REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR. NO. E012 of 2026

SINTMOND GROUP LIMITED..... APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... 1ST RESPONDENT

THE ACCOUNTING OFFICER, KENYA ELECTRICITY GENERATING COMPANY PLC ..... 2ND RESPONDENT

KENYA ELECTRICITY GENERATING COMPANY PLC..... 3RD RESPONDENT

JV OF MUNJA TRADING LIMITED AND MARWIL ENERGY HOLDING AS ..... INTERESTED PARTY

JUDGMENT

1. The Application that comes up for determination is the Originating Motion dated 16th January 2026 wherein the Applicant seeks the following orders;

1) **Spent**

2) **THAT** this Honorable Court be pleased to issue an order of **CERTIORARI,** to remove into the High Court and quash and/or set aside the Decision of the Public Procurement Administrative Review Board (the 1st Respondent) dated 9thJanuary 2026 ("the impugned decision") issued upon re-

hearing in Public Procurement Administrative Review Board Application No. 97 of 2025, Sintmond Group Limited vs The Accounting Officer Kenya Electricity Generating Company PLC, Kenya Electricity Generating Company PLC and JV of Munja Trading Limited & Marwil Energy Holding AS, in respect of Tender No. KGN- SALE005-2025 for Sale of Certified Emissions Reductions (Re-Tender) ("the Tender").

3) **THAT** this Honorable Court be pleased to issue an order of **CERTIORARI**, to remove into the High Court and quash and/or set aside any award decision, Notification of Intention to Award Letter, Letter of Regret or any other award decision communication in respect to the Tender issued pursuant to the impugned decision of 1st Respondent in violation of Section 175 of the Public Procurement and Asset Disposal Act (hereinafter, "the Act").

4) **THAT** this Honorable Court be pleased to issue an order of **PROHIBITION,** directed at the 2nd and 3rd Respondents, prohibiting them from implementing, acting upon or giving effect to the said Decision of the 1st Respondent dated 9thJanuary 2026.

5) **THAT** this Honourable Court be pleased to issue an order of **MANDAMUS,** compelling the 1st Respondent to consider the full findings of the Judgment of the High Court, Hon. Justice J. Chigiti (SC) in Judicial Review No. E351 of 2025 ("the Judgment") in the re-hearing and provide clear directions to the 3rd Respondent on the re-evaluation of the Applicant at

the due diligence stage in line with the provisions of the Tender Document and keeping in mind the Board's findings on MR 16 in PPARB 90 of 2025.

6) In the alternative, and without prejudice to the foregoing, an order of **MANDAMUS** do issue compelling the 2nd and 3rd Respondent to conduct due diligence based on the Exparte Applicant's bid, in full observance 1st Respondent's findings in PPARB Application No. 90 of 2025 including but not limited to the disjunctive nature Mandatory Requirement 16 of the Tender, disregarding all extraneous issues and issues pending in litigation as covered in the Regret Letter of 29thSeptember 2025 and proceed to issue a Letter of Notification of Award in accordance to Sections 86 and 87 of the Act.

7) **THAT** in view of the protracted litigation in this matter and the unwillingness of the 1st, 2nd and 3rd Respondents to comply with the law and obey court orders and treat the Applicant fairly in these procurement proceedings, this Honourable Court be pleased to issue appropriate directions and further orders as it may deem fit to bring an end to the endless litigation while ensuring the Applicant is treated fairly.

8) **THAT** pending the hearing and determination of the substantive Originating Motion, that this Honorable Court be pleased to issue An Interim Order For Stay, to stay the Execution and/or Implementation of the Decision of the 1stRespondent dated 9th January 2026 in rehearing of Public Procurement Administrative Review Board Application No.

97 of 2025, Sintmond Group Limited vs The Accounting Officer Kenya Electricity Generating Company PLC, Kenya Electricity Generating Company PLC and JV of Munja Trading Limited & Marwil Energy Holding AS, in respect of the Tender.

9) **THAT** the Costs of these proceedings be awarded to the Ex-Parte Applicant.

10) Such other, further, incidental and/or alternative relief(s) as this Honourable Court may deem just and expedient.

The Applicant's Case;

2. It is the Applicant's case that the issues in these proceedings are based on the tender issued by the 2nd and 3rd Respondents inviting bids in respect of Tender No. KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (CERs) (Re-Tender), relating to the sale of CERS (commonly referred to as carbon credits).

3. Following an initial disqualification of the Applicant through a Regret Letter dated 1st August 2025, the Applicant filed PPARB Application No. 90 of 2025 before the Public Procurement Administrative Review Board, "the 1st Respondent" or "the Board", which culminated in a Ruling dated 28th August 2025 in the Applicant's favour, wherein the 1stRespondent made conclusive findings on the interpretation and Application of Mandatory Requirement No. 16 (MR-16).

4. It is the Applicant's case that in the said Ruling the Board expressly held that the use of the words **"and/or"** under MR-16 rendered the

requirement disjunctive, such that a bidder could comply by providing either client references (the first part of MR 16) or evidence of previous CER/VER transactions (the second part of MR 16), or both.

5. The Board further held that the Applicant's bid, which relied on evidence of previous transactions, fully satisfied MR-16, the second part, and that any insistence on client references constituted an extraneous and unlawful evaluation criterion.

6. The Board directed a re-evaluation strictly in accordance with the Tender Document, the law, and its findings, which findings were final and binding.

7. Following the re-evaluation of bids, the 3rd Respondent issued the Applicant with a second Regret Letter dated 29th September 2025 prompting the Applicant to file a second Request for Review - PPARB Application No. 97 of 2025 which culminated in a decision on 27th October 2925.

8. Being aggrieved by the findings of the Board, the Applicant moved the High Court in Judicial Review Application No. E351 of 2025.

9. The Applicant relies on all the documents and the pleadings filed by the Applicant in HCJR E351 of 2025.

10. By a Judgment delivered on 19th December 2025, the Honourable Court **(Hon. Justice J. Chigiti, SC)** quashed the Board's decision and issued orders of Certiorari and Prohibition, finding amongst other findings, that:

a) The Board had misapplied and ignored its own binding findings in the Ruling of 28th August 2025;

b) The re-evaluation was not conducted in line with those findings; and

c) The Board had acted illegally in permitting re-litigation of settled issues.

11. The Court granted an order of certiorari to quash and set aside the entire decision of the Board and expressly remitted the matter back to the Board for re-hearing, to be conducted in compliance with the Judgment and within fourteen (14) days.

12. The 1st Respondent issued directions requesting the parties to file Submissions on the rehearing.

13. The hearing culminated in the impugned Ruling/Decision dated 9th January 2026, which decision is the subject of the present proceedings.

14. The 1st Respondent's impugned Ruling directed the 2nd Respondent to respond to the Exparte Applicant's letter dated 19th September 2025 within seven (7) days from the date of the Ruling.

15. It is its case that in directing so, the 1st Respondent acted illegally, ultra vires, and in direct breach of section 175 of the Public Procurement and Asset Disposal Act (hereinafter, "the Act") since Section 175 of the Act guarantees any person aggrieved by a decision of the 1stRespondent the right to seek judicial review before this

Honourable Court within fourteen (14) days from the date of the decision.

16. The fourteen (14) day period is intended to operate as a mandatory statutory standstill period during which no procurement activity or implementation steps may lawfully be undertaken, thereby preserving the substratum of the dispute and enabling an aggrieved party to consider and exercise the right of judicial review and that:

17. By directing the 2nd Respondent to take substantive action within seven (7) days of the Ruling, the 1st Respondent unlawfully undermined and effectively curtailed the Applicant's statutory right to judicial review, and impermissibly compelled implementation of its decision within the protected standstill period.

18. By directing that after responding to the Applicant's letter within 7 days the Accounting officer proceed to oversee the tender process and ensure the same is concluded in a logical manner, the Board further undermined the Applicant's right to an appeal as it meant the 2nd Respondent could proceed to issue a notification of award and proceed with contract signing with the Interested Party during this 14 days standstill period, in breach of the provisions of Section 175 of the Act and the Applicant's right of appeal.

19. It is its case that in the impugned decision, the Board erroneously and illegally limited the scope of the rehearing to what it termed as "response timelines", and declined to reconsider or apply the binding findings of both:

a. Its own Ruling dated 28th August 2025; and

b. The High Court Judgment of 19th December 2025.

20. By failing to address the issue of the Regret Letter dated 29th September 2025 issued by the 2nd and 3rd Respondent which found that the Applicant had failed to comply with MR 16 at the due diligence stage, the Board thereby re-opened, re-interpreted, and effectively sat on appeal over issues that had already been conclusively determined, including:

a. The disjunctive interpretation of MR-16;

b. The illegality of introducing client-reference requirements at due diligence; and

c. The prohibition against extraneous evaluation criteria.

21. The Board expressly declined to interrogate whether the re-evaluation complied with the findings of the High Court, thereby misconstruing and unduly narrowing the Judgment.

22. The Board's conclusion that the re-hearing was limited to one issue is irrational, unsupported by the Judgment as a whole, and one that no reasonable tribunal properly directing itself could reach.

23. The Board's finding at paragraph 90 of the impugned Decision that "*the Board perused the High Court Judgment and observed that its decision in PPARB Application No. 97 of 2025 was not altered*" is irrational and absurd, noting that the High Court identified both procedural and substantive defects in the decision and proceeded to issue an Order of Certiorari to quash and set aside the decision in its entirety.

24. The Board proceeds to absurdly state at that Paragraph 90 of the impuged Ruling that "the challenge was procedural, relating on legitimate right to be heard, and not substantive" which is totally inaccurate and out of context as substantive matters were addressed by the High Court, for instance under paragraph 333 to 337 of the Judgment where the Honourable Court found that 1st Respondent illegally failed to appreciate and give effect to its binding Ruling dated 28th August 2025 in PPARB No. 90 of 2025.

25. This unreasonableness and irrationality continue in the next paragraph 91 of the Impugned Ruling, where the Board stated that the High Court did not nullify all the findings of the Board and that "Rather, the Court faulted the Board on specific grounds…" which according to the Board were:

a. The failure to adequately interrogate issues of procedural fairness during the post qualification due diligence stage; and

b. Misapplication of the Board's earlier binding interpretation of MR 16.

26. It is its case that after its findings in paragraph 91 where it identified two issues where it was at fault, the Board at paragraph 94 finds and holds that the Board's jurisdiction in the rehearing is *"..limited to the issue of procedural fairness during the post qualification due diligence stage, with regard to legitimate expectation of the right to be heard as regarding the communication contained in the letter dated 19th September 2025."*

27. According to the Applicant, The Board blatantly contradicts itself in that:

a) The Board initially states that the challenge was procedural and not substantive then goes on to find that indeed the Honourable Court had found that the challenge was both procedural and substantive.

b) Misapplication of MR 16 was at the centre of the hearing before the Board and especially the impact of the Regret Letter which was mainly based on extraneous issues and alleged non-performance based on issues pending in litigation at the High Court between the parties.

c) The fact that the High Court quashed the impugned Decision means that the Board cannot now sit to analyse the decision afresh and on its own arrive at the finding that the High Court did not quash the entire decision- if that was the finding of the High Court, the judgment would have articulated as much.

28. The impugned Ruling is further tainted by vague, imprecise, and internally inconsistent findings whose effect is undermining the clarity, authority, and enforceability of the Judgment of this Honourable Court Judgment, which is a further indication of irrationality and illegality.

29. The 1st Respondent decision couched in ambiguous and qualified terms, is incapable of providing lawful guidance to the parties, and which in substance defeats the purpose of the remittal ordered by the Court.

30. The findings of the Board have resulted in judicial embarrassment and frustration, by placing this Honourable Court in the untenable position of having its clear and binding Judgment diluted, re-litigated, or rendered ineffective through administrative ambiguity thereby undermining the rule of law, eroding certainty in public procurement processes, and constitutes an abuse of statutory power warranting the intervention of this Court, actions which point further to the illegality, irrationality and unreasonableness of the impugned Decision.

31. The Board's refusal to engage with issues expressly addressed by the High Court in its Judgment as constituting an illegality by the Board amounts to an abdication of the jurisdiction remitted to it and renders the rehearing legally defective.

32. The Board's failure to address the issue of MR 16, which it noted was an issue in paragraph 97 of its Ruling, by simply indicating it shall not dwell on this issue since that the court found that its interpretation as given in Application No. 90 of 2025 was correct, smirks of mischief, irrationality and a failure to consider material considerations more so where it relates to the content of the Regret Letter which is clearly based on extraneous issues and grounds for disqualification based on matters currently pending before the High Court.

33. The Board failed to address and give effect to the findings of the High Court in paragraphs 334 to 336 of the Judgement, which led to leading to a finding that the Board misapplied itself in purporting to distinguish its earlier findings in its Ruling in PPARB 90 of 2025.

34. The Applicant argues that the decision of the Board cannot stand since as demonstrated in the motion, it is tainted with:

a. Abuse of Jurisdiction, Error of Law & Re-litigation

b. Illegality owing to a failure to Comply with Binding Findings of the High Court and internal contradictions/lack of internal consistency;

c. Irrationality and Unreasonableness; and

d. Failure to take into account relevant considerations.

35. The Applicant stands to suffer grave prejudice arising from the continued implementation of a decision rendered in excess of jurisdiction, in error of law, and in direct defiance of a binding High Court Judgment.

36. It is the Applicant's case that in view of the protracted litigation in this matter and the unwillingness of the 1st, 2nd and 3rdRespondents to comply with the law and treat the Applicant fairly in these procurement proceedings, this Honourable Court should be guided by the approach taken by the Court of Appeal in various cases including in **Civil Appeal E510 of 2022 between the Chief Executive Officer Public Service Superannuation Scheme and CPF Financial Services, PPARB and Another** to issue seemingly drastic but appropriate directions and further orders as it may deem fit to bring an end to the endless litigation while ensuring the Applicant is treated fairly.

37. The conduct and impugned Decision of the 1st Respondent;

a. Further violated Articles 10, 50(1), and 227 of the Constitution by undermining the rule of law, denying the Applicant a fair and meaningful hearing, and sanctioning an unfair, opaque, and unlawful procurement process through permitting the continued reliance on extraneous, undisclosed, and contested considerations—particularly alleged nonperformance and re-litigation of compliance with Mandatory Requirement No. 16, which had been conclusively determined.

b. Further to the above constitutional violations, the 1st Respondent failed to uphold the constitutional imperatives of transparency, accountability, fairness, and competitiveness in public procurement.

c. The selective engagement by the Board with binding judicial findings, coupled with vague and imprecise directions, could embolden the 2nd and 3rd Respondents to persist in conduct already quashed and prohibited by the High Court, thereby frustrating constitutional guarantees and eroding public confidence in the procurement and dispute resolution process.

