REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. E019 OF 2026

REPUBLIC……....
APPLICANT

AND

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD……...1ST RESPONDENT

KENYA POWER & LIGHTNING CO. LTD……...2ND RESPONDENT

SULTAN LIMITED……...*EXPARTE* APPLICANT

JUDGMENT

1. The Notice of Motion dated 27th January 2026 and filed on the same day is brought under the provisions of Articles 22, 23, 47, 50 (1), 159 and 227 of the Constitution as read with section 175 of the Public Procurement and Asset Disposal Act No. 33 of 2015.
2. The applicant seeks orders of setting aside of the decision of the PPARB rendered on 13th January, 2026, which decision struck out the applicant's request for review on account that the applicant did not enjoin the accounting officer of the procuring entity. Consequently, the applicant seeks judicial review orders of certiorari quashing the aforesaid decision for violation of Articles 47 and 50 (1) of the Constitution and that the request for review be remitted to the Public Procurement Administrative Review Board for

determination on its merits before a differently constituted panel, upon affording all parties an opportunity to be heard. The last prayer is for costs to be in the cause.

3. The Notice of motion is supported by grounds on the face thereof, the statutory statement and verifying affidavit sworn by Kefa Kamau Mundati who introduces himself as 'the applicant' and competent to swear the affidavit.
4. In his deposition, Mr. Mundati depones in a somewhat mixed-up manner, that on 23rd December 2025, he filed a request for review challenging procurement proceedings undertaken by the 2nd Respondent and that the accounting officer of the procuring entity was aware of the said proceedings as he was represented by counsel and that he fully participated in the said hearing of request for review and that at no point did he raise any objection as to joinder of accounting officer.
5. That on 13th January, 2026, the Review Board in its impugned decision struck out the request for review on account of lack of jurisdiction because, according to the Review Board, the applicant did not enjoin the accounting officer as a respondent party contrary to section 170 of the Public Procurement and Asset Disposal Act.
6. The applicant asserts that the non-joinder issue was raised *suo moto* by the Review Board in its impugned decision and that parties were never invited to make any submissions on the same, which action by the Review Board, the

applicant asserts, was in violation of Articles 47 on the right to a fair administrative action and 50 (1) on the right to a fair hearing.

7. According to the applicant deponent, he does not seek to invalidate the statutory omission but seeks redress for the procedural unfairness by which the Review Board arrived at its decision. The applicant annexed copy of the impugned decision.

8. Opposing the application, the 2nd Respondent procuring entity filed a Notice of Preliminary Objection dated 2nd February, 2026. It contends that the application offends the trite principle set out for filing of applications for judicial review and that therefore it offends the provisions of Order 53 Rules (1) and (2) of the Civil procedure Rules, 2010 and sections 7 and 11 of the Fair Administrative Action Act, 2015.

9. The 2nd Respondent further contends that the application is frivolous, vexatious and an abuse of the court process, a waste of the court's time and the parties' time. Additionally, that the applicant has not disclosed any grounds to merit the grant of any orders sought in the application; that the application seeks to emasculate a quasi-judicial institution from performing its duties; and finally, that the application seeks an appeal on the merits of the decision by the Review Board, disguised as a judicial review application.

10. The 1st respondent did not file any documents.

Submissions

11. The Notice of motion was canvassed by way of oral submissions. On behalf of the applicant, Mr. Abdi submitted reiterating the applicant's pleadings and argued that the decision by the Board where it raised the issue of non-joinder of the accounting officer on its own motion and deciding the request for review based on that *suo moto* issue without any party raising the said issue was erroneous. That in any event, the accounting officer was represented as part of the Kenya Power & Lighting Co. Ltd, PLC.

12. Secondly, that tere was no notice or hearing of that issue, that the Review Board did not invite the parties to be heard on that issue and instead, it proceeded to strike out the request for review. This, according to counsel for the applicant, violated Articles 47 and 50 of the Constitution and the rules of natural justice. He argued that a tribunal cannot terminate proceedings on a technical issue without hearing the parties.

13. Thirdly, it was submitted that a mandatory law does not equate to unfair process even while the law is strict. He argued that the Review Board acted unfairly, unreasonably and unprocedurally in striking out the request for review without hearing the parties. That by striking out the request for review, the Review Board shut out the applicant from the merits of the request for review, which defeats the Public Procurement and Asset Disposal Act (PPADA). He submitted that Section 175 of the Act empowers this court to correct such procedural fairness.

14. On the preliminary objection filed, it was submitted relying on the **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 at 700** case on what a preliminary objection is. He submitted that the point raised by the Review Board was not a point of law.

15. In regard to Order 53 of the Civil Procedure Rules, it was submitted that the objection is misleading and misconceived because this is not a common law Judicial Review but was brought under Section 175 of the PPADA and that no leave is required. That the procedure is to approach the court strictly within the given timelines and that courts have consistently held that Order 53 of the Civil Procedure Rules does not apply to public procurement matters. (Counsel retracted the submission upon being requested by the Court to indicate which decision he wa relying on.

16. Counsel submitted that the applicant was not seeking this court to evaluate the tender. That the applicant was seeking for certiorari to quash a procedurally unfair decision and remittal to the Board to hear the request for review before a differently constituted panel.

