

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC.APPLICATION NO. E142 OF 2025

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW

BOARD.....1ST RESPONDENT

WORLD STANDARDIZATION, CERTIFICATION AND

TESTING GROUP (SHENZHEN) CO. LTD.....2ND RESPONDENT

AND

QUALITY INSPECTION SERVICES JAPAN.....1ST INTERESTED PARTY

CHINA HANSOM INSPECTION AND

CERTIFICATE CO. LTD.....2ND INTERESTED PARTY

ASTC AS TEST CERTIFICATION

TECH (HANGZHOU) CO. LTD.....3RD INTERESTED PARTY

CHINA CERTIFICATION AND INSPECTION GROUP CO.

LTD.....4TH INTERESTED PARTY

INTERTEK INTERNATIONAL LIMITED.....5TH INTERESTED PARTY

COTECNA INSPECTION SA.....6TH INTERESTED PARTY

TUV RHEINLAND.....7TH INTERESTED PARTY

BUREAU VERITAS.....8TH INTERESTED PARTY

SGS SA.....9TH INTERESTED PARTY

AND

THE ACCOUNTING OFFICER, KENYA BUREAU OF

STANDARDS.....1ST EX PARTE APPLICANT

KENYA BUREAU OF STANDARDS.....2ND EX PARTE APPLICANT

JUDGMENT

1. For determination is the Originating Motion dated 3rd November 2025 and filed on 5th November 2025, supported by the affidavit sworn by Jane Ndinya on 3rd November 2025. The applicants who are the Accounting Officer and the

Procuring entity, Kenya Bureau of Standards respectively. They seek the following orders:

- a. Spent.*
 - b. spent*
 - c. That this Honourable Court be pleased to issue an order of certiorari quashing the decision of the 1st Respondent made on 27th October, 2025 in Public Procurement Administrative Review Board Application No. 98 of 2025 World Standardization, Certification & Testing Group (Shenzhen) Co. Ltd VS The Accounting Officer, Kenya Bureau of Standards and Kenya Bureau of Standards in its entirety and all consequential actions arising from the said Decision.*
 - d. That Costs and further incidentals of this Application be provided for.*
2. The Applicant's case is that the 2nd Respondent submitted its bid in respect of the 2nd Ex Parte Applicant's Tender No. KEBS/PRE-Q/T006/2025/2028 – Pre-Qualifications for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for the Year 2025–2028.

3. That upon evaluation of the mandatory and technical requirements of the Tender, the 2nd Respondent emerged successful for pre-qualification subject to conduct of a due diligence exercise.
4. The Applicant states that the duly appointed Evaluation Committee conducted a due diligence exercise and submitted a report recommending disqualification of the 2nd Respondent on account of material information arising from the performance of a previous contract with the 2nd Ex Parte Applicant.
5. It is urged that by a letter dated 23rd September 2025, the 2nd Respondent was informed that it had not been prequalified for reasons that despite having met the minimum requirements for prequalification during the due diligence exercise, it was noted that the Applicant had on several occasions breached the ongoing contract with the 2nd Respondent. This according to the Applicants is in line with Section 83(2) of the Public procurement and Asset Disposal Act, Cap 412C of the Laws of Kenya (PPADA).
6. The 2nd Respondent is said to have proceeded to file a Request for Review dated 6th October, 2025 in Public Procurement Administrative Review Board Application No. 98 of 2025 World Standardization, Certification & Testing Group (Shenzhen) Co. Ltd vs. The Accounting Officer, Kenya Bureau of Standards and Kenya Bureau of Standards. In its decision on 27th October, 2025 the 1st Respondent is said to have nullified and set aside the Letter of

Notification of Intention to Award dated 23rd September 2025 in respect of Tender No. KEBS/PRE-Q/T006/2025/2028 and expunged, as null and void, the portions of the due diligence report of 7th September 2025 and the professional opinion of 22nd September 2025 relating to the 2nd Respondent's disqualification.

7. It is urged that it also directed the 1st Ex parte Applicant to re-convene the Evaluation Committee and conduct a fresh due diligence exercise on the Applicant in strict compliance with the tender documents, the law, the Constitution, and the Board's findings within twenty-one (21) days. The Board is said to have further ordered the 1st Ex parte Applicant to conclude the procurement process, including issuing awards to all successful bidders, within thirty (30) days from the date of the Board's decision.
8. It is the Ex parte Applicants' case that at paragraphs 141 and 142 of its Decision, the 1st Respondent acted outside its jurisdiction as provided under Section 28 of the Public Procurement and Asset Disposal Act by pronouncing itself over the show cause letter for alleged breaches of the contract dated 14th July, 2025 issued by the 2nd Ex Parte Applicant in a contract stemming from a previous procurement proceeding and which issue is the subject of judicial proceedings in Milimani High Court Commercial Cases No. E632 of 2025 and

E608 World Standardization, Certification & Testing Group (Shenzhen) Co. Ltd VS Kenya Bureau of Standards.

9. That further, the 1st Respondent's Decision constitutes a material error of law for holding that the Evaluation Committee was mandated to accord the 2nd Respondent an opportunity to respond to the contents of confidential references contrary to Regulation 30(d) of the Public Procurement and Asset Disposal Regulations, 2020 and Sections 67(1)(c) and 83(2) of the Public Procurement and Asset Disposal Act, cap 412 of the Laws of Kenya.
10. That the averments of paragraph 13 of the Replying Affidavit sworn by Philemon Kiprop materially depart from the 1st Respondent's Decision of 27th October, 2025 wherein in paragraph 146 of the Decision, the 1st Respondent categorically stated that *"we examined all the confidential documents submitted to the Board and observed that the letters dated 14th July, 2025 and 25th July, 2025, which were presented to the Evaluation Committee as evidence of alleged breaches by the Applicant, were not included among the Confidential Documents availed to the Board. Vide letter advanced via email dated 16th October 2025, the Board through the Board Secretary sought for the aforementioned letters as guided under Section 67(3)(e) of the Act but the same have not been availed to date"*.

11. The Applicants state that for avoidance of doubt, the letter dated 16th October, 2025 presented the request as follows: “Upon review of the Due Diligence Report signed on 7th September, 2025, the Review Board notes that Evaluation Committee at page 5 of 38 of the said report makes reference to letters referenced KEBS/OP/68/VOL1(20) dated 14th July, 2025 and KEBS/LEG1/101/VOL1 dated 25th July, 2025 which were not submitted as part of the confidential documents. The purpose of this letter is to request that you urgently submit the aforementioned referenced letters...”.
12. According to the Applicants by holding that the Evaluation Committee failed to accord the 2nd Respondent a fair hearing, the 1st Respondent in paragraphs 141 and 142 misconstrued the mandate of the Evaluation Committee in the context of Section 83(2) of the Public Procurement and Asset Disposal Act, Cap 412C. The Evaluation Committee is mandated to make its own decision over any confidential references obtained and there is no requirement to reveal the contents of such information to the bidders, subject of evaluation.
13. The 1st Respondent’s Decision it is urged constitutes a material error of law for requiring the Evaluation Committee to accord the 2nd Respondent a hearing over allegations of contract breaches. The Applicants state that the mandate of the Evaluation Committee under Section 83(2) did not extend to a merit review

over actions and decisions made in the context of a contractual relationship between the 2nd Respondent and the 2nd Ex Parte Applicant.

