Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Power & Lighting Company Plc & another (Interested Parties); Jamari Enterprises Limited (Ex parte Applicant) (Judicial Review Application E406 of 2025) [2026] KEHC 501 (KLR) (Judicial Review) (27 January 2026) (Judgment)

Neutral citation: [2026] KEHC 501 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E406 OF 2025

RE ABURILI, J

JANUARY 27, 2026

BETWEEN

REPUBLIC .... APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD .... RESPONDENT

AND

THE ACCOUNTING OFFICER, KENYA POWER & LIGHTING COMPANY PLC .... INTERESTED PARTY

KENYA POWER & LIGHTING COMPANY PLC .... INTERESTED PARTY

AND

JAMARI ENTERPRISES LIMITED .... EX PARTE APPLICANT

JUDGMENT

1. The Exparte Applicant Jamari Enterprises Limited filed Notice of Motion dated 16th December 2025 on the same date, supported by the affidavit sworn by John Muigai Kamau on 15th December 2025. The Application seeks the following orders:

    1. An order of certiorari directed at the Respondent quashing the decision dated 3rd December 2025 in Application No. 107 of 2025, dismissing the Applicant's Request for Review concerning Tender for the Provision of Roads/Pavement Opening/Cutting, Ducting and

Reinstatement Services Tender No. KP1/9A.2/OT/003/NM/25-26, (hereinafter referred to as the “Tender”).

2. An order of mandamus directed at the 1st and 2nd Interested Parties, compelling them to forthwith terminate the current process for Tender for the Provision of Roads/Pavement Opening/Cutting, Ducting and Reinstatement Services Tender No. KP1/9A.2/OT/003/NM/25-26, (hereinafter referred to as the “Tender”) and re advertise the tender in strict compliance with the letter and spirit of Article 227 of *the Constitution* of Kenya and the *Public Procurement and Asset Disposal Act*, 2015 (PPADA), specifically by:

   a. Allowing a reasonable and sufficient period for the preparation and submission of tenders at least 60 days.

   b. Deleting all clauses that rely on undisclosed or subjective criteria, particularly the unpublished "powerline construction services cost handbook" and clauses 39-42 granting unfettered discretion to determine "abnormally low/high" or "unbalanced" tenders.

3. An order of prohibition directed at the 1st and 2nd Interested Parties, prohibiting them from proceeding in any manner whatsoever with Tender for the Provision of Roads/Pavement Opening/Cutting, Ducting and Reinstatement Services Tender No. KP1/9A.2/OT/003/NM/25-26, (hereinafter referred to as the “Tender”) or from awarding the said tender based on the flawed tender documents.

4. Such other, further order and/or incidental orders or directions as this Honorable Court shall deem just and expedient.

5. The costs of this application to provide for.

2. From the exparte applicant’s perspective, the circumstances giving rise to these proceedings are that, on or about 29th October 2025, the 2nd Interested Party Kenya Power & Lighting Company PLC, which is the procuring entity, published an Invitation To Tender (ITT) for the Provision of Roads/Pavement Opening/Cutting, Ducting and Reinstatement Services (Tender No. KP1/9A.2/OT/003/NM/25-26). The Applicant is said to have downloaded the tender document on or about 3rd November 2025 from the Procuring Entity’s e-procurement portal, with the bid submission initially scheduled to close on 20th November 2025 at 10.00 a.m.

3. The Exparte applicant avers that upon downloading the tender document, it noted that the said tender document suffered from fundamental flaws ab initio. First, that it allowed only approximately twenty (20) days for the preparation and submission of bids, which time, according to the Applicant, was manifestly inadequate for a works contract of substantial value, scope, and complexity. Secondly, that the Tender Document contained provisions contrary to the law, including reliance on an undisclosed and unpublished benchmark (the "powerline construction services cost handbook") for financial evaluation; and subjective clauses (Clauses 39 to 42) which is said to have granted the procuring entity unfettered discretion, thus rendering the procurement process susceptible to manipulation, thereby undermining the principles of fairness and objectivity required by the law.

4. Aggrieved by what it had observed concerning the tender document, the exparte applicant filed a Request for Review Application No. 107 of 2025 before the Respondent, Public Procurement Administrative Review Board (the Review Board) on 12th November 2025, challenging these alleged illegalities as being in breach of Section 80 of the *Public Procurement and Asset Disposal Act*, 2015 and Article 227 of *the Constitution*.

5. The Applicant contends that the Respondent did not take into consideration all material information filed before it before dismissing the applicant's request for review on 3rd December 2025, holding that a determination of the alleged illegality of the tender clauses was "premature" because the tender submission deadline had not yet lapsed. The Applicant contends that the dismissal of its request for review was a fundamental error of law.

6. The Respondent is said to have in its final orders, given a mandatory direction to the Interested Parties to proceed with the procurement process, thereby sanctioning the continuation of a procurement process based on a document that was fundamentally unlawful.

7. It is the Applicant's further case that dismissing the request for review on grounds of prematurity constitutes an abdication of the Respondent's statutory duty under Section 173 of the Act (PPADA) and undermines the principles of fairness transparency and competitiveness in public procurement, as espoused in Articles 10 and 227 of *the Constitution*.

8. The Applicant further contends that the Review Board's decision is vitiated by multiple errors of law, that it fails to address the use of undisclosed evaluation criteria thereby violating Section 80(2) of the Act and allowing subjective clauses that negate the requirement for objective evaluation standards.

9. The Applicant claims that it had a legitimate expectation, arising from *the Constitution* and the express provisions of the Act, that its right to a fair administrative action under Article 47 would be protected by the Respondent. However, that this expectation has been violated by the Review Board's impugned decision to ignore patent illegalities in the Tender Document.

10. The Applicant contends that the Respondent erred in finding that bidders had approximately seventeen (17) days to prepare and submit tenders, and that the Interested Parties, allegedly in violation of the mandatory stay and the fourteen (14) day standstill period under Section 175(1) of the *Public Procurement and Asset Disposal Act* (PPADA), unilaterally issued an Addendum dated 9th December 2025 setting a revised submission deadline of 18th December 2025, whereas the earliest lawful date would have been 5th January 2026.

11. The Applicant avers that the short tender period contravenes Sections 58 and 70(3) of the PPADA and Article 227(1) of *the Constitution* by denying bidders sufficient time and information to ensure fairness, equity, transparency, competitiveness and cost-effectiveness, is irrational and unnecessary, given that the existing contract for similar works had been extended to 2nd April 2026.

12. Further, the Applicant challenges Clauses 39 and 40 of the Instructions to Tenderers, which clauses permit rejection of "abnormally low" or "abnormally high" tenders, claiming that the clauses confer unfettered and subjective discretion contrary to Section 80 of the PPADA and Article 227 of *the Constitution*.

13. According to the applicant, the financial evaluation criteria under Part III, particularly sub-clauses (e) and (f), are irregular and unlawful for relying on an undisclosed "published powerline construction services cost handbook," in breach of Sections 70(3) and 80(2) of the PPADA and for imposing arbitrary thresholds of 25% above or below an unpublished benchmark, contrary to Article 227(1) and Section 3 of the PPADA.

14. The Applicant further asserts that Clause 41 on "Unbalanced and/or Front-Loaded Tenders" is defective for granting Kenya Power excessive discretion based on its "opinion," lacking objective or quantifiable criteria, and for allowing an arbitrary increase of performance security up to 30% of the contract price, contrary to Sections 3 and 80(3) of the PPADA and Article 47 of *the Constitution*.