17. He submitted that the preliminary objection dated 2/2/2026 is incompetent and misconceived and that the Board's decision violated Articles 47 and 50 of the constitution by condemning the applicant unheard. He urged this Court to dismiss the preliminary objection and allow the motion as prayed, with costs in the cause.

18. On behalf of the 2nd respondent, Ms Mulela submitted relying on the preliminary objection dated 2/2/2026. She submitted that the application offends the principles for filing of Judicial Review applications. That Judicial Review looks at decision making process. That the applicant had failed to demonstrate sufficient grounds and was asking this Court to sit as an appellate court.

19. She argued that each party was accorded an opportunity to be heard and all documents were placed before the Board. She submitted that the Board is entitled to determine jurisdiction or competence *suo moto* as it did, ensuring that it had the jurisdiction. She relied on **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment)** case, the locus classicus decision on jurisdiction.

20. It was submitted that the 1st Respondent was bound to determine non joinder of a mandatory party as it did and that there was no denial of a hearing or illegality. Further submission was that the applicant's grievance is merit based and therefore it does not meet the statutory threshold for Judicial Review. Counsel urged this Court to uphold the decision of the 1st Respondent.

21. In a brief rejoinder, Mr. Abdi submitted that the application is not an appeal disguised as a Judicial Review and that the applicant was challenging the decision-making process. That there was no due process in striking out the

request for review as the applicant was not given an opportunity to be heard on the own motion by the Review Board.

Analysis and determination

22. I have considered the application as pleaded and the preliminary objection together with the respective parties' counsel's oral submissions. the issues arising for determination are:

    i. ***Whether the application offends the provisions of Order 53 Rules (1) and (2) of the Civil procedure Rules on filing of Judicial Review Proceedings;***

    ii. ***Whether there is merit in the application and therefore-***

    a. ***Whether the application is an appeal disguised as judicial review;***

    b. ***Whether the application discloses grounds for grant of the judicial review orders sought;***

    iii. ***What orders should this Court make***

23. On whether the application offends Order 53 Rules (1) and (2) of the Civil Procedure Rules, the 2nd respondent contends and submits that the applicant filed a notice of motion without first seeking and obtaining leave of court as required under Order 53 of the Civil procedure Rules. In response, the respondent's counsel argued and retracted those applications under section

175 of the PPADA do not require leave of Court and that order 53 of the Civil Procedure Rules is inapplicable to public procurement proceedings. The latter submission was withdrawn when the Court asked counsel for the applicant to indicate which decision of the court he was relying on. That said, since the issue was raised, this court is under a duty to determine it to clarify the issue.

24. Order 53 Rule 1(1), (2) and (3) of the Civil Procedure Rules provides as follows:

> ***1. Applications for mandamus, prohibition and certiorari to be made only with leave [Order 53, rule 1]***
>
> ***(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.***
>
> ***(2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —***
>
> ***(a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and***
>
> ***(b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.***

(3) The judge may, where leave denotes stay, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution

25. On the other hand, Order 53 Rule 3 (1) stipulates that:

3. Application to be by notice of motion [Order 53, rule 3]

(1) <u>When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.</u>

26. Order 53 of the Civil Procedure Rules mandates that to apply for judicial review orders of mandamus, prohibition or certiorari, an applicant must first seek and obtain leave of court. Upon such leave being granted, the applicant then files a substantive motion within the timeline of 21 days or such short period as the court may grant. This provision is akin to section 9 of the Law Reform Act which provides that:

9. Rules of court

(1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—

(a) prescribing the procedure and the fees payable on documents filed or

issued in cases where an order of mandamus, prohibition or certiorari is sought;

(b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;

27. The requirement for leave to apply for judicial review Orders of certiorari, mandamus and prohibition is under the Law Reform Act and its procedural operational provision Order 53 of the Civil Procedure Rules. The purpose for leave has been stated severally without a number, to be for weeding out frivolous, vexatious and hopeless applications and to ensure that only prima facie arguable applications are allowed to proceed to the substantive stage.

28. In **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321,** Nyamu,J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might

turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

29. Waki, J (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

> ***"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being***

whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

30. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

31. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

"The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…the controlling factor in determining whether the exercise of prerogative power is subject to

judicial review is not its source but its subject matter… It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers… In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was

alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought."

32. In **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199,** the Court of Appeal was of the view that leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave.

33. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK),** the Court stated:

"Application for leave to apply for orders of judicial review are normally ex parte and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without

delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him…. ...Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."

34. The Supreme Court affirmed the position that where a party approaches the High Court under Order 53 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act, they must first seek and obtain leave before filing the substantive Notice of Motion. The apex Court stated as follows in **Petition No. 20 of (E023) 2022, Isaac Aluoch Polo Aluochier v IEBC and 17 others:**

"[33] Rejecting the appellant's application to review by quashing this decision, the High Court agreed and upheld the reasons and

conclusions by the Committee for dismissing the complaint. It also found that the application, though constitutional, sought judicial review reliefs and ought to have been commenced in accordance with the relevant rules. [34] The Court of Appeal, on a second challenge affirmed this determination, answering the two issues framed by the High Court; whether the application was competent and whether the Committee had jurisdiction to determine the dispute before it. It appears to us that the ratio emanating from the High Court decision was around, the nature and scope of judicial review; the doctrine of sub-judice; and the jurisdiction of the Committee.