14.They state that the finding by the 1st Respondent, at paragraph 146 of its Decision, that they failed to provide certain documents in the confidential bundle is unsettling. This request for confidential documents it is urged was sent on 16th October, 2025 at 12.38pm to the Ex parte Applicants' counsel's email address gachaguat@kebs.org and copied to the departmental email Procurement@kebs.org.

15.That counsel responded to the said email on the same day, 16th October, 2025 at 12.48pm attaching the two requested letters being KEBS/OP/68/VOL1(20) dated 14th July, 2025 and KEBS/LEG1/101/VOL1 dated 25th July, 2025 and secondary to the advance copies sent on email, the Applicants' procurement officer delivered physical copies to the 1st Respondent on 21st October, 2025.

16.It is urged that the Decision by the 1st Respondent failed to take into account relevant considerations including Confidential Documents presented on behalf of the Applicants to the 1st Respondent by email of 16th October, 2025 thereby denying them an opportunity to state their case leading to a flawed Decision.

17.The Applicants state that the decision of the 1st Respondent is irrational and unreasonable for directing that the procurement proceedings be concluded within 30 days and an award of contract be made whereas as the subject

proceedings concern a pre-qualification, a secondary procurement process must be conducted to enable award of contract which process cannot be possibly completed in 30 days.

18.They also urge that the Decision of the 1st Respondent is influenced by irrelevant considerations as the Orders relating to conclusion of the procurement process in relation to other successful bidders has no direct correlation to the matters in issue in the Request for Review before the 1st Respondent.

The 1st Respondent's Replying Affidavit

19.In response the 1st Respondent filed a replying affidavit sworn by Mr. Philemon Kiprop who introduces himself as the Secretary of the 1st Respondent on 11th November 2025. Mr Kiprop deposes that on 6th October 2025, the 2nd Respondent filed Request for Review No. 98 of 2025 challenging its non-prequalification under Pre-qualification Reference No. KEBS/PRE-Q/T006/2025/2028 for PVOC services for 2025–2028, seeking annulment of the disqualification decision contained in the letter dated 23rd September 2025, directions for its pre-qualification and directions for invitation to tender for it together with other pre-qualified bidders, costs arising from, and incidental to, the Request for Review, and any other appropriate relief

20. That upon hearing the matter, the 1st Respondent exercised its statutory mandate under the Public Procurement and Asset Disposal Act and, on 27th October 2025, issued final orders nullifying the letter of notification dated 23rd September 2025, expunging from the due diligence report of 7th September 2025 and the subsequent professional opinion of 22nd September 2025 all contents relating to the reasons for the Applicant's disqualification, directing a fresh due diligence exercise strictly in accordance with the law and the tender document to be conducted within twenty-one days, directing conclusion of the procurement process including award within thirty days, clarifying that the expunging and fresh due diligence orders applied only to the Applicant's bid for Zone 1 (China), and ordering each party to bear its own costs.

21. The 1st Respondent maintains that its decision was neither irrational nor ultra vires, having been reached after considering all pleadings, documents, submissions, authorities, and confidential material submitted under section 67(3)(e) of the Act, and in line with prior High Court decisions, and it identified for determination the issues of jurisdiction, the lawfulness of the due diligence exercise, and the appropriate reliefs.

22. On jurisdiction, the 1st Respondent states that it found that the Request for Review was filed within the fourteen-day statutory period under section 167(1) of the Act, the notification letter having been received on 23rd September 2025

and the Request filed on 6th October 2025, and further held that the doctrine of *sub judice* did not apply despite the existence of Nairobi High Court Commercial Cases Nos. E608 of 2025 and E632 of 2025, as those matters concerned alleged contractual breaches while the Request for Review related to the propriety of the due diligence process, thereby leaving its jurisdiction intact.

23. Addressing the conduct of due diligence, the 1st Respondent states that it reviewed two due diligence reports dated 16th August 2025 and 7th September 2025, noting that the first recommended the 2nd Respondent for prequalification while the second introduced adverse findings based on alleged breaches arising from a separate contract, and it therefore focused on the latter report pursuant to its mandate under section 173 of the Act.

24. That upon interrogating the process leading to the second report, the 1st Respondent found that the 2nd Respondent had been disqualified without being afforded an opportunity to be heard on the adverse allegations, contrary to Article 47 of the Constitution, the Fair Administrative Action Act, and binding precedent, including **Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & Another [2021] KEHC 8109 (KLR)** where the court is said to have underscored the obligation of administrative bodies to observe the right to fair administrative action.

25. The 1st Respondent's position is that its finding of a lack of due process by the Evaluation Committee was based on its review of the confidential record, which revealed that key correspondences relied on to disqualify the 2nd Respondent were not availed, and that although the Applicants availed the letters dated 14th and 25th July 2025 were produced, there was no documented paper trail demonstrating how the Evaluation Committee obtained them.

26. That as an independent unit, the Evaluation Committee ought to have formally requested for such documents from the Accounting Officer and received formal written responses, and the absence of this chain of communication contravened section 64 of the Act, undermined transparency and accountability, impeded verification of the second due diligence process, and raised serious concerns about the integrity of its findings.

27. The 1st Respondent further notes that there was no documentation showing how information on the alleged contractual breaches by the 2nd Respondent was obtained, as there was neither evidence of a formal request by the Evaluation Committee nor any correspondence forwarding such information, thereby casting doubt on the independence, transparency, and procedural integrity of the second due diligence exercise.

28. This concern is said to have been reinforced by the fact that an earlier due diligence report dated 16th August 2025 had found the 2nd Respondent qualified

for prequalification, while the subsequent report of 7th September 2025, which introduced adverse findings, was procedurally flawed and lacked transparency, justifying the conclusions reached in Request for Review No. 98 of 2025.

29. Accordingly, the 1st Respondent maintains that it properly found the second due diligence exercise to be tainted by procedural irregularities and breaches of fairness, impartiality, and accountability, and lawfully expunged the impugned portions of the due diligence report and professional opinion, nullifying the Letter of Notification to Award. It emphasizes that it acted strictly within its jurisdiction under sections 28 and 173 of the Act, did not determine any contractual disputes, and referred to the show-cause letter of 14th July 2025 only to assess whether it was lawfully and fairly used in the evaluation process, without encroaching on matters before other courts.

30. The 1st Respondent further states that the Evaluation Committee was bound by Article 47 of the Constitution and the Fair Administrative Action Act, and that its functions under section 83(2) of the Act do not exclude adherence to natural justice, rather, they require fairness and reasonableness where a bidder faces disqualification. It clarifies that it did not require unlawful disclosure of confidential information, but merely held that adverse material could not be relied upon without procedural fairness, thereby harmonizing the Act with constitutional fair hearing principles.

31. The 1st Respondent further states that the Evaluation Committee was bound by Article 47 of the Constitution and the Fair Administrative Action Act, and that its functions under section 83(2) of the Act do not exclude adherence to natural justice, rather, they require fairness and reasonableness where a bidder faces disqualification. It clarifies that before relying on adverse material to a bidder's detriment, the Evaluation Committee had to ensure procedural fairness. It is urged that the 1st Respondent's decision therefore harmonized Section 83(2) of the Act with Article 47 of the Constitution and the principle of fair hearing recognized by the courts.

32. Finally, the 1st Respondent avers that its decision considered all relevant material, was reasoned and evidence-based, and that the timelines it directed were lawful, efficient, and non-prejudicial and pursuant to section 173(b) and (c). It maintains that its orders neither exceeded jurisdiction nor caused prejudice, and that the Applicant has failed to demonstrate any illegality, irrationality, procedural impropriety, or unfairness in the decision-making process.