38. The impugned Decision violates Article 47 of the Constitution in that:

a. The Applicant was denied a lawful, reasonable, procedurally fair, and substantively fair re-hearing as directed by the High Court.

b. The 1st Respondent constrained the rehearing through an erroneous and self-imposed limitation of scope, selectively ignored binding findings of both its own earlier Ruling and the

High Court Judgment, and failed to consider material and relevant considerations expressly remitted for determination, including the legality of the Regret Letter dated 29th September 2025 and the misapplication of Mandatory Requirement No. 16 at the due diligence stage.

c. The resulting decision was therefore arbitrary, internally inconsistent, and incapable of providing clear or lawful guidance, thereby falling below the constitutional threshold of reasonableness, lawfulness, and procedural fairness guaranteed under Article 47 and the Fair Administrative Action Act.

39. Section 175 of the Procurement Act empowers this Honourable Court to entertain this review Application.

40. The Applicant filed a Further affidavit wherein it argues that The Replying Affidavits on record from the 1st, 2nd and 3rdRespondent and the Interested Party are mere denials and evasive averments which neither controvert the factual foundation of the Application nor lawfully justify the impugned actions and decisions.

41. Such responses fall far short of the threshold required to displace the Applicant's case and underscore the absence of a bona fide answer to the serious constitutional and statutory violations complained of by the Applicant.

42. In response to paragraph 6 of the 1st Respondent's Replying Affidavit, it argues that the Courts have consistently held that a mere catalogue of factors that were or were not considered- as it has purported to do-

is not enough to vindicate it on the grounds of irrationality and illegality of the impugned decision.

43. It is case in response to paragraphs 7, 8, and 9 of the 1st Respondent's Replying Affidavit, the Applicant reiterates that:

a. This Court in its Judgment granted an order of certiorari to quash and set aside the entire decision of the 1st Respondent in PPARB 97 of 2025 and expressly remitted the matter back to the 1st Respondent for re-hearing, to be conducted in compliance with the Judgment and within fourteen (14) days.

b. It is therefore simply absurd, illogical and a mockery of these proceedings for the 1st Respondent to aver, at paragraphs 8 and 9 of its Replying Affidavit, that it observed that the High Court, in its Judgment, had not altered its original decision in PPARB 97 of 2025.

c. Contrary to the 1st Respondent's assertions, by failing and/or declining to interrogate the legality and effect of the Regret Letter dated 29th September 2025 in light of the binding findings of this Honourable Court, the 1st Respondent did not merely err, but acted in excess of its jurisdiction by re-opening, re-interpreting, and effectively sitting on appeal over issues that had already been conclusively determined by the High Court and expressly remitted to it for re-hearing and Application.

d. In so doing, as admitted in its Replying Affidavit, the 1st Respondent misdirected itself on the scope of the remittal, substituted its own interpretation for that of the Superior Court,

and thereby rendered a decision that is illegal, irrational and incapable of standing in law.

44. In responding to paragraphs 11, 12 and 13 of the 1st Respondent's Replying Affidavit, the Applicant reiterates that:

a. The same consists of a mere listing of the items considered without demonstrating how such considerations were relevant, determinative, or sufficient to lawfully justify the limitation of the re-hearing to the single procedural issue of the failure by the 2nd and 3rd Respondents to respond to the Applicant's clarification letter.

b. The Applicant reiterates that this approach fails to address the central complaint that the 1st Respondent ignored material, obligatory/mandatory relevant considerations, including the finding on illegality by the High Court in paragraphs 333 to 337 and effect of the Regret Letter dated 29th September 2025, and the misapplication of MR 16, while elevating peripheral matters.

c. In the circumstances, the Applicant maintains that the impugned decision was rendered without proper regard to relevant considerations and was rendered ultra vires to the express findings and judicial authority of this Honourable Court making it irrational and unlawful.

d. Further, the fixation on a single procedural aspect, to the exclusion of material and determinative issues, rendered the re-hearing irrational as it could not logically achieve a lawful or

meaningful resolution to the dispute remitted to the 1st Respondent for determination.

45. The Applicant reverts that it has indeed demonstrated, both in the Originating Motion and the Supporting Affidavit, that the impugned decision is tainted with illegality, irrationality and breaches of the Constitution including but not limited to, the 1st Respondent's failure to comply with binding findings of this Honourable Court, its unlawful limitation of the scope of the re-hearing, and its disregard of material and mandatory relevant considerations.

46. As such, the Applicant maintains that the 1st Respondent has failed to discharge its obligation to demonstrate that the impugned decision was arrived at lawfully, rationally and within its jurisdiction and mandate.

47. On the Letter dated 14th January 2026 the Applicant argues that;

a. This letter which was issued in purported compliance with the directions of the 1st Respondent was issued contrary to the provisions of Section 175 of the Public Procurement and Asset Disposal Act (hereinafter, "the Act") and did not cure the illegality of the 1st Respondents impugned decision. The same was purely a formal act of compliance, devoid of any remedial or legal effect on the defects complained of, further having come too late in the day to have any meaningful or practical effect to the Applicant.

b. Noting that the 1st Respondent's decision that authorised the issuing of the letter contrary to the provisions of Section 175 of

the Act is now under a challenge and in view of the interim orders issued by the court on 20th January 2026, the letter has now been overtaken by events and cannot be a matter of decision before the court in these proceedings.

48. The fourteen (14) day standstill period provided for under Section 175 of the Act is a mandatory and integral safeguard designed to preserve the integrity of the procurement process by affording aggrieved bidders a meaningful opportunity to seek review of the 1st Respondent's decision before the High Court.

a. The assertions by the 2nd and 3rd Respondents that the seven (7) days issued by the 1st Respondent to respond to the Applicant's clarification letter were reasonable are legally untenable since opinions based on reasonableness cannot be used to defeat express statutory provisions on timelines in the Act which courts have held are cast in stone.

b. The prolonged litigation and delay complained of by the Respondents is a direct consequence of their own failure, together with the 1st Respondent, to comply with the Act, the Tender Document and the binding findings of this Honourable Court, rather than any conduct attributable to the Applicant.

c. It is therefore disingenuous for the Respondents to allege prejudice arising from the delay when such delay is self-inflicted and cannot lawfully be invoked to defeat or limit the Applicant's statutory right to access the review mechanism

within the ample timelines provided under Section 167 and 175 of the Act.

d. In the circumstances, the 1st Respondent acted ultra vires and in disregard of the purpose and spirit of Section 175 of the Act by purporting to curtail or dilute the Applicant's right of review without any lawful, reasoned, or justifiable basis in its impugned decision.

49. Contrary to the assertions therein, the 1st Respondent neither demonstrated nor lawfully justified its decision to restrict the scope of the re-hearing to the procedural issue of a response letter, while excluding material and determinative issues expressly remitted by this Honourable Court, including those on illegality of its decision in PPARB 97 of 2025.

50. It is its case that the bare assertion that all issues were considered, without showing how mandatory relevant considerations were applied or how the scope of the re-hearing was lawfully defined, does not cure the defect complained of.

51. The rehearing was conducted on an improperly limited basis, in excess of jurisdiction, and in disregard of the binding Judgment of this Honourable Court.

52. In response to paragraph 28 of the 2nd and 3rd Respondents' Replying Affidavit, the Applicant states that:

a. The allegation therein is vague, unsupported, and does not identify the specific issues alleged to have been omitted so as to warrant a meaningful response.

b. In any event, the matters raised in these proceedings are peculiar to and arise from the impugned decision itself, including the manner in which the 1st Respondent confined the scope of the re-hearing, interpreted the remittal, and exercised its jurisdiction after delivery of its Ruling.

c. Such issues could not, in law or fact, have been raised before the 1st Respondent, as they only crystallized upon the issuance of the impugned decision, and the Applicant could not have reasonably anticipated or addressed errors that had not yet occurred.

d. The Applicant therefore maintains that the issues raised are properly before this Honourable Court in the exercise of its supervisory jurisdiction.

53. In response to paragraphs 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38 of the 2nd and 3rd Respondents' Replying Affidavit, the Applicant relies on and reiterates its averments in paragraphs 7 to 15 herein, and in the Applicant's Originating Motion and Supporting Affidavit. The Applicant maintains that the said paragraphs do not introduce any new matters capable of displacing the grounds of illegality, irrationality, unreasonableness and breach of the Constitution pleaded, and merely restate positions already addressed and responded to herein.

54. It is its case that the Interested Party has gone to great lengths to recount its own version of events and to justify the procurement outcome on factual and merit-based grounds, which matters are extraneous to and fall outside the scope of these judicial review proceedings.

55. By delving into alleged compliance at the due diligence stage, the Applicant's purported lack of capacity, and the substantive validity of the Applicant's bid, the Interested Party is in effect inviting this Honourable Court to descend into a re-evaluation of bids and merits, contrary to the issues raised in these Judicial Review proceedings.

56. The Interested Party's assertions do not engage with, and cannot cure, the Applicant's core complaint, namely the illegality, irrationality, and procedural impropriety attending the 1st Respondent's impugned decision, and amounts to a diversion from the real issues properly falling for determination before this Honourable Court.

57. In delving into issues pertaining to its alleged compliance at due diligence, the Applicant's alleged lack of capacity- which in any event the Applicant has proved capacity within the terms of the tender- or the validity of the Regret Letter sent to the Applicant, the Interested Party is in essence inviting the Applicant and this Honourable Court to go on a wild goose chase, and deviate the attention of this Honourable Court from the illegality and irrationality of the 1st Respondent's impugned decision.

58. The Interested Party cannot, through a Replying Affidavit, introduce or advance issues that were neither raised nor contested by the substantive parties before the 1st Respondent, nor contemplated within the scope of the impugned decision or the remittal ordered by this Honourable Court. To permit such an expansion would be to allow the Interested Party to redefine the dispute and impermissibly widen the issues for determination, contrary to its limited and supportive role in these proceedings.

59. In further response to paragraphs 9 (p) to (q) of the Interested Party's Affidavit, the Applicant maintains the request for additional documents not contained in the Tender Document at due diligence constituted an illegality and that is why the Applicant sought clarification and subsequently applied for review of the 2nd and 3rd Respondents Regret Letter and the 1st Respondents decision in No. 97 of 2025. The High Court decision which upheld the Board's findings in PPARB 90 of 2025 that the Applicant had complied with MR 16 and found procedural impropriety and illegality in the Board's decision in PPARB No. 97 of 2025 supports the Applicant's position.

60. In responding to allegations by the Interested Party the Applicant denies that the present Application has gone beyond the scope of matters considered at the re-hearing, and states that the allegation is internally inconsistent and self-defeating.

61. The core of the Applicant's case is precisely that the 1st Respondent unlawfully failed and/or declined to consider material and mandatory relevant considerations at the re-hearing and it therefore cannot lie in the mouth of the Interested Party to contend that the Applicant is

precluded from challenging what was omitted, ignored, or excluded from consideration.

62. In the absence of any particularization of the alleged overreach or identification of any specific issue said to have been improperly raised, the Applicant maintains that;

a. The Application before this Honourable Court properly invokes its supervisory and constitutional jurisdiction.

b. The Application is directed not merely at reviewing the procedural regularity, but at the substantive legality, rationality, and reasonableness of the impugned decision, and seeks the Court's intervention to vindicate the supremacy of the Constitution, in particular the breach of Article 227 and other attendant constitutional guarantees.

c. The matters raised go to the heart of constitutional accountability in public decision-making and fall squarely within the remit of this Honourable Court to interrogate and remedy violations of the Constitution.

63. In response to paragraphs 12 to 18 of the Interested Party's Replying Affidavit, the Applicant reiterates and relies on the averments contained in paragraphs 7 to 19 herein, together with the Applicant's Originating Motion and Supporting Affidavit.

64. The Applicant maintains that the said paragraphs merely assert that the 1st Respondent acted lawfully, without demonstrating how the impugned decision satisfied the applicable legal standards, engaged

with the specific defects complained of, or addressed the failure to consider material and mandatory relevant considerations.

The 1st Respondents Case;

65. It is its case that the Applicant's Originating Motion 16th January 2026 (the challenging the 1st Respondent's Decision dated 9th January 2026 arising from the Rehearing of Request for Review No. 97 of 2025 pursuant to Orders of the High Court at Nairobi issued on 19th December 2025 in HCJR/E351/2025 is devoid of merit and unsustainable in law.

66. On 19th December 2025, the High Court delivered a judgment in Milimani HCJR/E351/2025, Sintmond Group Limited v Public Procurement Administrative Review Board & Others in the following terms:

a) An order of CERTIORARI, to remove into the High Court and quash and/or set aside the Decision of the Public Procurement Administrative Review Board (the 1st Respondent) dated 27th October 2025 in Public Procurement Administrative Review Board Application No. 97 of 2025, Sintmond Group Limited us The Accounting Officer Kenya Electricity Generating Company PLC, Kenya Electricity Generating Company PLC and JV of Munja Trading Limited & Marwil Energy Holding AS, in respect of Tender No. KGN- SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) is hereby issued.

b) An order of PROHIBITION, directed at the 2nd and 3rd Respondents, prohibiting them from implementing the Decision of

the 1st Respondent dated 27th October 2025 in Public Procurement Administrative Review Board Application No. 85 of 2025, in Public Procurement Administrative Review Board Application No. 97 of 2025, Sintmond Group Limited us The Accounting Officer Kenya Electricity Generating Company PLC, Kenya Electricity Generating Company PLC and JV of Munja Trading Limited & Marwil Energy Holding AS, in respect of Tender No. KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) is hereby issued.

c) The prayer that an order of CERTIORARI, to remove into the High Court and quash and/ or set aside any Contract in respect of Tender No. KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) illegally signed between the 2nd and 3rd Respondent and the Interested Party during the 14 days standstill period following the decision of the 1st Respondent dated 27th October 2025 is declined.

d) The prayer that pending the hearing and determination of the substantive Originating Motion, that this Honorable Court be pleased to issue AN INTERIM ORDER FOR STAY, to stay the Execution and/ or Implementation of the Decision of the 1st Respondent dated 27th October 2025 in Public Procurement Administrative Review Board Application No. 97 of 2025, Sintmond Group Limited us The Accounting Officer Kenya Electricity Generating Company PLC, Kenya Electricity Generating Company PLC and J of Munja Trading Limited & Marwil Energy

Holding AS, in respect of Tender No. KGN- SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) is spent.

e) The Application is hereby sent back to the 1st Respondent for re hearing which in an event must be done within 14 days of today's date.

f) No order as to cost shall be issued.

67. The 1st Respondent re-heard the matter Request for Review No. 97 of 2025 (Re-hearing) and rendered its decision on 9th January 2026 making the following orders:

a. The Request for Review dated 2nd October 2025 and filed on 6th October 2025 be and is hereby, partially, allowed;

b. The Accounting Officer of the Kenya Electricity Generating Company PLC is hereby directed to respond to the Applicant's letter dated 19th September 2025 within seven (7) days from the date hereof.

c. Further to Order No. 2 above, the Accounting Officer of the Kenya Electricity Generating Company PLC be and is hereby directed to proceed with and oversee the tender proceedings for Tender No. KGN-SALE-005-2025 for the Sale of Certified Emission Reductions (Re-Tender) and to ensure that the said process is concluded in a lawful and logical manner; and

d. Each party shall bear its own costs of the proceedings.

