



World Standardization, Certification and Testing Group (Shenzhen) Co. Ltd v Public Procurement Administrative Review Board & 11 others (Judicial Review Miscellaneous Application E031 of 2026) [2026] KEHC 4766 (KLR) (Judicial Review) (14 April 2026) (Judgment)

Neutral citation: [2026] KEHC 4766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E031 OF 2026**

JM CHIGITI, J

APRIL 14, 2026

BETWEEN

**WORLD STANDARDIZATION, CERTIFICATION AND TESTING GROUP
(SHENZHEN) CO. LTD APPLICANT**

AND

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD RESPONDENT**

AND

**MANAGING DIRECTOR, KENYA BUREAU OF STANDARDS 1ST
INTERESTED PARTY**

KENYA BUREAU OF STANDARDS 2ND INTERESTED PARTY

QUALITY INSPECTION SERVICES JAPAN 3RD INTERESTED PARTY

**CHINA HANSOM INSPECTION AND CERTIFICATE CO.
LTD 4TH INTERESTED PARTY**

**ASTC AS TEST CERTIFICATION TECH. (HANGZHOU) CO.
LTD 5TH INTERESTED PARTY**

**CHINA CERTIFICATION AND INSPECTION GROUP INSPECTION
COMPANY LIMITED 6TH INTERESTED PARTY**

INTERTEK INTERNATIONAL LIMITED 7TH INTERESTED PARTY

COTECNA INSPECTION SA 8TH INTERESTED PARTY

TUV RHEINLAND 9TH INTERESTED PARTY



BUREAU VERITAS 10TH INTERESTED PARTY

SGS SA 11TH INTERESTED PARTY

JUDGMENT

1. The Application that is before the court for determination is the one dated 2nd March 2026 wherein it seeks the following reliefs:
 1. ...Spent.
 2. A temporary injunction does hereby issue, suspending the procurement proceedings in respect of Tender No. KEBS/PRE-Q/T006/2025/2028- Pre-Qualifications for Provision of Pre-Export of Verification of Conformity (PVoC) to Standards Services the Year 2025-2028 pending hearing and determination of the present Application.
 3. A Judicial Review order in the nature of Certiorari does hereby issue quashing the Respondent's decision dated 17th February 2026 in PPARB Application No. 14 of 2026; World Standardization Certification & Testing Group (Shenzhen) Co. Limited v Accounting Officer/ Managing Director, Kenya Bureau of Standards & 10 Others.
 4. A Judicial Review order in the nature of Mandamus does hereby issue, compelling the 1st Interested Party to prequalify the Applicant in respect of Tender No. KEBS/PRE-Q/T006/2025/2028- Pre-Qualifications for Provision of Pre-Export Verification of Conformity (PVoC) to Standards Services the Year 2025-2028.
 5. A Judicial Review order in the nature of Mandamus does hereby issue, compelling the 1st Interested Party to invite the Applicant together with the other prequalified bidders in respect of Tender No. KEBS/PRE-Q/T006/2025/2028- Pre-Qualifications for Provision of Pre-Export Verification of Conformity (PVoC) to Standards Services the Year 2025-2028, to submit their respective bids.
 6. A Judicial Review order in the nature of Prohibition does hereby issue prohibiting the 1st Respondent or any officer under him or acting on his instructions or delegation from executing any contract with bidders in respect of Tender No. KEBS/PRE-Q/T006/2025/2028- Pre-Qualifications for Provision of Pre-Export Verification of Conformity (PVoC) to Standards Services the Year 2025-2028.
 7. Costs of the Application.
 8. Any such other order that may advance the cause of justice.

The Applicant's case.

2. It is the Applicant's case that sometime in 2025, the 1st and 2nd Interested Parties invited interested bidders to submit their bids in response to Tender No. KEBS/PRE-Q/T006/2025/2028- Pre-Qualifications for Provision of Pre-Export Verification of Conformity (PVoC) to Standards Services the Year 2025-2028, hereinafter "the subject tender."
3. The Applicant tendered its bid, which was subsequently established by the Evaluation Committee as being responsive. It is its case that on or about 24th April 2025, the Applicant received a Notification



Letter from the Procuring Entity indicating that its bid had been established as responsive and that it had been prequalified for Zone – 1 China, subject to a successful due diligence.

