

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO. E049 OF 2026

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW
SEEKING AN ORDER OF CERTIORARI**

AND

**IN THE MATTER OF: KENGEN TENDER NO. KGN-BDD-016-2024
FOR PROCUREMENT OF CONSULTANCY
SERVICES, OLKARIA VII GEOTHERMAL POWER
PROJECT**

AND

**IN THE MATTER OF: ARTICLES 23(3) (f) OF THE CONSTITUTION
OF KENYA**

AND

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM
ACT**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

AND

SINTECNICA ENGINEERING S.R.L

IN JOINT VENTURE WITH STEAM S.R.L.....1ST INTERESTED PARTY

ELC ELECTROCONSULT S.P.A.....2ND INTERESTED PARTY

EUROPEAN INVESTMENT BANK (EIB)..... 3RD INTERESTED PARTY

AND

THE ACCOUNTING OFFICER, KENYA ELECTRICITY

GENERATING COMPANY PLC (KENGEN)...1ST EX-PARTE APPLICANT

KENYA ELECTRICITY

GENERATING COMPANY PLC (KENGEN)..2ND EX-PARTE APPLICANT
JUDGMENT

1. Pursuant to leave granted in JR MISC Application No. E026 of 2026 on 27th February, 2026, the exparte applicants herein, who are the accounting officer of the procuring entity and the procuring entity, respectively, seek the following orders:
 - a. An order of CERTIORARI to remove and bring to the High Court for purposes of Quashing the Respondent's Decision dated and delivered on 18th February, 2026 in Request for Review Application Number 18 of 2026 on Tender No. KGN-BDD-016-2024;*
 - b. Costs of the application to be awarded.*
2. The substantive Notice of motion is predicated on the grounds set out on the face thereof reiterating the grounds contained in the Statutory Statement dated 26th February 2026 and Verifying Affidavit of **Vincent Nyamweya Mamboleo** sworn on 26th February 2026 both lodged with the Exparte Chamber Summons for Leave dated 26th February, 2026.
3. The exparte applicants' case is that they advertised **Tender-No-KGN-BDD-016-2024** in the Dailies of **September 24, 2024** in which it was clearly indicated that **Kengen, the procuring entity was in the process of receiving financing from European Investment Bank (EIB)** and intended to use part of the funds thereof for payments towards **consultancy services**

for supervision and management of Olkaria VI Geothermal Power Project.

4. The procuring entity asserts that the advertisement indicated that these services would be procured under the ***Financier's Guidelines "Guide to Procurement for Projects Financed by the EIB" available online on EIB's Website <https://www.eib.org/en/publications/guide-to-procurement.htm>***; and that the ***EIB Procurement Framework Clause 3.5 and Annex 2 - International Procurement Procedures – Item 6*** incorporated into the tender documents, ***the requirement for Financier's review at every stage/step is concurrence through issuance of a Letter of No Objection as a mandatory condition precedent to award and contract execution.***
5. That the procuring entity undertook the procurement process and wrote to the Financier EIB for a No objection but never received the same hence it decided to terminate the procurement process of awarding the tender to the successful bidder as the project-consultancy was conditional upon the financier giving no objection since it was the financier that would release the funds that would be utilized for the project.
6. It is averred that the Respondent Review Board heard a ***Request for Review Application. No. 18 of 2026*** and in a decision rendered on 18th February 2026, it cancelled and set aside the termination letters and directed the 1st Applicant to proceed with the procurement process to its lawful conclusion.

7. The ex parte applicants contend that in cancelling the termination of the procurement process, the Respondent Review Board committed an error of law in fundamentally misapprehending the nature and legal effect of the **No Objection requirement**. That the No Objection is not a complaint mechanism and does not arise under Clause 1.8.2; but is a contractual condition precedent expressly incorporated into the Tender Documents under Clause 3.5 of the EIB Guide and Annex 2, Item 6 thereof, which governs the progression of the procurement process itself.
8. According to the ex parte applicants, the Respondent erred in conflating these two distinct legal instruments and in treating the mandatory No Objection requirement as a matter falling within the scope of national remedy mechanism; and that the practical consequence of this error was that the Respondent proceeded to issue orders whose implementation is contractually precluded by the very Tender Documents under which the procurement was conducted.
9. The Respondent Review Board is also accused of committing an error of law by failing to properly adjudicate upon the Ex Parte Applicants' Preliminary Objection regarding jurisdiction; specifically, that pursuant to **Clause 1.8.2 of the European Investment Bank (EIB) Guide to Procurement**, the Board is divested of jurisdiction to entertain complaints against the Financier, as such grievances are subject to the exclusive internal complaints architecture of the EIB.

10. The exparte applicants contend that by proceeding to interrogate, critique and effectively make determinations on the Financier's position and internal procurement requirements, the **Respondent** exceeded its mandate and substituted its own assessment for the clear applicable contractual/financier requirements expressly incorporated in the tender documents. It therefore asserts that the Respondent misdirected itself in law by failing to give effect to the Tender Documents and the donor-funded procurement framework which make the European Investment Bank (EIB) 'No Objection' a mandatory condition precedent to lawful progression to award/contracting steps and to disbursement of the donor financing component for this Tender.
11. The exparte applicants assert that the decision dated February 18, 2026, is legally untenable and irrational as it directs the completion of the tender process in total disregard of the mandatory requirement for a "No Objection" letter; which directive, it is urged, constitutes an arbitrary revision of the tender conditions previously established by the procuring entity and the donor.
12. The impugned decision is further said to be tainted with illegality and irrationality in that the Board improperly exercised its discretion by treating a mandatory donor 'no objection' as an irrelevant or non-binding consideration; and that by by-passing this contractual prerequisite, the Review Board reached a conclusion that no reasonable tribunal, properly directing itself to the law and the facts, could have reached.

13. The Respondent, in its decision of 18th February 2026, is said to have exceeded its jurisdiction by usurping the statutory powers of the Procuring Entity. That the findings were based on speculative assumptions and lacked an evidentiary foundation regarding compliance with **Sections 44 and 53 of the Act and Regulation 71 of the Public Procurement and Asset Disposal Regulations, 2020**. Critically, the ex parte applicants contend that the Respondent failed to consider the material fact that the tender was expressly **contingent upon** contemplated donor funding from the **European Investment Bank (EIB)**.

14. The Respondent is alleged to have misdirected itself in law and in fact by conflating the overall project-level co-financing arrangements for the **Olkaria VII Geothermal Power Plant** with the specific financing structure applicable to this Tender. That at paragraphs 121 and 126 of the impugned Decision, the Respondent found that because the broader Olkaria VII project was to be co-financed by multiple parties including EIB, JICA and KenGen itself, then the refusal of EIB's No Objection did not establish that funds were unavailable for the specific consultancy contract under this Tender. This reasoning, it is contended, is flawed, since the Tender No. KGN-BDD-016-2024 was structured, advertised and conducted exclusively under and subject to the EIB financing component and the EIB procurement framework. The Tender Documents, including the preface and Section II Special Provisions Clause 1.1.2, expressly identify EIB as the intended

financier for the contemplated consultancy services contract and make any contractual commitment arising from the Tender expressly subject to readiness of disbursements and compliance with applicable EIB financing conditions.

15. It is averred that the existence of JICA financing or KenGen's own financing for other components of the broader project is legally irrelevant to whether this specific consultancy contract could lawfully proceed in the absence of EIB's concurrence. The Respondent's failure to draw this distinction, it is asserted, constitutes a material error of law and fact

16. The ex parte applicant further accuses the Respondent for allegedly misdirecting itself by conflating overall project-level co-financing with the financing for this specific Tender/consultancy contract, and by treating the existence of other project funding sources as proof of funding availability for this Tender notwithstanding the withheld donor 'No Objection.'

17. The impugned decision is said to be illegal, irrational and unreasonable and violates the principles of legality and fair administrative action, as it directs and/or exposes the Ex Parte Applicants to proceed with a procurement process in a manner that cannot lawfully be implemented absent the mandatory donor 'No Objection' and associated donor financing, thereby occasioning illegality, unlawful public commitments and audit risk.

18. The impugned decision dated 18th February 2026 is said to be legally untenable and irrational as it directs the completion of the tender process in

total disregard of the mandatory requirement for a ‘No Objection’ letter, which requirement is expressly incorporated into the Tender Documents and remains unsatisfied. The ex parte applicants assert that it is a well-established principle of Kenyan law that courts and statutory tribunals ought not to make orders that are incapable of implementation or enforcement, as to do so would be an exercise in futility. That the Respondent’s orders directing the Ex Parte Applicants to proceed with the procurement to its lawful conclusion cannot be lawfully implemented in the absence of the Financier’s No Objection, which is a condition precedent to award and contract execution under the Tender Documents.

19. Further, that by directing a public entity to proceed towards contractual commitments in the absence of confirmed donor financing, the impugned Decision is contrary to the principles of sound public financial management enshrined in Article 201 of the Constitution of Kenya, which binds all public entities in the management of public funds. They rely on the High Court decision in **Republic v. PPARB & 3 Others Ex Parte Astral Industrial Alliance (Astronea) Ltd [2024] eKLR** which is said to have recognized the practical and legal effect of a financier’s refusal to concur on the viability of a donor-funded procurement process and urged that no reasonable tribunal, properly directing itself to the law and the facts, could have issued orders of the nature impugned herein in the circumstances prevailing.

20. According to the ex parte applicants, the Review Board committed an error of law by finding that there was insufficient evidence to justify the termination of the subject tender under Section 63 of the Act; a finding that is wholly untenable in light of the express, clear, uncontroverted email from the Donor dated 8th January 2026 as cited in paragraph 112 of the Impugned Decision categorically declining to issue a Letter of No Objection.
21. The Respondent is said to have improperly applied the statutory requirement in Section 63 of the PPADA by adopting an unduly formalistic approach while discounting the Mandatory precondition of donor concurrence that rendered award and contract execution untenable/impossible to perform under the governing framework.
22. The Respondent is alleged to have exceeded its jurisdiction and acted contrary to the principles of fair administrative action under Article 47 of the Constitution and the Fair Administrative Action Act, 2015 by proceeding to criticize, discount and effectively override the Financier's internal determination as expressed in EIB's email of 8th January 2026. In this regard, the ex parte applicants impugn the Respondent's decision at paragraphs 114 to 116 where it is said to have characterized EIB's position as acting in bad taste and applying undue pressure by holding that EIB could not approbate and reprobate by disregarding determinations of statutory bodies. That in making these findings, the Respondent substituted its own assessment for that of the Financier on a matter that is within the Financier's exclusive

contractual discretion under the Tender Documents, and did so without the procedural foundation necessary to sustain such findings. These findings, according to the ex parte applicants, are tainted with procedural irregularity and constitute an excess of the Respondent's statutory mandate under Section 173 of the Act.

23. The Respondent is also accused of committing an error of fact by failing to consider material evidence that was placed before it. That at paragraph 132 of the impugned decision, the Respondent found that it had not had sight of any written report submitted to the Public Procurement Regulatory Authority notifying the latter of the termination of the subject tender in accordance with Section 63(2) and (3) of the Act, which finding, according to the ex parte applicants, is contrary to the evidence. The Ex Parte Applicants claim that they included within the confidential bundle of documents submitted to the Respondent, pursuant to Section 67(3)(e) of the Act, a portal acknowledgement and confirmation screenshot evidencing the upload of all documentation relating to the procurement proceedings, including the termination notification, on the official Public Procurement Information Portal accessible at <https://www.tenders.go.ke/tenders/275952>, in compliance with PPRA Circular No. 4/2022 dated 1st July 2022, which said Circular is said to expressly direct procuring entities to submit all such documentation via the PPRA portal and provides that portal submission constitutes the prescribed mode of compliance. It is therefore asserted that

the Respondent's failure to engage with this evidence, or its inadvertent omission to consider it, constitutes a reviewable error of fact and renders the finding at paragraph 132 unsustainable.

24. According to the ex parte applicants, the Respondent failed to consider relevant considerations and/or took into account irrelevant considerations, and thereby violated the Ex Parte Applicants' rights to fair administrative action and lawful, rational and procedurally fair decision-making under Article 47 of the Constitution and the Fair Administrative Action Act.

25. Further and without prejudice to the foregoing, the Respondent is alleged to have erred in its assessment of the substantive requirements for termination under Section 63(1) of the Act. That Respondent's finding at paragraph 126 that the Ex Parte Applicants had failed to provide sufficient evidence justifying termination, notwithstanding the existence before it of the uncontroverted email from the Financier dated 8th January 2026 categorically declining to issue the No Objection, together with the correspondence between the parties evidencing the basis for that refusal. That the said email constituted clear, direct and unambiguous evidence of the unavailability of financing for the subject tender, which goes to the heart of the ground of termination relied upon. That the Respondent's characterization of this evidence as insufficient was unreasonable and unsupported by any reasoning in the impugned Decision

26. Finally, it is alleged that the Respondent committed an error of fact and/or failed to consider material evidence by finding that no termination report/notification had been submitted to the Public Procurement Regulatory Authority, despite evidence of submission through the official PPIP/Authority portal having been placed before it.