68. The 1st Respondent acted strictly within the confines of its statutory mandate. In arriving at the said Decision, the 1st Respondent duly and comprehensively considered the judgment issued in the Judicial Review Application, the pleadings, documents, written submissions, lists and bundles of authorities filed by all parties, as well as the confidential documents submitted pursuant to Section 67(3)(e) of the Act.

According to it,the 1st Respondent properly identified the following issues for determination:

a. What is the scope and extent of the Board's jurisdiction upon re-hearing the matter, having regard to the judgment of the High Court in Judicial Review Application E351 of 2025;

b. Whether the post-qualification due diligence exercise was conducted in accordance with the law, with particular regard to the alleged breach of legitimate expectation arising from the Respondents' failure to respond to the Applicant's letter dated 19th September 2025; and

c. What appropriate orders should issue in the circumstances.

69. In addressing the first issue concerning jurisdiction, the 1st Respondent carefully delineated the scope of its jurisdiction, ensuring strict fidelity to the judgment in the Judicial Review Application. The 1st Respondent confined itself to the defects specifically identified therein, and deliberately avoided conducting a de novo inquiry on matters that were neither quashed nor impugned.

70. Accordingly, the 1st Respondent argues that it deliberately limited its jurisdiction to addressing the procedural matters arising during the due diligence stage.

71. The 1st Respondent carefully perused the Judicial Review Application's judgment and observed that its original decision in Request for Review No. 97 of 2025 remained unaltered.

72. Accordingly, the re-hearing was strictly confined to addressing the procedural error identified by the Court.

73. The 1st Respondent further noted that the challenge was procedural in nature, relating specifically to the denial of the legitimate right to be heard, and did not pertain to any substantive issues of the decision.

74. In determining whether the post-qualification due diligence exercise was conducted in accordance with the law, particularly regarding the alleged breach of legitimate expectation arising from the Respondents' failure to respond to the Applicant's letter dated 19th September 2025, the 1st Respondent found that the failure to respond by the 2nd and 3rd Respondents constituted a violation of the Applicant's right to be heard.

75. In arriving at the above conclusion, the 1st Respondent carefully perused the confidential documents and the parties' pleadings, noting that the Applicant had sent a letter dated 19th September 2025, to which a response was expected.

76. The 1st Respondent further observed that the 2nd and 3rd Respondents failed to respond to the said letter.

77. The 1st Respondent ordered the 2nd and 3rd Respondents to issue an official and formal response to the letter as previously promised within seven (7) days of the 1st Respondent's Decision.

78. The 1st Respondent, in its Decision, duly considered the High Court's judgment in the Judicial Review Application, all the parties' pleadings, written submissions, and confidential documents.

79. The Applicant has failed to demonstrate any elements of illogicality, illegality, irrationality, procedural impropriety, or unfairness in the manner in which the 1st Respondent considered and interrogated the evidence, documents, pleadings, and information before it in arriving at its Decision in Request for Review No. 97 of 2025 (Re-hearing).

The 2nd and 3rd Respondents Case;

80. The 3rd Respondent advertised on 27th May 2025 Tender Number KGN-SALE-005-2025 for sale of Certified Emission Reductions (hereafter " CERs").

81. After the evaluation of bids it issued letters of intention award dated 1st August 2025 and letters of regret on 1st August 2025. This prompted the Applicant to file an Application for review before the Board being PPARB Application No 90 of 2025 Sintmond Group Ltd vs Accounting Officer Kenya Electricity Generating Company PLC and Kenya Electricity Generating Company.

82. The Board subsequently made its decision on 28th August 2025. Pursuant to the 1st Respondent's decision the 3rd Respondent was directed to reconvene its Evaluation Committee and undertake a fresh evaluation of all tenders at the preliminary stage in accordance with the Tender Document, the Public Procurement and Asset Disposal Act, 2015 (hereinafter "the Act"), and the attendant Regulations.

83. In compliance with the Board's decision of 28th August 2025, the 3rd Respondent's evaluation committee reconvened and re-evaluated all tenders at the preliminary evaluation stage a fresh. On conclusion of the evaluation due diligence was conducted and the Applicant was issued with the Letter of Regret dated 29th September 2025.

84. The Interested Party was issued with a letter of intention to award and declared the successful bidder.

85. The Applicant by a Request for Review dated 2nd October 2025 and filed on 6th October 2025, filed before the Board PPARB Application No 97 of 2020 Sintmond Group Limited vs The Accounting Officer Kenya Electricity Generating Company and Kenya Generating Company.

86. The 1st Respondent rendered its decision on 27th October 2025 dismissing the Request for Review and directed the 2nd and 3rd Respondent to proceed with the procurement in question and complete the same within 21 days thereof.

87. On the dismissal of the request for review by the 1st Respondent on 27th October 2025, the Applicant filed JR E351 of 2025 and in respect

of which Judgment was rendered on 19th December 2025. This led to the readmission of the request for review in PARB 97 for rehearing by the 1st Respondent within the context in the Judgment in JR E351 of 2025.

88. The 1st Respondent thereafter rendered its decision on 9th January 2025 and directed the 3rd Respondent to respond to the Applicant's letter dated 19th September 2025 within 7 days.

89. The 2nd Respondent has complied with the 1st Respondent's hearing decision of 9th January 2026 and by a letter dated 14th January 2026 sent a response to the Applicant.

90. The 1st Respondent by its decision of 9th January 2026 further directed the 2nd Respondent to proceed with and oversee the tender proceedings and ensure that the said process is concluded in a lawful and logical manner.

91. The procurement proceedings the subject of the tender in question commenced in May last Year and the 7 days granted by the 1st Respondent to respond to the Applicant's letter of 19th September 2025 is reasonable.

92. The 3rd Respondent continues to be prejudiced by the delay in conclusion of the tender proceedings including the risk of loss of value of the subject matter of the tender.

93. There has been no bar to the Applicant filing these proceedings and the allegation that its right to file for judicial review was compromised is not true.

94. The 1st Respondent limited the parties on the scope of the rehearing and that the 1st Respondent considered all issues as was to be done at the rehearing.

95. The 1st Respondent in rehearing the matter as well as in its decision of 9th January 2026 considered all relevant issues before it.

96. The Applicant by this Application seeks to raise issues not raised before the 1st Respondent during the hearing and I am informed by the 2nd and 3rd Respondent's Advocates that this is an abuse of the Court process and the Applicant cannot in these proceedings raise issues not raised before the 1st Respondent as a basis for grant of judicial review orders.

97. The allegations that the 1st Respondent sat on appeal on issues already determined is not true as alleged or at all. It is its case that no illegality arises from the said decision.

98. It argues that the 1st Respondent by its decision of 9th January 2026 did not contradict itself as alleged or at all.

99. The 1st Respondent's decision of 9th January 2026 has not resulted in judicial embarrassment and/or frustration as alleged or at all. The 1st Respondent at the rehearing addressed all issues for consideration and in its decision of 9th January 2026 addressed all issues that were for determination in the hearing and in proper exercise of its jurisdiction under the Public Procurement and Asset Disposal Act.

100. The decision of 9th January 2026 was properly made within the confines of the law and ought not to be impugned for the reasons

stated at paragraph 31 of the Supporting Affidavit or at all and in the circumstances the allegations of prejudice have no basis.

101. The 2nd and 3rd Respondents have complied with the law and ought to be allowed to proceed to complete the procurement process by the dismissal of these proceedings. The decision of 9th January 2026 has not resulted in any violations of the Constitution.

102. The Applicant has failed to meet make out a case for grant of orders of Judicial Review and its Originating Motion ought to be dismissed time being of essence in this matter noting the nature of the subject matter of the tender.

The Interested Party's Case

103. The 1st Respondent rendered its decision on 09 January 2026 following the rehearing of Request for Review NO. 97/2025 on 31 / 12/2025. The decision directed the 2nd Respondent to complete tender proceedings and ensure the tender was concluded in a lawful and logical manner.

104. It is its case that in reaching its decision on 09/01 /2026, the 1st Respondent complied with the court order 19/12/2025 and limited the scope of the re-hearing to correct the anomalies as found by this Honorable Court following the judgment of 19/12/2025.

105. The 1st Respondent vide its decision of 27th October 2025 dismissed the Request for Review No. 97 of 2025 filed by the Applicant against the Respondents challenging the decision of the 2nd and 3rd Respondents to award the Interested Party tender KGN-SALE-005-

2025 RFX.• 5000017132-TENDER FOR SALE OF CERTIFIED EMISSION REDUCTIONS (CERs) (Re-render) (OPEN INTERNATIONAL.

106. Vide its decision of 27 October 2025, the 1st Respondent directed the 2nd and 3rd Respondents to oversee the tender proceedings for Tender No. KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) to their lawful and logical conclusion.

107. The Applicant herein now challenges this decision on the grounds that the 1st Respondent's impugned decision:

a) Was tainted by illegality and excess of jurisdiction and breach of section 1 75 of the Public Procurement and Asset Disposal Act;

b) Was tainted by illegality and excess of jurisdiction and defiance of binding court findings

c) Was tainted with abuse of jurisdiction, error of law and re-litigation;

d) Was tainted with judicial embarrassment arising from vague and imprecise findings;

e) Was tainted by irrationality and unreasonableness; and

f) Was tainted with failure to exercise jurisdiction.

108. On 6th August 2025, the Applicant herein filed a Request for Review Number Application No. 90 of 2025, challenging the 2nd and 3rd

Respondents' decision to disqualify it from proceeding to the financial evaluation stage of the impugned.

109. The 1st Respondent vide its decision of 28th August 2025 directed the Respondents to undertake fresh evaluation of all tenders at the preliminary stage in accordance with the provisions of the Tender Document, the Act, Regulations 2020, and the Constitution taking into considerations of the Board's findings therein.

110. Order (C) of the said decision of 28th August 2025 directed the 2nd and 3rd Respondents to proceed with and conclude the tender proceedings concerning the Tender No. KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (Retender) including the issuance of an award within 21 days from the date of the Decision.

111. The 1st Respondent recommended that the tenderers ought to have been subjected to due diligence as provided for under section 83 and Regulation 80, and faulted the two-stage evaluation process of Mandatory and Financial Evaluation that was originally carried out by the 2nd and 3rd Respondents.

112. However, the Respondents found it challenging to comply with the above timeline and filed a Notice of Motion before the Board seeking for extension of time to comply with the Board's Decision of 28 August 2025.

113. That on 26 September 2025, parties appeared before the 1st Respondent for hearing of the 2nd and 3rd Respondents' motion for extension of time to comply with the Board's findings in its decision of 28 August 2025.

114. That during the hearing, the Motion was withdrawn by consent of all the parties.

115. The 1st Respondent in its decision of 26th September 2025 also granted the Respondents an extension of 14 days from 18 September 2025, when the initial 21 days were to elapse.

116. This meant that the Respondents had until 02 October 2025 to comply with the Board's decision of 28 August 2025 for fresh evaluation of the tenders.

117. That the procurement entity conducted fresh evaluation as directed by the 1st Respondent.

118. Both the bids of the Applicant and the Interested Party were evaluated and progressed through the Mandatory Requirements Stage both bids having been responsive.

119. On 8 September 2025, the Interested Party received a letter from the Respondents requesting that it submits a final offer under competitive negotiations pursuant to sections 131, 132 and 133 of the Act as read together with Regulation 100 of the 2020 Regulations.

120. The Interested Party responded and indicated that it was relying on its offer in the bid document.

121. That the 2nd and 3rd Respondents then commenced the due diligence process on the Applicant who was the highest evaluated bidder.

122. The due diligence conducted was in accordance with Section 83 of the Act, and Regulation 80 as read together with section 55(4) of the Act,

other Mandatory Requirements and MR14 which provided that "KenGen may at its own discretion conduct due diligence on the eligible bidders to establish their ability to perform the contract before the award of the contract."

123. That between 15th and 17th September 2025, the 2nd and 3rd Respondents carried physical due diligence on the Applicant. It also requested the Applicant to avail information/various documents among them past experiences- provision of evidence of past professional experience through testimonials from previous assignments undertaken.

124. That this request was in line with the provisions of section 83 and Regulation 80 as read with section 55(4) of the Act.

125. That the Applicant, however, did not avail the information requested. Instead, it wrote back saying that the information requested during due diligence were not part of tender requirements.

126. The Applicant also failed to provide information to demonstrate capacity and experience in carbon trading as contained in the Tender Mandatory Requirements and pursuant to section 83 and Regulation 80 as read with section 55(4) of the Act.

127. The Applicant indeed failed to demonstrate experience and capacity to deliver.

128. The 2nd and 3rd Respondents also noted that it was awarded a similar contract to the Applicant in Tender No.KGN-SALE-001-2024 to the Applicant for the Sale of 4.578.148 Certified Emission Reductions

(CERs) valued at USD 32,047.036.00. On 7th May 2024, but failed to deliver leading to re-advertisement of the said tender in 2025.

129. That having failed to supply the information required by the 2nd and 3rd Respondents during due diligence, the 2nd and 3rd Respondents considered the Interested Party herein who submitted the next responsive bid as provided for under Regulation 80 (2) (a) and conducted due diligence on it.

130. On 23 September 2025, the 2nd and 3rd Respondents conducted due diligence on the Interested Party physically by visiting their offices. They also requested information including past experience and evidence of carbon credit trading from the Interested Party.

131. The Interested Party responded by submitting two official European Union Registry Transaction Confirmations with EUAs, which are tradable units, under the EU Emissions Trading Scheme all done in August and September 2023. Additionally, the Interested Party submitted a commercial invoice to its client, Global DC Oy following sale and purchase agreement dated 10 July 2023.

132. After due diligence and re-evaluation of the tender, the Interested Party was informed that it was the successful bidder having met all the requirements thereof.

133. The Interested Party was issued with a Notice of Intention to Award while the Applicant was issued with a Letter of Regret.

134. The reasons contained in the Letter of Regret to the Applicant are valid and were arrived at after fresh evaluation of the tender which included due diligence.

135. The decision of the 2nd and 3rd Respondents to award the tender to the Interested Party therefore followed fender re-evaluation, due diligence which complied with the constitution, the law, regulations and the tender document. In awarding the tender to the Interested Party, no extraneous considerations were considered during due diligence as alleged by the Applicant.

136. The Applicant herein then filed a Request for Review Number 97 of 2025, challenging the award after fresh evaluation.

137. The 1st Respondent dismissed the Review Number 97 of 2025 and upheld the decision of the 2nd and 3rd Respondents to award the Interested Party the said Tender vide its decision of 27 October 2025.

138. That Applicant challenged the decision of 27 October 2025, and the court on 1 9 December 2025 remitted the matter to the 1st Respondent for rehearing.

139. That the 1st Respondent issued notices for rehearing and the Request for Review No. 97 was re-heard on 31 December 2025. The 1st Respondent then issued its decision on 09 January 2026 following the rehearing on 31 / 12/2025.