4. On 23rd September 2025, the Applicant received a letter from the 1st Respondent notifying it that it had not been pre-qualified for the subject pre-qualification for reasons that, despite the Applicant having met the requirements for prequalification, allegedly, it had breached a previous contract with the 2nd Respondent, which observation was noted during a due diligence exercise.
5. The Applicant filed a Request for Review before the Respondent, hereinafter “the Board” in PPARB Application No. 98 of 2025, through which it challenged the manner in which the due diligence exercise was conducted by the Procuring Entity.
6. On 27th October 2025, the board issued a Decision finding that the due diligence exercise was not carried out in accordance with the law, citing that the Applicant was not afforded a hearing before the Procuring Entity took an adverse decision against it.
7. The Procuring Entity unsuccessfully challenged the Board’s decision at the High Court in Milimani High Court Case No. HCJRMISC E142 of 2025, wherein the Court upheld the finding of the Board and directed the Procuring Entity to afford the Applicant a hearing in its consideration of the complaint with respect to the alleged breach of a past contract.
8. Via a letter dated 9th January 2026, the Procuring Entity’s Evaluation Committee wrote to the Applicant demanding the Applicant’s response to adverse materials relating to performance of a previous contract, the same adverse material the Evaluation Committee had used as a basis for disqualifying the Applicant, and which material the Board had expunged from the Respondents’ due diligence report.
9. It is its case that the same adverse material is also the subject of a pending Court case in Nairobi High Court Case No. HCCOMM/E632/2025 - World Standardization Certification and Testing Group Shenzhen Limited v Kenya Bureau of Standards in which the Applicant has challenged the 2nd Respondent’s termination of contract based on the same offending material. By a letter dated January 15, 2026, the Applicant responded to the Evaluation Committee’s letter of 9th January 2026.
10. The Evaluation Committee’s letter was in flagrant breach of the Board Decision of 27th October 2025 and the law.
11. The same allegations had been made by the Procuring Entity in its letter of 14th July 2025 and had been addressed by the Applicant vide its letters of 29th July 2025 and 12th August 2025. The Procuring Entity has never acknowledged and/or addressed the Applicant’s response.
12. It is also its case that the adverse material was the subject of a pending Court case, and none of the other parties had been subjected to this criterion during due diligence phase.
13. It further argues that the adverse material related to a previous contract that had nothing to do with the present pre-qualification.
14. Lastly it argues that there was open bias as none of the other bidders had been subjected to this criteria due diligence.
15. According to the Applicant, the Evaluation Committee’s deliberation of the issues of the alleged breach would prejudice the Applicant and embarrass the proceedings in the pending case.



16. The Applicant also took issue with the Procuring Entity's Evaluation Committee sitting to establish the merits of the allegations by the Procuring Entity, citing the absence of independence as the Procuring Entity would essentially be sitting as a judge in its own cause.
17. The Applicant is further aggrieved that the Evaluation Committee disregarded the representations and objections, with the result that the Procuring Entity went ahead to disqualify it at the due diligence stage on account of its own allegations of breach of a past contract.
18. The Applicant filed a Request for Review before the Board in PPARB Application No. 14 of 2026, taking issue with the manner in which the due diligence exercise was carried out.
19. The Applicant argued that it apprised the Board of its responses to the Evaluation Committee and the objections on account of the pending court case in Milimani High Court Case No. HCCOMM E632 of 2025; World Standardization Certification & Testing Group (Shenzhen) Limited v Kenya Bureau of Standards, as well as the apparent lack of objectivity for the Evaluation Committee to preside over a complaint by a Procuring Entity from which its membership was drawn.
20. On 17th February 2026, the Board dismissed the Applicant's Request for Review and directed the Accounting Officer to conclude the prequalification exercise, while excluding the Applicant's bid.
21. The Applicant submits that the Board's decision dated 17th February 2026 was materially influenced by an error of law in that The Board's decision gives a wide berth to the established doctrines of *nemo iudex in causa sua* and *sub iudice*.
22. The Applicant first challenged its disqualification from the procurement proceedings in Tender No. KEBS/PRE-Q/T006/2025/2028- Pre-Qualifications for Provision of Pre-Export Verification of Conformity (PVoC) to Standards Services the Year 2025-2028, herein "the subject tender" through PPARB Application No. 98 of 2025. The Applicant had previously received a Notification that it had been prequalified, only to be subsequently disqualified at the due diligence stage, on a complaint of an alleged breach of contract with the Procuring Entity.
23. The said breach was at the time and still remains the subject of litigation at the High Court in Milimani High Court Case No. HCCOMM E632 of 2025; World Standardization Certification & Testing Group (Shenzhen) Limited v Kenya Bureau of Standards.
24. The Board considered PPARB Application No. 98 of 2025 and correctly found that the Evaluation Committee fell into grave error when it purported to disqualify the Applicant's bid at the due diligence stage without affording it an opportunity to be heard on the complaint made against it. This decision was affirmed by this Court in Milimani High Court Case No. HCJRMISC E142 of 2025.
25. Consequently, the Evaluation Committee invited the Applicants to make representations in respect of the complaints of breach of contract made against it by the Procuring Entity. The Applicant offered its representations, including apprising the Evaluation Committee of the existence of court proceedings in Milimani High Court Case No. HCCOMM E632 of 2025, where the very questions of the alleged breach were pending determination.
26. The Applicant argues that it notified the Evaluation Committee that it would go against natural justice for it, as a Committee with membership drawn from within the Procuring Entity, to preside over a complaint made by the Procuring Entity, as this would be akin to a judge sitting on their own cause.
27. It argues that further, the criterion of past performance was not applied to other bidders during due diligence. The Applicant is troubled that notwithstanding the Applicant's representations,