The 2nd Respondent's Replying Affidavit

33. The 2nd Respondent filed a replying affidavit sworn on 10th October 2025 by Harold Amaya Munala. He deposes that the present motion is fatally defective for non-compliance with the mandatory provisions of Section 175 of the Public

Procurement and Asset Disposal Act and Order 53 of the Civil Procedure Rules, 2010.

34. That in their regret letter dated 23rd September 2025 the Applicants' sole reason for disqualifying it was the 2nd Respondent had on several occasions breached its contract with the 2nd Applicant. It is urged that the contract that was advertised was an ongoing contract between the parties. However, that the Applicants maliciously and deliberately failed to disclose material facts to it with respect to the alleged breaches.

35. It is the 2nd Respondents case that the basis of the alleged breaches was inter alia the Applicants' show cause letter dated 14th July 2025 addressed to it, through which the 2nd Respondent purported to raise concerns regarding the alleged distribution of substandard sockets in the market.

36. In the said letter, the Applicants are said to have required the 2nd Respondent to furnish a written explanation within seven (7) days of its issuance. However, that the letter was dispatched and served on the 2nd Respondent via email only on 23rd July 2025, which was two (2) days after the lapse of the seven (7) days within which the 2nd Respondent was required to respond.

37. That the belated transmission of the notice clearly demonstrated the Applicants' malice and premeditated action, and as such the Board could not have arrived at

a just decision without looking at the circumstances surrounding the 2nd Respondent's disqualification in which the letter of 14th July 2025 was key.

38. The 2nd Respondent's case is that the Board did not breach section 28 of the Public Procurement and Asset Disposal Act, as the provision expressly sets out the Board's powers and functions, which were properly exercised. It contends that confidentiality does not shield the Evaluation Committee from scrutiny and that the Board was entitled to investigate whether the Committee's actions met the required standards of openness, objectivity, fairness, and transparency.

39. The 2nd Respondent further maintains that the Applicants failed to identify any specific documents allegedly ignored by the Board in reaching its decision, and that there was nothing preventing completion of the procurement within the timelines directed by the Board. It asserts that the application was intended only to delay the procurement process and that section 173 of the Act fully empowered the Board to issue all the orders contained in its decision.

The Applicants' Supplementary Affidavit

40. In response to the 1st Respondent's replying affidavit the Applicants filed a supplementary affidavit sworn on 19th November 2025 by Jane Ndinya.

41. The Applicants in the supplementary affidavit contend that the 1st Respondent's findings in paragraph 142 were made in excess of its jurisdiction as at the time of evaluation, the 2nd Respondent had an ongoing contract with the 2nd Applicant

and that the show-cause letter dated 14th July 2025 arose purely within the sphere of contract management.

42. They also contend that by interrogating the response to that show-cause letter, concluding that the 2nd Respondent was not afforded an opportunity to be heard, and relying on correspondence exchanged, the 1st Respondent departed from the procurement process and improperly delved into contract management arising from a previous procurement, thereby acting outside its jurisdiction under section 28 of the Public Procurement and Asset Disposal Act, which is limited to tendering and disposal disputes.

43. The Applicants further maintain that the contractual issues underpinning the show-cause letter are the subject of **Milimani High Court Commercial Cases Nos. E608 of 2025** and **E632 of 2025**, whose pleadings were produced before the 1st Respondent, and that the Board's determination on whether the 2nd Respondent was afforded a hearing was therefore *sub judice*. That in their view, the 1st Respondent acted without jurisdiction by pronouncing itself on matters directly in issue before the High Court.

44. The Applicants contend that the 1st Respondent fundamentally erred in law by holding that the Evaluation Committee was required to accord the 2nd Respondent a fair hearing on matters arising from the show-cause letter of 14th July 2025, thereby conflating tender evaluation with contract management and

imposing obligations outside the Committee's statutory mandate under the Public Procurement Asset Disposal Act.

45. They argue that the Evaluation Committee was lawfully constituted under Section 46 to include representatives of the user department, whose roles under Regulations 30(b) and 34 include due diligence, contract knowledge, and disclosure of material information relating to prior engagements, and that no separate "paper trail" between the 1st Applicant and the Committee was legally required.

46. The Applicants further submit that Regulation 30(d) expressly prohibited the Evaluation Committee from engaging in direct communication with tenderers during due diligence, while Sections 67(1)(c) and 83(2) barred disclosure of confidential evaluation material, such that any hearing or response to the 2nd Respondent would have been unlawful and would have amounted to impermissible assumption of contract-management functions

47. They contend that the 1st Respondent's findings on communication and impartiality were internally contradictory, given that it condemned contact with the 2nd Respondent while simultaneously faulting the Committee for not engaging it, and that the limited email trail concerned remission of a show-cause letter in the context of contract management, not evaluation.

48. The Applicants also assert that the 1st Respondent acted unreasonably and without objectivity by shifting positions on whether confidential documents were availed, making adverse findings despite acknowledging receipt of the documents through affidavit evidence, failing to consider the contents of material correspondence dated 25th July and 13th August 2025 involving the Attorney General, misapprehending Sections 64 and 83(2) of the PPADA, and impermissibly importing additional requirements not grounded in statute.

49. They further argue that the 1st Respondent misapplied the decision in **Republic v PPARB, Rhombus Construction Co. Ltd ex parte KPA (2021)**, which was distinguishable as it involved adverse information from a third party, whereas in the present case the material information lay firsthand within the user department represented in the Evaluation Committee.

50. They also contend that by ignoring the gravity of documented contractual breaches implicating public safety and consumer protection, and by issuing unenforceable directions under Section 173 without appreciating that the process was a pre-qualification incapable of yielding contracts within the statutory timeline, the 1st Respondent acted irrationally, unreasonably, and in breach of its quasi-judicial mandate.

Submissions

51. Parties filed written submissions to canvass the originating Motion

The Applicants' Submissions

52. The Applicants filed written submissions dated 20th November 2025.

53. It is submitted that Section 28 of PPADA spells out the jurisdiction of the 1st Respondent which include *reviewing*, hearing and determining tendering and asset disposal disputes, and performing any other function conferred to the Review Board by the Act, Regulations or any other written law. The Applicants reiterate that the 1st Respondent's findings in paragraph 142 were made in excess of its jurisdiction.

54. The rely on the case of **Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020) [2022] KESC 62 (KLR)**, where the Supreme Court is said to have reaffirmed that jurisdiction is the cornerstone of any judicial or quasi-judicial process.

55. They further submit that the 1st Respondent acted out of its jurisdiction for addressing itself on matters *sub-judice*. They rely on the case of **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] KESC 54 (KLR)** where the court is said to have dismissed a reference for being *sub-judice*.

56. The Applicant's submit that the pronouncement by the 1st Respondent that the 2nd Respondent was not afforded an opportunity to be heard on the show cause

letter is itself *sub-judice* as the same matter is directly in issue before the High Court in **Milimani High Court Commercial Cases No. E608 of 2025 and E632 of 2025**. That, consequently by pronouncing itself on the matter, the 1st Respondent acted out of jurisdiction on account of the matter being *sub-judice*.