[33] Rejecting the appellant's application to review by quashing this decision, the High Court agreed and upheld the reasons and conclusions by the Committee for dismissing the complaint. It also found that the application, though constitutional, sought judicial review reliefs and ought to have been commenced in accordance with the relevant rules. [34] The Court of Appeal, on a second challenge affirmed this determination, answering the two issues framed by the High Court; whether the application was competent and whether the Committee had jurisdiction to determine the dispute before it. It appears to us that the ratio emanating from the High Court decision was around, the nature and scope of judicial review; the doctrine of sub-judice; and the jurisdiction of the Committee. 14 Petition No. 20 of

(E023) 2022 [35] On the first question, the learned Judge rendered this statement; "33. What then is the procedure for bringing Judicial Review application? The submission by Mr. Aluochier that this application is under Article 47 of the Constitution and therefore not subject to Order 53 Civil Procedure Rules and Section 8 and 9 of the Law Reform Act cannot hold water. Judicial Review is a special jurisdiction. In so far as no rules have been made under Article 47 of the Constitution, there can be no vacuum in law. A party approaching court for Judicial Review orders of Certiorari, Mandamus and Prohibition must comply with the procedure under Order 53 of the Civil Procedure Rules. He must seek the court's leave first through a Chamber Summons Application supported by a Statement of Facts and a Verifying Affidavit and annexures in support of the prayers. In this case, the applicant should have annexed the impugned decision. It is after grant of leave, that an applicant is allowed to file the Notice of Motion application within 21 days. Seeking of leave is meant to expedite the process and weed out any frivolous applications. 34.The applicant has done none of that. What is before the court is neither a Judicial Review application nor a Petition. If the applicant wanted to file a Petition to seek any Constitutional remedies available including Judicial Review orders, he should have done so under the rules under the Constitution (Mutunga Rules). Article 23 (3) of the Constitution

outlines the remedies a person can seek in a Constitutional Petition which includes Judicial Review orders. If it was a petition, then the applicant would have not needed to seek leave of court to file the petition."

[36] Reference in this passage to Articles 23 and 47 of the Constitution is only in relation to the scope of judicial review in terms of the Constitution, a totally different cause from the initial complaint before the Committee, where Articles 193(1)(b) and 194 (1) (e), among others, were alleged to have been breached."

35. What emerges clearly from the foregoing decisions is that where an applicant approaches the Court under the Law Reform Act and Order 53 Rule 1(1) of the Civil Procedure Rules, then they must first seek leave to apply for substantive judicial review orders stipulated in Order 53 and such leave may only be granted if on the material available, the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant, the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review.

36. However, where an applicant approaches the Court under the Constitution, the Fair Administrative Action Act and the Rules enacted in October 2024 operationalizing the Act, then the requirement for leave is absent. Such an applicant only needs to file an Originating Motion as stipulated in Rule 11 of

the Fair Administrative Action Rules, 2024, seeking for appropriate judicial review orders, save that such proceedings, other than Public Procurement proceedings which have a timeline of 45 days for determination, have to be determined within 90 days of the date of filing into court.

37. The relevant provisions of the Fair Administrative Action Act and Rules state as follows:

S.7. Institution of proceedings.

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to (a) a court in accordance with section 8; or

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

8. Period for determination of applications and appeals.

An application for the review of an administrative action or an appeal under this Act shall be determined within ninety days of filing the application.

9. Procedure for judicial review.

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

38. None of the above substantive provisions of the Fair Administrative Action Act mandate that leave to apply for judicial review must be sought and obtained. All that the applicant needs to do is apply for judicial review but without unreasonable delay. The Rules made under the Act provide for the procedure for applying for judicial review as follows, under Rule 11:

R.11. Originating motion

(1) An application for judicial review shall be by way of an originating motion accompanied by a supporting affidavit.

(2) The Originating Motion shall substantially be in Form JR 2 as set out in the Schedule.

(3) The claim shall—

(a) set out the name and description of the applicant;

(b) state the relief sought and the grounds on which it is sought;

(c) contain a statement that internal mechanisms for appeal or review and any remedy available under any other written law have been exhausted;

(d) state the administrative action or decision complained of or the date it was taken;

(e) state the person who took the administrative action or decision;

(f) state the reason for the administrative action or decision, if any; and

(g) state the reason the applicant thinks the administrative action or decision was not in accordance with the Act.

39. The Schedule to the aforesaid Rules provides for the format that the Originating motion shall take, but the Rule from a plain reading, is akin to a statutory statement which is required to be filed under Order 53 Rule 1 (2) of the Civil Procedure Rules which stipulates:

(2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —

(a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and

(b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.