- the Evaluation Committee went ahead to recommend the disqualification of the Applicant's bid, prompting the Applicant to file the proceedings in PPARB Application No. 14 of 2026.
28. The Applicant is aggrieved since, the Board still went ahead to affirm the Evaluation Committee's decision to make a conclusion on the basis of an undetermined case at the High Court, as well as to sit on a matter where the Committee was technically speaking the complainant and the judge at the same time.
 29. The Applicant argues that the Board, through its decision, sanctioned the departure from the established legal doctrines of *nemo iudex in causa sua* and *sub iudice*, without any justification whatsoever.
 30. It is its case that the Board's decision dated 17th February 2026, is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision and the information before it:
 - i. Article 227 of *the Constitution* of Kenya, 2010 decrees that all public procurement processes should be undertaken under a system that is fair, equitable, transparent, competitive, and cost-effective.
 - ii. Consequently, Sections 27 and 28 of the *Public Procurement and Asset Disposal Act* (Cap 412 C) establish the Board as a central board to hear and determine public procurement and asset disposal disputes. Further, Section 173 empowers the Board to take appropriate remedial action against decisions by Procuring Entities that offend the law.
 - iii. In the present case, the Board considered PPARB Application 14 of 2026, proceedings in which it was apparent that the Procuring Entity had arrived at a decision to disqualify a bidder after a due diligence process that offends the law i.e. the legal doctrines of *nemo iudex in causa sua* and *sub iudice*. However, the Board shirked from its statutory role by dismissing the Request for Review and overlooking the apparent breaches of the law.
 31. The Board's decision dated 17th February 2026 was unreasonable in the circumstances. Reasonableness calls for the Board, as the central public procurement and asset disposal disputes forum, to give consideration to the arguments and pleadings before it. The Board is to be impartial at all times, and it should not seek to introduce extraneous matters in arriving at its decision.
 32. At paragraph 104 of the Board Decision, it is stated that it is not in dispute that the 1st and 2nd Interested Parties conducted a fresh due diligence. This statement is contrary to the central pillar of the Applicant's complaint in terms of Paragraph 3 of the Applicant's Request for Review, as read together with paragraph 16(b) and (c) of the Applicant's Statement in Support of the Request for Review.
 33. It is stated expressly by the Applicant that no fresh due diligence was conducted on the Applicant as ordered by the Board.
 34. The Board, instead of dealing with the matter before it i.e., due diligence under Section 83 of the *Public Procurement and Asset Disposal Act* and Regulation 80 thereof, went on a tangent by taking the position of the Evaluation Committee by seeking to reevaluate the tender.
 35. The Board was completely unreasonable in considering tender document mandatory requirement No. 14 when, in fact, in its letter of January 22, 2026, the Procuring entity was explicit in its reasons for disqualifying the Applicant; breach of requirement no. 14 of the tender document was not one of the reasons.



36. It is its case that the Board's decision is unreasonable for failing to address itself to the applicability of the doctrine of *nemo iudex in causa sua* in respect of the Evaluation Committee's membership drawn from the Procuring Entity sitting on a complaint of breach of contract by the Procuring Entity, for failing to address itself to the applicability of the doctrine of *sub judice* in respect of the Evaluation Committee's considering the issue of an alleged breach of contract by the Applicant when the matter is still pending determination before a court of law in Milimani High Court Case No. HCCOMM E632 of 2025. This was notwithstanding the fact that this was pleaded in the proceedings before the Board.
37. The Board's decision dated 17th February 2026, violates the legitimate expectation of the Applicant:
 - i. The Applicant invoked the Board's jurisdiction under Section 167 of the *Public Procurement and Asset Disposal Act* under a legitimate expectation that, as the central board to hear procurement and asset disposal disputes, the Board would uphold the law.
38. The Board failed to live up to this legitimate expectation, as it gave a wide berth to the established legal doctrines of *nemo iudex in causa sua* and *sub judice*.
39. It argues that the Board's decision dated 17th February 2026 is unfair in that the Applicant turned to the Board as the central procurement and asset disposal dispute resolution forum to resolve the dispute in PPARB Application No. 14 of 2026 under the expectation that the Board would consider the actions of the Evaluation Committee against the established doctrines of *nemo iudex in causa sua* and *sub judice*. However, the Board dismissed its case without applying itself to the applicability of the said principles.
40. The Board had the opportunity of remedying the errors on the part of the Procuring Entity with respect to the current tender, but failed to do so while seized with the matter.
41. The Applicant submitted a responsive bid subject to due diligence as confirmed through its receipt of a Notification Letter confirming its bid was responsive to the requirements under the Tender Document.
42. The Applicant subsequently received multiple positive references, as the Decision at paragraph 11 also captures that it had been prequalified, subject to a successful due diligence.