The ex parte applicants' Further Affidavit

27. In the further affidavit sworn by Vincent Nyamweya Mamboleo on 27th February, 2026, the ex parte applicants in response to the Respondent's Replying Affidavit sworn by Philemon Kiprop dated 4th March 2026 and the 1st Interested Party's Replying Affidavit sworn by Matteo Quaia dated 3rd March 2026 deny the contents thereof and maintain their position as earlier pleaded.

28. They maintain that contrary to paragraph 3 of the 1st Interested Party's Replying Affidavit, the documents sought to be impugned and/or struck out were already part of the record before the Review Board. In particular, the tender advertisement, the complete tender document together with its addenda, Professional opinion, re-evaluation report, the letter of cancellation of tender, the EIB correspondence and the screenshot of the Public Procurement Information Portal PPIP portal evidencing submission/uploading of the Termination notification/report to Public Procurement Regulatory Authority were all supplied in the Ex Parte

Applicants' bundle of confidential documents in compliance with the Board's requirement. The deponent annexed a copy of the Notification of Appeal dated 28th January 2026 and the accompanying Form 5 setting out the documents required from the Procuring Entity as "VNM-2."

29. It was further deposed that the EIB procurement guidelines were annexed to the Ex Parte Applicants' Replying Affidavit dated 1st February 2026 filed before the Review Board in Review No.18 of 2026 and that the same appear at pages 755–858 of the Ex Parte Applicants' bundle in this Judicial Review Application. Accordingly, the said documents were, according to the exparte applicants, properly before the Review Board and are properly before this Court and do not constitute extraneous or fresh material.

30. In response to paragraphs 4, 5, 6, 7, 8 and 9 of the 1st Interested Party's Replying Affidavit and to the corresponding averments in the Respondent's Replying Affidavit, exparte applicants' deponent reiterates his depositions in the Verifying Affidavit and Statutory Statement that the Ex Parte Applicants' Preliminary Objection on jurisdiction, founded on Clause 1.8.2 of the EIB procurement guidelines was not considered or conclusively determined by the Review Board. That no express and reasoned finding was made on whether the Review Board had jurisdiction to entertain complaints against, or make pronouncements upon, the acts and decisions of the Financier/Donor, the 3rd Interested Party herein.

31.The exparte applicants further maintain that the Review Board analyzed, criticised and made determinations touching on the Financier's position regarding the Letter of No Objection, thereby effectively venturing into a domain that the Ex Parte Applicants had expressly challenged as lying outside the Review Board's remit.

32.In response to paragraphs 10, 11, 12, 13, 14, 15 and 16 of the 1st Interested Party's Replying Affidavit, the deponent deposes that neither the Ex Parte Applicants, the Respondent, nor the 1st Interested Party could compel, influence, or otherwise dictate the issuance or non-issuance of the Letter of No Objection by the Financier. That the Ex Parte Applicants having submitted the requisite re-evaluation report and recommendation in accordance with the tender process, the ultimate decision whether or not to grant concurrence rested solely within the discretion of the European Investment Bank (EIB) under the applicable tender documents and procurement framework.

33.Further in response to paragraphs 17 and 18 of the 1st Interested Party's Replying Affidavit, the deponent avers that the effect of the impugned decision was to disregard and/or rewrite the tender requirements by ignoring the mandatory requirement for a Letter of No Objection, which requirement was expressly provided for in the tender documents and the EIB

procurement guidelines forming part of the governing procurement framework.

34. In response to paragraphs 19, 20 and 21 of the 1st Interested Party's Replying Affidavit, it was averred that the Ex Parte Applicants' letter notifying the Interested Parties of the termination of tender, when read together with the EIB correspondence and other supporting documentation, sufficiently disclosed the basis for the termination, namely the absence of the Financier's concurrence and consequently, an unavailability of the contemplated financing for the procurement process to proceed lawfully to award and implementation.

35. In response to paragraphs 22 and 23 of the 1st Interested Party's Replying Affidavit, it was averred that even if the impugned decision were to be treated as valid, the procurement process still cannot lawfully proceed in the absence of the mandatory Letter of No Objection. In those circumstances, it was deposed that the Review Board's decision creates both a practical and legal stalemate, leaving the tender process in abeyance and exposes the Ex Parte Applicants to increased risk, liability and potential unlawful obligations without the tender contemplated financing. It is for that reason that the impugned decision is stated to be incapable of implementation and is, in effect, futile.

36. In response to paragraphs 24 and 25 of the 1st Interested Party's Replying Affidavit, it was averred that the Ex Parte Applicants duly complied with the

requirements of Section 63 of the Public Procurement and Asset Disposal Act, including the requirement of notification to the Public Procurement Regulatory Authority. That such notification was made through the Public Procurement Information Portal (PPIP) in accordance with PPRA Circular No. 4/2022. That the documents submitted included: the procurement plan, notification of cancellation of tender to bidders, professional opinion, tender cancellation report, evaluation report and matters arising memorandum.

37. It was further deposed that in addition to the notification made through the PPIP portal, the European Investment Bank (EIB) was formally notified of the cancellation of the tender vide a letter dated 20th January 2026, a copy of which is contained in the Ex Parte Applicants' bundle of exhibits at **pages 278 – 279** which also formed part of the Confidential documents submitted to the Review Board.

38. In response to paragraphs 26, 27, 28 and 29 of the 1st Interested Party's Replying Affidavit, it was deposed that the Ex Parte Applicants were entitled to rely on the confidential documents filed before the Review Board, those documents being integral to the procurement process and protected under the applicable statutory framework. That during the hearing before the Review Board and in the impugned Review Board's decision, the Respondent acknowledged the Ex Parte Applicants' confidential bundle and thus, the same formed part of the material before it.

39. Further, that the Respondent's Replying Affidavit sworn by Philemon Kiprop on 4th March 2026 confirms that the Board ventured into matters reserved to the Financier/Donor by interrogating the procedure, reasons and basis upon which the EIB declined to issue the Letter of No Objection. That the Respondent expressly adopts the Board's position that the EIB ought to have deferred to Kenya's municipal legal framework, could not "approve and reprobate," and acted in "bad taste" by questioning the Board and the courts. According to the ex parte applicants, those were not neutral observations on the conduct of the Ex Parte Applicants, but substantive determinations on the Financier's decision and contractual position. In so doing, the Board is said to have exceeded the limits of its mandate under sections 167 and 173 of the PPADA 2015.

40. The ex parte applicants maintain in their response that the impugned decision is unreasonable, legally untenable and incapable of implementation because it purports to compel continuation of a procurement process in defiance of a mandatory financier precondition.

The Ex Parte Applicants' Written Submissions

41. In support of the substantive notice of motion, the ex parte applicants filed written submissions dated 5th March, 2026 and framed the following issues for determination:

- a) *Whether the Board misdirected itself in law by disregarding the Tender Documents and the EIB Guide which made financier non-objection a mandatory precondition to lawful progression to award and contract execution.*
- b) *Whether the Board exceeded jurisdiction by effectively reviewing, criticizing and overriding the Bank's due diligence decision under a framework that reserved complaints against Bank action to the Bank's own complaint architecture.*
- c) *Whether the Board took into account irrelevant considerations and failed to take into account relevant considerations, contrary to Article 47, the Fair Administrative Action Act and settled judicial review principles.*
- d) *Whether the Board's order directing completion of the procurement process was irrational, unlawful and incapable of implementation because it exposed the Applicants to an unfunded and unauthorized public commitment.*

42. In resolving the above issues, the ex parte applicants wholly relied on the grounds in support of the motion, as set out in the Statutory Statement, Verifying Affidavit and Further Affidavit of Vincent Nyamweya Mamboleo. They also adopted their Submissions that were lodged before the Board as annexed to the Verifying Affidavit at **pages 859 – 869** of the Ex-parte Bundle of Exhibits of the Record in the present matter.

43. On what judicial review is concerned with, reliance was placed on the often-cited case of **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR** arguing that judicial review is not an appellate jurisdiction and therefore the court is not concerned with the merits of the decision but with the decision-making process.

44. Further submission is that judicial review in Kenya is now anchored in the Constitution under Article 47 and the Fair Administrative Action Act, and that in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** and **Suchan Investment Ltd v Ministry of National Heritage & Culture & 3 others [2016] eKLR**, the courts make clear that legality, rationality, reasonableness, proportionality and attention to relevant considerations are all squarely within the Court's remit.

45. Further submission was made citing **Section 7(2) of the Fair Administrative Action Act** and arguing that the impugned decision is reviewable where a mandatory and material procedure or condition was not complied with; where the decision was materially influenced by an error of law; where relevant considerations were ignored; where the decision was not rationally connected to the information before the decision-maker; where it was unreasonable; or where it amounted to an abuse of power.

46. *On whether the Board misdirected itself in law by disregarding the Tender Documents and the EIB Guide which made financier non-objection a*

mandatory precondition to lawful progression to award and contract execution, it was submitted that **Section 80 of the PPADA** requires evaluation and comparison of tenders using the procedures and criteria set out in the tender documents and **Section 86** requires award in accordance with the prescribed framework. That the Board's statutory powers under **Section 173** are wide, but not a license to re-write the tender architecture or to neutralize an express financing condition written into the Tender itself.

47. In the instant proceedings, it was submitted that the Tender Documents did not merely mention EIB in passing but **expressly identified EIB as the financier for the consultancy services contract, subjected any contractual commitment to readiness of disbursement, preserved EIB monitoring and no-objection and incorporated Guidelines**, providing that evaluation outcomes and the proposed award must obtain the Bank's non-objection.

48. That these were not optional administrative courtesies but conditions built into the procurement architecture itself as shown in the *Tender Preface contained at pages 778, 779, 665, 49 and 220; Special Provision clause 1.1.2 contained at pages 795 and 31; General Provision clauses 1.2.1 and 1.2.3 contained at page 782, 18 and 221; EIB Guide section 3.5.1 and Annex 2 contained at pages 831, 842 – 843, 242 and 253 - 254 respectively of the Ex-parte Bundle of Exhibits.*

49. *It was submitted that the Board's directive to the Procuring entity to proceed with the procurement to its lawful conclusion after the Bank had withheld the mandatory no-objection was a legal contradiction and that a tribunal cannot order the performance of a step that the controlling procurement documents and financing framework prohibit from being taken in the absence of prior financier concurrence. **The Board is therefore accused of misdirecting itself by treating a mandatory no-objection as dispensable.***

50. It was submitted that in any event, the Respondent's and the 1st Interested Party's Replying Affidavits do not answer that contradiction but **accept that the no-objection was required and that it was withheld, their argument being that** simply, the Board did not 'disregard' the requirement. In the view of the exparte applicants, the Board's directive despite there being a no objection letter had the legal effect of the order treating the no-objection as non-dispositive. Labels cannot alter that legal consequence.

51. They cited the Court of Appeal in **Sharp Cut Designers Ltd v Public Procurement Administrative Review Board & 2 others [2025] KECA 1132 (KLR)** where it is said that the Court emphasized/reaffirmed that mandatory tender requirements are binding and are not to be re-determined by a review body as though they were optional. Further, that the concern of a review court is the fairness and legality of the process, not an overreach into rewriting the tender terms. That the Board's order in the present matter did

exactly what **SharpCut** warns against, by effectively revising the tender by treating an express financing and no-objection condition as irrelevant.

52. It was submitted that the Bank's earlier interactions do not assist the Respondent and the 1st Interested Party since the consultancy-specific provisions in the EIB Guide expressly states that the Bank may review its position in the light of new information that comes to its knowledge after it has given its earlier opinion. It was argued that the 7th January 2026 letter referred to an earlier no-objection and its subsequent suspension and that the Bank was therefore contractually entitled under the Guide to revisit its stance at the contract award stage pursuant to the re-evaluation carried out. It was argued that the Board's suggestion that EIB could not 'approve and reprobate' and ignore the text of the incorporated Guide itself as contained in the annexed copy of EIB guide contained at pages 814 – 855 and 223 – 266 of the Ex-parte Applicants' Bundle of Exhibits.

53. For that reason alone, it was argued that certiorari lies because the impugned decision compelled the Applicants to act contrary to the Tender Documents, the incorporated EIB Guide and the very professional opinion on which the accounting officer would ordinarily act, which, according to the applicant, was an error of law within Article 47 and Section 7(2)(b) and (d) of the Fair Administrative Action Act.

54. *On the second issue of whether the Board exceeded jurisdiction by effectively reviewing, criticizing and overriding the Bank's due diligence*

decision under a framework that reserved complaints against Bank action to the Bank's own complaint architecture.