15. The Applicant also impugns Clause 42 on "Qualifications of the Tenderer" as being ambiguous and procedurally unfair, particularly Clause 42.1 for permitting subjective determinations "to its satisfaction" contrary to Section 80(2) of the PPADA; Clause 42.2 for excluding consideration of subsidiaries, parent companies, and affiliates, thereby discriminating against joint ventures in violation of Section 3 of the PPADA and Article 227; Clause 42.3 for authorizing disqualification without objective and verifiable evaluation; and Clauses 42.4 to 42.6 for duplicating the defective "abnormally low tender" provisions without objective benchmarks.

16. The Applicant maintains that the Interested Parties breached their statutory duties under the PPADA and the 2020 Regulations by failing to promote fair competition and equitable treatment, rendering the process discriminatory and contrary to Articles 10, 47, 227, and 232 of *the Constitution* and Section 3 of the Act. It is asserted that the procurement proceedings were unlawful and that the tender outcome is a nullity. The Applicant claims prejudice and loss, including denial of a fair opportunity to compete due to the short submission period, loss of legitimate expectation and potential profits arising from subjective evaluation provisions, loss of business prospects and competitiveness contrary to Sections 58, 70(3), and 80 of the PPADA and financial loss from expenses incurred in tender preparation. The Applicant concludes that these breaches undermine the integrity, transparency, accountability, and public confidence in the procurement process.

17. The Applicant also filed written submissions dated 24th December 2025. I will combine the applicant's case with its submissions.

18. It is submitted in reiteration of the facts that the Respondent's decision dated 3rd December, 2025 did not adhere to the principles set out in Article 47 of *the Constitution* and that therefore, the impugned decision by the Respondent was irrational and unreasonable. Reliance is placed on Section 7(2)(k) of the Fair Administrative Actions Act, 2015, which is said to provide that a court may review an administrative action or decision if it is irrational or unreasonable.

19. The Applicant relies on the cases of Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] eKLR, Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited [2013] eKLR and Republic v Public Procurement Administrative Review Board ex parte Trippex Construction Company Limited & another, JR No. 605 of 2015 to support this argument.

20. On the three grounds upon which administrative action is subject to control by judicial review, that is, illegality, irrationality and procedural impropriety, the Applicant relies on the case of Republic v Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR.

21. The Applicant submits that the Respondent acted irrationally and unreasonably by holding that a challenge to the legality of the procurement document itself was premature pursuant to paragraph 136 of the impugned decision dated 3rd December 2025. That the Respondent's decision effectively means that a bidder must proceed with an illegal, unconstitutional, and time-consuming process before challenging the foundation of that process, which is an absurd outcome that contradicts the spirit of the PPADA and Constitutional principles of public procurement.

22. The Applicant submits that the Respondent acted unreasonably and in breach of Section 80(2) and (3) of the *Public Procurement and Asset Disposal Act* and Article 227 of *the Constitution* by refusing to condemn the Procuring Entity's reliance on undisclosed criteria, namely the "Powerline Construction Services Cost Handbook," and by upholding Clauses 39–42, which confer unfettered and subjective discretion on the procuring entity. It is submitted in contention that no reasonable public body could

lawfully include or sustain such arbitrary provisions, and that the Respondent's failure to strike them down was Wednesbury unreasonable.

23. The Applicant further argues that the Interested Parties' claim that the handbook was accessible on their website is untenable, as the tender documents contained no reference, link, or direction to any external source. The Respondent is also faulted for declining to correct these illegalities at an early stage, thereby allowing a flawed process to proceed in a manner contrary to the public interest and resulting in a waste of public resources.

24. Additionally, the Applicant contends that the Respondent unreasonably failed to address the manifestly inadequate bidding timeframe for a complex works contract, which is said to be arbitrary and discriminatory and in contravention of Section 58 of the PPADA. It is also submitted that the Respondent erred in law and failed to exercise its jurisdiction under Section 173 of the PPADA by dismissing the Request for Review foe allegedly being "premature" on the ground that the tender submission deadline had not lapsed.

25. The Applicant relies on the case of JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises v Public Procurement Administrative Review Board & 2 others [2015] eKLR where the Court is said to have rendered itself on what amounts to an error of law.

26. It is also the Applicant's submission that Section 4(3) of the *Fair Administrative Action Act* requires that, where an administrative action is likely to adversely affect a person's rights, the administrator shall provide: (a) Prior and adequate notice of the nature and reasons for the proposed action, (b) An opportunity to be heard or make representations and (c) Information, materials and evidence to be relied upon in making the decision.

27. The Applicant further relies on the case Republic v Judiciary & 2 others; Waaso Construction Limited (Ex parte) [2025] KEHC 10847 (KLR) where the Court is said to have outlined the grounds upon which judicial review orders may be granted as laid out in Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300.

28. The Applicant submits that the Respondent's decision denied it an effective and timely administrative remedy under Article 47 of *the Constitution* and the *Fair Administrative Action Act* by compelling its participation in a tender process governed by allegedly unlawful rules, thereby rendering the review process illusory. The Respondent is further faulted for sanctioning a procedurally unfair process by failing to address the inadequate bidding period and the use of undisclosed evaluation criteria, contrary to the requirements of fair administrative action. The Applicant contends that the decision violated the applicant's legitimate expectation that public authorities would act consistently, transparently and in accordance with declared policies and procedures.

29. On the principles of legitimate expectation, the Applicant relies on the cases of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, Republic v Kenya School of Law; Ng'ang'a (Exparte Applicant) [2025] KEHC 4965 (KLR) and Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO [2019] eKLR.

30. The Applicant submits that it had a legitimate expectation that the procurement process would be conducted lawfully and in accordance with the principles of fairness, transparency, equity and objectivity; that upon invoking Section 173 of the PPADA, the Respondent would substantively determine the legality of the tender rather than dismiss the Request for Review as "premature"; that a reasonable and sufficient period would be allowed for the preparation and submission of a complex

works contract; and that the mandatory fourteen (14) days standstill period under Section 175(1) of the PPADA would be respected to allow recourse to the High Court.

31. The Applicant further contends that, arising from Article 47 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*, the Respondent had a duty to protect it's the applicant's rights by addressing patent illegalities, which duty was allegedly breached by the Respondent's irrational dismissal of the Request for Review Application.

The Respondent's case

32. Opposing the application, the Respondent filed a replying affidavit sworn on 22nd December 2025 by Philemon Kiprop, the Secretary of the Public Procurement Administrative Review Board.

33. According to the Respondent, the applicant's application subject of this judgment is an appeal against the Respondent's Decision and is being disguised as a judicial review application and that therefore, this Court should decline to allow the prayers sought for want of jurisdiction.

34. The Respondent relies on the case of Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others [2012] KECA 104 (KLR) where the Court is said to have held that the Respondent is a specialized statutory tribunal established to deal with all complaints of breach of duty by a procuring entity and that it is conferred with wide powers and as such that its jurisdiction should not be lightly interfered with.

35. The Ex parte Applicant is said to have on on 12th November 2025 filed Review Application No. 107 of 2025 dated 11th November 2025 and on 3rd December 2025, the Respondent rendered its decision dismissing the Request for Review and directing for the procurement proceedings to procced.

36. That the Respondent in reaching its Decision considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act. That in reaching its decision, the Respondent is said to have found that there were four issues for determination and these were; Whether it had jurisdiction to hear and determine the Request for Review, whether the time provided for submission of tender documents in the subject tender was reasonable and sufficient, whether the provisions of the Tender Document in the subject tender are in breach of *the Constitution*, the Act and Regulations 2020, and what orders ought to have been grant in the circumstances.