40. On the other hand, it is important to note that the Fair Administrative Action Act is an implementing Act for Article 47 of the Constitution which guarantees the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

41. The Fair Administrative Action Act does not repeal the Law Reform Act and its implementing Rules made pursuant to section 9 (1) (b) of the Act which is Order 53 of the Civil Procedure Rules and which Rules mandate leave to be sought and obtained before filing an application for substantive orders by

way of notice of motion for judicial review. In that regard, section 12 of the FAAA provides:

12. Principles of common law and rules of natural justice.

This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice

42. It is common knowledge that the Law Reform Act is derived from common law practices. Based on the above position, it is clear to this Court that there is no requirement for leave to apply, where a party seeks for judicial review purely under Articles 47 and 50(1) of the Constitution as well as the Fair Administrative Action Act and the Rules made thereunder. Further, judicial review being a constitutional remedy, and now with the Rules made under the Fair Administrative Action Act to operationalize the Act, an aggrieved person may elect to either approach the court under the Constitutional provisions or under Order 53 for judicia review remedies. The dander looms only where there is a mix-up of the two legal regimes as has been witnessed in some cases.

43. In the instant case, the applicant never cited Order 53 or Sections 8 and 9 of the Law Reform Act. The applicant only cited in the heading, Articles of the Constitution including Article 23 which provides for judicial review as constitutional remedy for violation of rights, Article 47, 50 among other Articles and section 175 of the PPADA as the provisions which are alleged to have been violated by the 1st respondent Review Board by its alleged

failure to accord the applicant the opportunity to be heard before striking out its application for non-joinder of the procuring entity.

44. However, the applicant did not initiate these judicial review proceedings by way of Originating Motion as stipulated in Rule 11 of the **Fair Administrative Action Rules, 2024.** The question is whether that failure to comply with the form for filing of judicial review applications under the Fair Administrative Action Rules is an incurable fatal omission and my answer is that in the circumstances of this case, the proceedings cannot be defeated for want of form. The form here is the filing of Judicial review proceedings by way of notice of motion instead of originating motion which I found to be a curable defect under Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities of the Constitution.

45. Moreover, Rule 4 of the FAA Rules,2024 provides:

> ***4. General power of the Court***
>
> ***Nothing in these Rules shall preclude the court from exercising any power or issuing any orders or directions which may be just and fit in the circumstances***

46. Thus, this Court has the power to exercise discretion in favour of a party who has merely erred by filing a notice of motion instead of an originating motion, a form which does not affect the substance and should therefore not deny a party an opportunity to be heard on merit.

47. In **Crescent Construction Co Ltd v Delphis Bank Limited [2007] eKLR**, the Court of Appeal emphasized the need for a court to exercise its discretion with utmost care when faced with an application for striking out a suit as it is draconian action which may have the consequences of slamming the door of justice on the face of one party without according it an opportunity to be heard.

48. Thus, while using a Notice of Motion to initiate a suit instead of an Originating Motion is generally technically improper and therefore a wrong procedure, it is not fatal, particularly when interpreted alongside Article 159(2)(d) of the Constitution which abhors elevating technicalities over substance.

49. Even before the advent of Article 159 of the Constitution, the Court of Appeal in **Trust Bank Ltd vs. Amalo Co. Ltd (2009) KLR 63** held: -

> ***"(1) The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.***
>
> ***(2) The spirit of the law is that as far as possible in the exercise of judicial discretion the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so."***

50. Accordingly, I find that the applicant herein was not mandated to file the Judicial Review application under Order 53 of the Civil Procedure Rules and having elected to file under Articles 22, 23, 47 and 50 (1) of the Constitution, the Notice of Motion though technically improper and a wrong procedure, is not fatal. I therefore disallow the preliminary objection based on want of form.

51. On the second issue of whether the judicial review application is merited or whether it is an appeal disguised as an appeal, it is important to note that judicial review is not an appeal and neither can an applicant expect the judicial review court to substitute the review Board's decision with its own decision as an appellate court would under section 78 of the Civil Procedure Act.

52. Having said that, I have perused the application by the applicant and in my view, it does not seek this Court to sit as an appellate court. All that the applicant claims is that the Review Board denied it an opportunity to be heard before suo moto raising a point of law on non-joinder of the accounting officer of the procuring entity and thereby striking out the request for review. That pleading does not require this court to determine the merits of the dispute but whether the review Board ought to have first called on the applicant and heard it before making a decision on non-joinder. I am not persuaded that the application is one disguised as an appeal.

53. Onto the main issue of whether the applicant has made out a case for judicial review orders sought, the applicant contends that the Review Board acted illegally, irrationally and with procedural impropriety by striking out the review application on account of non-joinder of the procuring entity and that it should have called on the parties to argue out that point which is arguable as to whether mere non joinder of a procuring entity's accounting officer who had been represented in the proceedings by counsel and therefore actively participated in the proceedings, could be said to have been non joined, yet the procuring entity was duly joined.

54. The question is whether the review Board had power to strike out the request for non-joinder without inviting the applicant to be heard on that issue. In its determination, the Review Board after considering some preliminary issues including whether the applicant herein was a candidate or tenderer and therefore whether it could request for review, and after finding in the affirmative, and further, after determining in the affirmative that the applicant had pleaded loss to be suffered unless the orders sought were granted, thereby disallowing the preliminary objection filed by the respondent, it went ahead to determine the issue of whether the request for review was fatally defective for failing to join the accounting officer of the procuring entity in breach of section 170 (b) of the PPADA.