55. The Applicants submit that they do not challenge the jurisdiction of the Board over **Request for Review No. 18 of 2026**. That all they are saying is that although the Board could examine /review the legality of the Applicants' decision to terminate the tender, but that it *could not, however, turn or convert that review into a de facto appeal against EIB's own no-objection decision, or direct the Applicants to proceed as though EIB had approved the award when in fact it had not.*

56. They relied on the cases of **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR** and **Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR 1** that jurisdiction is everything and that Jurisdiction flows from the Constitution and statute; it cannot be expanded by implication or good intentions.

57. They submitted that **Section 167 of the PPADA** allows a candidate or tenderer to seek review for breach of a duty imposed on a procuring entity by the Act or the Regulations while **Section 173** sets out the Board's remedial powers within procurement proceedings but **that neither provision authorizes the Board to supervise or condemn the Bank's internal due diligence under a donor framework that the tender expressly incorporated.**

58. The applicants referred to **Annex 7** and Clause 1.8.2 of the EIB Guide which is said to distinguish complaints against promoter action, which may go to national review bodies, from complaints against Bank action, which are to be pursued before the Bank's Procurement Complaints Committee. It further provides that where a complaint is lodged before the Bank has issued its no-objection to contract award, the substance of that complaint is to be considered by the Bank as part of its own due diligence. **(see pages 821, 852 – 853 and 263-264 of the Ex-parte Bundle of Exhibits.)**

59. It was submitted that the 1st Interested Party's Replying Affidavit attempt to recast the matter as only a complaint against KenGen does not answer the point since substantively, the Board is said to have pronounced itself on how EIB ought to behave, criticized EIB's reasons, and effectively discounted EIB's refusal when directing continuation of the procurement, thereby crossing from promoter review into Bank review. **(See paras 114 – 116 @ pages 939 – 942 of the Ex-Parte Applicants' bundle of documents herein).**

60. That the Respondent's Replying Affidavit confirms that the Board crossed that line by expressly repeating the Board's position that EIB ought to have deferred to Kenya's municipal legal framework, could not 'approbate and reprobate', and had acted in 'bad taste' by questioning the Board and the courts; which criticism, according to the applicants, are not neutral observations on the legality of KenGen's

conduct, but are substantive criticisms of the Bank's reasons and of the Bank's contractual position.

61. The applicants argue that those observations were not necessary to decide whether the procuring entity acted lawfully on the facts before it. That they were, in substance, a determination on Bank action and that once the Board stepped into that territory, it exceeded the jurisdictional bounds of Sections 167 and 173 by crossing from Promoter Review into Bank Review.

(See the Impugned Decision paragraph 114 – 116 contained at pages 939-942 of the Ex-parte Bundle of Exhibits)

62. *On the third issue of whether the Board took into account irrelevant considerations and failed to take into account relevant considerations, contrary to Article 47, the Fair Administrative Action Act and settled judicial review principles,* it was submitted that **the** impugned decision is also vitiated for failure to take into account relevant material to wit: the Tender Preface; Special Provisions Clause 1.1.2; General Provisions Clauses 1.2.1 and 1.2.3; Section 3.5.1 of the EIB Guide; Annex 2 item 6; the consultancy-Specific Provisions at *page 254 of the Ex-parte Bundle of Exhibits*; the Evaluation reports and recommendation to award 1st Interested Party, the professional opinion the request for no-objection dated 7th January 2026; the refusal email dated 8th January 2026; the cancellation letter dated 15th January 2026 and the screenshots confirming submission of

termination notification/report and other relevant documentation onto the Public Procurement Information Portal in accordance with PPRA Circular No. 4 of 2022. That each of those materials pointed in one direction only, being that the process could not lawfully proceed to award without financier concurrence.

63. It was submitted that instead, the Board took into account matters that were either legally irrelevant or were treated as though they could displace the Tender's express terms, by its disagreement with the Bank's internal due diligence, its view that the Bank should defer to Kenyan/municipal law outcomes and its reliance on the broader project's co-financing arrangement/structure without drawing the necessary distinction between the overall Olkaria VII project and this specific consultancy contract, a **classic Section 7(2)(f), (i) and (k) territory under the Fair Administrative Action Act.**

64. Reliance was placed on **R v PPARB & Others, Ex Parte Coast Water Service Board & Anor [2016] eKLR** where G.V. Odunga J (as he then was) held:

“137. “In my view, it is unlawful for the Board to adopt a procedure by which the provisions of the tender documents are bypassed in the award of the tender. Where the Board awards the tender in disregard of the provisions of the tender documents the court would not hesitate to quash such a decision.....”

65. According to the exparte applicants, pursuant to the Public Procurement Regulatory Authority's **Circular No. 4 of 2022 dated 1st July 2022**—directive **well within the Board's knowledge that** all documentation relating to procurement proceedings including termination notice/report are uploaded/submitted on the **PPRA portal**, in this case accessible at **<https://www.tenders.go.ke/tenders/275952>**. That the applicants duly complied with that prescribed mode of submission within the stipulated timelines, as evidenced by the confirmation screenshot that formed part of the confidential documents furnished to the Board. In the premises, it was argued that the Board's failure to see & engage with, or its omission to consider, this material evidence amounts to a **reviewable error**, being a failure to take into account relevant considerations. (*See para 78 of the impugned decision at page 913 of the bundle a confirmation that confidential documents were submitted*).

66. Further, it was submitted that the Board treated the PPRA reporting issue in an unduly formalistic manner as shown by paragraph 132 of its decision, where the Board recorded the Applicants' submission that the report could be accessed through the Public Procurement Information Portal and elevated the reporting issue above the central impossibility created by the withheld Financier concurrence/no-objection letter.

67. The Court of Appeal in **Suchan Investment** case was cited as having recognized that the statutory grounds of review now encompass failures to

consider relevant matters, irrationality and unreasonableness. That a Tribunal cannot acknowledge that the financier withheld a mandatory no-objection, yet still order the public entity to proceed as though the contractual and financing impediment did not exist hence, the Board is said to have ignored relevant considerations and relied on irrelevant ones.

68. ***On the fourth issue of whether the Board's order directing completion of the procurement process was irrational, unlawful and incapable of implementation because it exposed the Applicants to an unfunded and unauthorized public commitment***, it was submitted that at paragraphs 117 to 126 of the impugned decision, the Board reasoned that because the wider Olkaria VII Geothermal Power Plant would be co-financed by various stakeholders, the Applicants had not provided sufficient evidence to justify termination under Section 63 and that the Respondent's and the 1st Interested Party's Replying Affidavits repeat that same point, which reasoning conflated two different things: funding for the broader power project and the financing structure of this specific consultancy procurement. (See paras 117 -126 of Impugned decision contained at pages 942 – 949 of the Ex-parte Bundle of Exhibits.)

69. It was submitted that the Preface names EIB as 'the financier for the Consultancy Services Contract', with Clause 1.1.2 providing ***that the Employer intends to apply a portion of EIB funds to payments under the resulting contract, and that any contractual commitment was subject to***

readiness of disbursement for this assignment. That the process was also run under the EIB procurement framework and not under a generic pooled-funding model.

70. *(See pages 779, 795 and 220 – 221 of the Ex-parte Bundle of Exhibits.)*

71. It was therefore submitted that the Board's reliance on other project financiers such as JICA and KenGen's own contribution did not answer the question it had to decide which was not whether the overall power plant had multiple potential sources of money but whether this tender, as structured and advertised, could lawfully move to award and contract execution when the designated financier for the consultancy contract had withheld the required non-objection and the disbursement condition had not been met.

72. It was submitted that **Sections 44 and 53** of the PPADA, Regulation 71 of the 2020 Regulations, **Articles 201, 226(5) and 227 of the Constitution, and Sections 68, 196 and 197** of the Public Finance Management Act all point away from the Board's order, not towards it, that those provisions are meant to prevent public entities and accounting officers from assuming unauthorized or unfunded liabilities.

73. Further submission was that in a **donor-funded procurement where the tender itself makes contractual commitment contingent upon disbursement readiness and financier concurrence, an order compelling progression towards award despite the financier's refusal exposes the accounting officer to the very fiscal and legal risk those provisions are**

designed to prevent hence the co-financing reasoning was a material error of law and fact.

74. It was submitted that the cancellation letter of 15th January 2026 stated exactly that in absence of the Financier's no-objection, there would be no finances to honour the payment obligations under the resulting contract, which fact was not controverted by the respondent and the 1st interested party. That the allegations of bad faith, arbitrariness or malice do not manufacture financing, do not waive the tender condition, and neither do they confer on the Board power to command EIB concurrence hence, the Board lacked jurisdiction to dismiss that position once the contractual documents, the professional opinion, the no-objection request and the refusal email were read together.

75. On the relief sought, the ex parte applicants submitted that they had established that they were entitled to the orders sought and urged this court to allow the motion with costs.

The Respondent's Replying Affidavit

76. The **Respondent filed a very detailed Replying affidavit sworn on 4th March, 2026 by PHILEMON KIPROP** a procurement professional currently serving as the Secretary of the Public Procurement Administrative Review Board, on the authority of the Respondent herein. The said affidavit rehashes the impugned decision, in defence of the said decision wholly. The

respondent provides the historical background to the process leading up to the impugned decision.

77. According to the respondent, the the Ex-parte Applicant's challenge of the Respondent's Decision dated 18th February 2026 rendered in **PPARB Application No. 18 of 2026** is an appeal against the Respondent's Decision and is being disguised as a judicial review application. To this extent, this Court was urged to decline to allow the prayers sought in these judicial review proceedings for want of jurisdiction to hear and determine an appeal against the 1st Respondent's Decision.

78. It is deposed that Respondent in reaching its Decision considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and determined the issues that it framed for determination.

79. On the issue of whether the Respondent had jurisdiction to hear and determine Request for Review 18 of 2026, it was submitted that the Respondent considered the issue of whether the termination of the procurement proceedings in the subject tender was valid having taken cognizance of Section 63 of the Act which governs termination of procurement proceedings as well as Section 167(4)(b) of the Act which sets out that the Board's jurisdiction is divested where termination of

procurement proceedings has been carried out in line with Section 63 of the Act.

80. Further, that the Respondent took note of the Superior Courts' holdings and its previous decisions, as seen at paragraphs 89 to 92 of its Decision, that dictate that it has a duty to question whether a decision by a procuring entity terminating a tender has met the threshold of Section 63 of the Act since the mere fact of existence of a letter of termination notification does not oust its jurisdiction.

81. That the Respondent interrogated the termination of the subject tender so as to establish if it was in accordance with the requirements laid out under Section 63 of the Act noting that for termination of procurement proceedings to pass the legal muster, a procuring entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act.

82. It was further deposed that on the substantive requirements for termination of procurement proceedings in the subject tender, the Respondent reviewed the letter dated 15th January 2026 addressed to the 1st Interested Party with reference to the subject tender's cancellation and noted that the Ex parte Applicants did not make reference to the provisions under Section 63 of the Act in its termination but instead indicated that cancellation of the subject tender was due to the decline by the Project Financier to grant a letter of No

Objection without which they contend that there will be no finances to honour payment obligations for a contract resulting from the subject tender.

83. Additionally, that the Respondent also took note of the clarifications sought from both the Ex parte Applicant and the European Investment Bank “EIB” by the 1st Interested Party with regard to the subject tender and subsequent response by the Ex parte Applicants and EIB and from the said correspondence, it was clear to the Respondent that while the Ex parte Applicants attributed cancellation of the subject tender to the non-issuance of a letter of No Objection in the subject tender by the EIB, the said Bank indicated that it received communication pertaining to cancellation of the subject tender from the Ex parte Applicants and as such in accordance to its procedures, such cancellation closed all related requests for clarification or challenges and that the Ex parte Applicants were responsible to address any further clarification regarding the cancellation and reasons why it could not issue the letter of No Objection.

84. The deponent stated that the Respondent in its review of the subject tender noted that in compliance with its orders issued on 26th September 2025 in Rehearing PPARB Application No. 62 of 2025 which was upheld by both the High Court and the Court of Appeal, the Ex parte Applicants’ Evaluation Committee re-evaluated the subject tender and recommended award of the subject tender to the 1st Interested Party as seen at paragraph 110 of its Decision.

85. That the Respondent also noted the Ex parte Applicant's request seeking the No Objection from EIB vide letter dated 7th January 2026 in view of the completed re-evaluation and recommendation of award to the 1st Interested Party and this was captured at paragraph 111 of its Decision.
86. The respondent asserts that however, EIB in response, as seen at paragraph 112 of the Respondent's Decision, made a decision not to issue the requested letter of No Objection and laid blame on the respondent, which blame the respondent took great issue with in its decision.
87. That the Respondent while recognizing the vital role played by EIB in delivering the Government of Kenya's ambitious transformational programmes deemed it prudent to point out that where national and local laws have been embraced by development partners in resolving conflict, then the same ought to be complied with hence donor agencies should at the very least respect constitutional, statutory, and regulatory standards in the countries where they operate.
88. The respondent acknowledged that it reiterated in its decision that to the extent that EIB Guidelines designated Kenyan law as the applicable law in the procurement process in the subject tender, the threshold for termination of the subject tender on account of lack of funding must still be met as stipulated under Section 63 of the Act.
89. The deponent also avers that the respondent in its decision held that it is imperative that the multilateral partners in this case EIB exercises due

deference to Kenya's municipal legal framework, which it expressly acknowledged as the applicable regime for the resolution of procurement disputes under the subject tender and having acceded to the use of national review mechanisms, hence, EIB cannot approbate and reprobate by disregarding determinations rendered by duly constituted statutory bodies and affirmed by the superior courts and that a generalized aspersion of the nature cast on its decision and of the higher courts that affirmed the respondent's decision is in bad taste and risks being perceived as undue pressure rather than partnership which must be avoided in favour of comity, legality and institutional restraint.