37. On the first issue it is asserted that as can be seen at paragraphs 58 to 86 of its Decision it took cognizance of the provisions under Section 167(1) of the Act and various holdings by the Superior Courts and found that the Applicant had the locus standi to seek an administrative review before it in the subject tender. That the Applicant had sufficiently pleaded the loss it risked to suffer as a result of the alleged breach of duty imposed on the procuring entity by the Act, and that it was a candidate within the meaning of Section 2 and 167(1) of the Act. Thus, the Respondent is said to have established that it had jurisdiction to hear and determine Request for Review No. 107 of 2025.

38. On the second issue of whether the time provided for submission of tender documents in the subject tender was reasonable and sufficient as seen at paragraphs 87 to 97 of its Decision, the Respondent is said to have taken note of the provisions under ITT 3.6 of Section II – Tender Data Sheet (TDS) at page 28 of 146 of the Tender Document establishing that the subject tender was restricted to only local limited companies thus governed by Section 102(2) of the Act as read with Regulation 89(7) of Regulations 2020 which provides the minimum time for preparation of tenders to be 7 days.

39. The Respondent is also said to have taken note of the fact that the subject tender had been advertised on 29th October 2025 and was initially set to close on 20th November 2025 giving bidders 22 days to

prepare and submit their bids. That the Respondent also took further note of the addenda issued in the subject tender and specifically Addendum No. 2 dated 12th November 2025 which extended the tender submission deadline to 28th November 2025 which now meant that bidders had a total 30 days from 29th October 2025 to 28th November 2025 to prepare and submit their bids.

40. According to the Respondent, in addition, it noted that ITT 8.2 of Section II – Tender Data Sheet (TDS) at page 28 of 146 of the Tender Document informed eligible bidders that they could ask questions in writing which were required to reach the 2nd Interested Party not later than 7 days prior to the tender closing date and that as such, the Applicant had an avenue to seek for an extension of the tender submission deadline in the event that it was unable to conclude its preparation and submission of its bid documents within the stipulated timelines.

41. It is further contended that as seen at paragraph 96 of its Decision, the Respondent pointed out that it had not sighted any request for an extension of the tender submission deadline nor any clarification sought by the Applicant and that it was therefore disingenuous for a candidate to complain about sufficiency of time before demonstrating that it had done everything in its power to comply with the provided time but was unable to due to certain justifiable reasons, such as insufficiency of information in the tendering process.

42. That owing to this situation, the Respondent found that the time provided for submission of tender documents in the subject tender was reasonable and sufficient noting that bidders had 17 more days to prepare and submit their bids before the lapse of the tender submission deadline as seen at paragraph 94 of the Respondent's Decision.

43. The Respondent further contended that in so holding, it took into account the fact that upon the applicant filing of Request for Review No. 107 of 2025 on 12th November 2025, time stopped running in line with Section 168 of the Act and that by then, 13 days had been expended and bidders therefore had 17 more days to prepare and submit bids before lapse of the submission deadline once time started running after the Respondent had rendered its Decision.

44. Additionally, the Respondent contended that on the third issue, on whether the provisions of the Tender Documents in the subject tender were in breach of *the Constitution*, the Act and Regulations 2020, the Respondent took cognizance of the provisions of Article 227 of *the Constitution*, Sections 3, 58, 60, 70 and 80 of the Act as read with Regulation 68 of Regulations 2020, with regard to the mandate placed on an accounting officer of a procuring entity with regard to preparation of the tender documents, laying out the specifications and the evaluation criterion in addition to ensuring that sufficient information is provided to allow fair competition among prospective bidders.

45. Further, the Respondent is said to have taken note of reference to the published powerline construction services cost handbook referred to at Clause 3.4 of Part III – Criteria at page 37 of 146 of the Tender Document; reference to abnormally low tenders and abnormally high tenders as provided under ITT 39 and 40 of Section I: Instructions to Tenderers at page 23 of 146 to 24 of 126 of the Tender Document; reference to the tender evaluated as the lowest evaluated price as provided under Clause 41 of Section I: Instructions to Tenderers at 24 of 126 of the Tender Document; and reference to qualification of the eligible tenderer selected as having submitted the lowest evaluated and substantially responsive tender as provided under Clause 42 of Section I: and Instructions to Tenderers of the Tender Document.

46. That having had the benefit of perusing the Standard Tender Document for Procurement of Works (Roads, Water Bridges etc.) issued by the Public Procurement Regulatory Authority on 22nd April 2021 and updated on 21st April 2022 it noted that the impugned clauses had been lifted in verbatim in

the subject tender's Tender Document save for (i) change of reference of the procuring entity to read Kenya Power, and (ii) increase of the total amount of the Performance Security to 30% of the Contract Price as compared to the 10% of the Contract Price set out in the Standard Tender Document.

47. The Respondent is said to have further noted that pursuant to Clause 7 of the Preface of the Standard Tender Document, while the Standard Tender Document is to be customized to suit the needs of a procuring entity, no changes ought to be made to the Instructions to Tenderers (ITT) and the General Conditions of Contract (GCC) as the two sections are modified under the Tender Data Sheet (TDS) to suit the requirements of a procuring entity.

48. That in view of the foregoing, the Respondent proceeded to draw the attention of the 1st Interested Party to its responsibility to provide sufficient information in the subject tender, that is objective and quantifiable to enable the Evaluation Committee to evaluate bids submitted in the subject tender as envisioned under *the Constitution* and the Act noting that should a criterion emerge to be ambiguous in the course of evaluation, then the doctrine of contra Proferentem in Interpretation of Contracts would apply.

49. The Respondent is said to have further found that the 1st Interested Party would shoulder the responsibility of addressing any contest that may have been raised on applicability of an extraneous or ambiguous clause in the subject tender before the Respondent, and that it would be prudent to arrest such issues by way of clarifications before the subject tender submission deadline lapsed.

50. The Respondent further asserted that it also established that it would be premature to determine whether the provisions of the Tender Document in the subject tender were in breach of *the Constitution*, the Act and Regulations 2020 since the tender submission deadline was yet to lapse and the 2nd Interested Party still had adequate time to address any clarifications or issues that could be raised by prospective bidders with regard to the subject tender.

51. The Respondent maintains that its Decision dated 3rd December 2025 in Request for Review No. 107 of 2025 was lawful, reasonable, rational, and procedurally fair, having considered all issues raised and acted within *the Constitution*, the *Public Procurement and Asset Disposal Act*, the 2020 Regulations, the *Fair Administrative Action Act* and Article 227 of *the Constitution*.

52. It is asserted that the Respondent neither exceeded its mandate nor acted unlawfully, and that the Ex parte Applicant has failed to establish illegality, error of law, irrationality, procedural unfairness, bad faith, abuse of process, or any breach of legitimate process.

53. The Respondent therefore seeks dismissal of the Notice of Motion with costs, but, that in the alternative, urges that if the application is allowed, costs be disallowed pursuant to Section 175(7) of the Act.

54. The Respondent also filed written submissions dated 29th December 2025 to support its decision and contentions in deposition.

55. The Respondent submits that the Review Board's finding that a substantive challenge to the tender clauses was "premature" was a rational exercise of discretion, as the procurement was still at a preliminary stage, no bids had been submitted or evaluated and the Review Board's jurisdiction under Section 167 of the PPADA is triggered by actual or imminent loss.

56. According to the Review Board, bidders had mechanisms under the tender documents, including ITT 8.2, to seek clarifications or extensions, which mechanisms the Applicant did not utilize, and that in any event, time had been suspended under Section 168 of the Act, upon the applicant filing the Request for Review, leaving bidders with adequate time to prepare bids for submission.