The Applicant's Submissions;

43. The Applicant initiated the present Judicial Review proceedings under *the Constitution* and the Fair Administrative Actions Act, seeking a merit-based review of the decision of the Board in PPARB Application No. 14 of 2026.
44. Reliance is placed in *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023), in *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR)
45. On the issue, whether the Evaluation Committee with membership drawn from the Procuring Entity could preside over an allegation by the Procuring Entity against the Applicant without offending the doctrine of *nemo iudex in causa sua*; reliance is placed in *The Supreme Court in Popat & 7 others v Capital Markets Authority* (Petition 29 of 2019) [2020] KESC 3 (KLR) (11 December 2020) gave an exposition of the applicability of the doctrine of *nemo iudex in causa sua*. In this case, the apex court considered whether the Capital Markets Authority could objectively conduct both investigative and enforcement proceedings against a market participant alleged to have flouted capital market rules.



46. In allowing the appeal, the Court decreed that decision-making bodies must comply with the requirements of impartiality and independence, especially in instances where the bodies have to determine the culpability or otherwise of an individual:

“64. Furthermore, reasonable apprehension of bias is a legal standard for disqualifying judges and administrative decision-makers for bias. As such, the simple question which we require to answer in this case is whether there was or is a real possibility that a reasonable person, properly informed and viewing the circumstances realistically and practically, could conclude that the Respondent might well be prone to bias. If the answer is in the affirmative, that will be a constitutional violation that cannot be overlooked in the name of public interest...

70. Furthermore, from the evidence provided of the processes leading to the issuing of the Notices to Show Cause, the Respondent’s Board that appraised and approved Imperial Bank’s Bond Issue Application, is the same Board that initiated and conducted preliminary investigations into the petitioners’ conduct in relation to the Bond Issue Application and upon satisfying itself that the petitioners may have violated the relevant provisions of the Act and the Regulations made thereunder, made a decision to charge the petitioners and went ahead to formulate the requisite charges. It is this same Board that purported to preside over the hearing of the petitioners’ cases. This would obviously lead to an inescapable appearance of partiality on the Respondent’s part.”

47. It submits that it is not in dispute that the members of the Evaluation Committee were drawn from the Procuring Entity.

48. It is equally not in dispute that in carrying out a fresh due diligence exercise, the Evaluation Committee was to look into an allegation of past breach of a contract made by the Procuring Entity against the Applicant.

49. Section 46(1) of the *Public Procurement and Asset Disposal Act* provides that the members of an Evaluation Committee are drawn from a Procuring Entity’s members of staff.

50. It submits that the Procuring Entity was constituting itself as a judge over its own complaint against the Applicant. The Procuring Entity is hearing and determining its own complaint of an alleged past breach of contract against the Applicant.

51. It submits that the Procuring Entity failed to observe the requirements of impartiality and independence and thus breached the legal doctrine of *nemo iudex in causa sua*.

52. During the proceedings in PPARB Application No. 14 of 2026, the Applicant brought this breach to the attention of the Board, but the Board disregarded this.

53. The Evaluation Committee with membership drawn from the Procuring Entity could NOT preside over an allegation by the Procuring Entity against the Applicant without offending the doctrine of *nemo iudex in causa sua*.

54. The Court of Appeal in *Kiki Investments Ltd & 2 others v Insurance Regulatory Authority* (Civil Appeal 381 of 2017) [2024] KECA 1316 (KLR) affirmed that courts (and by extension decision-making bodies) should refrain from considering matters that are pending hearing and determination



- before a court of competent jurisdiction and involving the same parties and substantially the same dispute.
55. The legal doctrine of sub judice operates as a bar to a multiplicity of cases between the same parties or those claiming through them over the same subject matter to avoid abuse of court processes and diminish the chances of decision-making bodies issuing conflicting decisions over the same subject matter.
 56. It submits that in the instant case, the Evaluation Committee invited the Applicant to make responses with respect to a complaint from the Procuring Entity that the Applicant had breached a past contract with it.
 57. The Applicant submits that it brought it to the attention of the Committee that the very subject of the alleged breach of contract was disputed and was in fact, pending in the High Court in Nairobi, High Court Case No. HCCOMM/E632/2025 - World Standardization Certification and Testing Group Shenzhen Limited v Kenya Bureau of Standards as between the same parties.
 58. It submits that notwithstanding the Applicant's protest, the Evaluation Committee went ahead to make an adverse finding against the Applicant while disregarding the pending court case.
 59. In the proceedings in Nairobi High Court Case No. HCCOMM/E632/2025 - World Standardization Certification and Testing Group Shenzhen Limited v Kenya Bureau of Standards, the parties to the dispute are Applicant herein and the Procuring Entity.
 60. The cause of action before the High Court is a claim for breach of contract by the Applicant herein against the Procuring Entity.
 61. It submits that a look at the Board's Decision at paragraphs 107 to 118 (on pages 466 to 473 of the annexure annexed to the Supporting Affidavit of Harold Amaya Munala) shows that the Evaluation Committee opted to consider the merits of the Procuring Entity's complaint of an alleged breach of contract, notwithstanding being aware of the High Court case.
 62. It is the Evaluation Committee's decision on the merits of the complaint that then informed the Procuring Entity's disqualification from the subject tender.
 63. It submits that the sub judice rule applies to any consideration of the merits of matters substantially in issue in ongoing proceedings.
 64. Reliance is placed in the Court of Appeal in Republic v Tony Gachoka & another [1999] eKLR penalized an individual for making comments on ongoing court proceedings.
 65. It was not open for the Evaluation Committee to open up the merits of the allegations of breach of contract against the Applicant, when the matter remains pending before the High Court.
 66. The logical thing would have been to carry out the due diligence on the other references by the Applicant while excluding the reference from the Procuring Entity.
 67. The Evaluation Committee's insistence on considering the merits of the Procuring Entity's complaint before the High Court case had been concluded was irregular, as it had the effect of prejudicing the proceedings pending in court, something the Committee was warned against through the Applicant's protest.
 68. It submits that in view of the foregoing, the Evaluation Committee with membership drawn from the Procuring Entity could NOT preside over an allegation of breach of contract by the Procuring Entity against the Applicant when a similar case was pending in Nairobi High Court Case No. HCCOMM/