90. The deponent acknowledges that the respondent in its impugned decision observed as seen at paragraph 117, 118, 119, and 120 of its Decision that funding for the project in the subject tender being the development of the Olkaria VII 80.3MW Geothermal Power Plant would be obtained from various stakeholders and also considered the aspect of financing of the subject tender and highlighted the requirements under Section 44 and 53 of the Act; and noting the express restriction against commencement of a procurement process without ascertaining whether the good, work, or service is budgeted for and the requirement requiring the head of the user department to initiate the procurement process through a requisition in line with the procuring entity's approved procurement plan, the Respondent found that there is a strong rebuttable presumption that the subject tender

herein was within the Procuring Entity's approved budget and procurement plan.

91. According to the deponent, the respondent found that the Ex parte Applicants had failed to fulfill the substantive requirements for the termination of the procurement proceedings in the subject tender as required by Section 63 of the Act as the subject tender for development of the Olkaria VII 80.3MW Geothermal Power Plant was to be co-financed not only by EIB but other various stakeholders.

92. The respondent defended its finding that the Ex parte Applicants had also failed to fulfill the procedural requirements under Section 63 of the Act since (a) the termination letter issued by the Ex parte Applicant to the 1st Interested Party contravened Section 63 of the Act as it failed to point out the specific pre-condition listed under Section 63 sub-section (a) to (i) which led to cancellation of the subject tender; and (b) no written report addressed or submitted to the Public Procurement Regulatory Authority notifying it of termination of the subject tender and reasons thereof in accordance with Section 63(2) & (3) of the Act was produced before it.

93. It is deposed in reiteration that the respondent having established that the Ex parte Applicants failed to satisfy both the substantive and procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63 of the Act, the Respondent found and held that the purported termination of the subject tender's procurement proceedings was unlawful

and illegal and its jurisdiction to hear and determine Request for Review No. 18 of 2026 had not been ousted by dint of Section 167(4)(b) of the Act and that therefore, the Respondent's Decision dated 18th February 2026 in Request for Review No. 18 of 2026 was sound, reasonable, lawful, procedurally fair and rational, took into account all the issues raised and that it acted within the confines of the Constitution, the Act, Regulations 2020, the Fair Administrative Actions Act and the rule of law in its findings.

94. The Respondent denies that it overreached its mandate and jurisdiction and that neither did it misapprehend the nature and legal effect of the No Objection requirement as alleged by the Ex parte Applicants herein. That it has continued to uphold procurement procedures as required by law and has promoted the integrity and fairness of these procedures and processes, and has not flouted any law nor acted in excess of its powers.

95. The deponent denies that the Decision dated 18th February 2026 in Request for Review No. 18 of 2026 purports to arbitrarily revise the Tender Document or tender conditions as alleged by the Ex parte Applicants. He maintained that the Ex Parte Applicant has failed to demonstrate any elements of illegality, error of law, irrationality, unreasonableness, procedural unfairness, ultra vires, bad faith and abuse of process, or violation of legitimate process in the manner in which the Respondent considered and interrogated the evidence, documents, pleadings, and information before it in arriving at its Decision dated 18th February 2026 in Request for Review No. 18 of 2026.

96.He urged this Court to dismiss the Ex parte Applicant’s Notice of Motion Application herein with costs. However, that in the event this Court finds that the Ex parte Applicant’s Application is merited, in line with Section 175(7) of the Act, this Court should disallow the prayer on costs.

The Respondent’s Written Submissions

97.In the written submissions dated 10th March, 2026, the respondent gave a factual background of the matter and reiterated its response through the replying affidavit sworn by Philemon Kiprop. The respondent identified the following issues for determination:

- a. Whether the respondent acted within its jurisdiction by making a determination regarding Request for Review No. 18 of 2026.*
- b. Whether the applicants should be granted the order of certiorari sought to quash the Respondent’s decision in Request for Review Application Number 18 of 2026 on Tender No. KGN-BDD-016-2024 and costs of the application.*

98.*On Whether the respondent acted within its jurisdiction by making a determination regarding Request for Review No. 18 of 2026*, it was submitted that the Respondent was properly couched with jurisdiction to hear and determine Request for Review 18 of 2026 pursuant to the powers conferred upon it under section 12 of the Public Procurement and Asset Disposal Act. In reaching its decision, it was argued that the Respondent

applied the rules of natural justice by considering each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to it pursuant to section 67(3)(e) of the Act.

99. **that** In exercise of its jurisdiction in the Request for Review 18 of 2026, the Respondent considered whether the termination of the procurement proceedings followed section 63 of the Act which provides the termination of procurement proceedings.

100. **That** In applying the provisions of section 63, the Board noted that the provision of the Act mandates the accounting officer to comply with both substantive and procedural requirements to justify the termination of a procurement process. Substantive requirement requires a procuring entity to specify the particular ground under Section 63(1) of the Act for terminating a tender and to present the supporting facts justifying such termination. Thar Procedural requirement mandates the accounting officer to submit a written report to the Public Procurement Regulatory Authority within 14 days of the termination together with reasons. Reliance was placed on the case of **Republic V Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (Interested Party); Ex Parte Kenya Veterinary Vaccines Production Institute (2018)e KLR** where the High Court is said to have held that:

“In a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to terminate procurement process is challenged before the Board the procuring entity is to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The procuring entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act.”

101. Further reliance was placed on **In Republic V Public Procurement Administrative Review Board; Accounting Officer County Government of Tana River & Another (Exparte); Minet Kenya Insurance Brokers Limited & Another (Interested Parties) [2022] KEHC 14278 (KLR)** where it was held that: -

“The Board is said to have considered it to be trite law that a Procuring Entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act in that there must be demonstrable reasons for termination (the substantive requirement) and that an accounting officer is required to give the Public Procurement Regulatory Authority a written report on the termination outlining the reasons and notifying all tenderers in writing of the

termination with reasons within fourteen (14) days of termination (the procedural requirements).”

102. In this case, the Respondent maintains that in the ex-parte applicant’s letter dated 15th January 2026 notifying the 1st Interested Party of the decision to cancel the procurement process for refusal by the 3rd Interested Party to grant a non-objection letter without which no finances would be available to honour payment obligations for a contract resulting from the subject tender, the Ex-parte Applicant did not make any reference to Section 63 in its cancellation letter hence, it failed to fulfil its substantive requirements to provide evidence justifying termination of the subject tender and to point out the specific pre-condition listed under Section 63 of the Act as well as its procedural requirements to write a report to the Public Procurement Regulatory Authority within the prescribed time after cancellation.

103. In the premise, it was submitted that the Respondent’s decision reversing the purported termination of the subject tender’s procurement proceedings was sound, reasonable, lawful, procedurally fair, rational and grounded in law and that the Respondent’s jurisdiction to reverse the same was not ousted by the provisions of Section 167(4)(b) of the Act.

104. On the Ex-Parte Applicant’s assertion that the jurisdiction of the Respondent to entertain complaints against the financier was ousted by

Clause 1.8.2 of the procurement guidelines of the 3rd Interested which provide that such grievances are subject to the exclusive internal complaints architecture of the 3rd Respondent, it was submitted that under **Clause 1.3,1.8 and Annex 7 of the EIB Guidelines**, procurement related complaints against the Procuring Entity ought to be addressed under the available national remedy mechanisms. Accordingly, that once the subject tender commenced, the 3rd Respondent submitted themselves and the procurement process to Kenya's municipal legal framework as expressed in the EIB Procurement Guidelines hence, the Respondent correctly applied itself to this issue in their decision and did not act ultra vires to their statutory mandate.

105. *On Whether the applicants should be granted the order of certiorari sought to quash the Respondent's decision in Request for Review Application Number 18 of 2026 on Tender No. KGN-BDD-016-2024 and costs of the application*, the respondents submitted that the applicants have urged this Court to review the merits of the decision of the Respondent framed as a judicial review application, yet it is seeking to improperly invoke the appellate jurisdiction of this court. The respondent relied on the case of **Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR** wherew Mativo J is said to have stated that:

“There is a long-established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in Judicial Review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects”

106. Further reliance was placed on **Peesam Limited v Public Procurement Administrative Review Board & 2 others; Hannaneli Suppliers Limited (Interested Party)** [2025] KEHC 7277 (KLR)

“While acknowledging the evolving jurisprudence particularly following Article 47 of the Constitution of Kenya, 2010 which allows courts in appropriate cases to consider the merits of administrative decisions this Court cautions against blurring the distinction between review and appeal.”

107. The respondent also relied on **Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited** [2012] KEHC 1274 (KLR) where the Court is stated to have held that:

“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.”

108. On the Applicants’s arguments that the respondent misdirected itself by treating the no-objection as dispensable, it was submitted that to decide this, the court must determine whether the EIB Guide was binding and whether no-objection was mandatory, which, according to the responden, the Applicants are asking this Court to conduct its own interpretation of the Tender Documents, the EIB Guide and the financing structure and determine whether the Board reached the correct conclusion, which is the function of an appellate court, not a judicial review court. Reliance was placed on the matter of **Republic v Public Procurement Administrative Review Board; Principles Styles Limited & another (Interested Parties) Ex Parte Accounting Officer, Kenya Water Towers Agency & another [2020]**

KEHC 9278 (KLR) where the Court is said to have observed that in determining the legality of a decision, courts interpret the statute, regulations or tender terms conferring power on the decision-maker to ensure that administrative bodies act strictly within their lawful mandate and in line with the intent of Parliament.

109. The respondent relies on **Section 173 of the Public Procurement and Asset Disposal Act**, on the powers conferred on it in determining requests for review.

110. In this case, the respondent maintains that it exercised its power within the law in hearing and reaching its decision and that therefore it cannot be accused of having acted outside its jurisdiction or of having breached the rules of natural justice. Judicial review cannot therefore come to the aid of the applicants on the grounds of illegality. Reliance was placed on **Republic v Commissioner of Customs Services Ex-Parte Africa K-Link International Limited [2012] KEHC 1274 (KLR (supra))**, where the court is said to have reiterated that:

“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.”

111. Further reliance was placed on **Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300** where the Court is stated to have 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 the 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”

112. Further reliance was placed on **Republic Vs Kenya Power & Lighting Company Limited & Another [2013] eKLR** where the Court is said to have stated, quoting an unnamed decision of the Court of Appeal that:

“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”

113. It was submitted that the Applicants have not demonstrated that the Respondent acted ultra vires, irrationally, illegally, or in breach of the Constitution or fair administrative action principles and therefore this Court should find that there is no basis for this Court to quash the impugned decision.

114. It was submitted that in reaching the decision that it did, the Respondent considered all the pleadings, evidence and submissions by the parties that were before it and this Court cannot interfere merely because it might have reached a different conclusion on the facts.

115. On the prayer for costs, the Respondent submits that it is a well-established principle that costs follow the event as stipulated in the case of **Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] KEHC 5939 (KLR)**. In addition, and without prejudice to the foregoing, it was submitted that if this Court were inclined to uphold the applicants’ prayer to quash the decision of the respondent, **Section 175(7) of the Public Procurement and Asset Disposal Act** bars issuance of costs in the event the decision of the Board has been quashed. Accordingly, no order as to costs should be made against the Respondent.

The 1st Interested Party’s Replying Affidavit

116. The 1st interested party filed a replying affidavit sworn by Matteo Quaia the Director and Chief Executive Officer of Steam S.r.l, a party to the Joint Venture between Sintecnica Engineering S.r.l and Steam S.r.l,

117. He deposes that as a preliminary issue, that the *Ex-Parte* Applicants' Application annexes documents that did not form part of PPARB Application No. 18 of 2026 and that these being Judicial Review proceedings brought under Section 175 of the Public Procurement and Asset Disposal Act, the Applicants can only present before this Court and rely on the evidence that was presented before the Respondent, and which the Respondent relied on in making the impugned Decision. The 1st Interested Party, therefore, prays that this Court disregards and expunges from the Record the documents filed and appearing at Pages 2 to 277 forming part of the *Ex-Parte* Applicants Bundle of Documents marked as *Annexure 1*.

118. The rest of the depositions are a replica of what the respondent has deposed, giving the history of the matter adding that in as much as the Respondent appreciated the effect of the grant of a No-Objection, the process itself was flawed as was evidenced in the reasons given in the email communicating the refusal to grant the No-Objection. That such a decision (whether or not to grant a No-Objection) is not arbitrary but rather based on information shared by the *Ex-Parte* Applicants to the 3rd Interested Party.