57. The Review Board further contended that the Review Board properly exercised its powers under Section 173 of the PPADA by assuming jurisdiction, hearing the parties and issuing a reasoned merits-based decision rather than declining jurisdiction, and by invoking the contra proferentem principle to direct that any ambiguity in the tender documents be interpreted against the Procuring Entity as a safeguard for fairness.

58. The Review Board also noted that issues such as the alleged accessibility of the "powerline construction services cost handbook" which handbook the 2nd Respondent had indicated was published and accessible on its website could be clarified during the bidding process and that annulling the tender at a pre-submission stage would have been disproportionate.

59. The Respondent maintains that the Review Board correctly observed that the tender was restricted to local limited liability companies under ITT 3.6 of the Tender Data Sheet and as such it applied the statutory framework, including the minimum seven-day preparation period for restricted tenders under Section 102(2) of the PPADA and Regulation 89(7) of the 2020 Regulations, finding that a total of thirty (30) days had been provided and that the proceedings complied with the *Fair Administrative Action Act* through notice, hearing and consideration of submissions.

60. It is therefore contended that the Applicant's claims of violated legitimate expectations are unfounded, that any alleged post-decision breach of Section 175(1) would be a separate matter, and that the Board's decision of 3rd December 2025 was lawful, rational, procedurally fair and not amenable to judicial review.

61. The Respondent also submits that at no point did the Applicant argue before it that the addenda were ambiguous in a way that prevented compliance. That this is a new allegation raised only in these judicial review proceedings and is procedurally improper. The Respondent states that the Applicant's failure to use the available clarification mechanism amounts to a failure to exhaust alternative remedies within the procurement process.

The Interested Parties' case

62. The Interested Parties filed a replying affidavit sworn on 22nd December 2025 by Esther Waitara, the 2nd Interested Party's Supply Chain Officer, Procurement. She deposes that the 2nd Interested Party is a public limited company which is mandated to build and maintain the power distribution, transmission network and retail supply of electricity to its customers. That the principal legislative framework governing its operations is *the Constitution* of Kenya, 2010; *Energy Act*, 2019; *Public Procurement and Asset Disposal Act*, 2015; Public Procurement and Asset Disposal Regulations, 2020; Public Officers Ethics Act, CAP 183; *State Corporations Act*, CAP 446; and *Public Finance Management Act*, 2012 among other laws.

63. The deponent asserts that the nature of services provided by the 2nd Interested Party are of exceptional public importance and are core to the realization of social-economic development and enjoyment of various rights as set out under *the Constitution*.

64. The Interested Parties urge that to address the country's growing demand of electricity, the 2nd Interested Party invited eligible and qualified bidders capable of providing Road Cutting, Pavement Opening, Excavations and Reinstatement for underground cables services and that the inadvertent unavailability to provide crucial services translates to direct loss of revenue and affects the 2nd Interested Party's ability to connect new customers or undertake meter replacements as and when requested by the consumers.

65. According to the Interested Parties, sometime in April 2025, an executive directive had been issued directing that all procurement processes in public entities had to be conducted under the Electronic Government Procurement (e-GP) system and the was to take effect from 1st July 2025. That as such, the 2nd Interested Party was obligated to onboard its procurement operations onto the said system.

66. That the 2nd Interested Party however, sought and obtained from the National Treasury, an exemption to procure road cutting, pavement opening, excavation, ducting and reinstatement services under its existing procurement system pending onboarding to the e-GP system, and accordingly published Tender No. KP1/9A.2/0T/003/NM/25-26 on 29th October 2025, initially closing on 20th November 2025. It is their case that following a pre-bid meeting on 4th November 2025 and subsequent clarifications, the submission deadline was extended to 28th November 2025.

67. The Interested Parties contend that the Applicant became aware of the tender on 3rd November 2025 and failed to raise any issues at the pre-bid meeting or through the written clarification mechanism. They also state that the Cost Handbook was available on the 2nd Interested Party's website, and that the Respondent correctly found the Request for Review to be premature under the doctrine of exhaustion, and that the decision was misinterpreted by the Applicant.

68. The Interested Parties argue that the Applicant misread the tender documents by failing to consider them holistically, emphasizing that the tender comprises Part 1 (Tendering Procedures) including Section I (Instructions to Tenderers), Section II (Tender Data Sheet), Section III (Evaluation and Qualification Criteria), and Section IV (Tendering Forms); Part 2 (Works Requirements) including Section V (Schedules of Services), Section VI (Work Area Clusters), and Section VII (Bills of Quantities); and Part 3 (Conditions of Contract and Contract Forms) including Section VIII (General Conditions of Contract), Section IX (Special Conditions of Contract), and Section X (Contract Forms), all to be read together with any Addenda issued under ITT 8.

69. They maintain that Clauses 39–42 fall under Section I (Instructions to Tenderers), which are standardized tender documents issued by the Public Procurement Regulatory Authority and cannot be amended except through the Tender Data Sheet (Section II), which prevails over the ITT in the event of any conflict.

70. The Interested Parties assert that the evaluation and qualification criteria are set out in Section III, including selection of the lowest evaluated tender that meets the qualification criteria, is substantially responsive, and has the lowest evaluated price, and that the Preliminary Examination Criteria under Part I list the mandatory requirements to be satisfied before progression to the Technical Stage under Part II.

71. They contend that bidders were afforded sufficient time due to the statutory suspension of time during the PPARB proceedings, extensions through addenda, and interim court orders issued on 16th December 2025, which extended time for the bidders to comply as the Court has 45 days to hear and determine the review at hand. It is also their case that a right of appeal does not operate as an automatic stay of execution. Further, that there were no orders barring the 2nd Interested Party from proceeding with procurement process from 4th December 2025 till 16th December 2025. It is urged that the extension of existing contracts to 2nd April 2026 was necessary to prevent a service vacuum during onboarding to the e-GP system.

72. The Interested Parties further state that the cost handbook was developed after industry consultations to address pricing outliers and safeguard service quality, efficiency, and sustainability in line with Article 227 of *the Constitution*, and that performance security and percentage thresholds were based on the

value and complexity of the works. They deny any breach of statutory duty, allege the application is intended to frustrate the procurement process, and seek its dismissal with costs.

73. The Interested Parties filed written submissions dated 31st December 2025.

74. On the threshold for judicial review, the Interested Parties rely on the case of Civil Servants Union (CCU) v Minister for Civil Service [1985] A C 374 (HI) and submit that illegality a ground for judicial review has been described in the CCU case as a decisionmaker which must understand the law that regulates his decision-making power correctly and must give effect to it. It is urged that simply put, one needs to establish whether there was a jurisdictional error on the part of the decision-making body.

75. On the definition of a jurisdictional error, the Interested Parties rely on the cases of Craig v South Australia [1995] HCA 58 and Re Refugee Review Tribunal; Ex-Parte Aala [2000] HCA 57, where the Courts are said to have held that jurisdictional error arises when a court or tribunal acts beyond the scope of its lawful authority by entertaining a matter or making a decision or order that falls outside the limits of its assigned powers. It is their submission that decisions affected by jurisdictional error can be quashed by judicial review.

76. The Interested Parties further submit that the Respondent did not act ultra vires when rendering its determination dated 3rd December 2025, and that according to Section 28 of the *Public Procurement and Asset Disposal Act*, 2015, the Respondent's powers and functions are to review, hear and determine tendering and asset disposal disputes.

77. They contend that the Respondent had the jurisdiction to hear and determine the Ex parte Applicant's request for review dated 11th November 2025 and that the decision dated 3rd December 2025 was arrived at legally. To support this argument, they rely on the case of Republic v Kenya Power & Lighting Company Ltd & another [2013] KEHC 6677 (KLR).