57. It is the Applicants' submission that the Decision of the 1st Respondent constitutes material errors of law and reliance is placed in the case of **Republic v Public Procurement Review Board; Leeds Equipment & systems Limited (Interested Party); Ex Parte Kenya Veterinary vaccines Production Institute [2018] eKLR**, where the court is said to have held a public body commits an error of law warranting judicial intervention where, in the process of making its decision, it misinterprets or misapplies the law, breaches fundamental rights, relies on irrelevant or no evidence, fails to consider relevant matters or follow prescribed procedure, or otherwise acts *ultra vires* in a manner that materially affects the decision.

58. The Applicants submit that there is no prescription in law on how documents that are already in the personal knowledge of members of Evaluation Committee ought to be provided to the members for consideration, and to this extent, that the 1st Respondent misapprehended the requirements of Section 64 of PPADA.

59. The Decision of the 1st Respondent it is submitted constitutes legal unreasonableness and the Applicants rely on the case of **Minet Kenya Insurance Brokers Limited v Public Procurement Administrative Review Board & 2 others; Liaison Healthcare Limited (Interested Party) [2025] KEHC 6478 (KLR)** where the court is said to have set out the parameters defining legal unreasonableness as specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight in the sense of more than was reasonably necessary to some factors and insufficient weight to others. They also rely on the **Minet case** for the role of the Review Board

60. They submit that where Section 83(2) of PPADA is silent on the manner of obtaining confidential references, it is not the mandate of the 1st Respondent to legislate, rewrite or infuse additional meanings or impose additional requirements into the law. That by dictating that there needed to be communication between the Evaluation Committee and the 1st Applicant, the 1st Respondent imposed conditions into Section 83(2) of PPADA.

61. The Applicants' submission is further that the 1st Respondent's order that they conclude the procurement process within 30 days and award contracts was

irrational and unreasonable and to support this position reliance is placed on the case of **Rahab Wanjiru Njuguna v Inspector General of Police & another [2013] eKLR** where the court is said to have held that where the authority's decision displays gross unreasonableness the Court will interfere even if there is no illegality or procedural impropriety.

62. They submit that the 1st Respondent was irrational in ordering the Applicants to conclude the procurement process in 30 days and award contracts. That the 1st Respondent's powers under Section 173 are not to be exercised in a vacuum. Further, that the 1st Respondent was aware that the subject procurement proceedings were a pre-qualification from which contracts cannot be awarded.

63. It is urged that the Award of contracts would arise from a secondary procurement proceeding which cannot possibly be initiated and concluded within 30 days. That by failing to appreciate the nature of the procurement process and thereby giving unenforceable directions, the 1st Respondent engaged in legal unreasonableness.

The 1st Respondent's Submissions

64. The 1st Respondent's written submissions are dated 24th November 2025.

65. In the submissions the 1st Respondent refers to section 173 of the public Procurement and Asset Disposal Act, 2015 on what orders the Board can issue upon completing a review.

66. The 1st Respondent submits that it acted strictly within its statutory mandate under section 173 of the Act, faithfully exercising its powers without excess or deviation, and that the application should therefore be dismissed to allow completion of the procurement process. It further contends that judicial review is concerned with the fairness of the decision-making process rather than the correctness of the decision on the merits, and that this Court, exercising judicial review jurisdiction, lacks authority to interrogate or substitute the Review Board's merits-based determinations.

67. The Respondent submits that the High Court's judicial review jurisdiction is strictly limited by the Law Reform Act to the issuance of the prerogative orders of mandamus, prohibition, and certiorari. It is argued that, under section 8 of the Law Reform Act, the Court may not issue these orders in the exercise of its civil or criminal jurisdiction, but only in circumstances where, pursuant to section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 (UK), the High Court in England would be empowered to grant such relief.

68. The 1st Respondent relies on the cases of **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43** and **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** for the settled criteria for issuance of judicial review orders. It submits that it is incumbent upon a party in a judicial review application who seeks the issuance of any of the orders to prove breach

of any of the criteria set out in the above cases for that party to succeed in their claim.

69. The 1st Respondent also relies on the case **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** where the court is said to have held that the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. The 1st Respondent also relies on the case of **Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another [2014] eKLR** to further support this position.

70. The 1st Respondent also relies on the case of **Republic v Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where Majanja J. quoting with approval the decision of Githua J in **Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012[2012] eKLR** is said to have reiterated that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself.

71. The Court of Appeal in **Kenya Pipeline Company Limited V Hyosung Ebara Company Limited & 2 Others (2012) eKLR** it is urged drew the boundaries for reviewing the decisions of the Review Board. According to the 1st Respondent it found that the Review Board is a specialised statutory tribunal with wide powers under section 98 of the Act, including annulling procurement decisions and substituting its own, and is therefore better suited than the High Court to determine procurement disputes.
72. The court is also said to have found that the Board had jurisdiction to determine whether a tender met mandatory requirements and that its decisions should not be lightly interfered with. Further that the judicial review application was unfounded, as it improperly challenged the merits rather than the decision-making process, and that the High Court erred by treating the matter as an appeal and granting orders outside the scope of judicial review.
73. The Respondent submits that an error of law can only ground judicial review where it goes to jurisdiction, and that mere misinterpretation of the law is insufficient. It is contended that the application is a disguised appeal, since judicial review is concerned with the fairness of the decision-making process rather than the merits of the decision.
74. The Court in the case of **Republic Vs Kenya Power & Lighting Company Limited & Another [2013] eKLR** is said to have observed that although the

Board's decision may have been wrong the court would be usurping its statutory function were it to substitute its own views with that of the Board.

75. On the prayer for Prohibition and when it can be granted by the Court the 1st Respondent relies on the cases of **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005** and **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 eKLR.**
76. That as was held by the Court of Appeal in **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572**, the judicial order of prohibition must be pre-emptive in nature, that is, it must be directed at preventing what has not been done.
77. On the nature of the order of prohibition the 1st Respondent relies on the cases of **Okiya Omtatah Okoiti v Kenya Revenue Authority & 2 others [2016] eKLR** and **JR CASE NO. 382 OF 2014 Republic v Land Disputes Tribunal, Karuri & 2 others.**
78. The Respondent submits that judicial review remedies are discretionary public law remedies which the Court may decline in the public interest, and that the Applicants have failed to demonstrate any illegality, procedural impropriety, excess or lack of jurisdiction, or breach of natural justice to warrant the Court's

intervention. It is also argued that the application does not meet the threshold for judicial review and should be dismissed in its entirety. On the issue of costs, the 1st Respondent submits in any event, section 175(7) of the Public Procurement and Asset Disposal Act bars an award of costs where the Board's decision is quashed.

Analysis and Determination

79. From the pleadings, affidavits and submissions of the respective parties, the following issues arise for determination:

- i. Whether the Originating Motion seeks the court's exercise of legitimate judicial review jurisdiction or is an appeal in disguise.*
- ii. Whether the 1st Respondent's decision as impugned was sub judice matters that were before the High Court*
- iii. Whether the Request for Review was filed within the statutory period under Section 167(1) of the PPADA.*
- iv. Whether the 1st Respondent acted within its statutory mandate under the Public Procurement Asset Disposal Act when reviewing the due diligence process, including references to the show-cause letter, and directing a fresh due diligence exercise to be undertaken*
- v. Whether, in addressing the impugned matters, the 1st Respondent confined itself to questions of legality, procedural fairness and*

jurisdiction, or impermissibly ventured into the merits of the procurement process so as to render its decision amenable to interference by this Court on judicial review.

vi. What orders should this Court make?