140. That the decision directed the 2nd Respondent to the tender proceedings and ensure the tender was concluded in a lawful and logical manner.

141. That the board complied with the order of the High Court in reaching its decision of 09/01/2026.

142. The 1st Respondent in the rehearing limited the parties on the scope of rehearing and the 1st Respondent considered all relevant issues that were to be considered during the rehearing.

143. Indeed the Applicant in this Application has gone beyond the scope of matters that were considered during rehearing which I believe is an abuse of the court process.

144. The scope of rehearing by the 1st Respondent was limited and it did not sit on appeal on issues already determined as alleged.

145. The grounds for review as pleaded are therefore are unfounded as the Applicant is engaged in a fishing expedition in a bid to derail the 2nd Respondent's efforts to conclude the tender.

146. The decision of the 1st Respondent delivered on 09/01 /2026 was therefore within the confines of law.

147. The 1st Respondent's decision of 09/01 /2026 was lawful, rational, legal and reasonable, and did not violate any provisions of the Constitution, the Act or the Regulations thereto.

148. The prayers as sought in the Originating Motion are only meant to delay and/or frustrate the tender process the 1st Respondent having corrected any anomalies vide its decision of 09/01/2026.

149. It argues that the proceedings herein are only meant to ultimately endanger the imminent transaction between the 2nd and 3rd

Respondents and the Interested Party to the detriment of the reputation and standing of the Republic of Kenya in the international carbon trading market and deny the public the benefit of expanded sources of revenue for the country.

Applicants Submissions;

150. It relies in the case of **Republic v Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives (Interested Party) Tanners Association of Kenya (Suing through its Chairman Robert Njoka Applicant) [2019] eKLR** safeguarding legality is the primary objective of Judicial Review. The Court held:

> *"23. Safeguarding legality is the most important purpose for the judicial review of administrative actions. Thus a person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be judicially challenged. In one sense, there must always be the premise of "want of legality".*
>
> *Differently stated, in response to a challenge to the legality of administrative action, courts generally need to consider the compliance with both substantive and procedural legal rules. This is because any administrative decision- making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures."*

151. In **Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR**, the Court defined illegality into two categories:

> *"Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly.*
>
> *Grounds within the first category are simple ultra vires and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion and failing to fulfil substantive legitimate expectations are grounds within the second category."*

152. In **Republic vs Public Procurement Administrative Review Board & Another Gibb Africa Ltd & Another [2012] EKLR ("Gibb Africa Case"), the Court relied on the locus classicus of Council of Civil Service Unions V Minister for the Civil Service [1984] 3 All ER 935** where Lord Diplock established the test for illegality as hereunder:

> *".....By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in*

the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable." (Emphasis ours)

153. In **Republic v Public Procurement Administrative Review Board; County Government of Laikipia & 2 others (Interested Parties) (Judicial Review Application 74 of 2018) [2018] KEHC 2068 (KLR) (Judicial Review) (3 December 2018) (Judgment) ("County Government of Laikipia Case")** Hon. Justice J. Mativo corroborated the above and further categorized jurisdictional illegality into two:

"*34. Jurisdictional error will occur where the decision making body fails to exercise the jurisdiction conferred on it. This may be because the body actually declined to make the decision; alternatively, and more often, it is a 'constructive failure' to exercise jurisdiction. That is to say, the decision is made in a factual sense but as a result of the error the body failed to exercise the jurisdiction conferred upon it. The difficulty is being more precise about the kind of error that will amount to a jurisdictional error or a failure to exercise jurisdiction.*

35. A constructive error may be disclosed when a tribunal 'misunderstands the nature of its jurisdiction and, in consequence, applies a wrong test, misconceives its duty, fails to apply itself to the real question to be decided or misunderstands the nature of the opinion it is to form." (Emphasis Ours)

154. From these authorities it is clear that the 1stRespondent is a quasi-judicial body established under Section 27 of the Public Procurement

and Asset Disposal Act (hereinafter referred to as "the Act") with a duty to give effect to Article 227 of the Constitution by hearing and determining disputes on breach of the Act by procuring entities. Article 227 of the Constitution requires that:

> *"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective."*

155. It is submitted that as a tribunal clothed with judicial authority, the 1st Respondent's discharge of its judicial authority/jurisdiction does not operate in a vacuum but is also subject to/ bound by the rule of law and common law doctrines recognized in Kenya, as may be applicable.

156. This position is buttressed by the decision in **Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Kenya Power and Lighting Company Limited [2019] KEHC 9870 (KLR)** where it was held:

> *"64. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be the Constitution, a statute or delegated legislation. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring public bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of*

Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments."

157. The 1st Respondent, in the impugned decision following the re-hearing, committed a jurisdictional illegality by acting in excess of its jurisdiction and acting in defiance of the binding findings and directions of this Honourable Court in its Judgment.

158. It places reliance on the **Gibb Africa Case (Supra) and the County Government of Laikipia Case (Supra)**, they submit that the 1st Respondent's failure to engage with and implement the High Court's determinations on the disjunctive nature of MR 16, the impermissibility of introducing client – reference requirements at the due diligence stage, and the prohibition against re-opening settled findings under the guise of post-evaluation verification constitutes a constructive jurisdictional error as established in the County Government of Laikipia Case (Supra) for:

a) Failing to understand the law that regulated its decision making and failing to give effect to it- the operative law herein being this Honourable Court's Judgment and the common law principle of stare decisis;

b) Failing to understand the nature of its jurisdiction, mandate and duty to uphold Article 227 of the Constitution and ensure procurement is done in accordance with the sound procurement principles enshrined in the Constitution, the Act and the Public

Procurement and Asset Disposal Regulations, 2020 ("the Regulations"); and

c) As a consequence of this misunderstanding of its crucial role and mandate, the Review Board failed to apply itself to the real question to be decided and the nature of the opinion it was to form by deviating from the express findings of this Honourable Court, which it was meant to give effect to during the re-hearing.

159. They submit that instead, the 1st Respondent purported to analyze, interpret, distinguish and ultimately recast this Honourable Court's findings, specifically on the issue of whether it had correctly determined the question of the Procuring Entity's compliance with its orders and findings in PPARB 90 of 2025 during the re-evaluation of bids and due diligence, with a focus on the Application of MR-16.

160. They submit that this issue of the Procuring Entity's compliance with the 1st Respondent's orders and directions in PPARB 90 of 2025 was a key issue for consideration put forth by the Applicant in both the proceedings in PPARB 97 of 2025 and the proceedings before this Honourable Court in JR E351 of 2025.

161. The issue was finally put to rest in this Honourable Court's Judgment in HCJR E351 of 2025 ("the Judgment") where this Court made the following findings as regards this issue:

a) The 1st Respondent had deviated from its earlier Ruling in PPARB 90 of 2025 dated 28th August 2025, particularly with regard to the interpretation and Application of MR 16. This Honourable Court held and re-affirmed that the requirement

should be applied disjunctively and that the Applicant's reliance on the disjunctive Application of the requirement was responsive.

b) At paragraph 336 of the Judgment, that in purporting to distinguish its findings in its Ruling dated 28th August 2025 in PPARB 97 of 2025 on compliance with MR 16 at the evaluation stage from disqualification at the due diligence stage, the 1st Respondent had misdirected itself on the central question before it, namely whether the reevaluation and due diligence exercise had been conducted in strict conformity with its own binding findings.

c) The Court expressly found at paragraph 337 that this misdirection generated an illegality, and on that basis granted an order of certiorari quashing the Board's decision (the whole decision and not certain parts of it) and remitted the matter for rehearing strictly in accordance with the Judgment.

162. It submits that despite said findings, the 1st Respondent ignored the High Court's determinations and reduced them into a single, narrow issue, on procedural impropriety, namely the alleged failure by the 2nd and 3rd Respondents to respond to the Applicant's Letter. At paragraph 91 of the impugned decision, the 1stRespondent erroneously asserted that this Court's Judgment did not nullify the entire of its earlier decision (even as pertains to the re-evaluation of bids and due diligence) but merely faulted it on limited grounds. This assertion constituted a material misdirection in law, as the High

Court had expressly found that the Applicant had established an illegality sufficient to warrant the quashing of the entire decision, and not merely discrete aspects thereof.

163. At paragraph 91 of the impugned Ruling, the 1st Respondent itself expressly acknowledged that the High Court had faulted it on more than one issue, including both procedural fairness and the misapplication of its earlier binding interpretation of Mandatory Requirement No. 16. Having so acknowledged, the Review Board then, without explanation or legal justification, proceeded at paragraph 94 to restrict the scope of the rehearing to a single procedural issue. This unexplained reversal underscores the misdirection, irrational and unlawful narrowing of issues.

164. It places reliance **in Republic v Public Procurement Administrative Review Board & 2 others Suzan General Trading JLT [2014] KEHC 1800 (KLR)** where the Learned Judge rendered himself as thus;

> *"The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law."*

165. This Honourable Court's findings in its Judgment were not of a procedural nature but substantive in nature and required the Board to review the due diligence exercise conducted by the 2nd and 3rd Respondents to check compliance with its earlier ruling and the content of Regret Letter dated 29th September 2025 which was based on extraneous reasons especially those the Board had acknowledged that they were subject of pending litigation between the parties.

166. In **Sceneries Limited v National Land Commission [2017] eKLR**, the Honourable Justice Odunga held that:

> *"Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached."*

167. It submits that the 1st Respondent acted in abuse of power, illegally, ultra vires, and in direct breach of section 175 of the Act in that:

a) In its impugned decision, the 1st Respondent directed the 2nd Respondent to respond to the Applicant's letter dated 19th September 2025 within seven (7) days from the date of the Ruling.

b) Section 175 (1) of the Act guarantees any person aggrieved by a decision of the 1st Respondent the right to seek judicial review before this Honourable Court within fourteen (14) days from the

date of the decision and is firmly grounded in Articles 227 and 47 of the Constitution.

c) The fourteen (14) day period is intended to operate as a mandatory statutory standstill period during which no procurement activity or implementation steps may lawfully be undertaken, thereby preserving the substratum of the dispute and enabling an aggrieved party to consider and exercise the constitutional right to be heard on judicial review.

d) By directing the 2nd Respondent to take substantive action within seven (7) days of the Ruling and proceed with the procurement process thereafter, the 1st Respondent unlawfully undermined and effectively curtailed the Applicant's statutory right to judicial review, and impermissibly compelled implementation of its decision within the protected standstill period.

e) The impugned directive was therefore issued in excess of jurisdiction, was contrary to the mandatory framework of section 175 of the Act and is null and void ab initio.

f) The Applicant further submits that the illegality arising from the 1st Respondent's directions issued within the statutory standstill period cannot be salvaged by arguments of reasonableness, convenience or administrative practicality. Where Parliament has expressly prescribed a mandatory temporal safeguard to protect the right of access to judicial review, neither the Review Board nor the Procuring Entity has discretion to abridge, dilute or circumvent that protection under the guise of efficiency or

expediency. Any action taken in derogation of that statutory pause is unlawful ab initio, irrespective of its perceived utility or proportionality. To hold otherwise would permit administrative bodies to defeat statutory rights through post hoc justification, thereby rendering the standstill period illusory and undermining the rule of law in procurement dispute resolution.

168. On the issue of the failure to take into account relevant mandatory/obligatory considerations; Reliance is placed in **Republic v Public Procurement Review Board; Leeds Equipment & systems Limited (Interested Party); Kenya Veterinary vaccines Production Institute [2018] EKLR (**"the Leeds Equipment Case") where it was held that,

> *"A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant considerations into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power."*

20. In the **County Government of Laikipia Case (Supra),** Hon. Justice J Mativo rendered himself as thus:

"62. As Cooke J pointed out in the case Ashby v. Minister of Immigration considerations may be obligatory i.e. those which the Act expressly or impliedly requires the Tribunal to take into account and permissible considerations i.e. those which can properly be taken into account, but do not have to be. Where the decision maker fails to consider those obligatory considerations expressed or implied in the Act, the decision has to be invalidated.

64. If, in the exercise of its discretion on a public duty, an authority takes into account considerations which the courts consider not to be proper, then in the eyes of the law it has not exercised its discretions legally.

On the other hand, considerations that are relevant to a public authority's decision are of two kinds: there are mandatory relevant considerations (that is, considerations that the statute empowering the authority expressly or impliedly identifies as those that must be taken into account), and discretionary relevant considerations (those which the authority may take into account if it regards them as appropriate)."

The Learned Judge further held:

"69. If the ground of challenge is that relevant considerations have not been taken into account, the Court will normally try to assess the actual or potential importance of the factor that was overlooked, even though this may entail a degree of speculation. The question is whether the validity of the decision is contingent on strict observance of antecedent requirements. In determining

what factors may or must be taken into account by the authority, the courts are again faced with the problem of statutory interpretation. If relevant factors are specified in the enabling Act it is for the courts to determine whether they are factors to which the authority is compelled to have regard. If so, may other, non-specified considerations be taken into account or are the specified, considerations to be construed as being exhaustive?"

169. Guided by the above Authorities, the Applicant submits that the grounds cited alleging that the 1st Respondent's erred in law as contemplated in both the Leeds Equipment Case (Supra) and the County Government of Laikipia Case (Supra) for reasons that:

a) The 1st Respondent failed to appreciate and give effect to precedent facts being the findings of this Honourable Court as contained in its Judgment thereby acting in breach of the rule of Law and in breach of the common law principle of stare decisis which bound it to apply and implement those findings of the High Court faithfully in the re-hearing;

b) Solely on the basis of stare decisis, res-judicata and the rule of law, the entirety of the findings and directions of this Honourable Court constituted mandatory and obligatory considerations which the 1st Respondent was expressly and impliedly required to take into account in exercising its statutory mandate on re-hearing, and its failure to do so rendered the impugned decision legally infirm for want of strict observance of antecedent and jurisdiction-conditioning requirements;

c) By failing to apply itself to those mandatory considerations and instead reintroducing issues already conclusively determined, minimizing the scope of the Judgment, and permitting reliance on extraneous and impermissible considerations, the 1st Respondent misdirected itself in law, failed to exercise its discretion legally, and thereby arrived at a decision that is invalid, unlawful and amenable to quashing by this Honourable Court on judicial review;

d) The issue so disregarded by the 1st Respondent went to the very root and validity of the impugned decision, the same having been expressly identified by this Honourable Court in its Judgment as an illegality by it as the Review Board, sufficient to vitiate the entire decision and warrant an order of certiorari;

e) Applying the test articulated at paragraph 69 of the County Government of Laikipia Case (Supra), (Paragraph 31 above) the issue so disregarded was a mandatory consideration as the validity of the 1st Respondent's decision was contingent upon strict observance of that antecedent requirement, namely, that on re-hearing, it would exercise faithful compliance with the Court's binding findings on MR 16 (and its own for that matter) and the lawfulness of the due diligence exercise conducted on the Applicant's bid.