E632/2025 - World Standardization Certification and Testing Group Shenzhen Limited v Kenya Bureau of Standards, without offending the doctrine of sub judice.

69. The Applicant further submits on the issue whether the Board was correct in affirming that it was not in dispute that there was no dispute that the Procuring Entity carried out a fresh due diligence exercise in respect of the subject tender.

70. At paragraph 103 of its Decision in PPARB Application No. 14 of 2026, the Board contended that it was not in dispute that the Procuring Entity had carried out a fresh due diligence:

“ 103. The Board notes that it is not in dispute that the Respondents conducted a fresh due diligence exercise. The Applicant acknowledges that the exercise was undertaken and that it culminated in the issuance of a Notification Letter dated 22nd January 2026 informing it that it had been found unsuccessful.”

71. A reading of the above paragraph would give the impression that no dispute existed over the carrying out of a fresh due diligence exercise.

72. It submits that on the contrary, the gist of the Applicant’s case in PPARB Application No. 14 of 2026 was that no fresh due diligence was carried out as directed by the Board.

73. Paragraph 3 of the Request for Review and paragraph 16(b) and (c) of the Statement in support (pages 110, 121 and 122 of the annexures annexed to the affidavit of Harold Amaya Munala) expressed the Applicant’s concern that no fresh due diligence was carried out as directed:

“ 3. The Respondents have breached this Board’s decision issued on 27th October 2025, in PPARB Application No. 98 of 2025 (hereinafter “the Board Decision) by failing to conduct fresh due diligence on the Applicant, in strict compliance with the provisions of the Tender Document, the Act, the Regulations 2020, *the Constitution*, while taking into account the findings and observations of the Board in the said Decision.

16. I am advised by the Applicant’s advocate on record, which advice I verily believe to be true that: a...

b. There was no fresh due diligence conducted on the Applicant as ordered by this Board. The Respondents’ motion for extension of time was a red herring to enable the Respondents complete an irregular direct procurement process without the Applicant or the Board’s knowledge.

c. The alleged due diligence conducted on the Applicant was a complete sham as the very matters that this Board expunged from the 2nd Respondent’s due diligence report were used to disqualify the Applicant a second time. The alleged due diligence was done in bad faith, unfairly, lacking in transparency, and in a manner biased against the Applicant with calculated precision not to pre-qualify the Applicant for the following reasons:

i. at pages 1557 to 1585 of the Applicant’s Application in response to the subject pre-qualification, the Applicant in demonstrating experience in providing conformity assessment



services, provided eleven (11) similar conformity assessment programs undertaken for a cumulative period of not less than 5 years within the last 10 years accompanied with five (5) recommendation letters from the contracting authorities addressed to the 1st Respondent. One (1) out of the eleven (11) of the similar conformity assessment programs was with the 2nd Respondent.

- ii. Our of the eleven (11) similar conformity programs, only the 2nd Respondent alleged breaches of its contracts by the Applicant;
- iii. This is clear evidence that the evaluation committee of the 2nd Respondent was not objective while conducting due diligence on the Applicant on the basis that all ten (10) persons whom the Applicant had prior engagement did not return a negative response during due diligence exercise being conducted on the Applicant;
- iv. The 1st Respondent seems to have conducted due diligence on the Applicant by obtaining references only from herself as the person whom the Applicant had prior engagement in contravention of the rule of natural justice against bias, that no man/woman shall be a judge in his/her own cause.”