55. I answering this question, the review Board reproduced section 170 of the PPADA and the interpretation given to this section in **El Roba Enterprises**

Limited & 5 others v James Oyondi t/a Betoyo Contreactors & 5 others [2018]e KLR where the Review Board stated that the High Court affirmed that non joinder of an accounting officer of a procuring entity in a request for review is a fatal defect, rendering the request for review incompetent.

56. The Review Board reproduced paragraphs 34, 35 and 37 of the said decision filed in this Court as an exhibit.

57. It also cited the same decision but on appeal to the Court of Appeal where the Court of Appeal affirmed in **James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] KECA 916 (KLR**) and upheld the finding by the High Court on the issue of non-joinder of the accounting officer of a procuring entity to be fatal to the request for review application.

58. In the above **James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others** case, the Court of Appeal stated inter alia as follows in its holding:

> ***"In the case before us, the learned Judge determined the petition before him principally on two issues that went to the jurisdictional competency of the review proceedings that were before the Board. We think that this appeal also turns on the same two issues. The first relates to the legal consequences of non-joinder of KPA's accounting officer in the review proceedings. The appellants complain that the learned Judge was wrong to hold that the omission rendered the proceedings incompetent,***

null and void, and argue that so long as KPA, as the procuring entity, had been joined as respondent, the non-joinder of the accounting officer could not invalidate the proceedings. The argument by the petitioners as well as KPA and its managing director is to the contrary end that the requirement is mandatory and goes to the root of the proceedings.

Now, section 170 of the PPADA is in rather straight-forward terms;

"The parties to a review shall be-

(a) The person who requested the review;

(b) The accounting officer of a procuring entity;

(c) The tenderer notified as successful by the procuring entity, and

(d) Such other persons as the Review Board may determine." (Our emphasis)

This issue was fully engaged before the Board and, disallowing the objections based on the non-joinder of the accounting officer, it rendered itself as follows;

"It is common knowledge that the Procuring Entity is a state corporation with perpetual succession. As a state corporation the procuring entity discharges its functions through it employees, including the accounting officer. Employees of the procuring entity when perfuming their duties in accordance with their terms of is the one to be sued and not the agent. The accounting officer acts on behalf

of the procuring entity but the procuring entity does not act on behalf of the accounting officer. It is the firm view of the Board that the Procuring Entity is the party in this request for review and was properly sued and, equally, was properly represented in the proceedings."

The learned Judge rejected that reasoning and drew a clear distinction between section 170 of the PPADA and the statute it replaced, namely the Public Procurement and Disposal Act 2005 (repealed) which provided at section 96, as follows;

"96. The parties to a review shall be-

(a) the person who requested the review;

(b) the procuring entity;

(c) if the procuring entity has notified a person that the person's tender, proposal or quotation was successful, that person; and

(d) Such other persons as the Review Board may determine."

(Our emphasis)

It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replace it, the PPADA, requires that the accounting officer of the procuring entity, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is

where the Board's importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply.

We think, with respect, that the learned Judge was fully entitled to, and did address his mind correctly to the law when he followed the binding decision of the Supreme Court in NICHOLAS ARAP KORIR SALAT vs. IEBC [2014] eKLR when it stated, adopting with approval the judgment of Kiage, JA;

"I am not in the least persuaded that Article 159 and Oxygen principles which both commands courts to seek substantial justice in an efficient and proportionate and cost effective manner to eschew defeatist technicalities were ever meant to aid in overthrow of rules of procedure and cerate anarchical tree for all in administration of justice. This

Court, indeed all Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines are to serve the process of judicial adjudication and determine fair, just certain and even handed courts cannot aid in bending or circumventing of rules and a shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules."

We have no difficulty holding, on that score, that the proceedings before the Board were incompetent and a nullity, which the learned Judge properly quashed by way of certiorari. [emphasis added]

59. Basing its decision on the aforesaid decisions which bound the Review Board, the Review Board concluded that it had no jurisdiction to hear and determine the request for review on its merits, in view of the non-joinder of the accounting officer of the procuring entity. The Review Board also cited the Owners of **Motor Vessel Lilian S** as cited by the Supreme Court in **Nasra Ibrahim v IEBC and 7 others [2018] e KLR** where the Court of Appeal stated that the Court can raise on its own motion a jurisdictional question and determine it.

60. The question is, was it mandatory for the Review Board to invite the applicant to submit on that issue which had already been settled by the Court of Appeal, in the name of according the applicant a hearing in order to arrive

at the same decision by the review Board? The answer lies in another question to be answered and which is whether a tribunal or court can on its own motion determine a jurisdictional or point of law without hearing the parties to the dispute. I now proceed to determine the latter question based on judicial pronouncements, and not whether or not non joinder of the accounting officer was fatal to the request for review.