80. On the first issue of whether the Originating motion is a disguised appeal in the name of a judicial review application, the Respondents contend that the Originating motion is a legitimate exercise of judicial review or an appeal in disguise and that the Applicants are seeking to re-litigate or correct the merits of the Board's decision rather than challenging the decision-making process. The 1st Respondent stresses that judicial review is concerned with the fairness, legality and rationality of the process, not correcting the correctness of decisions. The 2nd Respondent supports this position, stating that the Applicants' originating motion is intended to delay the procurement process by challenging lawful rational orders rather than attacking procedural defects.

81. In response, the Applicants argue that their Originating Motion application is a legitimate judicial review application, maintaining that the Review Board exceeded its jurisdiction, acted irrationally and failed to observe procedural fairness, thus justifying judicial intervention.

82.. This issue as raised by the respondents is of critical importance because it seeks to define the scope of the Court's jurisdiction and the limits of intervention by this court.

83. Judicial review is a public law remedy concerned with the legality, rationality, and procedural fairness of administrative action, and does not extend to correcting errors of fact or law made by a specialized tribunal where the decision falls within its statutory mandate. The Court must therefore examine the parties' positions on this preliminary issue to determine whether the application is properly framed within the ambit of judicial review, or whether it impermissibly seeks to challenge the merits of the Review Board's decision.

84. The fundamental distinction between an appeal and judicial review is that an appeal challenges the merits (correctness) of a court's decision, while a judicial review scrutinizes the lawfulness and fairness of the process used by an administrative body. Judicial review does not permit the Court to re-evaluate evidence, reassess factual findings or substitute its own view for that of a specialized statutory body. Rather, it is concerned with the lawfulness, procedural propriety, rationality and compliance with constitutional and statutory mandates. This principle was enunciated in the landmark case of **Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948) UK** which introduced the "Wednesbury unreasonableness" standard, a

ground for judicial review. And wherein the Court stated that Judicial review focuses on legality and reasonableness, not re-evaluation of facts or merits like an appeal. The principle was restated by the Supreme Court in **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)** wherein the Supreme Court extensively discussed the distinction between judicial review and an appeal in the following terms:

“100. The considerations for judicial review were aptly captured by G V Odunga, J in the case of Republic v Chesang (Ms) Resident Magistrate & 2 others ex parte Paul Karanja Kamunge t/a Davisco Agencies & 2 others [2017] eKLR where he held as follows: 25. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the Judge disagrees with what the public body has done, but whether there is some recognizable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the court through proceedings brought nominally by the Republic. See R v Traffic Commissioner for North Western Traffic Area ex

parte Brake [1996] COD 248.26. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See Reid v Secretary of State for Scotland [1999] 2 AC 512.”

101. Article 47 of the Constitution of Kenya, 2010 and subsequent enactment of the Fair Administrative Action Act No 4 of 2015 have sought to allow the courts to consider certain aspects of merit when considering an application for judicial review. The Court of Appeal in the case of Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] KLR attempted to reconcile this expanded context as follows:⁵⁴ The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of article 47 of Constitution as read with the Fair Administrative Action Act of 2015. The Act establishes statutory judicial review with jurisdictional error in section 2(a) as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision-making process in articles 47 and 10(2)(c) of the Constitution. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the Fair Administrative Action Act and the Constitution. As correctly stated by the High Court in Martin Nyaga Wambora v Speaker of the Senate [2014] eKLR it is clear that they - articles 47 and 50(1) - have elevated the rules of natural justice and the duty to act

fairly when making administrative, judicial or quasi-judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, section 7(2)(l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is

guaranteed by the twin requirements in article 24(1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications. Analysis of article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7(2)(f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; section 7(2)(j) identifies abuse of discretion as a ground for review while section 7(2)(k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7(2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7(2)(i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in section 7(2)(i) that require

consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in section 7(2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act. In Mbogo & another v Shah (1968) EA 93 at 96, this court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the Judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo v Shah (supra) and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review. The essence of merit review is the power to substitute a

decision. Under the Fair Administrative Action Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11(1)(e) and (h) of the Fair Administrative Action Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11(1)e/act/2015/4 Fair Administrative Action Act}} permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.”

85.102.Despite the shift from common law to codification in the Constitution and the Fair Administrative Action Act, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision–making process itself. This finding is further reinforced by the fact that though the court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body or office with the power to make that decision. In this regard we cite the decision of Lord Hailsham LC

in Chief Constable of North Wales Police v Evans (1982) 3 All ER at pg 141 said of the remedy of judicial review as follows: It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual Judges for that of the authority constituted by law to decide the matters in question. The court will not, however, on a judicial review application act as a “Court of Appeal” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body’s jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power.” [Emphasis added]

86. In this case, the Respondents have convincingly argued that the Applicants’ complaint largely seeks to reconsider the merits of the Board’s orders, including the finding of procedural defects and the timelines for concluding the procurement. They argue that the Applicants’ submissions on alleged unfairness

and rationality closely mirror arguments that would ordinarily be raised in an appeal. They maintain that the application bears the hallmarks of an appeal in disguise, as it attempts to relitigate matters which fall within the Board's mandate and statutory discretion, rather than confining itself to issues of jurisdiction, procedural fairness or legality.

87. Having considered the pleadings and the rival submissions of the parties on whether this application is an appeal in disguise, I find that while certain aspects of the Applicants' challenge tend to question the correctness of the Review Board's decisions on the merits, there remain genuine issues relating to jurisdiction, procedural fairness and rationality that fall squarely within the scope of judicial review. As such, I do not find that that situation alone can lead this court to determine the application at the preliminary stage without delving into the substantive issues.

Whether the 1st Respondent determined matters that were sub judice before the High Court; and

Whether the Request for Review was filed within the statutory period under Section 167(1) of the PPADA

88. The Applicants claim that the Review Board acted without jurisdiction because the matters raised in the show-cause letter were *sub judice* before the High

Court in **Milimani Commercial Cases Nos. E608 of 2025 and E632 of 2025.**

They further aver that the Review Board improperly delved into issues already pending before the High Court and that the impugned Request for Review should have been barred if not filed within the 14-day statutory period.

89. In response, the Respondents maintain that the Review Board retained jurisdiction because the Request for Review concerned the due diligence process and prequalification evaluation and not the underlying contractual disputes which were being litigated before the High Court.

90. The respondents further assert that the Request was filed within the 14-day period prescribed under Section 167(1) of the Public Procurement and Asset Disposal Act as the notification of intention to award was issued on 23rd September 2025 and the Request filed on 6th October 2025.

91. They submit that *sub judice* rule does not bar the Board from examining procedural fairness in prequalification, as the matters before the High Court relate to contract management, not evaluation or compliance of the procurement process.

92. This question of whether the 1st Respondent had jurisdiction to hear the Request for Review Application No.98 of 2025 was raised before the Review Board by the Respondents and 1st Interested Party on two fronts. Firstly, that the Board did not have jurisdiction to hear the request for review as the same was time

barred since the 14 day statutory period had lapsed. According to them, the Applicant before the Board ought to have lodged the request within 14 days from 24th April 2025 when the Notification of Intention to award was issued. Second, the Respondents and 1st Interested Party before the Board argued that the 1st Respondent herein lacked jurisdiction as the request for review was sub judice. They argued that the Applicant had raised issues similar to contractual breaches which were directly in issue before the High Court in **Nairobi High Court Commercial Cases Nos. E608 of 2025 and E632 of 2025.**

93. The 1st Respondent addressed both issues from paragraph 94 all the way to paragraph 123 of its decision citing various sections of the statute and case law. On the first issue, the Board found that the Request for Review had been filed within the 14-day statutory period and as such it had jurisdiction to determine the request.
94. The Review Board observed as follows, extensively:

***“109. In determining this issue, we examined the confidential file and noted that two letters of notification of intention to award were issued. The first letter, dated 24th April 2025, listed ten successful bidders, including the Applicant and expressly stated that the award was subject to a due diligence process. The second letter, dated 23rd September 2025, was issued subsequent to the completion of the due diligence exercise.*”**

110. Upon perusal of the Request for Review, we observe that the Applicant challenges the due diligence process which culminated in its disqualification. The Applicant became aware of its disqualification upon receipt of the letter of notification of intention to award dated 23rd September 2025. Accordingly, we find that, for purposes of computing time for the filing of the present Request for Review, time began to run from the date of issuance of the said letter of notification of intention to award.