119. That the conduct of the exparte applicants demonstrated bad faith, were demonstrable unequivocally opposed to the 1st Interested Party's success in

the subject procurement and that their actions transcend mere procedural irregularity and reveal a calculated design to preclude the 1st Interested Party from winning the bid.

120. That the exparte applicants deliberately gave misleading communications to the 3rd Interested Party, which were crafted to ensure the withholding of a critical No Objection to the award in the 1st Interested Party's favour. The 1st interested party supported the decision of the respondent and submitted that the reasons given for the refusal to grant a No-Objection were vague, insufficient and not justifiable but were based on erroneous and misleading information given to the Bank by the *Ex-Parte* Applicants.

121. The deponent deponed that the respondent set aside the the *Ex-Parte* Applicants' Letters communicating the termination of procurement proceedings of the subject tender to ensure that the *Ex-Parte* Applicants regularize and complete the procurement process in accordance with the Law, the previous Decision of the Respondent in PPARB Application No. 62 of 2025 (re-hearing) and the Tender Documents. He denied that the Respondent revised the Tender Documents including the requirement for a No-Objection to be issued, neither did it treat the requirement for a No-Objection as an irrelevant, non-binding consideration. He supported the decision of the respondent as being legal and rational and asserted that the Respondent did not at all disregard the import of the mandatory No-Objection.

122. The deponent further denied that Respondent usurped the statutory powers of the Procuring Entity since the *Ex-parte* Applicants failed to meet the threshold for termination of the tender on account of lack of funding. Further, that the *Ex-parte* Applicants cannot claim that the tender was cancelled because of lack of budgetary provisions and in the same breath backtrack and claim that they were not in violation of Regulation 71 of the Public Procurement and Asset Disposal Regulations, 2020 requiring procurement plans and budgets be approved.

123. That in any case, the *Ex-Parte* Applicants in their letter dated 20th January, 2026 (*at Page 278 and 279 of the filed bundle of documents*) indicate that they were cancelling the tender to conduct fresh procurement proceedings. For those reasons, that the termination of the procurement proceedings was not occasioned by the reasons listed under Section 63 of the Act, specifically inadequate budgetary provisions, since, if that were the case, then the *Ex-Parte* Applicants would not be exploring fresh procurement proceedings allegedly in full compliance with EIB Guide to Procurement.

124. Further deposition was that the *Ex-Parte* Applicants' allegation that the Respondent conflated the overall project co-financing arrangements with the specific financing structure applicable to the subject tender is incorrect and misguided because the Respondent, rightly held that from the evidence placed on record in PPARB Application No. 18 of 2026, funding for the

development of Olkaria VII would be indeed obtained by various stakeholders.

125. The 1st interested party's further depositions are that Section 63 of the Public Procurement Asset Disposal Act, 2015 sets out specific grounds of termination of procurement proceedings and that in this case, as was observed in the impugned Decision, the reasons given by the *Ex-Parte* Applicants in their Letter dated 19th January, 2026 were vague, insufficient and further referred the 1st Interested Party to the 3rd Interested Party who could not provide any clarifications for the failure to issue a No-Objection since the tender had been cancelled.

126. It was therefore asserted that there were no justifiable and sufficient reasons that have been advanced to the 1st Interested Party for terminating the tender to date, which was correctly and legally noted by the Respondent.

127. In response to the contents of Paragraphs xiv, xv, xvi and xvii of the *Ex-Parte* Applicants' Notice of Motion and Paragraphs 9, 10, 11 and 12 of the Verifying Affidavit, it was deposed that the Respondent's Decision simply directed the *Ex-Parte* Applicants to proceed with the procurement process after finding that the *Ex-Parte* Applicants had unlawfully, illegally and irregularly cancelled the tender without any justifiable reasons and without following the critical steps in cancellation of a procurement process. That the impugned Decision is, therefore, legally sound, tenable and rational and can be lawfully implemented.

128. It was further contended that the *exparte* applicants gave contradictory reasons for termination of the procurement process, which reasons were different from those given by the 3rd interested party bank therefore, the Respondents Decision that the termination of the procurement proceedings was not compliant with the Law, is proper.

129. That the procedure for termination of procurement proceedings as provided for under section 63 of the Act was not followed as the reasons given by the *Ex-Parte* Applicants for termination of the subject tender are contradictory and unjustifiable and that the *Ex-Parte* Applicants did not adduce any evidence to the effect that they had notified the Public Procurement Regulatory Authority of the termination of the subject tender in writing within the stipulated period as mandated by section 63(2) of the Act as read with the PPRA Circular 4/2022 dated 1st July, 2022.

130. **That** during the hearing of PPARB Application No. 18 of 2026, the Respondent, despite being given an opportunity to address the issue on whether they submitted a written Report on the termination, they deliberately failed to do so, which said issue was also not addressed in their filed documents.

131. **In response to the** allegations in Paragraphs 13, 14 and 15 of the *Ex-Parte* Applicants' Verifying Affidavit, it was deposed that the *Ex-Parte* Applicants did not file or refer to any bundle of confidential documents. That at the beginning of the hearing on 12th February, 2026, all the parties present

confirmed the documents that they had filed and which were duly confirmed by the Board See *Paragraphs 43, 48 and 49 of the Respondent's Decision*).

132. That the Respondent's Decision rightly found that the *Ex-Parte* Applicants failed to satisfy both the substantive and procedural pre-conditions of termination of the subject tender in line with Section 63 of the Act.

133. I reiterate that the impugned Decision rightly, legally and rationally observed that the reasons given by the *Ex-Parte* Applicants in their Letter dated 19th January, 2026 are vague, insufficient and further referred the 1st Interested Party to the 3rd Interested Party who could not provide any clarifications for the failure to issue a No-Objection since the tender had been cancelled. There were, therefore, no justifiable and sufficient reasons that have been advanced to the 1st Interested Party for terminating the tender to date.

The 1st Interested Party's Submissions

134. In its submissions dated 10th March 2026, the 1st interested party submitted raising the following issues for determination:

- i. Whether the Board had Jurisdiction to entertain the Request for Review;***
- ii. Whether the Respondent erred in its assessment of the requirements under Section 63 of the Act; and***
- iii. Whether the Ex-Parte Applicants are entitled to the Orders sought.***

135. *On whether the Board had Jurisdiction to Entertain the Request for Review* the 1st interested party restated the principle espoused in the locus classicus **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** on jurisdiction where it was affirmed that:

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

136. Further reliance was placed on the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, where the Supreme Court held that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1st and 2nd respondents in his submission that the

issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

137. It was submitted that the Respondent is a creature of statute established under Section 27 (1) of the Public Procurement and Asset Disposal Act, whose functions are set out in section 28 (1) of the Act.

138. The 1st interested party submitted that the Respondent rightly considered the Notice of Preliminary Objection placed before it in the *Request for Review Application No. 18 of 2026* where the *Ex-Parte* Applicants relied on Clause 1.8.2 of the European Guide to Procurement in alleging that it lacked jurisdiction; concluding that it indeed had Jurisdiction to hear the Request for Review Application and that its jurisdiction is not ousted by the mere existence of a Letter of notification of termination of procurement proceedings, as the *Ex-Parte* Applicants want this Honorable Court to believe. That the Respondent further noted, correctly, that only a termination that has been done lawfully can oust the Board’s jurisdiction.

139. Further submission was that the Request for Review Application from which the impugned Decision stems, was not a Complaint against the Banks’s Actions, which would unlock Clause 1.8.2 of the EIB Guide to Procurement, but against the actions of the *Ex-Parte* Applicants who

irregularly cancelled the Tender and intentionally misled the Bank to withhold a No Objection with a view to ensuring that the tender was not awarded to the 1st Interested Party. Further, from the very Tender Documents, under Clause 31.2 of Part A: Tendering Procedures; Section II: Instruction to Consultants, the *Ex-Parte* Applicants specifically directs any bidder who is not satisfied with the evaluation to seek administrative review before the Board. The *Ex-Parte* Applicants could not, therefore, turn around to challenge the jurisdiction of the Respondent to hear and determine the Request for Review Application.

140. It was submitted that the tendering processes are, as per Articles 10, 201 and 227 of the Constitution, supposed to be carried out in an environment that is open, fair and transparent and that where any person is aggrieved by the tendering process, the same principles of openness and transparency would entitle them to approach the Public Procurement Administrative Review Board, the Respondent herein, to address such grievances.

141. That in view of Articles 10 and 227 of the Constitution on transparency and accountability, the *Ex-Parte* Applicants cannot hide behind the cloak of Clause 1.8.2. of the EIB Guide to Procurement knowing very well that the Request for Review was filed against their actions and not those of the Bank and that they undertook an unlawful cancellation of the procurement.

142. That contrary to the *Ex-Parte* Applicants' submission that the Respondent misdirected itself by finding that the financier's No-Objection was not

mandatory, the Respondent, in its Decision, recognized the critical role played by the No-Objection that was to be issued and that the Respondent rightfully held that the *Ex-Parte* Applicants failed to point out which specific pre-condition led to the termination and instead unilaterally cancelled the tender, with the 3rd Interested Party, thereafter, simply informing the 1st Interested Party that following the cancellation by *Ex-Parte* Applicants, it could not issue any further clarifications.

143. Accordingly, it was urged that this Court should find that the Respondent had the requisite jurisdiction to entertain and determine PPARB Application No. 18 of 2026 as it did.

144. On the second issue of ***Whether the Respondent erred in its assessment of the requirements under Section 63 of the Act***, it was submitted relying on ***Republic v Public Procurement Administrative Review Board & 2 Others [2019] KEHC 9688 (KLR)***, where the Court is said to have been faced with a similar issue on termination of procurement proceedings and it observed thus:

“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.”

145. It was submitted that the Decision by the *Ex-Parte* Applicants to cancel the Tender and the subsequent reasons given to the 1st Interested Party were not sufficient and the attempt by the *Ex-Parte* Applicants to cite inadequate budgetary provisions is neither real nor substantial. This is because, according to the 1st Interested Party, it had since learnt that the reason given to the Financier, the 3rd Interested Party, for the cancellation of the tender was non-adherence to procurement guide (*Reference is made to Page 278 of the Ex-Parte Applicants filed bundle*) and that the *Ex-Parte* Applicants would restart the tendering process hence it would be false and improper for the *Ex-Parte* Applicants to claim that they did have justifiable reasons, listed under Section 63 of the Act, to cancel/ terminate the tender.

146. Further reliance was placed on **Republic v Public Procurement Administrative Review Board Exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] KEHC 4757 (KLR)** where the Court observed thus:

“The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender

process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the ambit of the law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63.”

147. It was submitted that despite the 1st Interested Party seeking clarifications on the reasons for cancellation of the tender from the *Ex-Parte* Applicants and the 3rd Interested Party, no justifiable reasons have been given to date. That for the 3rd Interested Party to fail to grant the No-Objection, such decision (whether or not to grant No-Objection) is not arbitrary but rather based on information shared by the *Ex-Parte* Applicants to the 3rd Interested Party hence, the Respondent, in its Decision, rightfully held that the Respondent failed to fulfil the substantive requirements for the termination of the procurement proceedings in the subject tender as required by Section 63 of the Act and similarly failed to meet the procedural statutory pre-conditions for a lawful termination.

148. It is was submitted that particularly, the Board, while making reference to the confidential documents submitted to it by the *Ex-Parte* Applicants, did not have sight of any Written Report addressed or submitted to the Public Procurement Regulatory Authority in accordance with Section 63 (2) and (3) of the Act. That as at the time of the termination of the procurement, filing of the Request for Review and the hearing and determination by the Respondent, the said termination notification on the Public Procurement Information Portal had not even been done. That strangely, the *Ex-Parte* Applicants have now attached a link to the said notification, which link they did not avail to the Respondent, a demonstration that the documents were uploaded after the hearing of the Application by the Respondent or after the Decision.

149. It was therefore submitted that the Respondent, in arriving at the impugned decision of 18th February, 2026, acted within its jurisdiction as provided for in the Act as it only addressed the *Ex-Parte* Applicants' decision to ignore the well set out requirements under Section 63 of the Act with respect to cancellation/ termination of procurement proceedings.

150. On the third issue of ***whether the Ex-Parte Applicants are entitled to the Orders sought***, it was submitted that judicial review is concerned not with the merits of the decision, but with the decision-making process itself as was held in ***Municipal Council of Mombasa v Republic & Umoja Consultants Limited (supra)***. Further reliance was placed on the cases of ***Republic v***

Public Procurement and Administrative Review Board & Another; Dochar Construction and Trade Inc Ltd (Interested Party) Ex Parte Xtreme Engineering Services Limited [2019] eKLR, and Cortec Mining Kenya Limited vs. Cabinet Secretary, Attorney General & 8 Others [2015] eKLR where the Court of Appeal is said to have discussed the judicial review remedy of Certiorari and stated that :

“...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.”