170. To further qualify the mandatory/obligatory nature of the consideration so disregarded, by the 1st Respondent, the Applicant submits that this Honourable Court has previously held that where a tribunal's attention is drawn to an illegality or a breach of statute or the Constitution, it must investigate the same. This Honourable

Court having already deemed this issue an illegality, the 1st Respondent could not then justifiably disregard considering it.

171. This was held in **Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] KEHC 7978 (KLR)** as below:

> *"...once a court or tribunal's attention is brought to an issue of an illegality or breach of statute or constitutional provision, in the course of proceedings then in the interest of justice the court or tribunal must investigate it because the court's fundamental role is to uphold the law."*

172. It submits that the impugned decision was reached in clear disregard of mandatory and jurisdiction-conditioning considerations, including precedent facts which this Honourable Court had already pronounced upon as constituting an illegality. Having failed to correct the very defect that led to the quashing of its earlier decision, the 1st Respondent acted outside the confines of lawful discretion, thereby rendering its decision not only illegal but also logically unsustainable.

173. It submits that the decision lacks an intelligible and lawful justification, is disconnected from the evidential and legal framework governing the 1st Respondent and the dispute before it, and inexorably falls to be examined –and invalidated- on the further and independent ground of irrationality and unreasonableness.

174. It submits that the impugned decision was not a product of lawful or rational reasoning, but one that no reasonable tribunal, properly

directing itself to the law and the material before it, could have reached in the circumstances.

175. Section 7 (2) (i) of the Fair Administrative Action Act (hereinafter referred to as "FAAA") was recognized in **Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Kenya Power and Lighting Company Limited [2019] KEHC 9870 (KLR)**(hereinafter, "Shenzhen Instrument Case"): by Honourable J. Mativo wherein the Learned Judge held: *"Rationality, as a ground for the Review of an administrative action is dealt with in Section 7(2) (a)(i) of Fair Administrative Action which provides that:- "A court or tribunal under subsection (1) may review an administrative action or decision, if— the person who made the decision— was not authorized to do so by the empowering provision.*"

176. The test for rationality was stated as follows:-

> *"The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational.*
>
> *Such a conclusion would place form above substance and undermine an important constitutional principle." In applying this test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the*

administrative decision maker between the materials made available and the conclusion arrived at." (Emphasis ours).

177. Lord Diplock in Mahon V New Zealand Ltd affirms the above position by stating:

"The Decision Maker, in the process of finding a fact, must base their judgment upon materials and reasoning that logically supports the existence of facts consistent with the pronouncement in order to stand sensibly and not self-contradictory once it is revealed."

178. In **Judicial Review Miscellaneous Application No. E039 of 2022 Procurement Administrative Review Board Madison General Insurance Kenya Ltd Accounting Officer KEBS & Another** cited with approval the case of Council of Civil Service Unions v Minister for the Civil Service (1985) A.C 374 where Lord Diplock stated:

"...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness".....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.....'Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review...."

179. The standard to justify the reasonableness or unreasonableness of an administrative decision was held by Justice Hon. Justice Mativo in the Shenzen Instrument Case (Supra) to be as hereunder:

> *"113. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law."*

180. It submits that the intersection between illegality, irrationality and unreasonableness, particularly where a decision-maker disregards relevant considerations or relies on irrelevant ones, was comprehensively addressed in the County Government of Laikipia Case (Supra), where the Court held as follows:

> *"Reaching at a decision on the basis of irrelevant considerations, or by disregarding relevant considerations, is one of the manifestations of irrationality. So, as stated in the case R v Secretary of State for Social Services, Wellcome Foundation Ltd, it is a reviewable error either to take account of irrelevant considerations or to ignore relevant ones, provided that if the relevant matter has been considered or the irrelevant one is ignored, a different decision or rule might (but not necessarily would) have been made. Many errors of law and fact involve ignoring relevant matters or taking into account irrelevant ones. Ignoring relevant considerations or taking account of irrelevant ones may make a decision, or rule unreasonable."*

Further:

"85. A decision which fails to give proper weight to a relevant factors may also be challenged as being unreasonable.[59] It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated."

181. Guided by the above authorities, the Applicant submits that the impugned decision does not pass the test for rationality or reasonableness for the reasons as espoused in the Originating Motion and buttressed as hereunder:

a. The 1st Respondent irrationally confined the scope of the re-hearing to a single procedural issue- the Procuring Entity's failure to respond to the Applicant's Letter- (see paragraph 44 of the impugned Ruling), notwithstanding that the Judgment, read holistically, expressly identified and determined substantive defects in its earlier decision and proceeded to quash it in its entirety (paragraphs 336 and 337 of the Judgment of this Honourable Court). That conclusion bears no rational relationship to the Judgment as a whole and is unsupported by the material the 1st Respondent was bound to consider.

b. At paragraph 91 of the impugned Ruling, the 1stRespondent's asserted that its earlier decision in PPARB 97 of 2025 was "not altered" by the High Court was objectively unreasonable, given that the Court expressly identified the illegality and granted an

order of certiorari setting aside the entire decision and ordering the re-hearing. The conclusion reached was therefore disconnected from the legal effect and consequences of the Judgment (Refer to paragraph 337 of the Judgment of the High Court).

c. The characterization of the import of this Honourable Court's findings as purely procedural (paragraph 91-94 of the impugned Ruling), to the exclusion of substantive illegality was irrational and contrary to the express findings that the Review Board had misapplied its own binding interpretation of MR 16 and failed to interrogate the lawfulness of the re-evaluation and due diligence exercise (Refer to paragraph 336 – 337 of the Judgment). No rational tribunal, properly directing itself to its scope, purpose and mandate, could so diminish or reframe those findings.

d. The impugned decision is internally inconsistent and logically incoherent, in that the 1st Respondent acknowledged the High Court's finding on misapplication of MR 16 (Refer to paragraph 91 of the impugned Ruling), yet declined to address that issue on the basis that its earlier ruling in PPARB 90 of 2025 had been upheld, hence no need to 're-hash' or 'dwell' (Refer to paragraph 94 of the impugned Ruling). That reasoning is self-contradictory, as the illegality identified by the Court lay precisely in the Review Board's departure from those correct findings in its subsequent decision.

e. By treating its correct findings in PPARB 90 of 2025 as a basis for declining to interrogate the illegality committed in PPARB 97 of 2025, the 1st Respondent failed to establish any rational nexus between the material placed before it on re-hearing and the

conclusions ultimately reached (Refer to paragraphs 94-96 of the impugned Ruling contrasted with paragraph 337 of this Court's Judgment). This amounted to an abdication of the very purpose for which the re-hearing was ordered and rendered the decision arbitrary and unreasonable.

f. Further, the impugned decision lacks justification, transparency and intelligibility, in that it neither explains how the substantive defects identified by this Honourable Court were cured (Refer to paragraphs 336-337 of this Court's Judgment) nor demonstrates that the re-evaluation and due diligence exercise complied with the binding legal parameters previously laid down (Refer to paragraphs 94-100 of the impugned Ruling). As such, the decision does not fall within a range of possible or defensible outcomes when tested against the facts and the law.

182. In the premise, the impugned decision was not only tainted by illegality but was also so unreasonable and irrational in its reasoning, conclusions and internal coherence that it falls squarely outside the bounds of lawful administrative action. It is therefore amenable to intervention by this Honourable Court under Section 7 of the Fair Administrative Action Act and the established principles governing judicial review.

183. In advancing its case on the issue of Breach Of Articles, 10, 47 & 22 of the Constitution and the Fair Administrative Action Act the Applicant relies in the case of **Republic v Public Procurement Administrative Review Board & another; SS Mehta and Sons Limited (Interested Party); Abdulhakim Ahmed**

Bayusuf and Sons Limited (Exparte Applicant) (Judicial Review Application E177 of 2024) [2024] KEHC 14595 (KLR) (Judicial Review) (24 September 2024) (Judgment) Honourable Justice Nyamweya reaffirmed that administrative action must be carried out in line with the values and principles as set out in the Constitution. The Honourable Judge held as follows:

> *"212.It is this court's finding that administrative action must at all times be processed within the values and principles on transparency, accountability and good governance as enshrined under Articles 10 and 227 of the Constitution. To do otherwise would lead to an illegality.*
>
> *213. Kenya must move forward in a democratic trajectory where all the administrative decisions in procurement matters are based on the standards set under Article 227(1) of the Constitution which requires public entities to contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective and nothing less."*

184. In **Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party); Authority & another (Exparte); Mwangemi (Contemnor) [2021] KEHC 301 (KLR)** the Court held:

> *"What must be borne in mind is that public procurement has a constitutional underpinning as clearly stated in Article 227. In addition, the scheme of the Act is such that procurement process*

including cancellation of the tender process must strictly conform to the constitutional dictates of transparency, openness, accountability, fairness and generally, the rule of law and such rights cannot be narrowly construed…"

185. It submits that Article 47 (1) of the Constitution of Kenya, 2010 provides as follows:

"(1) every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

186. The above provision constitutionalizes the standards governing administrative decision- making and requires that administrative bodies such as the 1st Respondent, act not only within the bounds of legality, but also reasonably, rationally, transparently and in a manner that accords affected parties a fair process. These standards are now codified and operationalized through the Fair Administrative Action Act.

187. Article 10 of the Constitution binds all State organs, State officers and public bodies, including the 1st Respondent, to uphold the national values and principles of governance, including the rule of law, transparency, accountability and good governance, while Article 227 requires that public procurement be conducted in a system that is fair, equitable, transparent, competitive and cost-effective.

188. It submits that the impugned decision was reached in disregard of binding precedent facts, mandatory considerations and rational decision-making standards, the Applicant submits that the same

conduct equally constitutes a violation of Article 47(1) of the Constitution.

189. An administrative decision that is illegal, irrational and unreasonable cannot, by definition, meet the constitutional threshold of lawful, reasonable and procedurally fair administrative action.

190. Further, on breach of Article 47 of the Constitution the Applicant submits:

a) The failure by the 1st Respondent to faithfully engage with and implement the binding findings and directions of this Honourable Court deprived the Applicant of a fair and meaningful re-hearing. The re-hearing ordered by the Court was intended to cure the illegality identified, not to narrow, reframe or diminish it, and the Review Board's approach therefore undermined the Applicant's legitimate expectation of a lawful and fair administrative process.

b) In addition, the impugned decision fails to satisfy the requirements of Article 47(2), in that it does not provide intelligible, coherent and responsive reasons explaining how the substantive defects identified by this Honourable Court were addressed or remedied. A decision that glosses over material issues, avoids engagement with binding findings, and offers internally inconsistent explanations does not amount to "written reasons" within the meaning of the Constitution.

191. In the premises, the Applicant submits that the impugned decision violated Article 47 of the Constitution and the Fair Administrative Action Act, thereby warranting the intervention of this Honourable

Court to vindicate the Applicant's constitutional right to Fair Administrative Action.

192. It submits that the 1st Respondent fundamentally misconceived the scope and purpose of the rehearing directed by this Honourable Court by reducing it to a narrow finding of procedural impropriety, namely, the Procuring Entity's failure to respond to the Applicant's Letter seeking clarification. In doing so, the 1st Respondent failed to engage with the core substantive issue remitted for determination, being the adherence with its previous findings on the Application of MR 16 by the Procuring Entity in re-evaluation of the bids and due diligence, which this Honourable Court had already identified as an illegality that went to the lawfulness of the Applicant's disqualification.

193. The 1st Respondent's decision to merely direct the Procuring Entity to respond to the Applicant's Letter within seven (7) days, while simultaneously allowing the award to the Interested Party to stand and issuing no consequential orders for re-evaluation or reconsideration in light of the Judgment was arbitrary and devoid of practical or legal utility.

194. It further submits that the directive by the 1st Respondent was not timely as contemplated under the FAAA, was devoid of legal or practical effect, as the clarification sought by the Applicant was only relevant prior to the issuance of the Regret Letter dated 29th September 2025, and could not, after the fact, cure or reverse and unlawfully concluded evaluation and award process.

195. By issuing a post facto procedural directive that neither addressed nor remedied the substantive illegality identified by this Honourable Court, the 1st Respondent acted in a manner that defeated the very purpose of the Court's remittal, abdicated its statutory mandate to provide effective redress, and rendered the re-hearing illusory.

196. The decision was arbitrary, internally inconsistent and incapable of providing clear or lawful guidance to the Procuring Entity, thereby falling below the constitutional thresholds of lawfulness, reasonableness, accountability and fairness guaranteed under Articles 47, 10 and 227 of the Constitution.

197. A procurement dispute resolution process that ignores binding judicial findings, issues hollow directives, and preserves an unlawfully reached outcome cannot be reconciled with the constitutional requirement of a fair, transparent and competitive procurement system.

198. By acting in a manner that rendered the re-hearing ineffectual, disregarded substantive illegality, and undermined the principles of fair administrative action and sound procurement, the 1st Respondent violated Articles 47, 10 and 227 of the Constitution as well as the rules and principles of fair administrative action codified under the FAAA, thereby warranting the intervention of this Honourable Court.

199. In **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] eKLR** as:

"Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter…An administrative decision can only be challenged for illegality, irrationality and procedural impropriety. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

200. The Applicant submits that it has satisfactorily demonstrated grounds to warrant the grant of the orders of Certiorari and Prohibition.

201. The impugned decision has been shown to be unlawful, irrational and unreasonable, having been reached in excess of jurisdiction, in disregard of binding precedent facts and mandatory considerations, and in breach of the constitutional and statutory standards governing the exercise of judicial and quasi-judicial authority.

202. The decision further undermined Articles 10, 47 and 227 of the Constitution by rendering the re-hearing ineffectual and preserving an outcome tainted by illegality, thereby justifying the intervention of this Honourable Court.

203. It submits that the 1st Respondent was under a clear statutory and judicial obligation to conduct a meaningful re-hearing strictly in accordance with the binding Judgment of this Honourable Court and its own prior determinations, particularly on the Application of Mandatory Requirement No. 16 and the legality of the due diligence exercise. Despite being afforded an opportunity to remedy the illegality, the 1stRespondent has persistently narrowed, reframed or sidestepped both its own findings and directions, as well as those of this Honourable Court.

204. The conduct of the Procuring Entity during the re-evaluation and due diligence process—marked by introduction and reliance on extraneous considerations, preservation of an outcome already found unlawful, and resistance to giving effect to binding findings—does not inspire confidence that a lawful and impartial reconsideration will occur absent firm judicial direction.

205. The actions of both the 1st Respondent/Review Board and the Accounting Officer and the Procuring Entity (2nd and 3rd Respondents) disclose a consistent pattern that has had the practical effect of entrenching the Applicant's exclusion from the procurement process, rather than correcting the illegality identified.

206. Even in the face of glaring economic benefit offered by the Applicant's bid as opposed to the Interested Party.

207. In these circumstances, it submits, the failure is no longer incidental but structural, and no alternative remedy remains capable of vindicating the Applicant's rights. An order of Mandamus compelling

lawful re-consideration in strict conformity with the Constitution, the Act and binding court orders would therefore be of clear practical effect. It should be noted that the Applicant does not invite this Honourable Court to usurp statutory discretion or direct the award of the tender, but merely to arrest a cycle of ineffective remittals by rendering a waterproof Judgment to effectively compel the performance of public duties lawfully owed- circumstances that fall squarely and solely within the proper, restrained and remedial scope of mandamus.