111. Having established that the benchmark event for purposes of computing time is the date on which the Applicant received the Letter of Notification of Intention to Award dated 23rd September 2025, the next issue for consideration is whether the statutory fourteen-day period had lapsed by the time the Request for Review was filed. We note that it is not in dispute that the Applicant received the Letter of Notification of Intention to Award on 23rd September 2025, and that the Request for Review was filed on 6th October 2025.

112. In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, which provides as follows:

“57. Computation of time.

In computing time for the purposes of a written law, unless the contrary intention appears-

a. period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

b. if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

c. where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

d. where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

113. We understand the above section of the law to mean that, in computing time under a written law, unless a different intention is clearly indicated the day on which an event occurs or an act is done is

not counted in the calculation of time; if the final day of the period falls on a Sunday, public holiday, or any officially recognized non-working day (collectively referred to as excluded days). the period is extended to the next working day; where an act is required to be done on a specific day that turns out to be an excluded day, performing the act on the next working day is deemed timely; and where the time allowed for performing an act is six days or fewer, excluded days are entirely omitted from the count.

14. In computing the time within which the Applicant ought to have sought administrative review before the Board in relation to the evaluation of its tender, the fourteen-day period commenced on 24th September 2025 and lapsed on 7th October 2025. In accordance with Section 57(a) of the Interpretation and General Provisions Act, 23rd September 2025, being the date on which the notification letter was sent, is excluded from the computation. Accordingly, the Applicant had the period between 24th September 2025 and 7th October 2025 to file its Request for Review before the Board.

115. We observe that the Request for Review was filed on 6th October 2025, which falls within the fourteen-day statutory timeline.

Accordingly, we find that the Request for Review was filed in compliance with Section 167(1) of the Act.”

95. The parties are hereby reminded that the scope of judicial review is limited to the process followed in reaching a decision. It is concerned with the decision-making process and not the merits of the decision itself. This Court’s responsibility is therefore 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**.

96. The Court of Appeal in the case **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others, [2016] eKLR** stated thus:

“Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator. Lastly, Article 165(6) of the Constitution also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person’s rights.”

97. In **Republic v National Transport and Safety Authority & 2 others; Kimathi (Exparte) [2025] KEHC 6608 (KLR)**, it was also observed that:

“It is trite that judicial review remedies are concerned with the decision-making process of administrative or public bodies rather than the merits of the decision itself. The scope of judicial review is thus limited to assessing whether an administrative or public body acted within its legal mandate, observed the rules of natural justice and adhered to statutory and constitutional procedures.”

98. The grounds upon which judicial review orders 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.”

99. 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.

100. 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.

101. The Court of Appeal has reaffirmed this position as seen in the cases below namely- **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)**.

102. Under Article 23 of the Constitution, Judicial review is one of the remedies for violation of constitutional rights.

103. In the circumstances, and having carefully examined the manner in which the 1st Respondent addressed the issues of *sub judice* and statutory timelines, this Court is not persuaded that the Applicants have demonstrated that the Review Board acted illegality, irrationality, or procedural impropriety in the decision-making process, thereby violating the *sub judice* rule.

Was the request for review filed within the 14 days stipulated in section 167 of the Public Procurement and Asset Disposal Act?

104. On allegations that the request for review was filed outside the 14 days period, section 167 (1) of the Act provides that requests for review shall be filed to the Board within 14 days of the date of the impugned decision. I have considered the decision by the review Board and how the Board computed time as stipulated in section 57 of the Interpretation and General provisions Act and I find that the computation of time was accurately done. From 23rd September to 6th October, the 23rd is excluded while the 6th is included in computing 14 days and 6th October was the 13th day hence the objection as to time for filing of the request is found to be devoid of any substance. It is rejected.

Whether the 1st Respondent acted within its statutory mandate under the Public Procurement and Asset Disposal Act when it reviewed the due diligence process, including references to the show-cause letter and directing a fresh due diligence exercise to be undertaken

105. At the heart of this issue are the two sets of due diligence reports dated 16th August 2025 and 7th September 2025, the show-cause letter dated 14th July 2025 and transmitted on 23rd July 2025 addressed to the 2nd Respondent herein and the 2nd Respondent's letters dated 29th July 2025 and 15th August 2025 in response to the show-cause letter from the 1st Ex parte Applicant.
106. There is also the issue of whether or not the Evaluation Committee ought to have given the 2nd Respondent an opportunity to be heard. According to the Applicants, the Evaluation Committee was not required to give the 2nd Respondent a hearing regarding the show-cause letter or alleged breaches of contract.
107. The applicants further contend that these letters arose from contract management matters under an ongoing contract, which is outside the Evaluation Committee's mandate under Section 83(2) of the Public Procurement Asset Disposal Act. They stress that Regulation 30(d) and Sections 67(1)(c) and 83(2) prohibit disclosure of confidential evaluation material and direct communication with tenderers during due diligence.
108. Further, that any requirement to afford the 2nd Respondent a hearing, in their view, would amount to impermissible assumption of contract-management functions and that therefore the Review Board's finding imposing this obligation was a material error of law.

109. The Applicants argue that the Board exceeded its jurisdiction under Section 28 of the Act by interfering with contract management matters arising from the show-cause letter and prior contractual obligations.
110. They contend that the Evaluation Committee's role was strictly limited to prequalification assessment and confidential references and that therefore, the Board improperly required a hearing on matters that were not part of the evaluation process.
111. The Applicants' further contention is that the Evaluation Committee was properly constituted under Section 46 of the PPADA, including representatives from the user department with knowledge of prior contractual engagements and that the Committee's role under Regulations 30(b) and 34 was to carry out due diligence, assess confidential information and disclose relevant material internally, not to engage directly with the tenderer.
112. Additionally, the applicants argue that because the Committee had access to all necessary information through internal channels, there was no legal obligation to afford the 2nd Respondent a hearing. According to the applicants, any suggestion that a hearing was required misconstrues the statutory mandate and improperly conflates evaluation with contract management.
113. In response, the Respondents maintain that the Review Board acted squarely within its statutory powers under Sections 28 and 173 of the Act. They submit

that the Board's intervention was limited to ensuring procedural fairness in the due diligence process and the intervention did not involve adjudicating contractual disputes. Further, that the Review Board's directions for a fresh due diligence exercise were lawful remedies to correct procedural irregularities, ensure transparency and protect the rights of bidders under Article 47 of the Constitution and the Fair Administrative Action Act.

114. From the court record, the Review Board extensively dealt with this issue at paragraphs 124 to 151 and in its reasoning for the finding reached on the issue, it observed as follows:

“135. Turning to the main issue of whether the Respondents complied with the law in conducting the due diligence exercise on the Applicant, we note that this question can only be resolved by examining the procedure that was followed in undertaking the said due diligence.