- 74. The Applicant submits that from the above, it is apparent that in preparing its decision, the Board took an erroneous position in presuming that there was no dispute on the carrying out of a fresh diligence exercise when, in fact, that was the gist of the Applicant’s complaint in PPARB Application No. 14 of 2026.
- 75. It submits that in view of the above, the Board was NOT correct in affirming that it was not in dispute that there was no dispute that the Procuring Entity carried out a fresh due diligence exercise in respect of the subject tender.
- 76. In making its Decision, the Board addressed itself to Mandatory Requirement No. 14 under the Tender Document at paragraph 99 of the Decision and on page 462 of the annexure annexed to the affidavit of Harold Amaya Munala.
- 77. None of the parties in the proceedings in PPARB Application No. 14 of 2026 addressed the Board on Mandatory Requirement No. 14 under the Tender Document.
- 78. It is instructive to highlight that the evaluation process in the subject tender was on a sequential basis, with bids first being evaluated for the Mandatory Requirements at the Preliminary Evaluation Stage before being qualified at the Technical Evaluation Stage. It was only after a bidder was responsive to the requirements at the Preliminary and Technical Evaluation Stages that they qualified for being evaluated at the due diligence stage.
- 79. In the present case, the Evaluation Committee sent the Applicant a Notification Letter indicating that its bid had been established as responsive at the Preliminary and Technical Evaluation Stages.



80. It therefore came as a surprise that in its decision, the Board decided to substitute itself for the Evaluation Committee to re-evaluate the Applicant's compliance levels with Mandatory Requirement No. 14 at the Preliminary Evaluation Stage.
81. The Board's sojourn on Mandatory Requirement No. 14 at paragraph 99 of its Decision, when no party had pleaded anything to do with the Applicant's compliance with the Requirement, exemplifies the Board as giving consideration to extraneous matters.
82. It submits that the law does not suffer that there can exist a legal wrong without a remedy (See *Rai & 3 others v Rai & 5 others* (Petition 4 of 2012) [2013] KESC 21 (KLR) (20 August 2013) (Ruling).
83. Section 175(3) of the *Public Procurement and Asset Disposal Act* exists for the very purpose of remedying errors made by the Board, just like in the present case.
84. Indeed, superior courts in our jurisdiction, including the Court of Appeal have on multiple occasions rectified erroneous procurement decisions by directing the award of procurement contracts to deserving bidders and disqualifying the undeserving ones.
85. In *Vickers Security Services Limited v Public Procurement Administrative Review Board & 3 others* (Civil Appeal E143 & E150 of 2025 (Consolidated)) [2025] KECA 671 (KLR) (11 April 2025) the Court of Appeal set aside the decision of the High Court and directed the award of the procurement contract in question to a deserving bidder who had been unfairly denied the contract by both the Board and the High Court:

“ 117. Ultimately, we find merit in the consolidated appeal and allow the same. The decision of the High Court dated February 21, 2025 is hereby set aside. We substitute therefor an order allowing the consolidated Application for Judicial Review. We further issue an order of certiorari and quash the decision of the Board dated 6th January 2025 and an order of mandamus compelling KRA and its Accounting Officer to award the Tender for Lot No. 1 in accordance with the Letter of Intention to Award tender, dated 2nd December 2024. Vickers and KRA shall have the costs in the High Court and in this Court. It is so ordered.”

86. Equally in *Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others* (Civil Appeal E012 of 2024) [2024] KECA 184 (KLR) (23 February 2024) (Judgment) the Court of Appeal disqualified an undeserving bidder who had unfairly been awarded a procurement contract to the disadvantage of other bidders:

“ 58. For the reasons discussed above, we find merit in this appeal to the extent that both the Review Board and the High Court failed to appreciate the proper meaning of section 167(1) of the Act, in that there was no breach by the procuring entity at the Tender Opening Stage. Further, the Review Board and the High Court fell into a grave error by failing to appreciate that the Tender Evaluation Committee violated section 79 of the Act by declaring as responsive the 4th Respondent's bid which clearly had failed to comply with a mandatory bid term. The ensuing award of the tender to the 4th Respondent is founded on an illegality. It would be unconscionable and a dereliction of duty for this Court to endorse the award of the tender to the 4th Respondent on the face of the manifest violation of section 79. Accordingly, reverse the High Court decision and set aside the award of the subject tender to the 4th Respondent



in its entirety for the reasons herein above stated. Each party shall bear its own costs of the appeal.”

The Respondents case;