61. In Owners **of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment)** the Court of Appeal stated as follows:

> ***"7.A question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter was then obliged to decide the issue right away on the material before it. Jurisdiction was everything. Without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downed tools in respect of the matter before it the moment it held the opinion that it was without jurisdiction.***
>
> ***8.A question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It was immaterial whether the evidence was scanty or limited. Scanty or limited facts constituted the evidence before the court. A***

party who failed to question the jurisdiction of a court may not be heard to raise the issue after the matter was heard and determined. There were no grounds as to why a question of jurisdiction could not be raised during the proceedings. As soon as that was done, the court should hear and dispose of that issue without further ado.

30. With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under

which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given

"See Words and Phrases Legally defined – Volume 3: I – N Page 113"

62. The above decision is cited in almost all cases where the question of jurisdiction is discussed. In **Odera t/a AJ Odera & Associates v Machira t/a Machira & Co Advocates (Civil Appeal 161 of 1999) [2013] KECA 208 (KLR) (11 October 2013) (Judgment)** the Court of Appeal stated:

"Lastly in the celebrated case of Owners of the Motor Vehicle M.V. Lillian S versus Caltex Oil (Kenya) Limited (1989) KLR1. At page 14 line 29-43 Nyarangi JA (as he then was) had this to say:-

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like mean. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters of which the particular court has cognizance of or as to the area over which the jurisdiction shall extend; or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal ha s been given power to determine conclusively whether the fact exists where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision a merit to nothing. Jurisdiction must be acquired before judgment. <u>It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court</u>. It is

immaterial whether the evidence is scanty or limited. Facts constitute the evidence before the court…The moment a court determines that it has no jurisdiction it has to down its tools and proceed no further"

63. In **Ibren v Independent Electoral and Boundaries Commission & 2 others (Petition 19 of 2018) [2018] KESC 75 (KLR) (21 December 2018) (Judgment)** the Supreme Court stated as follows on whether a court of law can take up and or raise a jurisdictional issue and determine it without the parties raising it:

"A jurisdictional issue is fundamental and can even be raised by the court suo motu, as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367 stated thus:

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

Consequently, while the parties have not given the jurisdiction issue the much premium that it deserves, upon evaluation of the matter before

us, it is our considered opinion that the issue of jurisdiction of this court to hear and determine this appeal warrants settlement upfront."

64. **In Dan Maurice Haya v County Government of Siaya [2021] KEHC 8639 (KLR)** the High Court stated as follows:

"15. In the present case, it is clear that the High Court has no Jurisdiction not even split jurisdiction to hear and determine the filed dispute or to make any of the Orders Sought. The claim is also not eclectic at all meaning there is no confusion about whether the dispute relates to land and occupation thereof.

16. The Court that is clothed with relevant jurisdiction is the Environment and Land Court. That being the case, this Court must refuse to entertain the dispute at this early opportunity and this kind of decision does not require this court to invite parties to argue on the issue of whether or not the Court has jurisdiction. Iam fortified by the Supreme Court and Court of Appeal decisions below that a court of law has power on its own motion to determine a jurisdictional issue without involving parties to the dispute.

17. In Anaclet Kalia Musau v Attorney General & 2 Others [2020] eKLR, Civil Appeal 111 of 2017, *the* ***Court of Appeal citing a Supreme Court decision and its own decisions agreed with my decision to***

determine a jurisdictional issue which was never raised by the parties to the suit. The Court of Appeal stated:

"The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of Nasra Ibrahim Ibren V. Independent Electoral and Boundaries Commission & 2 others, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:

> *"40 A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367 stated thus:*
>
> *"25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a*

determination thereon without the same being pleaded…" (Emphasis supplied)

We fortify that view by quoting yet another passage from the East African Court of Appeal in the matter of Iga V. Makerere University (1972) E.A 62, where it was stated that;

"The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief…….

The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected." (Our emphasis)

The learned Judge in this appeal, no doubt did not err when she determined whether, by operation of the law, she had to down tools for want of jurisdiction."

18. Therefore, on this Court's own motion, I hereby find that the suit herein is incompetently filed before this Court which is devoid of jurisdiction to hear and determine the dispute and or grant the prayers sought in the plaint dated 5th March, 2021. The entire suit is therefore hereby struck out and the file closed."

65. The Supreme Court in **Petition No. 20 of (E023) 2022, Isaac Aluoch Polo Aluochier v IEBC and 17 others** stated as follows on the question of jurisdiction and when such question can be raised:

> ***"[25] The 2nd, 5th, 7th, 8th, 9th, 11th, 12th, 13th, 14th and 16th respondents had prayed that the question of jurisdiction of the Court to entertain this appeal be determined in limine litis without arguments on merit. Though we heard arguments on the appeal, as a matter of practice, this Court before considering the merits of arguments in any appeal before it, first ascertains if it has properly been moved. This is because, as Nyarangi, JA said in his famous and time-honoured statement in the Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, jurisdiction is everything. If we find, as we have in previous cases that we do not have jurisdiction, we down tools at that point, save in exceptional circumstances as we shortly shall demonstrate. It is equally now firmly established that a point of jurisdiction can be raised at any time, formally by a notice of preliminary objection, grounds of opposition, viva voce during arguments or by the Court suo motu because challenging the jurisdiction of a Court is a threshold issue. Jurisdiction can only be conferred on a court by either the Constitution or statute. A court cannot expand its jurisdiction through judicial craft or innovation. See S.K. Macharia and Another v. Kenya Commercial Bank Ltd. & 2***

Others, Sup. Ct. Civil Application No. 2 of 2011; [2012] eKLR. Nor can a party confer on a court power it does not have. Similarly, parties cannot by mutual consent confer jurisdiction when there is none."