136. In determining the foregoing issue, we perused the confidential documents and noted that the Respondents prepared two sets of due diligence reports, the first dated 16th August 2025 and the second dated 7th September 2025. Both reports focused on assessing the Applicant's capability to undertake the subject tender.

137. The 1st Due diligence report concluded that the Applicant possessed the requisite capacity, competence and preparedness for the

Prequalification for the Provision of Pre-Export Verification of Conformity (PVoC) to Standards Services for the period 2025-2028, in accordance with the requirements of the Tender Document. The report further indicated that the due diligence had been conducted pursuant to Section 83(1), (2), and (3) of the Act and, consequently, recommended that the Applicant be prequalified for the said services.

138. The 2nd Due diligence report set out the following observations, quoting the Evaluation Committee's findings in respect of the due diligence conducted on the Applicant:

"It has also come to the attention of the committee through KEBS letter ref: KEBS/OP/68/VOL1(20) dated 14th July 2025 that the bidder has a serious breach on the current tender, which is considered to be compromising the safety of the population. The committee has also been made aware that steps have been initiated to terminate the contract through KEBS letter KEBS/CONF/2/C78 VOL 2 dated 25th July 2025 and the Attorney General's advisory on termination of the contract through letter ref: AG/CONF/2/C/78 VOL 2 dated 13th August 2025 has been received. As a result, considering the strength of this information, the committee does not recommend the bidder to the next step,"

139. We observe that the findings in the 2nd Due diligence report formed the basis of the Applicant's disqualification. Accordingly, our analysis shall focus on this report and the process through which its findings were reached, noting that the Applicant's principal contention is that the exercise was conducted contrary to the law and without affording it an opportunity to respond to the issues that led to its disqualification. Our focus on the process is deliberate, given that while the law contemplates the conduct of due diligence, it equally requires that such an exercise be undertaken prudently and fairly as a means of verifying the credentials of successful tenderers.

140. We note from the 2nd Due diligence report that the Evaluation Committee based its findings on a letter dated 14th July 2025, which revealed that the Applicant had allegedly committed serious breaches under its existing contract. The Committee further observed that it had been informed that steps were underway to terminate the said contract between the Applicant and the 2nd Respondent arising from a similar tender.

141. Upon perusal of the confidential documents, we note that a show-cause letter dated 14th July 2025 was transmitted to the Applicant on 23rd July 2025. The Applicant responded on 29th July 2025, raising, among

other things, concerns regarding the confidentiality of its contract with the 2nd Respondent. The Applicant's response and the issues raised therein were not addressed, prompting it to issue a further letter dated 15th August 2025, which reiterated similar concerns but likewise received no response.

142. In view of the foregoing, we find that the Applicant was not afforded an opportunity to be heard on the issues raised in the letter dated 14th July 2025, which the Evaluation Committee relied upon in reaching its decision to disqualify the Applicant. The Evaluation Committee, in exercising an administrative function was under an obligation to accord the Applicant (sic) interests.

143. In the case of Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & Another [2021] KEHC 8109 (KLR), the Court stated the following:

“The ex-parte Applicants (procuring entity) being an administrative body ought to have afforded the Interested Party an opportunity to be heard by hearing its side on the allegations of forgery levelled against it by concerned members of the public vide letter dated 26/11/2020 and the letter dated 10/12/2020 from PPRA.”

144. We understand the above case law to mean that administrative bodies entrusted with public procurement responsibilities, are under a legal duty to observe the principles of natural justice. Before arriving at any adverse decision, it is important to give the affected party a fair opportunity to respond to the said allegations. Failure to accord the Interested Party a hearing amounts to a breach of their right to be heard, a key tenet of fair administrative action under Article 47 of the Constitution and the Fair Administrative Action Act.

145. From the material placed before us, and in particular, the documents annexed to the 1st Interested Party's response, we observe that during the period when the Evaluation Committee was being urged to consider the disqualification of the Applicant, several pieces of correspondence failed to reach the Committee. Consequently, the Committee was deprived of information necessary to enable it to make a rational and objective decision and, in the process, accord the Applicant fair administrative action and a fair hearing

146. In addressing this issue, we examined all the confidential documents submitted to the Board and observed that the letters dated 14th July 2025 and 25th July 2025, which were presented to the Evaluation Committee as evidence of alleged breaches by the Applicant, were not included among

the confidential documents availed to the Board. Vide letter advanced via email dated 16th October 2025, the Board through the Board Secretary sought for the aforementioned letters as guided under Section 67(3)(e) of the Act but the same have not been availed to date. We further note a missing link as to how these documents came into the possession of the Evaluation Committee, since there is no record of any correspondence from the Committee requesting the said documents from the 2nd Respondent, nor any communication from the 2nd Respondent forwarding them to the Committee.

147. The missing paper trail highlighted above raises serious concerns regarding the independence and impartiality of the Evaluation Committee as an autonomous body tasked with conducting the due diligence process. This gap not only undermines the confidentiality of the process but also calls into question the objectivity with which the Evaluation Committee discharged its mandate. Moreover, we note that a member of the Evaluation Committee engaged in direct communication with the Applicant, notwithstanding that the Committee is expected to operate as a standalone unit. In doing so, the Committee crossed the line of impartiality by engaging with the very subject of its evaluation during the due diligence process.

148. In view of the foregoing analysis, we find that the Evaluation Committee did not conduct the due diligence exercise in respect of the Applicant in accordance with the requirements of the Constitution, the Act and Regulations 2020 thereby resulting in a materially and legally flawed disqualification of the applicant.”

115. Under Section 28 of the Public Procurement and Asset Disposal Act, the Board is expressly mandated to review procurement processes to ensure compliance with the Constitution, the Act and applicable regulations, while Section 173 empowers the Board it to annul or set aside decisions and to give directions it considers appropriate to remedy any breach.

116. Further, Sections 83 and 86 of the Act, read together with Regulation 30 of the Public Procurement Regulations, contemplate due diligence as an integral part of the evaluation process, subject to the overarching requirements of lawfulness, reasonableness and procedural fairness.

117. In exercising this mandate, this court is unable to find any evidence that the review Board descended into contract management, it confined itself to examining whether the Evaluation Committee conducted due diligence in a manner consistent with Article 47 of the Constitution and the Fair Administrative Action Act, particularly the obligation to afford an affected bidder a fair opportunity to be heard before an adverse determination is made.

118. Having considered the above decision by the Review Board and the material on record, I find that the Review Board was well within its statutory mandate to interrogate and review the due diligence process.
119. In my view, the intervention by the Review Board was squarely grounded in the Public Procurement and Asset Disposal Act and was aimed at curing procedural impropriety, not substituting the Board's views for those of the procuring entity. ***Whether, in addressing the impugned matters, the 1st Respondent confined itself to questions of legality, procedural fairness and jurisdiction or impermissibly ventured into the merits of the procurement process so as to render its decision amenable to interference by this Court through these judicial review proceedings***
120. The Applicants contend that, in interrogating matters such as the adequacy of due diligence, the reasonableness of the timelines, and the handling of the show-cause correspondence, the 1st Respondent impermissibly descended into the merits of the procurement process and effectively substituted its own view for that of the Evaluation Committee.
121. In the applicants' view, the Review Board went beyond its mandate under the Public Procurement and Asset Disposal Act and conducted what amounted to a re-evaluation of the tender, thereby rendering its decision susceptible to interference by this Court on judicial review.