208. This Honourable Court is invited to adopt the approach taken by the Court of Appeal in **Civil Appeal 510 of 2022, Chief Executive Officer, Public Service Superannuation Scheme v CPF Financial Services Limited & others**, where the appellate Court affirmed that where a procurement dispute has been subjected to repeated litigation and remittals without resolution, and the administrative bodies involved demonstrate an unwillingness or inability to conclusively address the illegality identified, the Court is entitled to issue firm and outcome- determinative directions to bring the dispute to an end. The Court emphasized that judicial review remedies must be effective and not illusory, and that Courts should not sanction endless cycles of remittal where the record discloses that only one lawful outcome is possible. In the present case, the continued narrowing, reframing and avoidance of the substantive issues already determined by this Honourable Court demonstrates that further remittal would serve no useful purpose, and that decisive judicial intervention is necessary to vindicate the rule of law, protect

the integrity of the procurement system, and finally accord the Applicant substantive justice.

The 1st Respondent's Written Submissions;

209. It submits that the Application does not meet the basic tenets of judicial review Application and should be dismissed.

210. The present Application emanates from an order of this court issued in Milimani JR E351 of 2025 on 19th December 2025 which directed the 1st Respondent to re-hear a Request for Review No. 97 of 2025.

211. The 1st Respondent in compliance with the Order, re-heard the matter and rendered its decision on 9th January 2026.

212. The Applicant dissatisfied with the decision filed this Judicial Review Application.

213. The Attorney-General submits that the Board's mandate in the Rehearing was framed by this Court's order that the matter "be remitted to the Public Procurement Administrative Review Board for reconsideration within fourteen (14) days."

214. The term "reconsideration" is not a hollow directive; it imposes a duty to apply a fresh judicial mind to the evidence and the law. Contrary to the Applicant's assertions, the Board did not merely reinstate its initial flawed decision. Instead, it engaged in a rigorous re-evaluation, as evidenced by its extensive analysis.

215. The Public Procurement Administrative Review Board's Rehearing Decision represents a faithful and nuanced compliance with Justice Chigiti's judgment in JR E351 of 2025 not a departure from them.

216. Section 173 of the public Procurement and Asset Disposal Act, 2015 provides as follows:

> Upon completing a review, the Review Board may do any one or more of the following:
>
> a. annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
>
> b. give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
>
> c. substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
>
> d. order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
>
> e. order termination of the procurement process and commencement of a new procurement process.

217. The 1st Respondent in granting the orders herein remained faithful to its powers and mandate and did not divert from the same contrary to what is alleged herein.

218. The Respondent only acted as expressly authorized under section 173 of the Act. Accordingly, the Respondent only discharged its mandate and had power to do so.

219. The purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies. It is not the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court.

220. Therefore, this being a judicial review case (and not an appeal), this court is not empowered to venture into correcting the decision of the Review Board on the merits (whether wrong or correct).

221. That is the work of the Review Board and not the Court exercising judicial review jurisdiction.

222. The High Court's jurisdiction in judicial review is circumscribed by the provisions of the Law Reform Act which confers to the court the jurisdiction to issue any of the three judicial review orders; section 8 of the Act provides that the High court shall not issue any of the orders in the exercise of its civil or criminal jurisdiction, it goes further to state that the orders will be issued in any case where the High Court in England is by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous provisions) Act, 1938, of the

United Kingdom empowered to make an order of Mandamus, Prohibition or Certiorari the High Court shall have power to make like order.

223. This it submits has led to the development of fairly well settled criteria for issuance of the orders; these include illegality, impropriety of procedure and irrationality (the three "I's") see Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43 . Additionally, the ground upon which the Court grants judicial review were stated in the case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 where it was held:

> *"In order to succeed in an Application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral*

standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

224. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that;

"The remedy of judicial review is concerned with reviewing not the merits of the decision of which the Application for judicial review is made, but the decision making process itself. 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 the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power."

225. The High Court in **Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another [2014] eKLR** held that;

'The purpose judicial review proceedings is to ensure that the individual is given fair treatment by the authority to which he has been subjected and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorized law to decide for itself a conclusion which is correct in the eyes of the court."

226. In **Republic v Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where Majanja J. quoting with approval the decision of Githua J in Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012[2012] eKLR as follows;

"It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to

curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates."

227. The Court of Appeal in **Kenya Pipeline Company Limited V Hyosung Ebara Company Limited & 2 Others (2012) e KLR** drew the boundaries for reviewing the decisions of the Review Board as follows:

"The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity…S.98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procuring entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the review board is obviously better equipped that the High Court to handle disputes relating to breach of duty of the procuring entity .it follows that its decision in matters within its jurisdiction should not be lightly interfered with.

228. Having regard to the wide powers of the Review Board it is satisfied that the High court erred in holding that the Review Board was not competent to decide whether or not the 1st Respondent's tender had met the mandatory conditions. The issue whether or not the 1st Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it.

229. In conclusion, it is manifest that the Application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of natural justice of that the decision was irrational. The Judicial review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly.

230. The High Court erred in essence in treating the Judicial Review Application as an appeal and in granting review orders on the grounds which were outside the scope of Judicial Review jurisdiction". We pray that this court adopts similar view as the Court of Appeal in the case above.

231. It is submitted that in order for an Applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the Applicant must demonstrate that there is indeed a mistake that goes to the jurisdiction of the tribunal. Misinterpretation of the law is not sufficient to move a judicial review Application.

232. It submits that this Application is an appeal disguised as a Judicial Review Application. The same should therefore not be entertained. There is a clear distinction between an appeal and judicial review proceedings. In Judicial review the court is only concerned with the fairness of the process under which the impugned decision or action was reached. Once a judicial review court gives a clean bill of health to

the process, it must down its tools without considering the merits of the decision for to do so would amount to usurping the power of the body that was mandated by the law giver to make the decision.

233. The Court of Appeal in **Municipal Council of Mombasa V Republic & another (2002) e KLR** held that in judicial review:

> *"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters of did he take into account irrelevant matters? These are the kind of the questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was ore there was not sufficient evidence to support the decision –and that, as we have, is not the province of judicial review".*

234. In **Republic vs Kenya Power & Lighting Company Limited & Another [2013] eKLR** the learned Judge quoting a decision of the Court of Appeal stated:

> *"The Board considering all the arguments of the Applicant and made findings on each of these issues. The Board may have been wrong in its decision but this Court would be usurping the*

statutory function of the Board were it to substitute its own views for those of the Board"

235. It has not been demonstrated that the Respondent is in breach of any statutory provision or that they acted in excess or without jurisdiction or breached rules of natural justice envisaged in a particular statute.

236. On the issues of costs; Section 175(7) of the Public Procurement and Asset Disposal Act forbids award of costs to any party in the event the Board's decision is quashed by the High Court.

The 2nd and 3rd Respondents' Written Submissions;

237. They submit that the scope and parameters of judicial review jurisdiction have been addressed in various decisions, where the Applicant has to show that the impugned decision or act is tainted with illegality, irrationality and procedural impropriety.

238. Reliance is placed in **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300** held as follows:

"In order to succeed in an Application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality… Irrationality is when there is such

gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision"

239. Judicial review ought to address, particularly the decision-making process and not the merits of the case thus bringing the distinction between an appeal and judicial review, the courts in **Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Ex parte Kenya Power and Lighting Company Limited [2019] eKLR** determined that:

"Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. Broadly, in order to succeed in a Judicial Review proceeding, the Applicant will need to show either:- the person or body is under a legal duty to act or make a decision in

certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is 'beyond the powers' (in Latin, 'ultra vires') of the person or body responsible for it.”

240. Article 47 of the Constitution of Kenya 2010, as read with the Fair Administrative Action Act implies a shift in judicial review to include certain aspects of merit review of an administrative action, with section 7 outlining the conditions that ought to be taken into account when seeking judicial review.

241. They submit that the main essence of merit review is the power to substitute a decision, a power which judicial review does not confer to any courts, which then brings out the difference between an appeal and judicial review.

242. This was highlighted in **Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR)** the Supreme court held as follows:

“*75.In order for the court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly “in the circumstances of the case”, without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was*

within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in Judicial Service Commission & another v Lucy Muthoni Njora, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of the Constitution which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.

76.Be that as it may, it is the court's firm view that the intention was never to transform judicial review into full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialized institutions are better placed to do so. Second, the courts are limited in the nature of reliefs that they may grant to those set

out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the Fair Administrative Action Act. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng. Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised."

243. They submit that in this case, the Applicant seeks the court to make a full inquiry into the facts and merits of the matter. Specifically, the Applicant urges the court to find that the Board's decision of 27th October 2025 contravenes its previous order dated 28thAugust 2025 in Application No 90 of 2025 directing the 2nd and 3rdRespondents to re-evaluate the Applicant's tender, to which the 2nd and 3rd Respondents adhered to thus culminating to the 2nd Letter of Regret issued to the Applicant.

244. The Applicant further urges this Court to try one of the highly controverted issues during determination by the Board of MR 16 vis a vis Clause 14 of the Bid Data Sheet which was one of the reasons that

led to the disqualification of the Applicant due to its failure to issue client references even after being given an opportunity to do so through email dated 17thSeptember 2025.

245. The Applicant further in paragraph 4(f) of the OM urges the court to consider an alleged award of tender to the Interested Party by the 2nd and 3rd Respondents, which allegation has no factual basis as the 2nd Respondent is yet to issue the tender.

246. They submit that one thing the Applicant has constantly focused on is how wrong the decision of the Board is, which focus should be directed in appeal instead of focusing on the conduct of the Board throughout the case, which forms the import of a judicial review Application.

247. Interestingly, the Applicant fails to mention that despite receiving an email from the 2nd and 3rdRespondents on 17th September 2025 requesting for any new or independent client references, the Applicant explicitly replied by asserting that the documents sought were not part of the tender requirements and then proceeded to provide documents immediately thereafter.

248. It is submitted that the Applicant under this limb claims that the Board failed to appreciate sections 3, 79, 80(2) and 173 of the Public Procurement and Disposal Act (hereinafter referred to as the "**PPADA**"), as read with the Fair Administrative Action Act (FAAA) and Article 227 of the Constitution.

249. Section 79 of the PPADA emphasizes that a tender shall be considered responsive if it conforms to all the mandatory requirements enlisted

in the tender documents and that such a tender shall not be affected by minor deviations, errors or oversights that can be corrected without affecting the substance of the tender.

250. On the other hand, S. 80(2) stipulates that evaluation of tenders shall be done using the procedures and criteria set out in the tender documents. Section 173 goes ahead to empower the Review Board upon completion of a review to annul any proceedings or give directions in relation to the tendering process, with such decisions being made in accordance with the guiding principles set out in s. 3 of the PPADA.

251. It submits that from paragraph 28 to paragraph 32, the Applicant enumerates the alleged illegality in the Board's decision. The issues of past performance and the lack of client references particularly arise with the Applicant vehemently opposing that its past performance ought to have formed part of the due diligence process as stated in Clause 14 of the Bid Data Sheet or MR 16 of the tender documents.

252. They reiterate that the Board in its decision 28thAugust 2025, as empowered by s. 173 of the PPDAA, directed the Board to readmit and reevaluate the Applicant's bid.

253. In following the Board's directions, the 3rdRespondent consequently conducted due diligence in accordance with Clause 14 of the Bid Data Sheet on the Applicant on 17th September 2025 after which it sent an email to the Applicant seeking additional client references, which email the Applicant responded by categorically stating that what we

were requesting for was not part of the requirements in the tender document.

254. The Applicant's bid became unresponsive as per s. 79 (2) of the PPDA and the Applicant cannot try to fault the Board or the 2nd and 3rdRespondents of its misgivings.

255. In the 3rd Respondent's Letter of Regret dated 29th September 2025, it was also stated the Applicant's past performance with the 3rdRespondent as it had failed to deliver on d Tender No.KGN-SALE-001-2024 for the Sale of 4,578,148 Certified Emission Reductions (CERs) by KenGen, valued at USD 32,047,036.00, on 7th May 2024 despite being granted two extensions under the contract, and a stay order by the High court.

256. It submits that in order to show that the Board correctly applied itself to the rule of law, the Board, went ahead and ruled that past performance as stated as the 1st and 2nd reasons for disqualification of the Applicant's bid was sub judice as the same was the subject of High Court and arbitral proceedings thus could not address itself on the said reasons for disqualification.

257. They submit that the Board's decision in holding that capacity to perform a contract as listed as the 3rdreason for disqualification of the Applicant, is a critical requirement in a tender such as the 3rd Respondent's and due diligence as provided in Clause 14 of the Bid Data Sheet and further echoed in section 83 of the PPDA and Regulation 80 of the Public Procurement and Asset Disposal Regulations, 2020.

258. Reliance is placed in **Republic v Public Procurement Administrative Review Board & another Ex-parte University of Eldoret [2017] eKLR** where the court held as follows:

> *"108. In my humble view, there must be in every tender document, an implied criteria for due diligence without which there can never be an efficient, transparent and or accountable public procurement process. Tenderers would be quoting the lowest figures and once awarded the tenders, then they would be unable to perform or implement public projects, thereby swindling the taxpayer of the much hard-earned tax and rendering the whole process a waste of valuable time and financial resources.*
>
> *109. I would, therefore, without hesitation find that the due diligence complained of is not an additional criteria but is an implied criteria in every tender document, and that the Procuring Entity is under a public duty to carry out due diligence and satisfy itself that the responsive bidders at the technical evaluation stage are capable of implementing the projects before considering the financial aspect for the bidders.*
>
> *110. In other words, all bidders in all public contracts should expect that they would be evaluated on their capability to implement the projects, notwithstanding their low value bids. [Emphasis added]*

259. The Applicant cannot claim illegality or irregularity where the Board rightly applied itself to the law thus this Honourable Court should not interfere with the Board's decision.

260. The decision of a tribunal can only be said to be irrational and unreasonable where there is such callousness in the orders given that no reasonable authority addressing itself to the present facts and law would have made such a decision.

261. Reliance is placed in **Republic v Kenya Bureau of Standards & 4 others; Exparte United Millers Limited; Department of Health Services, Nakuru County (Interested Party) [2019] KEHC 11292KLR)** in establishing the test for unreasonableness stated thus:

> *63. The tests for legal unreasonableness comprises of any or all of the following:- a. specific errors of relevancy or purpose, b. reasoning illogically or irrationally, c. reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; d. giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others. The ex parte Applicant has not demonstrated any of the above tests. 64. The court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the*

outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently. (Emphasis added)

262. The Applicant under paragraph 36 alleges that the Board directed itself on the issue of its past performance, yet it had declared the same as subjudice. However, the record ought to be set straight that under paragraph 149 and 150 the Board in applying the law held the first two reasons for disqualification as per the Letter of Regret to be sub judice.