151. The 1st interested party further relied on the case of *Republic v The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 Others [2013] eKLR* where the court is said to have stated *inter alia*, that *the* function of the court sitting in judicial review is not concerned with the merits of the decision, citing other decisions including *Republic v Chief Magistrate’s court Nairobi & 4 others ex parte Beth Wanja Njoroge [2013] eKLR, Nairobi Civil Misc Appl. 327 of 2011.*

152. It was submitted that the *Ex-Parte* Applicants have failed to demonstrate to this Court that the decision by the Respondent was imbued with illegality, irrationality, or procedural impropriety to warrant grant of the orders sought. Counsel cited the case of *Pastoli v Kabale District Local Government Council & Others (supra)* on the *testto* be satisfied in order for an application seeking Judicial Review Orders to succeed which test has been

restated in other cited cases of ***Republic v Public Procurement Administrative Review Board & 2 Others; Medvision Equipment (Exparte); Royale Online Limited (Interested Party) [2022] KEHC 18100 (KLR)*** and in the case of ***OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 Others (2017) eKLR Civil Appeal No. 28 of 2016*** where the Court is said to have stated that in considering a judicial review application, the Court must never consider its role as an appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions regarding whether there was or there was no sufficient evidence to support the decision of the public body concerned.

153. Further submission was in reliance on the case of ***Republic v National Water Conservation & Pipeline Corporation & 11 Others [2015] eKLR*** where the Court is said to have held that once a Judicial Review Court fails to sniff any illegality, irrationality, or procedural impropriety, it should down its tools forthwith.

154. Further reliance was placed on the case of ***Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others [2012] eKLR*** where the Court, is said to have expounded on the on the jurisdiction and powers of the Board.

155. According to the 1st interested party, the current Application in its vague nature is a veiled attempt to relitigate a procurement dispute that was decided by a competent Board and that the Court should decline that invite. It relied on *Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Rongo University [2018] eKLR* where the Court is said to have held that the grant of orders of certiorari, mandamus and prohibition is discretionary, which discretion must be exercised cautiously, sparingly and judiciously.

156. The 1st interested party urged this court to dismiss the exparte applicants' application with costs.

Analysis And Determination

157. I have carefully considered the substantive notice of motion, the grounds, statutory statement, verifying and further affidavit as well as the responses by the respondent and the 1st interested party and the respective parties' written submissions which are very detailed as captured in this judgment,

158. The main issues for determination in these proceedings are

- a. Whether the Review Board had jurisdiction to entertain the request for review as filed***
- b. Whether the application herein is a veiled appeal and therefore whether this Court has jurisdiction to hear and determine the application***

c. whether the Procuring Entity's termination of the procurement process was lawful, reasonable, and in line with the principles of public procurement and more specifically, whether there was compliance with section 63 of the Public Procurement and Asset Disposal Act.

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

159. There are also many ancillary questions that this Court will answer as it resolves the identified issues. Before resolving the issues identified herein, I observe and appreciate that the Respondent's decision is quite detailed and it sets out the history of this matter right from the time of Request for proposal, evaluation, request for review, reevaluation, request for review which went up to the High Court and all the way to the Court of Appeal and back to the Review Board. That history was also restated by the parties in their pleadings and submissions

160. Particularly, it is important to highlight that the dispute has lingered for quite a while, almost defeating the purpose for which the tender was advertised on 24th September, 2024 in the Star Newspaper, nearly two years ago.

161. Each of the respective parties' positions are well set out in their affidavits and submissions which I have captured at length almost verbatim in this judgment and therefore I will only briefly highlight the background to the

dispute, which background to the dispute herein is important as all the participating parties are in agreement on the facts as they emerged.

162. The Applicants moved this Court vide a notice of motion application dated 27th February 2026 seeking for an order of certiorari to remove and bring to the High Court for purposes of quashing the Respondent's decision dated and delivered on 18th February, 2026 in Request for Review Application Number 18 of 2026 on Tender No. KGN-BDD-016-2024 and costs of the application.

163. The 2nd ex-parte applicant invited tenders for consulting services for Olkaria VII Geothermal Power Project, which was receiving financing from various investors including the 3rd interested party. The issuance of the tender as clearly seen from the tender documents annexed was subject to issuance of a non-objection by the 3rd interested party. The Applicants wrote to the 3rd interested party requesting no-objection to the re-evaluation report recommending the award to the 1st interested Party. The 3rd interested party refused to provide the no-objection. Following the refusal, the ex parte applicants terminated the tender stating that since the financier had declined to grant the required non-objection, which was a condition precedent to the procurement process as per the tender documents, there would be no finances to honor the payment obligations under the resulting contract.

164. The 1st interested party then made a request for review to the respondent following the notification of termination of the tender. The respondent made a determination directing the ex parte applicants to proceed with the procurement process to its conclusion and set aside the letters communicating the termination of procurement proceedings. Based on the foregoing, the applicants filed these judicial review proceedings seeking for an order of certiorari to quash the respondent's decision.

165. In response, the Respondent through the Attorney General filed a replying affidavit sworn by Mr. Philemon Kiprop on 4th March 2026 opposing the Notice of Motion dated 27th February 2026. Further, the 1st interested party too filed a replying affidavit and all parties filed written submissions which I have reproduced above in this judgment.

166. As a preliminary issue, the ex parte applicants contend that the 2nd Interested Party/Financier (EIB) was irregularly enjoined in the proceedings before the Review Board but that they did not participate. They assert that the contractual framework excludes their actions from being subjected to the Board's jurisdiction. However, the ex parte applicants submit that they have included them in the proceedings merely by virtue of them having been named as a party in the proceedings before the Review Board that are subject of challenge in these judicial review proceedings. I make no finding concerning the presence of the financier EIB in these proceedings as there is

nothing sought against them and neither did they participate in these proceedings.

167. Onto the main issues for determination:

a. Whether the review Board had jurisdiction to entertain the request for review

168. The exparte applicants had raised a preliminary objection to jurisdiction of the Review Board entertaining the request for review on account that the challenge was against the giving of no objection by the financier instead of focusing on the decision made by the exparte applicants to terminate the procurement process. The respondent and 1st interested party maintained that the review Board was seized of jurisdiction to entertain the matter.

169. My finding on this issue is that jurisdiction is everything without which, a court of law or tribunal acts in vain. This principle has been stated many times by courts, commencing with **Owners of Motor Vessel Lilian S V Caltex Oil Kenya Ltd**(supra) as restated in **Samuel Kamau Macharia V Kenya Commercial Bank Limited**(supra).

170. In the instant case, and as acknowledged by the respondent and the 1st interested party, the request for review and the decision of the review Board reveal that the 1st interested party did not challenge the refusal to give a no objection letter by the financier EIB but cancellation of the tender process by the exparte applicants allegedly without any sufficient or lawful reason and in doing so, the 1st interested party and the respondent maintained that the

procuring entity did not comply with the conditions set out in section 63 of the Act.

171. In my humble view, the procuring entity was clouded by the criticism levelled against the financier when discussing the reasons given by the financier for refusing to give a no objection letter, attributing blame on the review Board which discussion was in the context of determining whether the termination of the tender was in accordance with section 63 of the Act. That criticism is what made the exparte applicants believe that the challenge was being made against the decision of the EIB to refuse to give a no objection letter.

172. In the view of this Court, the Review Board's jurisdiction was not ousted by the mere fact of there being no objection letter issues as the Review Board was entitled to hear the dispute and make a determination as to whether the termination/ cancellation of the tender was in accordance with section 63 of the Act.

173. In the same vein, and from the material on record, this court further disagrees with the argument by the exparte applicants that the request for review was in a way, a complaint against the financier who, from a reading of the prequalification for consultancy services document, would not be privy to contracts with third parties involving the subject tender.

174. Accordingly, I find and hold that the respondent review Board was vested with jurisdiction to entertain the request for review filed by the 1st interested party.

b.whether this court has jurisdiction to hear and determine the judicial review application which is said to be a veiled appeal.

175. The Respondent and the Interested Party further took a preliminary position that these proceedings amount to an appeal disguised as an application for judicial review. Their contention is that the Applicants are, in substance, inviting this Court to interrogate the merits of the decision rendered by the Review Board, including interrogating whether the no objection refusal was lawful, a task which falls outside the scope of judicial review under Order 53 of the Civil Procedure Rules.

176. I have considered that objection in light of the pleadings, the grounds upon which the application is brought, and the applicable judicial pronouncements cited by the parties in their submissions and the legal framework.

177. It is important to note that Judicial review in Kenya is now anchored not only in the common law and Order 53 of the Civil Procedure Rules, but also in the Constitution and statute. Article 47 of the Constitution of Kenya 2010 guarantees every person the right to administrative action that is expeditious, lawful, reasonable, and procedurally fair. That right is operationalised by the

Fair Administrative Action Act, which sets out the grounds upon which administrative action may be reviewed by the Court.

178. Notwithstanding this expanded constitutional and statutory foundation, the essential character of judicial review remains unchanged. In judicial review proceedings brought under Order 53, courts are concerned with the legality of the decision-making process, as opposed to the merits of the decision itself. This principle was authoritatively stated in **Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9**, and has been consistently affirmed in Kenyan jurisprudence, including the case of **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd** cited herein above as well as the often-cited Ugandan case of **Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300**.

179. In the present case, the Applicants' complaint is not framed as a mere disagreement with the outcome reached by the Review Board. Rather, the Applicants assert that the Review Board acted outside the scope of its statutory mandate by determining, according to *ex parte* applicants, the lawfulness of the refusal to give no objection to the reevaluated process, that the Review Board acted irrationally in directing the *ex parte* applicants to complete the procurement process yet the process was conditional upon the 3rd interested party giving no objection letter at every stage of the process and that the Review Board 's decision is therefore tainted with illegality and irrationality, and thus falls short of the standards of lawfulness and

reasonableness required under Article 47 and the Fair Administrative Action Act.

180. These grounds fall squarely within the recognised realm of judicial review. A claim of ultra vires conduct raises a jurisdictional issue; an allegation of illegality concerns whether the decision-maker properly directed itself in law; and a claim of irrationality invites this Court to consider whether the impugned decision meets the threshold of reasonableness as articulated in **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223.**

181. The fact that the Court may be required to examine the record of the impugned decision in order to determine these questions does not, without more, transform the proceedings into an appeal. The Court does not thereby assume an appellate role, nor does it substitute its own decision for that of the Review Board. Its mandate remains supervisory: to check whether the impugned decision was made within jurisdiction, in accordance with the law, and in a manner that meets the constitutional threshold of fairness and reasonableness.

182. In the premises, this Court is not persuaded that the present application constitutes a veiled appeal. The grounds advanced disclose a proper invocation of this Court's judicial review jurisdiction under Order 53, as read together with Article 47 of the Constitution and the Fair Administrative

Action Act. The objection raised by the Respondent and the Interested Party is therefore without merit

c. whether the Procuring Entity's termination of the procurement process was lawful, reasonable, procedurally fair and in line with the principles of public procurement more specifically, whether the termination was in accordance with section 63 of the Public Procurement and Asset Disposal Act.

183. This issue is loaded with many questions. The exparte applicants contended and submitted that the Review Board itself acknowledged, at paragraph 112 of the impugned decision of 18th February, 2026 in **PPARB Application No. 18 of 2026**, that EIB withheld the no-objection by email dated 8 January 2026 and that despite that acknowledgement, the Review Board cancelled the termination letters and directed the Applicants to proceed with the procurement process to its lawful conclusion, which directive is said to be unlawful, unreasonable as the same is incapable of implementation since the no objection clause was part of the tender documents and a condition precedent to the procurement process.

184. The respondent and the 1st interested party on their part contend that the reasons given by the exparte applicants for cancellation of the procurement process are insufficient, making no reference to any of the grounds stipulated in section 63 of the Public Procurement and Asset Disposal Act, (the Act), do not accord with the substantive and procedural underpinnings under

section 63 of the Act, that the exparte applicants' explanation that the cancellation was occasioned by the financier failing to give no objection letter was contradictory and influenced by the exparte applicant's acting in bad faith as there were other sources of financing by other stakeholders and that the exparte applicants did not notify the Public Procurement Regulatory Authority as required under the Act and Regulations, 2020, among other reasons as given in the impugned decision.

185. As I resolve this issue which is very key to these proceedings, I note that this Judicial Review Application presents a narrow but dispositive question to the extent that once the Tender Documents and the applicable EIB procurement framework made the Bank's non-objection a mandatory step before award and contracting, could the Board nonetheless direct the Applicants to proceed to the lawful conclusion of the procurement as though that step had been satisfied? The answer is NO. And in justifying that answer, it is important to note that the issue is not whether the failure to give no objection letter is an arguable one, noting that there is no room, in these proceedings, for challenging the financier's decision to refuse to give a no objection and this fact is acknowledged by both the respondent and the 1st interested party. This is so, notwithstanding the respondent's criticism of the reasons given by the financier for refusing to give a no objection letter, attributing the problem to the Review Board's role in the procurement process.