66. The above decisions are clear that a court or tribunal can inquire into its jurisdiction and decide that it has no jurisdiction to determine the matter, even where parties have not raised the issue. However, the applicant's issue is that the Review Board could not do so without first hearing its side since.

67. On the question of whether the Review Board could on its own motion and without hearing the parties determine its jurisdiction in limine, guidance is found in various other juridical pronouncements as cited extensively by Odunga J (as he then was) in **Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] KEHC 1901 (KLR):**

23. In this case, the applicant's case is that the Tribunal did not afford the parties before it an opportunity of being heard before it arrived at its decision under challenge. In my view the impression created that where a Tribunal raises a matter suo moto, it is not under any obligation to hear parties before it is not, as contended on behalf of the 5th Interested Parties, necessarily correct. Even in cases where the issue is a jurisdictional the decision to make a decision without hearing the parties if parties are desirous of being heard

ought not to be arrived at lightly and such a decision would only be justified in exceptional circumstances.

24. In Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367 the Court of Appeal expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no

reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded. I however did not understand the Court to be saying that the Court ought not to hear the parties on the issue of jurisdiction before determining an issue raised suo moto. In fact in the said decision the Court held that as soon as the issue arises, the court should hear and dispose of that issue without further ado. It is therefore incorrect to contend that where a Tribunal raises a matter suo moto the right to hear parties is thereby dispensed with.

26. Mwera, J (as he then was) in <u>Nagendra Saxena vs. Miwani Sugar Company (1989) Limited (Under Receivership) Kisumu HCCC No. 225 of 1993</u> while citing <u>Habig Nig Bank Limited vs. Nashtex International Nig Ltd Nigeria Court of Appeal Kaduna Division CA/K/13/04</u> and Playing God: A Critical Look At Sua Sponte Decisions By Appellate Courts By Adam M Milani and Michael R. Smith, Tenessee Law Review <u>{VOL. 69 XXX 2002}</u> dealt

with the suo moto procedure extensively and expressed himself as follows:

"The term suo moto is a Latin term meaning "on its own motion" and it is approximately an equivalent of the term "sua sponte" (Latin) which means, "of one's own accord". The term defines one acting spontaneously without prompting from another party. <u>Blacks Dictionary</u> defines "sua sponte" as "of his or its own will or motion, voluntarily and without prompting or suggestion". In our jurisdiction action "suo motu" or "sua sponte" for the two mean the same thing, a judge or court in a given case takes a course or decision without prior motion or request from the parties. Usually the matter being decided suo motu or sua sponte is not in the pleadings, briefs, submissions, issues and evidence placed before the court for determination. For that is the essence of the adversarial systems where the parties direct the course of the litigation that brought them to court while the judge plays the referee. He/she hears them and makes a decision. In matters suo motu the court usually on perusing the file before it comes by a matter that is of the essence of the case but not raised by the parties. It could be a matter of law or procedure or other. Then that is considered by the judge who rules on it. <u>The better course in matters dealt with sua sponte is to notify the parties to the cause of the point(s) in question, inviting</u>

them to submit on it, before a ruling/finding is arrived at. There is no dispute that the fundamental premise of the adversary process is that the advocates do uncover and present more useful information and arguments to the decision-maker than would be developed by a judicial officer acting on his own in an inquisitorial system. Accordingly most lawyers probably never think about a possibility that a court will decide a case or an issue that the court itself raises and which was neither briefed nor argued by the parties. But it happens and it is known as sua sponte. Once a court raises an issue sua sponte the court can go about deciding it in one of two ways. First, it can involve the parties and request that they submit briefs on the issue to assist the court in reaching a decision. In this context, while the issue may be raised sua sponte the decision on the issue is made in accordance with the principles and traditions of the adversarial system. Alternatively, the court can decide the issue on its own without the input from the parties. In this context, the issue is not only raised sua sponte, but is also decided sua sponte. The proper approach to decide sua sponte issues is the former approach – the approach that involves the parties in the decision-making process…It is not in doubt that hearing parties on issues sua sponte or suo motu is better favoured since the parties have been heard before a decision…Even when a court raises a point suo motu the

parties must be given an opportunity to be heard on the point particularly the party that may suffer a loss as a result of the point raised. The law is well settled that on no account should a court raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without hearing the parties…If it does so, it will be in breach of the parties right to fair hearing." [Emphasis mine].

27. Therefore, if the parties desired to be heard on the issue, the Tribunal ought to have afforded them an opportunity of being heard before arriving at a decision whose effect was to determine by which firm the Party was to be represented. The right to be represented in legal proceedings by an advocate of one's choice where legal representation is permitted in my view is an element of a fair hearing under Article 50 of the Constitution.