78. They further submit that irrationality as a ground of judicial review was developed by the Court in the Associated Provincial Picture House v. Wednesbury which later established the "Wednesbury test" and that the test is used to determine whether a decision rendered is unreasonable. They also rely on the case of Republic vs. Public Procurement Administrative Review Board & 3 others, Ex-parte Olive Telecommunication PVT Limited [2014] eKLR where the court is said to have observed that a court may interfere on Wednesbury grounds only where a decision is so grossly unreasonable, irrational, and defiant of logic or accepted standards that no reasonable authority, properly directing itself to the facts and law, could have made it.

79. The Interested Parties rely on the case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 on what constitutes procedural impropriety and submit that procedural impropriety centers on the Respondent's failure to follow proper legal/statutory procedures or natural justice rules. Further that the Respondent followed the proper legal/statutory procedures as well as the natural justice rules in arriving at its decision as pursuant to Section 206 of the Public Procurement and Asset Disposal Regulations, the Respondent issued a hearing date to all parties and at the hearing of the request for review, all parties were granted an opportunity to ventilate the request for review filed by the Ex parte Applicant in accordance with Section 214 of the Public Procurement and Asset Disposal Regulations.

80. They also submit that at all material times, the Respondent communicated to all the parties present of the time, in writing by its Secretary. Further, that the Respondent accorded the Ex parte Applicant the right to a fair hearing in line with Article 50 of *the Constitution* of Kenya.

81. Additionally, that the Respondent having ensured that the Ex parte Applicant had an opportunity to present its case after receiving a response from the Interested Parties, ensuring that Fair Administrative Action and access to Justice in accordance with Article 47 and 48 of *the Constitution* of Kenya, 2010 had been achieved. That the Ex parte Applicant does not controvert the process and manner in which the Respondent arrived at its decision but challenges the merits of the decision.

82. On whether the Respondent's decision was proportionate, the Interested Parties rely on the definition of proportionality as defined by De Smith Woolf and Jowel, in Judicial Review of Administrative Action, Fifth Edition (pp.594-596) (as cited in the case of James Opiyo Wandayi v Kenya National Assembly & 2 others [2016] KEHC 7850 (KLR) where the court is said to have observed that it is a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues.

83. The Interested Parties further submit that, the Respondent dismissed the Ex parte Applicant's request for review taking note of concerns raised in its determination. Furthermore, that the tender is yet to close, and the evaluation has not yet commenced.

84. They rely on the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR and De Smith, Woolf & Jowell, Judicial Review of Administrative Action 6th Edition Sweet & Maxwell page 609 for the guiding principles of legitimate expectation. The court in Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR is said to have observed that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate in the sense of an expectation which will be protected by law. It is urged that this view was also adopted in the case of Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] eKLR.

85. On the order of mandamus, the Interested Parties rely on the case of Kenya National Examination Council v Republic; Njoroge & 9 others (Ex parte) [1997] KECA 58 (KLR) where the Court is said to have described what an order of mandamus is and its purpose in law. They also rely on the case of Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 on the order of mandamus and when it is issued.

86. It is submitted that certiorari is a discretionary judicial review remedy, granted only for compelling reasons to quash ultra vires, illegal, or irrational decisions of public bodies, and in this case the Ex parte Applicant has failed to establish a reasonable basis for its grant.

87. The Interested Parties conclude that the Ex parte Applicant's application for judicial review is incompetent, frivolous and an abuse of the Honourable Court's process, and they humbly pray that this Honourable Court exercises its discretion to dismiss the application with costs to them.

Analysis and Determination

88. I have considered the application, the grounds, affidavits in support thereof and the responses together with submissions for and against the application for judicial review orders and the issues that flow for determination are:

    i. Whether this Court has jurisdiction, or whether the application amounts to an appeal on the merits.

ii. Whether the Respondent acted within its statutory mandate and in accordance with the law, particularly Section 173 of the *Public Procurement and Asset Disposal Act* and Article 47 of *the Constitution*, in dismissing the Applicant's Request for Review as being premature

iii. Whether the orders sought by the Applicant are merited

iv. What orders should this Court make, including on costs.

89. There are other ancillary questions that this Court will endeavour to answer in resolving the above main issues.

Whether this Court has jurisdiction, or whether the application amounts to an appeal on the merits.

90. The Respondent contends that the applicant's application is an appeal against its Decision, and is being disguised as a judicial review application and that therefore this Court should decline to allow the prayers sought for want of jurisdiction.

91. This issue is important because it touches on jurisdiction of the court, although the court should always be cautious in declining jurisdiction and only do so where it is clear that it has no jurisdiction.

92. The distinction between an appeal and judicial review is well established. In Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR), the Dande case, the Supreme Court stated as follows on what judicial review is:

74. The Black's Law Dictionary, 9th Edition defines judicial review as:

> 'A court's power to review the actions of other branches or levels of government; esp., the court's power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power. 3. A court's review of a lower courts or an administrative body's factual or legal findings.'

75. Mark Ryan, in his book, 'Unlocking Constitutional and Administrative Law', (3rd ed Routledge/Taylor & Francis Group, 2014) on page 506 defines Judicial Review as:

> 'The constitutionally justified as a legal control on the misuse of public law powers, including both statutory and common law prerogative powers.'

76. We note that judicial review was introduced to Kenya from England in 1956 through sections 8 and 9 of the *Law Reform Act*, cap 26. The jurisdiction to hear and determine judicial review was then vested in the High Court of Kenya. Under this system, the High Court could issue orders of mandamus, prohibition, and certiorari. The grounds for the issuance of such orders were borrowed from common law."

93. Thus, Judicial review strictly speaking and traditionally, 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 and rationality.

94. However, with the elevation of judicial review as a constitutional remedy under Article 23 of *the Constitution*, judicial review was elevated to a substantive and justiciable right under *the Constitution*. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in *the Constitution*.

95. Thus, Article 47 provides that 'every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair., and compliance with constitutional and statutory mandates.

96. Additionally, section 7 of the Fair Administrative Actions Act provides that:(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.

97. The Supreme Court in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) further stated as follows on the considerations for judicial review:

> “ 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 recognisable 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.”

98. 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."

99. 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]"

100. The same Supreme Court quite recently, has clarified in a judgment dated 16th June 2023 in Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR), and set the scope of Judicial review and the circumstances under which the scope may be expanded to include inquiry into the merits of administrative action. In the said case of Dande & 3 others, the Supreme Court while disagreeing with the reasoning of the Court of Appeal and in complete shift from its previous decision in SGS Kenya Limited v Energy Regulatory Commission & 2 others Petition 2 of 2019; [2020] KESC 64 (KLR) case and held inter alia that:

> " With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under *the Constitution* if it limits itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the Jirongo and Praxedes Saisi cases speaks succinctly to this issue. That is also why, the question below is pertinent to the present appeal."

101. Based on the above decision of the Supreme Court, the current position can be summarized as follows: first, is that the entrenchment of judicial review under *the Constitution* of Kenya, 2010 elevated it to a substantive and justiciable right under *the Constitution*. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in *the Constitution*.

102. Secondly, that where a party approaches a court under the provisions of *the Constitution*, then the court ought to carry out a merit review of the case. However, if a party files proceedings under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision per se.

103. The Supreme Court in the Dande case, citing its earlier decision in the SGS case stated as follows, affirming that judicial review is not an appeal.

> " 83And also this Court in SGS Kenya Limited v Energy Regulatory Commission & 2 others SC Petition No 2 of 2019 [2020] eKLR observed as follows:
>
> > [40] The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic 'Administrative Law', is clear enough, and it is unnecessary to belabour the point.'
> >
> > We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board

decision as if it was an appeal, nor granted the order of mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner.'