263. They submit that the Board in its decision went ahead under paragraph 151 to 153 to analyse the issue of the Applicant's capacity to implement the subject contract by finding that the failure to provide independent client references and its failure to provide previous contracts of comparable value and complexity despite given the opportunity to present the same as substantive reasons to disqualify the Applicant.

264. They submit that the Board's analysis of the 2nd and 3rdRespondents' reasons for disqualifying the Applicant, the Board held that the disqualification was valid due to the third and fourth reasons for

disqualification as stated in the Letter for Regret. The Board did not apply itself to the first and second reasons as claimed by the Applicant.

265. They submit that the Applicant has failed to show how the Board erred in its Application of the law, how the decision was irrational nor did give weight to irrelevant facts as presented in the Application for review. In fact, the Board rightly considered all the relevant issues raised by the parties, the interpretation of MR 16 and Clause 14, its decision dated 28th August 2025, the Letter of Regret as drawn by us and the magnitude of the subject contract.

266. They submit that the decision of a specialised tribunal, such as the Board ought to be considered weighty and should not be interfered with lightly and any party that seeks such interference is mandated to prove that the decision is highly unreasonable thus defying logic, marred with illegality or unfair.

267. Reliance is placed in **Republic v Kenya Power & Lighting Company Ltd & Another [2013] eKLR**, where in placing reliance on **Associated Provincial Picture Houses Ltd V Wednesbury Corporation [1948] 1 KB 223** the court held that:

> *"I think the words of Lord Greene, M.R. at page 229 in the Wednesbury Corporation case (supra) will make good closing remarks in this case. He observed that:-*
>
> "*It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions*

often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another

It is not enough for an Applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of the rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."

The Interested Party's submissions;

268. It submits that the Court only ought to consider the grounds of review found on the traditional/common law grounds for judicial review as pleaded by the Applicant in the Originating Motion.

269. Reliance is placed in **The Supreme Court in the case of Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR)** summarized the two approaches to Judicial Review in the following manner: -

> *"It is clear from the above decisions that when 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 a suit 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 following our decision in SGS Kenya Ltd and not the merits of the decision per se."*

270. The Supreme Court in **SGS Kenya Limited v Energy Regulatory Commission & 2 others(Petition 2 of 2019) [2020] KESC 64 (KLR)** (10 January 2020) (Judgment) at paragraph 45 stated as follows:

> *"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."*

271. The Court of Appeal in the SGS Kenya Limited case above endorsed and approved by the Supreme Court in faulting a decision of the High

Court where an extensive merit review had been undertaken and had this view:

> *"Save for a limited scope, which we shall return to later, the court, considering a judicial review Application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See Republic v. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Misc. Civil Appl. No. 374 of 2006.*
>
> *In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal."*

272. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does

not necessarily qualify as a candidate for juridical review. See East African Railways Corp. v. Anthony Sefu Far-Es-Salaam (1973) EA 327."

273. At paragraph 2 of the Motion and Paragraphs 28 to 33of the Supporting Affidavit to the Originating Motion, the Applicant makes a broad allegation that the 1st Respondent "erroneously, selectively narrowly and/or superficially interpreted and or applied the provisions of sections 3, 79, 80(2), 83 and 173 of the Act as well as Fair Administrative Action Act and Article 227 of the Constitution in blatant regard to the Applicants pleadings and submissions." Nothing could be farther from the truth.

274. It submits that the finding at paragraph 145 of the impugned decision that "the Applicant's bid was disqualified following the due diligence exercise conducted on its bid at the Preliminary Evaluation stage" was proper for the reasons enumerated below.

275. The tender evaluation criteria were set out as Mandatory Requirements Stage, Financial stage. Part of mandatory requirements was the conduct of due diligence on the successful bidder by the 2nd and 3rd Respondents.

276. The Applicant and the Interested Party having passed the mandatory requirements were subjected to the next stage of due diligence as recommended by the Board in its earlier decision involving the same parties. The Applicant failed due diligence and only the Interested Party proceeded to the Financial Evaluation stage.

277. It submits that the due diligence carried out by the 2nd and 3rd Respondents who sought to satisfy a legal requirement or discharge their obligation.

278. In conducting due diligence, the 2nd and 3rd Respondents physically/practically ascertained whether the contents of the bidder's documents were true, and whether they had past experience in carbon trading.

279. Having emerged as the highest bidder, on 17th September 2025, the 2nd Respondent carried due diligence and requested the Applicant to avail information/ various documents among them past experiences-provision of evidence of past professional experience through testimonials from previous assignments undertaken.

280. The Applicant, however, did not avail the information requested. Instead, it wrote back saying that the information requested during due diligence were not part of tender requirements.

281. The 2nd and 3rd Respondents also noted during due diligence that the Applicant had been awarded a similar contract in 2024 Tender No.KGN-SALE-001-2024 to the Applicant for the Sale of 4,578,148 Certified Emission Reductions (CERs)valued at USD 32,047,036.00, on 7th May 2024 , but failed to perform the contract leading to re-advertisement of the said tender in 2025.

282. Having failed to provide information requested, the 2nd and 3rd Respondents proceeded and conducted due diligence on the Interested Party, who was the 2nd highest evaluated bidder in accordance with Regulation 80(2).

283. The Interested Party submitted all the information required during due diligence on 23 September 2025, including past experience and evidence of carbon credit trading by submitting two official European Union Registry Transaction Confirmations with EUAs, which are tradable units under the EU Emissions Trading Scheme all done in August and September 2023.

284. The Board in its finding agreed that the Applicant failed due diligence, and the evaluation committee considered the next responsive bid for goods, works or services as recommended by the evaluation committee under Regulation 80.

285. It submits that the finding by the 1st Respondent that the 2nd and 3rdRespondents complied with the law in awarding the tender to the Interested Party is therefore in compliance with the provisions below.

286. Section 83 of the Public Procurement and Asset Disposal Act, 2015 provides as follows;

> 83. Post-qualification
>
> (1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.

287. It submits that Regulation 80 provides thus:

80. Post-qualification

(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.

288. Section 55(4) of the PPADA provides that *"A State organ or public entity shall require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied."*

289. The 1st Respondent found that due diligence conducted by the 2ndand 3rd Respondents complied with the provisions of Section 83 of the Act and in this case the Respondents fully complied with the law. See Republic vs Public Procurement Administrative Review Board and Two Others ex parte Krohne (Pty) Ltd, Nrb H.C. JR Misc. Appl. No 147 of 2018.

290. It submits that the 1st Respondent also was right to find that due diligence in this instance was for the Respondents to apply the care and attention required of them to satisfy themselves that the bidder was capable to deliver on the Tender. It confirmed and verified that the information provided by bidders were true. Indeed, in PPARB Application No. 134 of 2019, Trident Insurance Company Ltd v Accounting Officer, County Assembly of Nyamira & Anor) the court held that due diligence in this case includes verifying as past performance from previous clients of such a bidder/persons the bidder has had previous engagement. The Applicant failed to do so.

291. It further submits that the Applicant failed to demonstrate experience and capacity to deliver the contract. Indeed, it was awarded a similar contract in Tender No.KGN-SALE-001-2024 to the Applicant for the

Sale of 4,578,148 Certified Emission Reductions (CERs) valued at USD 32,047,036.00, on 7th May 2024, but failed to perform the contract leading to re-advertisement of the said tender in 2025, which is now the subject of review.

292. Reliance is placed in the case of **Republic v Public Procurement Administrative Review Board & another Ex-parte University of Eldoret [2017] eKLR** where the court held as follows:

> *"108. .... there must be in every tender document, an implied criteria for due diligence without which there can never be an efficient, transparent and or accountable public procurement process. Tenderers would be quoting the lowest figures and once awarded the tenders, then they would be unable to perform or implement public projects, thereby swindling the tax payer of the much hard-earned tax and rendering the whole process a waste of valuable time and financial resources.*
>
> *109. I would, therefore, without hesitation find that the due diligence complained of is not an additional criteria but is an implied criteria in every tender document, and that the Procuring Entity is under a public duty to carry out due diligence and satisfy itself that the responsive bidders at the technical evaluation stage are capable of implementing the projects before considering the financial aspect for the bidders.*
>
> *110. In other words, all bidders in all public contracts should expect that they would be evaluated on their capability to implement the projects, notwithstanding their low value bids."*

293. The 1st Respondent rightly found that the Applicant failed to demonstrate capability and past experience in implementing the Tender hence it failed due diligence as envisaged in the law.

294. The Applicant's is inviting this court to find in its favor that duly diligence ought to be an academic exercise, which would be a violation of sections 55 and 83 of the Act as well as Regulation 80(2).

295. It submits that the allegation of illegality and irrationality as pleaded by the Applicant is therefore an invitation to the court to conduct a merit review of the decision through an interrogation of the Request for Review, the responses filed by the parties and their submissions before the 1st Respondent and to come to a different conclusion.

296. This court cannot delve into the question of evaluation of the tender and whether a party deserved an award or not.

297. The 1st Respondent heard all the parties orally and considered their written pleadings and submissions before analyzing the facts and coming to the conclusion that the tender process was compliant with Article 227 of the Constitution.

298. Article 227 of the Constitution lays down the minimum requirements for a valid tender process and contracts entered following an award of tender to a successful tender.

299. It requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be 'fair, equitable, transparent competitive and cost-effective.' This position is replicated

in section 3 of the Act. The 2nd and 3rd Respondents in awarding the tender were therefore bound to abide by these provisions.

300. It submits that the decision to award a tender constitutes administrative action. It follows that Article 47 and the provisions for the Fair Administrative Action Act apply to the process. This is the legislative background against which the present matter must be considered, in light of the 1stRespondent's decision dated 19 August 2025.

301. It submits that the1st Respondent's decision to dismiss the Applicant's Request for Review No. 97 of 2025 was legal, rational, followed the procedure.

302. The test to be applied is whether the decision made by the 1stRespondent is a decision to which no reasonable decision-maker could have arrived at; or a decision which was not reasonably open in the circumstances.

303. In arriving at its decision, the 1st Respondent correctly interpreted;

a) The evaluation criteria in the tender document, including the Mandatory Requirements and the due diligence under sections 83 and 55 of the Act, and Regulation 80.

b) the provisions of sections 80 and 86 of the Public Procurement and Asset Disposal Act as read together with the tender document vis-à-vis the award of the Interested Party that the evaluation committee and arrived at a decision which was llegal, reasonable and rational.

c) The law in finding that the 2nd & 3rd Respondents fully complied with the mandatory provisions of section 87 of the PPADA as read together with Regulation 82.

304. Section 87 of the PPADA as read together with Regulation 82 provides that after evaluating tenders and identifying a successful bidder, the Accounting Officer (the 2nd Respondent herein) must issue written notification to both the successful and unsuccessful tenderers/bidders to inform them of the imminent contract award.

305. This communication must include such pertinent information as the name of the successful tenderer/bidder, the tender price, and the reason why the bid was unsuccessful.

306. Additionally, issuance of the Notification triggers a standstill period (14 days) during which the procuring entity must refrain from concluding or signing the contract with the successful tenderers/bidders to allow unsuccessful tenderers to inter alia request a debriefing.

307. It submits that no material has been placed by the Applicant that any contract was signed between the parties to warrant grant of prayer 4 in the motion, which is merely speculative.

308. The 1st Respondent is faulted for acting arbitrarily and irrationally in its interpretation and dismissing the Applicant's Request for Review No. 97 of 2025. According to the Applicant, "the entire decision was entirely based on the irrational and unreasonable assumption of both facts and law."

309. It submits that the threshold for finding a decision of a public body as being irrational and/or unreasonable is a high one and has been the subject of many court decisions.

310. In **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** the Court held that;

> *"The test of Wednesbury unreasonableness has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated."*

311. Reliance is places in **Prasad v Minister for Immigration {1985} 6 FCR 155,** the court opined that;

> *"The decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them."*

312. It submits that at paragraphs 147-160 of the impugned decision, the 1st Respondent clearly justified the decision to find the mode of evaluation and its Application lawful and gave reasons for finding that it was proper and in accordance with the law.

313. It submits that the Provisions of Section 80 and 86 of the Procurement Act were juxtaposed with the mandatory provisions of Article 227 of the Constitution and whether these findings were right or wrong, or whether another judicial body seized of the same disputed facts and law would come to a different finding or not, the impugned decision cannot be overturned in these judicial review proceedings.

314. It is Further submitted that, by reaching the conclusion that the mode of evaluation/award was in compliance with mandatory requirements, and that the due diligence was in accordance with regulation 80 and section 83 and 55, and the provisions of Article 227 of the Constitution, the 1st Respondent considered the pleadings and submissions from all the parties before making the determination.

315. There was no violation of due process of law or the breach of laws of natural justice and the 1st Respondent at all times exercised powers granted to it by Statute.

316. It was within the realms of reasonableness and rationality to dismiss the request for Review No. 97 of 2025, the award to the Interested Party having been predictable, and transparent in light of the Constitutional ideals of transparency and cost effectiveness.

317. It submits that the findings by the 1st Respondent in these circumstances cannot be faulted as it considered compliance with all the laws in reaching its decision that is being challenged.

318. The Court of Appeal in **Capital Markets Authority v Ciano & another (Civil Appeal 314 of 2018) [2023] KECA 581 (KLR)**

(26 May 2023) (Judgment) stated as follows on what constitutes procedural impropriety:

> *"Procedural impropriety generally encompasses two things: procedural ultra vires, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness. Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice, is a form of procedural impropriety."*

319. In **Republic v Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior, Ministry of Interior and Co-ordination of National Government (Interested Party); Ex Parte Applicant CMC Motors Group Limited [2020] eKLR** it was held that;

> *"The most basic rules of administrative law are first that decision makers may exercise only those powers which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators comply with these two rules, their decisions are safe."*

320. It submits that the Applicant did not plead with specificity and precision the substantive and procedural legal rules that were not

observed or complied with by the 1st Respondent. After this failure, the Applicant is inviting the court to act ultra vires and review the entire record of the proceedings before the 1st Respondent in a fishing expedition.

321. In reaching the conclusion that the mode of evaluation/award was transparent and predictable in compliance with the provisions of Article 227 of the Constitution, the 1st Respondent considered the pleadings and submissions from all the parties before making the determination. There was no violation of due process of law or the breach of laws of natural justice and the 1st Respondent at all times exercised powers granted to it by Statute.

322. It submits that there was no violation of legitimate expectation in circumstances where a party was invited by the 1st Respondent to be heard and all the rules of procedure were followed to come to a decision that is clearly legal, rational and reasonable.

323. The Applicant did not particularize the allegation of bias and the biased decision and cannot be a victim of unprocedural and prejudicial proceedings as alleged. As stated earlier, a party is bound by its pleadings.

324. It submits that The Applicant failed to particularize with exactitude and precision how the 1st Respondent's decision was illegal, irrational, unreasonable, biased and against the laid down substantive and procedural legal rules.