28. The issue of determining matters raised suo moto without hearing parties was also alluded to by the Court of Appeal in Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] EKLR where the Court expressed itself as follows:

"In the present case it was the Superior Court which put the appellant in the predicament it finds itself in. It was mistaken on the applicable law. The appellant acted promptly and sought an order reviewing the erroneous order. The court declined jurisdiction with

the result that the limitation period expired. If that decision is not reviewed it would not have any remedy. It is hardship of that nature which the review jurisdictions should be exercised to obviate, more so if it is shown that the applicant did not contribute to that state of affairs. The case of Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others vs. Kilach [2003] KLR 249, does not hold that review is not available under Order 53 of the Civil Procedure Rules. It would be oppressive and an affront to common sense in a case like the one before the court where the court precipitated a situation for the same court to turn round and say it lacks jurisdiction to correct what is obviously a wrong decision, more so where, as here, the court was not addressed on the merits or otherwise of the application for leave. The court suo moto raised the jurisdictional issue without asking the applicant's counsel to address it on the matter."

29. It is irrelevant whether the Tribunal would have arrived at the same decision even if it had afforded the parties an opportunity of being heard before making its decision. It must always be remembered that where a party has a right to be heard that right cannot be taken away by the mere fact that the Tribunal considers that the said party's contribution is unlikely to affect the decision. As

was held in Onyango Oloo vs. Attorney General [1986-1989] EA 456:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.....Denial of the right to be heard renders any decision made null and void ab initio."

30. Similarly in Pashito Holdings Ltd. & Another vs. Paul Nderitu Ndun'gu & Others Civil Appeal No. 138 of 1997 [1997] 1 KLR (E&L) the Court of Appeal expressed itself as follows:

"An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice

are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision…The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under duty to 'act judicially'.

68. In this case, the Public Procurement Administrative Review Board, upon receiving a request for review, and upon considering some preliminary objections relating to locus standi of the applicant as to whether it was a candidate or tenderer, or whether it had pleaded that it had suffered loss or was likely to suffer loss unless the orders sought were granted, proceeded to find that although the issues raised could not defeat the request for review, nonetheless found that the applicant did not enjoin the accounting officer of the procuring entity to the request for review, contrary to section 170 of the PPADA and that therefore the Review Board had no jurisdiction to entertain the request for review, on account pf that non joinder of a mandatory party.

69. Indeed, the applicant only enjoined the procuring entity and there is no dispute about that. The applicant is now before this Court seeking judicial review orders to quash the decision by the Review Board, striking out the request for review. The applicant asserts that it was not accorded an opportunity to be heard and that the question of whether non joinder of the accounting officer of the procuring entity to the request for review can

render that request for review fatally defective is arguable hence this court should quash the decision and proceed to direct the Review Board to hear the parties interpartes in **Application No. 118 of 2025.**

70. The 2nd Respondent maintains that the omission was fatal and that the Review Board justified the striking out of the Request for Review as it had the power to, on its own motion to do so where it was of the view that it had no jurisdiction to entertain the matter.

71. As stated in the above cited cases, a court or tribunal has power to examine its jurisdiction on its own motion whether parties raise the issue of jurisdiction or not. This is because, jurisdiction is the cornerstone of every dispute filed before any court of law or tribunal. Additionally, the decisions do not say that a court or tribunal is prohibited from inviting parties to submit on the jurisdictional issue that may have been identified in the proceedings before it, In hearing the parties, the court or tribunal will have accorded each of them an opportunity to be heard before determining the matter.

72. That said, in the instant case, the Review Board before determining the jurisdictional issue which is impugned herein, did hear the parties on the issues which had been raised as preliminary issues, as stated above and in the process, identified a further jurisdictional issue of non-joinder. It proceeded to determine that issue and upon finding that non joinder of the accounting officer of the procuring entity was a fatal omission, it struck out the request

for review. In reaching that decision, the Review Board cited decisions of the High Court and the Court of Appeal upholding the High Court decision on the question of non-joinder of the accounting officer of a procuring entity as provided for under section 170 of the PPADA. Those decisions firmly found that non joinder of the accounting officer of a procuring entity to the request for review is a fatal omission which is not curable.

73. That being the case, it is the view of this court that albeit the applicant was not heard on that issue of non-joinder, even if this court were to order that the matter be remitted back to the Review Board to be heard afresh on the same issue by a differently constituted panel of the Review Board, I have no doubt in my mind that the Review Board will arrive at the same decision.

74. Courts of law do not act in vain and judicial time is very precious. To return a matter to the Review Board knowing that it will reach the same decision because the Review Board cannot depart from established jurisprudence set by superior courts in similar circumstances prevailing, is a waste of judicial time.

75. In other words, in judicial review, whereas a party may prove their case, the court may decline to grant the reliefs sought because of the discretionary nature of judicial review. This principle is well known and in his writings in **Public Law in East Africa published by Law Africa the author, Ssekaana Musa** states as follows at page 250:

"Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. <u>A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully."</u>

76. For the above reasons, this court declines to grant the orders sought and dismisses the applicant's Notice of Motion dated 27th January, 2026.

77. Each party to bear their own costs of the application.

78. This file is closed.

Dated, Signed & Delivered virtually at Nairobi this 10th Day of March, 2026

R.E. ABURILI

JUDGE