84. More recently in Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others) (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) Praxedes Saisi case this court stated that:

> 'It is our considered opinion that the framers of *the Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority.'

104. Thus, in as much as the Court may undertake some limited merit review where the judicial review is sought as a relief for constitutional rights violations, it is not an appeal perse.

105. In public procurement matters, section 175 of the *Public Procurement and Asset Disposal Act*, circumscribes the Court's supervisory role to examining questions of illegality, unreasonableness, procedural impropriety and jurisdictional excess, without re-weighing evidence or revisiting discretionary decisions properly made by the Public Procurement Administrative Review Board.

106. That Section provides as follows;

“ 175. Right to judicial review to procurement

1. A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.
2. The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.
3. The High Court shall determine the judicial review application within forty- five days after such application.
4. A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.
5. If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.
6. A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

7. Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

107. The applicant brought the application under Order 53 of the Civil Procedure Rules and sections 8 and 9 of the *Law Reform Act*.

108. My careful examination of the pleadings, affidavits and submissions on record reveals that although the Applicant has framed its case in the language of illegality, irrationality, and procedural impropriety, as well as alleged violation of Article 227 of *the Constitution*, the gravamen of the complaint largely departs from a challenge to the Respondent's decision-making process and instead targets the substantive correctness and legality of the tender document and the underlying procurement framework.

109. In particular, the Applicant undertakes an extensive and clause-by-clause critique of the tender document's terms and evaluation criteria, including the adequacy of the bidding period given and the propriety of specific provisions within the Instructions to Tenderers and the financial evaluation framework.

110. By inviting this Court to pronounce itself on whether those provisions of the tender document are lawful, reasonable, or substantively fair, the Applicant effectively calls upon the Court to re-evaluate matters that fall within the statutory mandate of the Review Board and to substitute the Respondent's judgment with that of this Court.

111. Further, the Applicant's challenge to the computation of timelines, the legality of the Addendum and the earliest lawful date for submission of tenders requires a reconstruction of factual and regulatory compliance issues. Such an exercise goes beyond the supervisory role of judicial review in public procurement matters.

112. Moreover, a Request for Review under Section 167 of the *Public Procurement and Asset Disposal Act* is a decision-centric mechanism. It does not confer jurisdiction upon the Review Board to entertain abstract or collateral challenges to the substantive correctness or legality of the entire tender document or underlying procurement framework. Such challenges fall outside the Board's statutory mandate. The Review Board's jurisdiction is limited to reviewing specific procurement decisions and the legality of actions taken in implementation of the tender documents, not to re-engineer or invalidate the procurement framework itself.

113. That said, this Court is mindful that the Applicant has also raised other distinct judicial review grounds, particularly the contention that the Respondent erred in law and failed to properly exercise its jurisdiction under Section 173 of the *Public Procurement and Asset Disposal Act* by dismissing the Request for Review as premature, as well as the allegation that the impugned decision was reached in a manner inconsistent with the requirements of fair administrative action under Article 47 of *the Constitution* and the *Fair Administrative Action Act*.

114. Accordingly, while this Court declines the invitation to sit as an appellate forum on the substantive merits of the tender document and the procurement process, it shall proceed to interrogate, within the proper confines of judicial review jurisdiction, the genuine process-based grounds raised, namely whether the Respondent acted within its jurisdiction, applied the law correctly and observed the

principles of legality, rationality, and procedural fairness in arriving at the impugned decision. This leads me to the next issue.

> Whether the Respondent acted within its statutory mandate and in accordance with the law, particularly Section 173 of the *Public Procurement and Asset Disposal Act* and Article 47 of *the Constitution*, in dismissing the Applicant's Request for Review as premature.

115. The Applicant argues that the Respondent dismissed its Request for Review as "premature" without addressing the fundamental illegality of the tender document, including: Clauses 39-42 granting subjective discretion in rejecting abnormally low/high tenders, unbalanced tenders, or disqualifying tenderers; Reliance on an undisclosed "Powerline Construction Services Cost Handbook" for financial evaluation; Inadequate time for preparation and submission of bids (initially 20 days); and Violations of Sections 58, 70(3), and 80 of the PPADA, and Articles 10, 47, and 227 of *the Constitution*. The Applicant contends that the Board ignored these issues and allowed the procurement process to proceed unlawfully.

116. The Respondent in its response provides a detailed account of how it dealt with each grievance including its jurisdiction to hear the Request for Review lodged by the Applicant and the Applicant's locus standi, the issue of the Tender validity period, the issue of Clauses 39-42 or the legality of some of the clauses in the Tender document, and the issue of the undisclosed and unpublished cost handbook.

117. The Interested Parties support the Respondent's position, emphasizing that the Applicant had sufficient time and procedural avenues to address any concerns, including making written clarifications and seeking extensions, that Clauses 39-42 and evaluation criteria were standard, and that the Respondent correctly guided the procuring entity to provide sufficient objective information. Further, that the procurement process was ongoing and the Applicant's challenge was premature.

118. I will delve into this issue by analyzing what the Review Board did and whether The Review Board acted within its statutory mandate and in accordance with the law, particularly Section 173 of the *Public Procurement and Asset Disposal Act* and Article 47 of *the Constitution*, in dismissing the Applicant's Request for Review as premature.

119. The Review Board, upon considering each parties' cases, documents, pleadings, written submissions, list and bundle of authorities together with confidential documents submitted to it by the Respondents pursuant to Section 67(3)(e) of the Act as seen from its decision at paragraph 45, identified the following issues for determination:

> Whether the Board has jurisdiction to hear and determine the instant Request for Review;
>
> whether the time provided for submission of tender documents in the subject tender is reasonable and sufficient; and
>
> whether the provisions of the Tender Document in the subject tender are in breach of *the Constitution*, the Act and Regulations 2020 and what orders should the Board grant in the circumstances.

120. On the first issue of whether it had jurisdiction to hear the Request for Review before it, the Review Board from paragraphs 46 to 86 extensively addressed this issue relying on various decisions of the Superior Courts on the issue of jurisdiction together with the relevant sections of the law. It then held that the Applicant herein was a candidate under the meaning of Section 2 of the Act as read with Section 167 (1) of the Act and as such it had locus standi to institute the instant Request for Review before the Board. It also found that it had the jurisdiction to entertain the Request for Review filed by the Applicant.

121. The Review Board addressed the second issue that is whether the time provided for submission of tender documents in the subject tender was reasonable and sufficient as from paragraph 87 of its decision, and observed at paragraphs 87,88 and 89 as herein below:

> " 87. We understand the Applicant's case on this issue to be that according to the Invitation to Tender issued by the Procuring Entity on 29th October 2025, the subject tender was scheduled to close on 20th November 2025 thereby allowing bidders to prepare and submit their tender documents within a limited period of approximately twenty (20) days. The Applicant contends that by all standards of reasonableness, this period is manifestly inadequate for a works contract of substantial value, scope and complexity. Further, that this short period is inconsistent with provisions under Section 58 and 70(3) of the Act as read with Article 227 (1) of *the Constitution* which collectively require that open tendering processes provide sufficient time and information to ensure fairness, equity, transparency, competitiveness, and cost-effectiveness among bidders.
>
> 88. We understand the Respondents' case on this issue to be that the subject tender was initially scheduled to close on 20th November 2025 but following a pre-bid meeting held on 4th November 2025, various concerns were raised which necessitated the Procuring Entity to make various clarifications and amendments leading to extension of the tender submission deadline to 28th November 2025 as communicated vide Addendum No.2 dated 12th November 2025. The Respondents contend that the Applicant is deploying delay tactics in a bid to seek more time to obtain requisite compliance documents sought in the subject tender noting that it has not demonstrated any breach of duty by the Procuring Entity in regard to the procurement proceedings in the subject tender.
>
> 89. On the basis of the above representations, the Board is invited to interrogate whether the time provided for submission of tender documents in the subject tender is reasonable and sufficient."