Analysis and determination;

Upon perusing the pleadings filed and exchanged by the parties herein, as well as the rival submissions of the respective parties and the authorities relied upon, this court finds the following to be the issues for determination;;

1) Whether the Application has merit.

2) Costs.

Whether the Application has merit.

328. In determining this issue the court looks at the scope of the re-hearing. It is not in dispute that on 19.12.25 the High Court in Judicial Review Application E351 of 2025 ordered as follows;

1) An order of CERTIORARI, to remove into the High Court and quash and/or set aside the Decision of the Public Procurement Administrative Review Board (the 1st Respondent) dated 27th October 2025 in Public Procurement Administrative Review Board Application No. 97 of 2025, Sintmond Group Limited vs The Accounting Officer Kenya Electricity Generating Company PLC, Kenya Electricity Generating Company PLC and JV of Munja Trading Limited & Marwil Energy Holding AS, in respect of Tender No. KGN- SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) is hereby issued.

2) An order of PROHIBITION, directed at the 2nd and 3rd Respondents, prohibiting them from implementing the Decision of the 1st Respondent dated 27th October 2025 in Public Procurement Administrative Review Board Application No. 85 of

2025, in Public Procurement Administrative Review Board Application No. 97 of 2025, Sintmond Group Limited vs The Accounting Officer Kenya Electricity Generating Company PLC, Kenya Electricity Generating Company PLC and JV of Munja Trading Limited & Marwil Energy Holding AS, in respect of Tender No. KGN- SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) is hereby issued.

3) The prayer that an order of CERTIORARI, to remove into the High Court and quash and/or set aside any Contract in respect of Tender No. KGN- SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) illegally signed between the 2nd and 3rd Respondent and the Interested Party during the 14 days standstill period following the decision of the 1st Respondent dated 27th October 2025 is declined.

4) The prayer that pending the hearing and determination of the substantive Originating Motion, that this Honorable Court be pleased to issue AN INTERIM ORDER FOR STAY, to stay the Execution and/or Implementation of the Decision of the 1st Respondent dated 27th October 2025 in Public.

5) Procurement Administrative Review Board Application No. 97 of 2025, Sintmond Group Limited vs The Accounting Officer Kenya Electricity Generating Company PLC, Kenya Electricity Generating.

6) Company PLC and JV of Munja Trading Limited & Marwil Energy Holding AS, in respect of Tender No. KGN- SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) is spent.

7) The Application is hereby sent back to the 1st Respondent for re hearing which in an event must be done within 14 days of today's date.

It is also not in dispute that at the re-hearing, the Board identified the issues for determination as follows:

a. What is the scope and extent of the Board's jurisdiction upon re-hearing the matter, having regard to the judgment of the High Court in Judicial Review Application E351 of 2025;

b. Whether the post-qualification due diligence exercise was conducted in accordance with the law, with particular regard to the alleged breach of legitimate expectation arising from the Respondents' failure to respond to the Applicant's letter dated 19th September 2025; and

c. What appropriate orders should issue in the circumstances.

329. After hearing the Application No. 97/2025, The board issued the following orders on 9.1.26;

1. The Request for Review dated 2nd October 2025 and filed on 6th October 2025 be and is hereby, partially, allowed;

2. The Accounting Officer of the Kenya Electricity Generating Company PLC is hereby directed to respond to the Applicant's

letter dated 19th September 2025 within seven (7) days from the date hereof.

3. Further to Order No. 2 above, the Accounting Officer of the Kenya Electricity Generating Company PLC be and is hereby directed to proceed with and oversee the tender proceedings for Tender No. KGN-SALE-005-2025 for the Sale of Certified Emission Reductions (Re-Tender) and to ensure that the said process is concluded in a lawful and logical manner; and

4. Each party shall bear its own costs of the proceedings.

330. The High Court's order in relation to the re-hearing was very clear. It ordered that, "The Application is hereby sent back to the 1st Respondent for re hearing which in an event must be done within 14 days of today's date."

331. In a bid to comply with this order, the board was correct in identifying that one of the issues for its determination was the scope of the re-hearing.

332. However it is this court's view and I so hold that the board erroneously came up with the holding that…,"the scope of the Board's jurisdiction in the rehearing is limited to the issue of procedural fairness during the post-qualification due diligence stage, with regard to the legitimate expectation of the right to be heard as regarding the communication contained in the letter dated 19th September 2025."

333. The Board acted ultra-views when it qualified the High Court's order. In qualifying the High Court's judgment, the board's decision is

tainted with illegality, irrationality or procedural impropriety. Had the court intended to, it would have qualified, limited or defined the scope of the hearing. It did not qualify the re-hearing scope.

334. In order for the re-hearing to make sense, the 1st Respondent must conduct a re-hearing. The response to the Applicant's letter on its own amounts to a cosmetic engagement that leads to a barren outcome. The mere responding to the Applicant's letter on its own has no relevance.

335. The 1st Respondent should not just send the reply without addressing its mind to the impact that its failure to respond to the letter had on the Applicant. The procurement proceeded leaving the Applicant behind. This no doubt gave the competitors an unfair edge.

336. This is an unfair and unreasonable gesture on the part of the 1st Respondent that leaves the Applicant with no bargaining power in the face of the competitive procurement process.

337. It is not for this court to prescribe to the 1st Respondent what it should do. The re-hearing must be one that adds value to the procurement process. The elements of the re-hearing must be of the same quality magnitude, relevance and weight just like the initial hearing had.

338. The fact that it is a re-hearing does not take away the board’s duty to ensure that it is conducted in a legal, procedurally fair manner that is in keeping with Article 47 of the Constitution. Any re-hearing that does not uphold the tenets of Article 47 of The Constitution is a sham.

339. The case of **Republic v Public Procurement Administrative Review Board; Ex Parte Madison General Insurance Kenya Ltd; Accounting Officer (KEBS) & another (Interested Parties)** the High Court cited with approval the case of **Council of Civil Service Unions v Minister for the Civil Service (1985) A.C. 374,410** and held as follows at paragraph 43**: -**

> *"43. A person aggrieved by the decision of the Board has recourse before this court by dint of section 175 of the Act. The emphasis I would wish to lay here is that the recourse is one under the judicial review jurisdiction of this court and not an appellate one. The court, thus, would be exercising its supervisory powers over the board through sniffing for any whiff of illegality, irrationality or procedural impropriety. In Council of Civil Service Unions v Minister for the Civil Service (1985) A.C. 374,410 Lord Diplock stated as follows:*
>
> *"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case-by-case basis may not in course of time*

add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it..." (Emphasis Added).

The Court applied the test of Wednesbury unreasonableness which has been stated as "*the impugned decision must be objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated*." In the Republic v Law Society of Kenya Disciplinary Tribunal & another [2018] eKLR, the Honourable Judge cited the case of *Pastoli vs.*

Kabale District Local Government Council and Others [2008] 2 EA 300 in defining irrationality:

"Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision".

Further, the case held that:

"In order to succeed in an Application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality".

340. In concluding this issue the court is satisfied that the board acted illegally. In so holding the court is guided by the case of Council of Civil Service Unions v Minister for the Civil Service (1985) A.C. 374,410 where it was held;

> *"Illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*

In addressing the issue of whether or not the Application has merit, the court addresses the question whether the 1st Responded offended Article 175 of the Constitution.

341. In its ruling, the 1st Respondent ordered;

Order No.2, The Accounting Officer of the Kenya Electricity Generating Company PLC is hereby directed to respond to the Applicant's letter dated 19th September 2025 within seven (7) days from the date hereof.

Order No.3, Further to Order No. 2 above, the Accounting Officer of the Kenya Electricity Generating Company PLC be and is hereby directed to proceed with and oversee the tender proceedings for Tender No. KGN-SALE-005-2025 for the Sale of Certified Emission Reductions (Re-Tender) and to ensure that the said process is concluded in a lawful and logical manner.

342. Section 175(1) provides, "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."

343. In the case of **Pastoli v Kabale District Local Government Canal & Others (2008) 2EA** where the learned Judge stated;

"In order to succeed in an Application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality--.

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision."

344. In **Anisminic vs Foreign Compensation Commission (1969) 1 All ER 208 at 233, Lord Pearce** it was held as follows ,

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while

engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step out of its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

345. It is this court's finding that the Applicant had a legitimate expectation that the 1st Respondent would ensure that it accesses its right to initiate judicial review proceedings within Section 175 of The PPDA Act.

346. **In the Aprim Consultants v. Parliamentary Service Commission & Another, CA. No. E039 of 2021**, the Court stated that section 175 was couched in mandatory terms and expressed itself as follows:

"A perusal of section 175 of the Act reveals Parliament's unmistakable intention to constrict the time taken for the filing, hearing and determination of public procurement disputes in keeping with the Act's avowed intent and object of expeditious resolution of those disputes. Parliament was thus fully engaged and intentional in setting the timelines in the Section."

347. This court finds that 1st Respondent violated the Applicant's legitimate expectation that it would enjoy access to justice when it directed that;

"The Accounting Officer of the Kenya Electricity Generating Company PLC is hereby directed to respond to the Applicant's letter dated 19th September 2025 within seven (7) days from the date hereof and that "Further to Order No. 2 above, the Accounting Officer of the Kenya Electricity Generating Company PLC be and is hereby directed to proceed with and oversee the tender proceedings for Tender No. KGN-SALE-005-2025 for the Sale of Certified Emission Reductions (Re-Tender) and to ensure that the said process is concluded in a lawful and logical manner."

348. The 1st Respondent simply liberated the procurement process upon the expiry of the 7 days at the expense of the Applicant's right to invoke Section 175 of the Act.

349. This offended Section 175 of PPAD Act. An order that offends Section 175 by limiting statutory timelines leads to an illegality and any outcome therefrom is ultra vires.

350. Article 227 of The Constitution provides (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost- effective.

351. The order by the 1st Respondent's that the process be completed after the sending the letter has the ripple effect of offending the right to fair competition as guaranteed to the Applicant under Article 227 of the Constitution. The outcome of such a re-hearing cannot be said to be legal.

352. In the case of **Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 others [2015] eKLR** the Court of Appeal discussed the judicial review remedies as follows:

> *"...certiorari issues to quash decisions for errors of law in making such decisions or for failure to act fairly towards the person who may be adversely affected by such decision. Prohibition is directed to an inferior tribunal or body from continuing proceedings in excess of its jurisdiction or in contravention of the laws of the land. The order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same."*

353. The court finds that the 1st Respondent's decision amounts to a failure to act fairly towards the Applicant who was adversely affected by such decision and in this case the Applicant.

354. This leaves one wondering what purpose the letter would achieve or serve once the Applicant. Orders must not be issued in vain.

355. That amounted to an illegality that is curable through the issuance of an order of Certiorari.

356. All that the Respondent gave to the Applicant to take home was a barren letter with no economic value or relevance in the face of Article 227 of the constitution. This does not amount to redress and I so hold.

357. The Respondent's decision must be quashed and I so hold.

358. The Applicant also sought for an order of Mandamus. The scope of an order of mandamus was discussed by the Court of Appeal in the case of **Kenya National Examination Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** thus:

> *"What is the scope and efficacy of an order of Mandamus? Once again, we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says:*
>
> *"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."*
>
> At paragraph 90 headed "the mandate" it is stated:
>
> *"The order must command no more than the party against whom the Application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of*

the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

359. Having quashed the decision, this court is satisfied that there is a justification for the issuance of a Mandamus order compelling the 1st Respondent to readmit the Application for re hearing and I so direct.

360. The Applicant also sought for an order of Prohibition, directed at the 2nd and 3rd Respondents, prohibiting them from implementing the Decision of the 1st Respondent dated 27th October 2025 to issue.

361. In **Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [20221 eKLR**, the Court rendered itself thus:

"The Order of "Prohibition" issues where there are assumptions of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi's Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction."

"Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of

that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself."

362. This court is satisfied that ruling was illegal the same cannot be implemented. Consequently this court is satisfied that the Applicant is entitled to an order of prohibition and I so hold.

Determination;

363. The Application has merit.

364. No orders as to costs.

Order:

1) …**Spent.**

2) An order of **CERTIORARI,** to remove into the High Court and quash and/or set aside the Decision of the Public Procurement Administrative Review Board (the 1st Respondent) dated 9th January 2026 ("the impugned decision") issued upon re-hearing in Public Procurement Administrative Review Board Application No. 97 of 2025, Sintmond Group Limited vs The Accounting Officer Kenya Electricity Generating Company PLC, Kenya Electricity Generating Company PLC and JV of Munja Trading Limited & Marwil Energy Holding AS, in respect of Tender No. KGN- SALE005-2025 for Sale of Certified Emissions Reductions (Re-Tender) ("the Tender") is hereby issued.

3) An order of **CERTIORARI**, to remove into the High Court and quash and/or set aside any award decision, Notification of Intention to Award Letter, Letter of Regret or any other award decision communication in respect to the Tender issued pursuant to the impugned decision of 1st Respondent in violation of Section 175 of the Public Procurement and Asset Disposal Act (hereinafter, "the Act") is hereby issued.

4) An order of **PROHIBITION,** directed at the 2nd and 3rd Respondents, prohibiting them from implementing, acting upon or giving effect to the said Decision of the 1st Respondent dated 9thJanuary 2026 is hereby issued.

5) An order of **MANDAMUS,** compelling the 1st Respondent to readmit The Application for re hearing which in an event must be done within 14 days of today's date is hereby issued.

6) The prayer that in The Alternative, and without prejudice to the foregoing, an order of **MANDAMUS** do issue compelling the 2nd and 3rd Respondent to conduct due diligence based on the Exparte Applicant's bid, in full observance 1st Respondent's findings in PPARB Application No. 90 of 2025 including but not limited to the disjunctive nature Mandatory Requirement 16 of the Tender, disregarding all extraneous issues and issues pending in litigation as covered in the Regret Letter of 29thSeptember 2025 and proceed to issue a Letter of Notification of Award in accordance to Sections 86 and 87 of the Act is disallowed.

7) The prayer **THAT** in view of the protracted litigation in this matter and the unwillingness of the 1st, 2nd and 3rd Respondents to comply with the law and obey court orders and treat the Applicant fairly in these procurement proceedings, this Honourable Court be pleased to issue appropriate directions and further orders as it may deem fit to bring an end to the endless litigation while ensuring the Applicant is treated fairly will amount to micro managing the Respondent and the same is disallowed.

8) The prayer that pending the hearing and determination of the substantive Originating Motion, that this Honorable Court be pleased to issue **AN INTERIM ORDER FOR STAY**, to stay the Execution and/or Implementation of the Decision of the 1stRespondent dated 9th January 2026 in **rehearing of** Public Procurement Administrative Review Board Application No. 97 of 2025, Sintmond Group Limited vs The Accounting Officer Kenya Electricity Generating Company PLC, Kenya Electricity Generating Company PLC and JV of Munja Trading Limited & Marwil Energy Holding AS, in respect of the Tender is spent.

9) No order as to costs.

Dated, signed and delivered at Nairobi this 27th day of February, 2026.

.....

J. CHIGITI (SC)

JUDGE