bypass those mechanisms and jump into a judicial review Court to obtain orders which are discretionary."

We see no reason to warrant interference with those findings as in our view they are based on sound law and evidence. The record does not reflect any attempt by the appellant to first resolve its grievances against the respondent under the procedure provided for redress under PPA or FAA. There is no evidence that the appellant made any complaints in the nature of the respondent's refusal to approve its plans for construction of a perimeter wall to the liaison committee under section 13 of the PPA. It's clear that the appellant could only approach the High Court on appeal against the decision of the National Liaison Committee. Though the High Court can exempt a party from following such clear laid procedures for redress of grievances before approaching it in the noble interests of

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justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court's power to exercise its jurisdiction under Article 165 of the Constitution was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue.

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66. In **Geoffrey Muthinja Kabiru and 2 Others v Samuel Munga Henry & 1756 others [2015] eKLR**, the Court expressed itself as follows:

> ***"It is imperative that where a dispute resolution mechanism exists outside courts the same be exhausted before the jurisdiction of the court invoked. Courts ought to be of a last resort and not the first port of call the moment a storm brews… the exhaustion doctrine is a sound one and serves the purpose of ensuring that there is postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This accords with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution."***

67. The Constitution at Article 159(2) (c) mandates the Courts and tribunals to promote alternative dispute resolution mechanisms which include arbitration. and negotiation. In this case, the contract signed between the parties and dated

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8th December, 2022 provides for arbitration of any dispute arising between the parties and even before resorting to arbitration, first endeavour to negotiate for an amicable settlement. The applicant said nothing about that clause in its pleadings and neither has it stated that arbitration is not an effective method of resolving the dispute relating to performance of the contract in issue and which contract the applicant has annexed in support of the chamber summons.

68. For all those reasons, I find and hold that even if the dispute was capable of being resolved via judicial review, which I have found is not for being a purely a question of enforcing a contract between the applicant and the 1st respondent herein, this court is not the first port of call and therefore it is devoid of jurisdiction to hear and determine these proceedings and for want of jurisdiction, I down my tools and strike out the chamber summons dated 21st November, 2025 filed under certificate of urgency. I uphold the respondents' preliminary objection dated 24th November, 2025.

69. I order that each party bear their own costs of the chamber summons and the preliminary objection.

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70. This file is closed.

Dated, Signed and Delivered at Nairobi this 2nd Day of December, 2025

R.E. BURILI
JUDGE

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