186. I now take the parties through the journey leading to these proceedings on whether or not section 63 of the PPADA was complied with.

187. The dispositive materials for this Motion are the Tender clauses, the EIB Guide, the professional opinion, the 7th January 2026 request for no-objection made by the ex parte applicants, the 8th January 2026 refusal email send by the financier EIB, the 15th January 2026 termination letter, the screen shot evidencing submission/upload of the termination notice/report into the PPRA Portal on 19th January, 2026 and the impugned decision itself and all documents that were either before the Board or expressly referred to in the impugned decision.

188. From the impugned decision and the tender documents which were filed before the Review Board and before this Court and marked as Annexure VNM I, which the 1st interested party submitted that the annexure ought not to have been filed in this Court as it was not before the Review Board, and which objection I find unmerited for reasons that we cannot have a request for review that does not place before the Review Board tender Documents, and neither would this court be enabled to make a decision absent the tender documents in view of the parties' submissions on the Governing Contractual Framework for Tender No. KGN-BDD-016-2024 which is the **Tender No. KGN-BDD-016-2024**, it is clear to this Court that **Tender No. KGN-BDD-016-2024**, was expressly framed as donor-funded procurement under the EIB framework. The Tender Preface states that KenGen and EIB, 'the financier

for the Consultancy Services Contract for the Olkaria VII Geothermal Power Project', agreed to use the EIB Guide for the subject tender and Procurement process and adapted procurement documents for the project in question. The same Preface states that the process would be conducted as a single-stage, three-envelope International Competitive Bidding with prequalification.

189. Additionally, Special Provisions (SP) Clause 1.1.2 tied the contractual commitment to financing readiness in unqualified terms. It states that the Employer had applied for financing from EIB, intended to use part of those funds for payments under the resulting contract, and that *'Any contractual commitment related to this tender procedure is subject to the readiness of disbursement of funds for this assignment.'* See page 221 of the Annexure I.

190. As correctly submitted by the exparte applicants, the General Provisions reinforce that position at Clause 1.2.1 which states that the Consultant would be selected in accordance with the Guidelines and that *'EIB's monitoring and no-objection is not affected.'*

191. Further, Clause 1.2.3 provides that EIB exercises monitoring on the basis of the contractual arrangements with the Employer and the Guidelines containing details for EIB approval and no objection to individual steps during the procurement process. It also states that no contractual relationship between EIB and any third party exists other than with the Employer.

192. Section 3.5.1 of the incorporated EIB Guide states that all international procurement procedures are subject to prior review by the Bank and that prior review means promoters must send the Bank the relevant documentation and seek the Bank's concurrence prior to all major procurement decisions. The same section specifically provides that the evaluation of bids at each evaluation stage and the proposed decision on the award of contracts '*must obtain the Bank's non-objection*'.

193. Again, Annex 2, item 6, dealing with international procurement procedures outside the European Union, provides that after analysis of the tenders, the promoter must send the evaluation report to the Bank, with a clear recommendation for the next tendering stage or contract award and that the Bank will provide its non-objection or appropriate comments.

194. The Guide to the consultancy procurement, provides that for consulting services, the Bank reviews, among other things, the evaluation report justifying the proposed selection and the draft consultant's contract to ensure that it can finance the corresponding services. It further states that after analysis of the offers, the promoter must send the evaluation report recommending award and the draft consultant contract upon which the Bank will provide its' non-objection or appropriate comments.

195. Significantly, at *pages 843 and 254 of the Ex-Parte Applicants' Bundle of Exhibits*, the Bank's non-objection or comments do not relieve the promoter of responsibility and that the Bank may review its' position in the light of

new information that comes to its' knowledge after it has given its' opinion on a specific aspect of the process.

196. The EIB Guide also separates complaints against the promoter from complaints against the Bank. The promoter in this instance is the procuring entity/employer. Annex 7 states that complaints against promoter action should be addressed to the promoter and or national review bodies, but complaints against Bank action are to be lodged with the Bank's Procurement Complaints Committee. Additionally, that complaints submitted before the Bank has issued its non-objection to contract award are treated through the Bank's standard due diligence, and their substance is considered when the Bank decides whether or not to provide its non-objection to the contract award.

197. The Guide provides at page 221 of the Ex-parte Applicants' Annexure I at Clause 1.1.2 on funds that:

"Any contractual commitment related to this tender procedure is subject to the readiness of disbursement of funds for this assignment."

198. Section 3.5.1 of the EIB Guide at Pages 795 & 221 of the bundle of documents filed by the applicants, the Guide provides that:

"The evaluation of bids (at each evaluation stage) and the proposed decision on the award of contracts must obtain the Bank's non-objection, based on appropriate documents."

199. While EIB Guide section 843 and 254 provides:

"After analysis of the offers, the promoter must send to the Bank its evaluation report, making a clear recommendation for the contract award, and the draft consultant contract. The Bank will provide its non-objection or appropriate comments."

200. From the letter dated 15th January 2026 terminating the procurement process, following the reevaluation of the tender as directed by the Respondent following the decision in **PPARB Application No. 62 of 2025** (de novo re-hearing), this court finds no material to demonstrate, as alleged by the respondent and the 1st interested party, that the applicants were acting in bad faith or that they were hell bent to defeat the decision of the Review Board, considering that the reevaluation report recommended an award of the tender to the 1st interested party herein, subject to confirmation of the financing approval and obtaining a no-objection from the Financier, as per the tender documents which, indisputably, bound all bidders.

201. This is further evidenced by the letter dated 7th January 2026 wherein the procuring entity wrote to EIB requesting no-objection to the re-evaluation

report. That letter explicitly referred to EIB's earlier no-objection of 17th March 2025, the EIB's later suspension of that no-objection on 4th April 2025 pending conclusion of the review process and seeking EIB to lift the suspension so that the procuring entity could proceed with notification of intent to award and contract negotiations with the 1st interested party successful bidder. See **pages 856 – 857 and 267 – 268 of the Ex-parte Applicants' Bundle of Exhibits.**

202. The request for no objection letter was responded to on 8th January 2026 by the EIB refusing to provide the no-objection, stating that, in its view, the PPARB decisions had not adhered to the procurement procedures in the tender dossier; that PPARB had acted as a separate evaluation committee and that the overall process had been compromised from the perspective of the Bank's procurement principles. Whether that view was right or wrong on the merits is not the point for present purposes. The critical fact is that the required no-objection was withheld. This communication was via EIB email dated 8th January 2026 contained at pages 858 and 269 and the Impugned decision's excerpts of paras 111-113 contained at pages 937 – 938 of the Ex-parte Applicants' Bundle of Exhibits referred to the said email and contents.

203. It was following the above refusal that the procuring entity terminated the tender on 15th January 2026 giving the reason:

The Project Financier had declined to grant the required no objection and without it there would be no finances to honor the payment obligations under the resulting contract.

204. The above reasons are an extract from the financier's email dated 8/1/2026 declining to give no objection as requested by the procuring entity. According to the procuring entity, since the subject procurement was explicitly covered by the EIB procurement guidelines and subject to receiving a Letter of No Objection, the only option was to terminate the Tender after the financier declined to give a no objection letter.

205. I reiterate that the incorporation of the EIB Procurement Guidelines into the tender and the mandatory no objection requirement letter from the financier at every stage of the procurement process meant that the applicants could not award the tender without receiving a no objection from the financier. Elsewhere, I have discussed what would be the effect of the decision by the respondent directing the applicants to complete the procurement process absent the financier's approval, which approval was a condition precedent to the procurement process all the way to contract award and implementation.

206. On the question of multiple stakeholders financing the project, and at the risk of repeating myself, it is clear that the procurement in question was a

publicly funded project with multiple financiers as observed by the Review Board in its impugned decision. The evidence on record and as summarized by the Review Board in its impugned decision shows that, before seeking for additional funding, the Procuring Entity consulted the National Treasury, which acknowledged a financing gap and negotiated for financing from EIB. The EIB was to give the money by way of a loan to the National Treasury, upon which the National Treasury was to on lend to the procuring entity, a public listed company.

207. In its emails to the financier, the National Treasury disclosed the other sources of funding for the anticipated project – JICA and KenGen and stated that more funding was needed to make the project viable. This communication is important because it highlights that the procurement process took place amidst incomplete financial closure. That albeit there were other financiers involved, the evidence indicates that their funds were not adequate to cover the total project cost. The procurement process and tender documents clearly show that the process was subject to a no objection letter from the EIB Financier. Therefore, the request for no objection made to the financier was necessary due to the funding shortfall identified at the highest level of government finance management.

208. Given the above situation, the question is whether the Procuring Entity could reasonably be expected to move forward with the procurement

process, award contracts or implement those contracts without confirmed and adequate budgetary provision and funding. The answer, is a big NO.

209. I further observe that the Review Board reviewed the communication from the financier, following the clarifications sought by the 1st interested party dated 15th, 16th and 20th January, 2026, seeking to understand from both the procuring entity and the financier, the reasons why the financier refused to give a no objection letter to the award of the subject tender.

210. A broad reading of the letter written by the financier on 22nd January, 2026 as reproduced by the review Board, shows that the financier had two main points. First, it referred to information from the Procuring Entity stating that the procurement process had been terminated. Second, and importantly, it advised the 1st interested party that the 1st interested party (then Applicant) seek clarification of the issues directly with the Procuring Entity regarding the lack of a "no objection," making it clear that the financier was not required to engage with tenderers about these matters, as per the terms of the Tender documents more specifically, the EIB Guide.

211. In the view of this Court, any interpretation of the financier's letter dated 22nd January 2026 should take into account the whole document. Focusing only on the financier's mention of termination of the procurement process by the procuring entity, while ignoring its clear statement about not engaging with tenderers, leads to a misleading conclusion.

212. When properly and wholesomely read and understood, the letter does not imply that the financier deemed the termination irregular or that it was conducted in bad faith. Instead, the letter sets out the necessary boundaries between the financier, the Procuring Entity and the tenderers. It is not lost to this Court that the letter in question must be read alongside the email dated 8th January 2026 written by the financier, giving reasons for declining to give a no objection letter to the request by the procuring entity to award the tender to the successful tenderer.

213. In this context, this Court is concerned that too much weight was placed by the respondent on the selected part from the financier's letter, leading to the false belief that the Procuring Entity acted unilaterally and in bad faith in terminating the procurement process. This conclusion by the review Board is not supported by the complete set of evidence on record.

214. I further note that some comments about the Board's role in previous litigation made by the financier, when giving reasons why the financier refused to give a no objection, seem to have influenced the reasoning by the Review Board.

215. While the Review Board must act independently and fairly, its decisions should be based solely on the evidence and the law. If outside factors or negative comments about it are allowed to affect its interpretation of the termination of the tender as was the case herein, this undermines the neutrality expected from a quasi-judicial body.

216. Focusing on the main issue of termination of the subject tender and whether the procuring entity could act on the review Board's directive to complete the procurement process, this Court confirms that public procurement is governed by the need to comply with procedures and the broader principles of prudence, accountability and value for money. When a financing gap has been clearly identified by the procuring entity, particularly through official communication from the National Treasury, it would be unwise and against the public interest, to compel a Procuring Entity to continue the procurement process without sufficient funds or where the budgetary allocation is inadequate.

217. Requiring the Procuring Entity to complete the procurement process and proceed to a contract award and consequential implementation in such a situation would set up the project for failure. It would also jeopardize public resources, impact contractual performance and result in halted or abandoned work. Such an outcome would contradict the goals of public procurement law.

218. Based on this, I have no hesitation in concluding that the financing gap identified by the procuring entity provided a valid and reasonable ground to terminate the procurement process. I therefore find and hold that the decision to terminate the procurement process was not arbitrary, unreasonable or made in bad faith.