122. The Respondents, on the other hand, submit that the 1st Respondent remained firmly within the confines of its statutory mandate. They argue that the Board did not reassess scores, rank tenderers, or determine the commercial merits of the bids, but rather, confined itself to examining whether the procurement process particularly the due diligence stage complied with the law, constitutional requirements of procedural fairness and the principles under Article 47 of the Constitution and the Fair Administrative Action Act.
123. According to the Respondents, any consideration of timelines, correspondence, or conduct of the Evaluation Committee was incidental and necessary to determine legality and procedural propriety, not to re-evaluate the tender.
124. This Court reiterates that judicial review is concerned not with the merits of a decision but with the decision-making process. However, the Review Board is statutorily empowered under Sections 28 and 173 of the Public Procurement and Asset Disposal Act to interrogate the legality and propriety of procurement processes and to issue appropriate remedies where breaches are established. The mere fact that such interrogation touches on factual matrices or evaluative steps does not, without more, convert the Board's exercise into a merits appeal. What is prohibited is a wholesale substitution of the procuring entity's discretion with that of the Board on matters reserved to technical or commercial evaluation.

125. This Court having carefully considered the impugned decision, I am not persuaded that the 1st Respondent transgressed the prohibited boundaries of its mandate. There is no evidence to show that the Review Board purported to re-score bids, identify a preferred tenderer or make definitive determinations on contractual liability. Rather, the Board conducted inquiries which were confined to examining whether the Evaluation Committee's reliance on adverse material emanating from a show-cause letter, without affording the affected tenderer an opportunity to be heard, was consistent with the statutory and constitutional requirements of procedural fairness.

126. Such an inquiry fell squarely within the Board's supervisory and oversight jurisdiction and cannot, by any fair characterization, be construed as a merits review of the procurement process. This is because, the principle that a party must be accorded an opportunity to be heard before an adverse action is taken against them is not one that may be sacrificed on the altar of alleged interference with procurement discretion. The Board merely affirmed that the applicant before it was entitled to an opportunity to be heard in respect of the adverse report touching on it.

127. It cannot be gainsaid that the right to a fair hearing and to fair administrative action is sacrosanct and admits of no derogation. These rights as enshrined and

guaranteed in the Bill of Rights, bind all persons and entities, including the applicant herein.

128. In the premises, this Court finds no basis for the applicants' contention that the Review Board exceeded its mandate by vindicating those rights. To the contrary, any procurement process conducted in breach of *the audi alteram partem* rule would be constitutionally infirm and this Court cannot lend an endorsement to such a violation. The Review Board cannot be faulted for intervening to forestall a breach of fundamental rights and neither can this Court in these proceedings accept an invitation to sanction any administrative action that undermines the guarantees of fairness protected by the Constitution. Article 21 of the Constitution places a duty on the state and State and every State organ to observe, respect, protect, promote and fulfil the rights and Fundamental freedoms in the Bill of Rights while Article 23 gives this Court authority to uphold and enforce the Bill of Rights.

129. I am therefore satisfied that the 1st Respondent acted strictly within its statutory mandate in interrogating the due diligence process and in directing that a fresh exercise be undertaken. The Board correctly appreciated that due diligence, though an evaluative function, constitutes administrative action subject to the imperatives of Article 47 of the Constitution and the Fair Administrative Action Act and the requirement for fairness, equity, transparency, openness,

accountability, efficiency competitiveness and cost effectiveness in public procurement processes

130. I reiterate that where an Evaluation Committee relies on adverse material to disqualify a bidder, fairness demands that the affected party be afforded an opportunity to respond. The failure by the procuring entity to consider or respond to the 2nd Respondent's correspondence before arriving at an adverse decision was rightly found by the Board to offend the right to be heard and to undermine the integrity of the procurement process. The Board's intervention was therefore lawful, rational and procedurally sound, and this Court finds no basis for interfering with the Board's determination on this issue through judicial review.

131. Accordingly, I find that the Applicants' grievance on this issue amounts, in substance, to a disagreement with the Board's reasoning and conclusions rather than a demonstration that the Board acted outside the bounds of legality, procedural fairness or jurisdiction. Such disagreement does not furnish a basis for judicial review.

132. In the end, I find and hold that the 1st Respondent confined itself to permissible public law questions and did not transform the review proceedings into an appeal on the merits so as to warrant this Court's intervention

133. The Applicants further contended that the 1st Respondent acted irrationally by directing the conclusion of the procurement process and award of contracts within thirty (30) days. They argue that the powers conferred under Section 173 of the Public Procurement and Asset Disposal Act must be exercised with full appreciation of the procurement process and that in this instance, the Board failed to recognize that the subject procurement was a pre-qualification exercise, which in itself does not result in contract awards. According to the Applicants, any direction to award contracts arising from this process was practically impossible and legally unreasonable.
134. The Respondents counter that the Board's directive was not intended to preempt or replace subsequent procurement stages, but rather to ensure expeditious conclusion of due diligence and related prequalification determinations, consistent with statutory timelines and procedural fairness.
135. The respondents contend that the Board's direction was a lawful exercise of its powers under Section 173, aimed at remedying procedural delay, promoting efficiency and safeguarding the rights of bidders under Article 47 of the Constitution.
136. Judicial review principles dictate that a finding of irrationality or unreasonableness arises where a decision is so defiant of logic, fairness, or acceptable standards that no reasonable authority addressing itself to the matter

could have made it see *Pastoli v Kabale District Local Government Council & Others* [2008] 2 EA 300.

137. In the present case, this Court observes that the procurement process involved prequalification for provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for the year 2025-2028. The Review Board in its order No. D directed the procuring entity to proceed and conclude the procurement process relating to the said tender and issue an award, in respect of all successful bidders within 30 days from 27th October, 2025.
138. However, the process having been the prequalification and from which no contracts were expected to be awarded at that stage as the procuring entity was not procuring any goods or services within any specific period, I find the directive that the procuring entity concludes the procurement process in 30 days and award contracts was irrational and unreasonable as the directive was incapable of being implemented.
139. The Review Board' argument that its intention was procedural efficiency and not the imposition of impossible obligations does not hold. The letter and spirit of the directive assumed that there were specific procurement processes undertaken and hence, conclusion and awarding of contracts within 30 days of the decision, which was erroneous and mistaken.

140. In the circumstances, this Court is satisfied that the 1st Respondent's direction was irrational and not connected to its statutory mandate, for the purpose of expediting the procurement process and the protection of bidders' rights, noting that the process involved prequalification and not the actual procurement process.

141. In view of the above the Originating Motion application dated 3rd November 2025 succeeds partially only to the extent that the Review Board's directive that the procuring entity concludes the procurement process in 30 days is hereby removed into this Court for purposes of quashing and is hereby quashed for being irrational and unreasonable.

142. All the other aspects of the Originating Motion dated 3rd November, 2025 are hereby dismissed. The Court upholds the orders made by the review Board as per Order Nos. A, B, C, E, and F on 27th October, 2025. The procuring entity to continue with the prequalification process taking into account the orders of the Review Board and this Judgment, and may seek for extension of time within which to conclude the process.

143. I order that each party shall bear their own costs.

144. I so order.

145. This file is closed.

**Dated, Signed & Delivered virtually in Court at Nairobi this 19th Day of
December 2025**

**R.E ABURILI
JUDGE**

ORIGINAL