87. According to the Respondent, the Application is misconceived, devoid of merit, and unsustainable in law. On 27th January 2026, the Applicant lodged Request for Review Application No. 14 of 2026 before the Respondent.
88. On 17th February 2026, the Respondent made the following orders with respect to Request for Review No. 14 of 2026:
- a. The Request for Review dated 23rd January 2026 be and is hereby dismissed.
 - b. The 1st Respondent be and is hereby directed to proceed with and conclude the procurement process relating to Tender No. KEBS/PRFR Q/T006/2025/2028 Pre-Qualifications for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for the Year 2025-2028.
 - c. Each party shall bear its own costs in this Request for Review.
89. In arriving at its Decision, the Respondent duly considered all parties' pleadings, documents, written submissions, lists and bundles of authorities, as well as the confidential documents submitted pursuant to Section 67(3)(e) of the Act.
90. It believes that it acted within the confines of its statutory mandate. It is its case that the Respondent identified the following issues for determination:
- a. Whether the Respondents conducted afresh due diligence in compliance with the Board's order in PPARB Application No. 98 of 2025, as upheld by the High Court in Nairobi in HCJR E142 of 2025.
 - b. What appropriate orders should issue in the circumstances.
91. With respect to the first issue, the Respondent noted that following the decision of the Board in PPARB Application No. 98 of 2025, the 1st Interested Party had instituted Judicial Review proceedings before the High Court being Nairobi Judicial Review Application No. E142 of 2025 challenging the said decision of the Board.
92. The High Court, in its judgment in the Judicial Review Application, ordered that upheld the following orders, A, B, C, E, and F, as issued in PPARB Application No. 98 of 2025:
- a. The Letter of Notification of Intention to Award dated 23rd September 2025 addressed to the Applicant in respect of Tender No. KEBS/ PRE-Q/T006/2025/2028 - Pre-Qualifications for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for the Year 2025—2028 be and is hereby nullified and set aside;
 - b. That in as far as the contents of the due diligence report dated 7th September 2025 and subsequent Professional opinion dated 22nd September 2025 address the Applicants reasons for disqualification, the said contents be and are hereby expunged from the said report and opinion and are null and void.
 - c. The 1st Respondent be and is hereby directed to re-convene the Evaluation Committee and undertake a fresh due diligence exercise on the Applicant in strict compliance with the provisions of the Tender Document, the Act, the Regulations, 2020, *the Constitution*, and



taking into account the findings and observations of this Board in this decision within twenty-one (21) days from the date hereof;

- d. Not upheld.
 - e. For the avoidance of doubt, the orders issued in (B) and (C) herein apply only to the Applicant's bid in respect of Zone 1 China; and
 - f. Each party shall bear its own costs in this Request for Review.
93. Order (d), the one the High Court declined to uphold provided as follows:
- The 1st Respondent be and is hereby directed to proceed with and conclude the procurement process relating to Tender No. KEBS/PREQ/T006/2025/2028 — Pre-Qualifications for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for the Year 2025—2028, including the issuance of an award, within thirty (30) days from the date hereof;
94. It is its case that the High Court quashed that order on the basis that the subject process was one of prequalification, and therefore no contracts were contemplated for award at that stage, the procuring entity not being engaged in the procurement of specific goods or services within a defined period.
95. It argues that the High Court specifically ordered the Procuring Entity to proceed with the prequalification process in compliance with the Board's orders in PPARB Application No. 98 of 2025 and in accordance with its Judgment, with liberty to seek an extension of time within which to conclude the process, if necessary.
96. The Respondent noted that the essence of the Board's findings in PPARB Application No. 98 of 2025 was that the Applicant had not been afforded an opportunity to be heard before adverse findings were made against it, and further that there was no clear paper trail demonstrating how the documentation relied upon by the Evaluation Committee during the second due diligence exercise had been received and considered by the said Committee.
97. The Respondent at paragraph 105 of its Decision noted that the aforementioned reasoning was acknowledged by the High Court in the Judicial Review Application and proceeded to analyze the conduct of the 3rd Due Diligence exercise in the subject tender so as to determine whether it was carried out in accordance with the findings outlined in the Judicial Review Application.
98. The Respondent perused the pleadings filed by the parties as well as the confidential documents, and noted that on 9th January 2026, the Evaluation Committee formally requested, via email, documentation from the 1st Interested Party regarding the Applicant's past performance, which was provided to the Evaluation Committee on the same date, 9th January 2026.
99. Upon receipt of the information from the 1st Interested Party, the Respondent noted that the Evaluation Committee had reviewed the material and identified adverse findings concerning two consignments certified by the Applicant during the performance of a previous contract.
100. It is its case that it noted that by a letter dated 9th January 2026, the Chairperson of the Evaluation Committee wrote to the Applicant, granting it an opportunity to respond within seven (7) days.
101. The Applicant submitted its response by letter dated 15th January 2026, which the Evaluation Committee considered alongside the adverse information received and concluded that the concerns had not been satisfactorily addressed, ultimately recommending that the Applicant not be pre-qualified.