122. At paragraph 90 of its decision, the Review Board observed that pursuant to ITT 3.6 Section II-Tender Data Sheet (TDS) at page 28 of 146 of the Tender Document, the subject tender was restricted to only local limited companies. It went ahead to state as follows at paragraphs 91 to 97:

> " 91. Section 102 (2) of the Act provides that an accounting officer may engage in procurement by means of restricted tendering in such manner as may be prescribed. Further, Regulation 89(7) of Regulation 2020 states that:
>
> > "The minimum time for preparation of tenders for the purposes of section 102 of the Act shall be a period of seven days."
>
> 92. In essence, the minimum time for preparation of tenders under restricted tendering shall be a period of seven (7) days. In this instance where the subject tender was limited to only local limited liability companies, the minimum period for preparation of tenders was therefore seven (7) days.

93, Turning to the present matter, we note that the subject tender was advertised on 29th October 2025 and was initially set to close on 20th November 2025 which gave bidders a total of 22 days to prepare and submit their bids. A pre-bid meeting was held on Tuesday, 4th November 2025 and from clarifications sought by bidders, the Procuring Entity issued (i) Addendum No. 1 dated 10th November 2025 where it made various clarifications and amendments, and (ii) Addendum No. 2 dated 12th November 2025 extending the tender submission deadline to 28th November 2025.

94. Following the extension of the subject tender's validity period, bidders had a total of 30 days from 29th October 2025 to 28th November 2025 to prepare and submit their tender documents in the subject tender. However, the Applicant filed the instant Request for Review on 12th November 2025 leading to suspension of the procurement proceedings in line with Section 168 of the Act hence time stopped running. As at 12th November 2025, a total of 13 days had been expended and bidders had 17 more days to prepare and submit their tenders before lapse of the tender submission deadline.

95. We note that ITT 8.2 of Section II - Tender Data Sheet (TDS) at page 28 of 146 of the Tender Document provides that an eligible bidder can seek questions in writing and the same are required to reach the Procuring Entity not later than seven (7) days prior to the tender closing date.

96. As such, the Applicant had an avenue of seeking for an extension of the tender submission deadline in the event that it was unable to conclude its preparation and submission of its tender document within the stipulated timelines. However, we have not had sight of any request for extension of the tender submission deadline by the Applicant nor clarification sought from the Procuring Entity on the sufficiency of the stipulated timelines within which bids were required to be submitted. It is therefore disingenuous for a candidate to complain about sufficiency of time before demonstrating that it has done everything in its power to comply with the provided time but has been unable to do so due to certain justifiable reasons, such as insufficiency of information in the procurement process.

97. In view of the foregoing the Board finds that the time provided for submission of tender documents in the subject tender is reasonable and sufficient."

123. From the foregoing, it is evident that the Respondent Review Board did not summarily dismiss the Applicant's Request for Review, but rather, it identified the issues for determination, assumed jurisdiction, and rightly so and substantively addressed the grievances placed before it. The record reveals that the Review Board considered the sufficiency of the bidding period provided by the procuring entity, interpreted and applied the relevant statutory provisions under the *Public Procurement and Asset Disposal Act* and the 2020 Regulations, and rendered a reasoned finding that, the time provided for submission of tenders was reasonable and sufficient within the applicable procurement framework.

124. In reaching that determination, the Review Board evaluated the nature of the tender, the extensions granted through an Addendum, the effect of the statutory suspension under Section 168 of the Act and the regulatory minimum timelines applicable to restricted tendering. It further noted the procedural

avenues available to the Applicant to seek clarifications or extensions and found that no such steps had been taken by the applicant. These considerations reflect an active exercise of statutory mandate on the part of the review Board, rather than an abdication of jurisdiction.

125. The review Board from paragraph 98 determined the next issue which was whether the provisions of the Tender Document in the subject tender were in breach of *the Constitution*, the Act and Regulations 2020. It began by observing what the Applicant's case on this issue was and the response that was given by the Respondent to the issues raised.

126. At paragraph 106 it stated that the issue that was at hand pertained to what the Applicant deemed as subjective, inconsistent and ambiguous tender provisions as provided in the subject Tender document. At paragraphs 107 to 108 the Board went ahead to restate the principles provided under Article 227 of *the Constitution* and what the Courts had held on the said principles. It also observed that the legislation contemplated under Article 227 (2) is the Act, and that Section 3 of the Act underpinned good governance, integrity, transparency and accountability as key pillars in public procurement and asset disposal proceedings.

127. The Review Board at paragraph 110 referred to Section 58 of the Act which according to it required a procuring entity to use standard tender documents which contain sufficient information. It also observed that a procuring entity was mandated to use the standard document issued by the Public Procurement Regulatory Authority in all its procurement and disposal proceedings.

128. The Review Board reproduced section 60 (1) of the Act whose import according to it was that the specific requirements prepared in a tender document relating to goods, works, or services being procures ought to be clear, and give a correct and complete description of what is to be procured so as to allow for fair and open competition among bidders. It also observed at paragraph 114 that section 70 of the Act also requires a procuring entity to use a standard document which contains sufficient information to allow fair competition among tenderers. This according to the Board was the position under Regulation 68 of Regulations 2020.

129. The Review Board at paragraph 116 held that the obligation of preparing tender documents and laying out specifications and applicable evaluation criterion rested upon the accounting officer of a procuring entity ,in consultation with the user department and other relevant departments as provided under the Act and Regulations 2020. That it was therefore the accounting officer's duty to ensure that sufficient information is provided to allow fair competition among those who may wish to submit tenders.

130. The Review Board also referred to Section 80 which it stated is instructive on how evaluations and comparison of tenders ought to be conducted by procuring entities. At paragraph 120, it addressed the issue of the published powerline construction cost handbook referred to under Clause 3.4 of Part III-Financial Examination Criteria of Section III-Evaluation and Qualification Criteria at Page 37 of 146 of the Tender documents, reproducing what was provided therein verbatim. It observed that the Applicant had urged that the Procuring Entity was placing reliance on an undisclosed and unpublished benchmark, and an inaccessible handbook to which the Respondent had responded that the same was published and available on its website.

131. The Review Board at paragraph 122 also went ahead to consider ITT 39 and 40 of Section I which provided for abnormally low and abnormally high tenders and reproduce the contents of the said clauses verbatim and at paragraphs 123 to 124 made the following observations;

> " 123. From the above, the Board notes that where a bidder presents an abnormally low tender, the Procuring Entity shall seek written clarification from the said bidder including a detailed price analysis of its tender price in relation to

the subject matter of the contract, scope, proposed methodology, schedule, allocation of risks and responsibilities and any other requirements of the Tender Document and such a tender shall only be rejected in case the tenderer fails to demonstrate its capability to perform the contract for the offered tender price."

124. Further, where a bidder presents an abnormally high tender, the Procuring Entity shall conduct a survey of the market prices, checking if the estimated cost of the contract is correct and review the Tender Documents to check if the specifications, scope of work and conditions of contract are contributory to the abnormally high tenders. It may also seek clarification from the bidder on the reason for the high tender price."