219. Having determined the broader question of termination, I now determine the other questions linked to the broader question, the first question is whether the exparte applicants failed to notify the Public Procurement Regulatory Authority of the termination/ cancellation of the procurement process as mandated by section 63 (2) of the Act and the Regulations, 2020. The section provides that (2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

220. From the record, the exparte applicants filed the information on termination of the Tender as directed by the PPRA through the Public Procurement Information Portal (PIIP) ON 19th January, 2026 through the link <https://www.tenders.go.ke/tenders/275952> which is available at page 272 of the annexure I of the exparte applicants' bundle and in accordance with Circular No. 4 of 2022 of 1st July 2022 which provided that:

**RE: MANDATORY REPORTING REQUIREMENTS BY
PROCURING ENTITIES**

***The Public Procurement and Asset Disposal Act, 2015 (the Act) came into effect on 7th January, 2016. In order to fully operationalize the Act, the National KISM Towers, 6th Floor, Ngong Road | P.O Box 58535-00200, Nairobi, Kenya | Tel: +254 (020) 3244000, 2213106/7
Email: info@ppra.go.ke; feedback@ppra.go.ke | Website: www.ppra.go.ke PPRA is ISO 9001:2015 Certified Treasury issued the***

Public Procurement and Asset Disposal Regulations, 2020 (the Regulations) on 2nd July, 2020. The Act gives effect to Article 227 of the Constitution of Kenya, 2010 which provides that public procurement should be conducted in a system that is fair, equitable, transparent, competitive and cost-effective. The Act and the attendant Regulations seeks to enhance efficiency, accountability and transparency as key pillars in streamlining the public procurement processes. It is against this background that various provisions of the Act and Regulations requires procuring entities to continuously submit reports on public procurement and asset disposal transactions to Authority and to publicize this information through their websites and notice boards to make the information easily accessible by the stakeholders. In order to support this initiative, the Authority developed the Public Procurement Information Portal (Portal) - <http://tenders.go.ke>) for use by all public entities in the dissemination/publication of the information relating to public procurement to the public. In addition, the Authority organized capacity building programs at the beginning of this year whereby each procuring entity, at the National Government and County Government, was required to nominate two (2) officers to attend the training which were organized in nine (9) regions. The purpose of the trainings was to enhance the capacity of all procuring entity users to publish

information in the Portal. The trainings were successfully undertaken from 10th January to 11th March, 2022 and therefore procuring entities can now easily upload the data in the Portal. The Authority now brings to the attention of all the Accounting Officers/heads of Procuring Entity that with effect from 1st July, 2022, all reports on public procurements will be submitted to the Authority through the Portal and any report that may be submitted through email or any other media will not be considered. It is imperative to note that failure to submit mandatory reports and publish the same information in the Portal amounts to non-compliance and therefore an offence pursuant to Section 176(m) of the Act. The Authority through this circular, reminds the Procuring Entities the various reports to be submitted under the Act and the Regulations; and to be published in the Public Procurement Information Portal (the Portal), as prescribed in the Executive Order No. 2 of 2018 - Procurement of Public Goods, Works and Services by Public Entities. The Authority takes note of the Section 158(2) of the Act which requires the procuring entities to submit to the Authority part of the Annual Procurement Plan demonstrating application of the Preference and reservation schemes. It is important that the entire consolidated annual procurement plan be submitted as well for ease of verification compliance with the reservation

requirements. The nature and timelines for submission of the mandatory reports are as indicated in the table below:

No. Report Type/Name Frequency of Submission timeline Enabling Provision Submissionno

a) A. Reports on General Procurement Transactions

b) Terminations of Procurement and Asset Disposal Proceedings

c) As and when

d) within 14 days of done termination

e) Sec 63(2) & (3) of the Act and Regulation 48(2) of the Regulations

221. The exparte applicants contend that this information was available as evidence during the hearing of the request for review and contained in the confidential documents submitted to the Respondent. It is important to note that the respondent did not in its decision list the confidential documents submitted to it. The 1st interested party claims that this document was doctored and sneaked into these proceedings. If that were the case, then the live link would in no way open to the PPIP. I have in the process of writing this judgment accessed the document through the URL link provided and also accessed the PPRA -the Authority's circular No. 4 of 1/7/2022 by simply googling although it was annexed at page 273 of the Annexure I bundle.

222. From the record, the applicants duly complied with the requirement and filed the cancellation report with the Authority in the mode directed by the

Authority as per Circular 4 of 2022 dated 1st July 2022 and uploaded the report on the e portal platform within the stipulated timeline as shown by the screenshot that formed part of the confidential documents furnished to the Review Board and which were acknowledged by the Review Board at paragraph 78 of its impugned decision page 913 of the bundle. That was the formal mode of filing reports to the Authority and therefore it cannot be said that the applicants failed to comply with the procedure for termination of the procurement process.

223. For the above reasons, I do not find that there was any breach of the procedural requirement for notification of the termination of the procurement proceedings within the stipulated time, upon the PPRA.

224. The other important question is whether in giving the reason for termination, failure to specifically cite section 63 of the Act is fatal .

225. The 1st interested party and the respondent's case rests heavily on the argument that the procuring entity did not expressly cite section 63 of the PPADA in communicating the termination of the tender and further, as stated in the impugned decision at page 83 paragraph 113, that the procuring entity did not comply with section 63 of the Act because it did not provide sufficient reasons for cancellation of the procurement process as the reason given, that the financier declined to grant a no objection hence there would be no finances to honour the payment obligations for the resultant contract was insufficient reason and did not afford the 1st interested party sufficient

information to understand the reasons for the termination or to determine whether to challenge it which, In the view of the respondent, constituted unfair administrative action and fails to satisfy the procedural requirement of giving reasons to tenderers as envisaged by law.

226. However, from the same decision, at pages 68 and 69, the Review Board acknowledged the reasons for the no objection decline were provided by the EIB as reproduced therein. Additionally, at page 36 paragraph 54 of the impugned decision, the review board rehashed submissions by the 1st interested party's counsel to the effect that:

“counsel submitted that upon receiving communication regarding the termination of the subject tender, they sought clarification and were informed that the reason for the cancellation was because the respondents did not receive a no objection from the Bank which meant that they did not have financing yet when the applicant sought similar clarification from the Bank, it indicated that the reason it did not give a no objection was because the respondents confirmed that the subject tender had been cancelled and there was no reason to give an no objection to that extent.”

227. As earlier stated in this judgment, the last part of the submission as underlined is contrary to the evidence on record which clearly shows that the exparte applicants herein filed evidence of email received from the Bank

with all the reasons for declining no objection letter issuance, which evidence was placed before the Review Board. The Review Board reproduced the same reasons contained in the email by the financier, but bought into the allegation by the 1st interested party that the procuring entity simply cancelled the tender and informed the financier, as opposed to the cancellation of the tender after receiving clear communication giving reasons, however unacceptable they may have been to the Review Board and 1st interested party, for declining to give a no objection letter via email dated 8th January 2026.

228. Therefore, on failure to expressly cite section 63 of the Act and its effect on the letter of termination of the subject tender, the question is whether the reasons for cancellation of the procurement process fell within the grounds for cancellation stipulated in section 63 of the Act.

229. Courts of law are enjoined to look beyond mere technicalities and to interrogate the substance of an administrative decision. The validity of a procurement decision must be assessed against the statutory framework and not on the basis of formal defects in expression. What is critical in this case is whether the reasons given correspond to the permissible statutory grounds under section 63.

230. In the view of this Court, to insist on the mechanical citation of section 63, in circumstances where the reason given clearly falls within its ambit,

would be to elevate form over substance and to undermine the efficient administration of public procurement.

231. Under section 63 of the Act, a tender may be cancelled on account of inadequate budgetary provision. In this case, the procuring entity cancelled the tender after the financier, whose financing was the condition precedent for the project in issue, refused to give a no objection letter after the re-evaluation of the tender as directed by the Review Board. As to whether the reasons for refusal were adequate or acceptable is not the issue here as that is a matter not within the jurisdiction of the Review Board to determine. The Guide provides for the procedure for lodging and handling of complaints with the financier and not through a request for review of the financier's decision.

232. In the circumstances, I find and hold that the reason given for the termination of the subject tender, being the failure to get a no objection letter from the financier Bank, which had the effect of denying the promoter/employer adequate resources to meet the financing gap identified was a reason falling within section 63 (1) (b) which is inadequate budgetary provision.

233. The respondent and 1st interested party argued further that the exparte applicants must have influenced the decline of no objection objection letter and that therefore there was no lawful ground for termination of the procurement process.

234. It is worth repeating here that it is not in dispute that the tender documents expressly required a “no objection” letter from the financier as a condition precedent to the completion of the procurement process until the implementation of the project. The record shows, that the Exparte applicants faithfully carried out a re-evaluation as directed by the Respondent and by their letter dated 7th January 2026, they sought for a no objection to the reevaluation report for the consultancy services tender project, giving to the financier, information on what had transpired in the earlier litigation which had escalated all the way to the Court of Appeal and back.

235. The exparte applicants submitted the reevaluation report to the financier and even requested for suspension on the concurrence/no objection to allow them to proceed with notification of the intent to award the tender and to also undertake the contract negotiations with the successful bidders as guided by the Review Board. That letter is found at pages 267 and 268 of the Notice of motion documents. That letter was sent by email authored by Reuben Lagat on 8th January 2026 and a hard copy was also send.

236. In response to the request for no objection letter, the financier, at page 269 of the exparte applicants’ bundle and on the same date of receipt of the request for no objection letter, wrote an email authored by David, and whose contents the Respondent acknowledged in its judgment by reproducing the same at pages 68 and 69 regretting that it could not give a no objection to the reevaluation as completed by the Respondent and giving reasons for the

rejection and concluding that the approach by the Respondent in alleged non adherence to procurement procedures outlined in the tender dossier and their alleged acting as a separate evaluation committee, assigning scores and conducting evaluations, which approach, according to the financier, had compromised the reliability and compliance of the overall process with the Financier's overall process with the Banks general principles of procurement.

237. At Page 69 of its impugned judgment, the Review Board at paragraphs 113 to 114 of the exparte applicants' bundle rehashed the reasons given by the financier for not giving the no objection and justified its decisions in the requests for review and from whence it derives its jurisdiction.

238. With the above material on record, it is not necessary for the respondent to be defensive and accuse the financiers for being indifferent to Kenya's municipal legal framework and eventually dismissing the refusal to give a no-objection as if it was dealing with an appeal against the decision of the financier refusing to give a no objection letter to the exparte applicants to proceed with the procurement process.

239. It is important to note that absence of such approval by the financier has two important consequences. Firstly, is that it renders the project incapable of lawful implementation due to inadequate budgetary provision as the financing gap had been identified by the procuring entity before contacting and involving the National Treasury to engage in bilateral negotiations with

the EIB, to advance the funds to the national Treasury for on lending to the procuring entity. And secondly, the refusal to give no objection introduces a supervening constraint beyond the control of the procuring entity.

240. In my humble view, this squarely falls within the statutory grounds contemplated under section 63, particularly, the unavailability of funding and a material change in circumstances rendering the procurement impracticable. In addition, a procuring entity cannot be compelled to proceed with a procurement process that is, in practical terms, dead on arrival. To do so would not only be irrational but would also expose public resources to unnecessary risk.

241. The Review Board at page 76 of its impugned decision in paragraph 121 stated that funding for development of the subject project would be obtained from various stakeholders and acknowledged at paragraph 122 that budgetary provision is a key factor in public procurement, citing sections 44 (1) and 53 of the Act and this was after it had acknowledged at page 74 that there was a financing gap that necessitated the concessional financing through the National treasury for on lending to the procuring entity for implementation of the project under a bilateral agreement between the Republic of Kenya and the EIB.

242. Even with the financing gap identified which necessitated the sourcing of funds from EIB for the project, it is surprising that the Review Board in its decision at page 80 held that the procuring entity had failed to fill the

substantive requirements for the termination of the procurement proceedings in the subject tender as required by section 63 of the Act; that it failed to provide sufficient evidence for termination of the procurement noting that the funding for the project was to be co-financed by not only EIB but other various stakeholders.

243. In the view of this Court, that finding was in error and I have already said so above, as the no objection clause was a condition precedent at every stage of the procurement process and binding on the procuring entity and even the tenderers and for a project which was dependent on the co-financing by EIB to fill the financing gap, it is not correct to say that the project could still be implemented simply because there were other financiers.

244. Therefore, on the question of whether the decision to terminate the procurement process *met the threshold of legality and fairness*, it is important to note that the requirement to provide reasons is a central pillar of administrative justice and reasons are the “heartbeat” of any administrative decision as stipulated in sections 4, 5 and 6 of the Fair Administrative Action Act, 2015.

245. In the present case, the reason given, namely, the absence of the financier’s approval was clear and traceable to the tender conditions known to all bidders. There is no evidence that the decision by the procuring entity was actuated by bad faith, ulterior motive, or arbitrariness. On the contrary,

it reflects a rational response to a binding precondition in the tender documents and EIB Guidelines.

246. In those circumstances, this Court is satisfied that the decision to terminate the procurement process meets the threshold of legality, rationality, and procedural propriety.

247. Furthermore, Public procurement must be conducted within the confines of both legality and practicality. Where a project is contingent upon external approvals that are not forthcoming, the law does not require or expect a procuring entity to proceed with a futile process while the Court's role is not to compel impracticability, but to ensure fidelity to the law.

248. For the foregoing reasons, this Court finds and holds that the applicants' application dated 27th February 2026 is merited and make the following orders:

a. An order of CERTIORARI is hereby issued removing and quashing the Respondent's Decision dated and delivered on 18th February, 2026 in Request for Review Application Number 18 of 2026 on Tender No. KGN-BDD-016-2024;

b. In accordance with section 175(7) of the Public Procurement and Asset Disposal Act, I order that each party bear their own costs of these proceedings.

249. ***This file is closed.***

250. ***It is so ordered.***

Dated, Signed and Delivered virtually at Nairobi this 9th Day of April, 2026

**R.E. ABURILI
JUDGE**