132. At paragraphs 125 with regard to tender evaluated at the lowest evaluated price, the Review Board also considered Clause 41 of Section I: Instructions to Tenderers at page 24 of 125 and reproduced the contents of the said clause. It also reproduced and considered Clause 42 on the qualification of the eligible tenderer selected as having submitted the lowest evaluated and substantially responsive tender. The Board at paragraphs 127 to 133 observed as follows;

" 127. The Board has had the benefit of perusing the Standard Tender Document for Procurement of Works (Roads, Water Bridges etc.) issued by the Public Procurement Regulatory Authority on 22nd April 2021 and updated on 21st April 2022 and notes that the impugned Clause 39, 40, 41, and 42 of Section I: Instructions to Tenderers at page 23 of 146 to 24 of 126 of the Tender Document have been lifted verbatim in the subject tender's Tender Document save for (i) change of reference of the procuring entity to read Kenya Power, and (ii) increase of the total amount of the Performance Security to 30% of the Contract Price as compared to the 10% of the Contract Price set out in the Standard Tender Document.

128. Notably, Clause 7 of the Preface of the Standard Tender Document provides that:

> "This document will be customized to suit the needs of the Procuring Entity. No changes should be made to Instructions to Tenderers (ITT) and to the General Conditions of Contract (GCC). These two sections will be modified to suit the Procuring Entity's requirement in the Tender Data Sheets (TDS) and in the Special Conditions of Contract (SCC), respectively. The Cover Page of this document, the Preface, Guidelines or notes to users and the Invitation to Tender should not be part of the tender Document to be issued to Tenderers. Refer to Appendix to the Preface for more details."

129. From the above, it is clear that while the Standard Tender Document is to be customized to suit the needs of the Procuring Entity, no changes ought to be made to the Instructions to Tenderers (ITT) and the General Conditions of Contract (GCC) as the two sections are modified under the Tender Data Sheet (TDS) to suit the requirements of the Procuring Entity.

130. In view of the above, the Board draws the attention of the Accounting Officer of the Procuring Entity to their responsibility to provide sufficient information in the subject tender, that is objective and quantifiable for the Evaluation Committee to be able to evaluate bids submitted in the subject tender as envisioned under *the Constitution* and the Act noting that should a criterion emerge to be ambiguous in the course of evaluation, then the doctrine of contra Proferentem in interpretation of Contracts will be applicable. The doctrine stipulates that in the event of an ambiguity, a clause shall be interpreted against the party who puts such clause forward and usually relies on such clause. The doctrine has been defined by the Black's Law Dictionary,9th Edition, at page 377 as:

> "The doctrine that, in interpreting documents, ambiguities are to be construed unfavorably to the drafter."

131. The prerequisite for the applicability of the doctrine of Contra of Proferentem is the prevalence of ambiguity as was observed in the case of Horne Coupar v Velletta & Company 2010 BCSC 483 where the Supreme Court of British Columbia held that "ambiguity in a contract is the precondition to apply this doctrine though where the ambiguity is established, the rule is applied directly."

132. Similarly, in the Civil Appeal No. 1942 of 2009 Bank of India & Another V K. Mohandas & Others, 2009 (5) SCC 313 where a question arose with respect to the interpretation of some provisions of the voluntary retirement scheme of 2000 of the Appellant, Justice R.M Lodha opined that "it was the Appellant who ultimately formulated the terms in the Contractual Scheme which stated, "the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulation, 1995," therefore they bear the risk of lack of clarity, if any."

133. As such, the Procuring Entity's Accounting Officer will shoulder the responsibility of addressing any contest that may be raised on applicability of an extraneous or ambiguous clause in the subject tender before the Board and it may be prudent to arrest such issues by way of clarifications before the subject tender submission deadline lapses. In the circumstances, and in view of the foregoing observations, it would be premature to determine whether the provisions of the Tender Document in the subject tender are in breach of *the Constitution*, the Act and Regulations 2020 noting that the tender submission deadline is yet to lapse and the Procuring Entity has adequate time to address any clarifications or issues that may be raised by prospective bidders with regard to the subject tender."

133. The Review Board at paragraphs 134 to 137 stated what orders it should issue as follows:

" 134. The Board has established that it has jurisdiction to hear and determine the instant Request for Review having found that the Respondents' Preliminary Objection lacks merit

> 135. The Board has found that the time provided for submission of tender documents in the subject tender is reasonable and sufficient noting that bidders have 17 more days to prepare and submit their tenders before lapse of the tender submission deadline
>
> 136. The Board has further found that it would be premature to determine whether the provisions of the Tender Document in the subject tender are in breach of *the Constitution*, the Act and Regulations 2020 noting that the tender submission deadline is yet to lapse and the Procuring Entity has adequate time to address any clarifications or issues that may be raised by prospective bidders with regard to the subject tender.
>
> 137. The upshot of our findings is that the instant Request for Review fails."

134. Having carefully considered the pleadings, the record of proceedings before the Respondent, and the submissions filed by all the parties, as well as the analysis and findings by the Review Board, this Court is not persuaded that the Applicant has demonstrated any illegality, irrationality or procedural impropriety or that the review Board acted ultra vires its mandate.

135. The impugned decision discloses the Review Board's structured engagement with the issues raised, a proper assumption and exercise of jurisdiction and a reasoned application of the relevant provisions of the *Public Procurement and Asset Disposal Act* and the 2020 Regulations.

136. The Review Board identified the material questions for determination, considered the parties' respective positions and articulated the statutory and regulatory framework governing the procurement process, including the timelines applicable to the subject tender. Its conclusions were supported by intelligible reasons and cannot be said to be so unreasonable or perverse as to fall outside the range of lawful responses open to a public decision-maker.

137. Further, the record reflects that the Applicant was accorded notice of the proceedings, an opportunity to be heard and access to the material relied upon, thereby satisfying the requirements of Article 47 of *the Constitution* and the *Fair Administrative Action Act*. There is no evidence that the Review Board acted in excess of jurisdiction, took into account irrelevant considerations or failed to consider relevant ones.

138. In the premises, this Court finds that the Applicant has not discharged the burden of establishing grounds warranting the intervention of this Court by way of judicial review. I find that the Review Board's decision was arrived at lawfully, rationally and in a procedurally fair manner.

Whether the orders sought by the Applicant are merited

139. The Applicant seeks orders to quash the Respondent's decision, annul the tender, and restrain the Interested Parties from continuing the procurement process. It argues that these remedies are necessary due to the alleged illegality, unreasonableness, and procedural impropriety in the tender document.

140. The Respondent contends that the Applicant has not established a legal or procedural basis to justify the grant of the orders. It maintains that the Request for Review was dismissed lawfully, and the tender process was ongoing and subject to further clarifications, making pre-submission annulment disproportionate. The Respondent submits that the remedies are discretionary and are not warranted in the instant case.

141. The Interested Parties assert that the Applicant's application is frivolous and an abuse of process, as the tender is critical to public service delivery. They argue that the orders sought are not justified, given the procurement process was procedurally sound and the Applicant had avenues to seek clarifications or extensions. That granting the orders would disrupt essential services, causing prejudice to the public interest.

142. This Court has considered all the above arguments by the respective parties and it finds that the orders sought are not merited. This is because, from the material placed on record, the Respondent acted within its statutory mandate and the Applicant's grievances were addressed with reasons and procedural safeguards. Quashing the Review Board's decision or restraining the Interested Parties at this stage would be disproportionate and unnecessary, as the process has in-built mechanisms including clarifications and extension of time to address any issues arising.

143. Accordingly, the Notice of Motion dated 16th December 2025 found to be devoid of merit and is hereby dismissed.

144. On costs, I order that each party shall bear its own costs of these proceedings.

145. This file is closed.

146. It is so ordered.

DATED, SIGNED & DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY 2026

R.E ABURILI

JUDGE