102. The Respondent noted that the Evaluation Committee complied with the findings in PPARB Application No. 98 of 2025 by obtaining the documentation relied upon during the due diligence exercise from the Procuring Entity through verifiable channels.
103. Accordingly, the Respondent found that there was no missing paper trail demonstrating how the documentation considered during the due diligence exercise reached the Evaluation Committee.
104. It is its case that it further noted that the Evaluation Committee did not rely on the information obtained from the Procuring Entity without first affording the Applicant an opportunity to be heard.
105. The Respondent found that this approach was consistent with the principle that the right to be heard is sacrosanct, which had been a key finding in PPARB Application No. 98 of 2025 and was subsequently upheld by the High Court in the Judicial Review Application.
106. It found that the Applicant was indeed afforded an opportunity to be heard and was subsequently not pre-qualified following a procedurally fair due diligence exercise.
107. In light of the foregoing analysis, the Board held that the Evaluation Committee conducted the due diligence exercise in respect of the Applicant in accordance with the requirements of *the Constitution*, and the Act.
108. It argues that contrary to the allegations made by the Applicant in this Judicial Review Application, the Respondent, in its Decision, duly considered all the parties' pleadings, written submissions, and confidential documents.
109. It is evident according to it that the Respondent acted within the confines of *the Constitution*, the Act, the *Fair Administrative Action Act*, and the rule of law in rendering its decision in Request for Review No. 14 of 2026.
110. It argues that The Applicant has failed to demonstrate any elements of illogicality, illegality, irrationality, procedural impropriety, or unfairness in the manner in which the Respondent considered and interrogated the evidence, documents, pleadings, and information before it in arriving at its Decision in Request for Review No. 14 of 2026.

The Respondents Submissions;

111. It submits that it is trite law that Judicial Review is concerned with the decision-making process, not with the merits of the decision itself.
112. The Court of Appeal in *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR famously held:

“Judicial Review is concerned with the decision-making process, not with the merits of the decision itself: The Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself.”
113. In *Republic v Kenya Revenue Authority, Ex parte Yaya Towers Limited* [2008] eKLR, the Court held that Judicial Review is not concerned with the merits of the decision but with the process through which the decision was arrived at.



114. Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (the "GCHQ case"), which identified three main grounds:
- a. Illegality: The decision-maker must understand correctly the law that regulates their decision-making power and must give effect to it.
 - b. Irrationality/Unreasonableness: The decision must be so outrageous in its defiance of logic or accepted moral standards that no sensible person applying their mind to the matter could have arrived at it.
 - c. Procedural Impropriety: Failure to observe basic rules of natural justice or to act with procedural fairness.
115. In the instant case, the Respondent submits that the Applicant invites this Court to re-evaluate the due diligence exercise and to substitute its views for those of the Board.
116. This is impermissible in Judicial Review proceedings. As held in Republic v Public Procurement Administrative Review Board & Another Exparte Rongo University [2017] eKLR, Judicial Review should not be used to micro-manage procurement processes or to supplant the specialized jurisdiction of the Board.
117. The Respondent submits that the Board acted within its statutory mandate, observed the rules of natural justice, and arrived at a reasoned decision based on the evidence before it.
118. It submits that the Evaluation Committee is a statutory body established by law. Section 46(1) of the *Public Procurement and Asset Disposal Act*, No. 33 of 2015, Laws of Kenya (hereinafter "the Act") provides:
- “(1) An accounting officer shall ensure that a tender is evaluated by an evaluation committee appointed by the accounting officer on ad-hoc basis.”
119. The composition of the Evaluation Committee as comprising members of staff from the procuring entity is not a matter of choice but of statutory prescription. Regulation 29 of the Public Procurement and Asset Disposal Regulations, 2020 reinforces this position by providing for the appointment of evaluation committee members from within the procuring entity.
120. It submits that the doctrine of *nemo iudex in causa sua* admits exceptions where the decisionmaker is performing a statutory function.
121. The Supreme Court of Kenya in *Popat & 7 others v Capital Markets Authority* [2020] KESC 3 (KLR) addressed this very principle. The Court held:
- “The mere overlap of roles by a statutory body carrying out investigative and adjudicative functions is not, without more, a ground for finding a breach of the *nemo iudex in causa sua* principle. What is required is that the body must demonstrate that it has complied with the procedural fairness requirements set out in Article 47 of *the Constitution* and the *Fair Administrative Action Act*.”



122. The Evaluation Committee’s mandate was to perform due diligence under Section 83 of the Act, not to adjudicate a dispute between the Applicant and KEBS. Section 83(2) of the Act expressly authorizes:
- “ (2) For purposes of due diligence, the accounting officer may obtain confidential references from persons with whom the candidate or tenderer has had previous similar engagements.”
123. The Respondent submits that the information regarding past contract performance was obtained through verifiable channels, and the Applicant was afforded an opportunity to respond.
124. It submits further that; issue estoppel bars the Applicant from raising this ground.
125. In PPARB No. 98 of 2025, the Board directed that the Evaluation Committee be reconvened to conduct a fresh due diligence. The High Court in HCJRMISC E142 of 2025 upheld this order. The Applicant did not challenge the propriety of having the same committee conduct the fresh exercise. Having accepted the remedy, the Applicant cannot now challenge the composition of the same committee.
126. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] KESC 53 (KLR) affirmed:
- “ Issue estoppel prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or Judicial Review route.”
127. The Applicant has not pointed to any specific conduct by any member of the Evaluation Committee demonstrating bias. The test for bias is whether a fair-minded and informed observer would conclude that there was a real possibility of bias.
128. In *Republic v Judicial Service Commission Exparte Pareno* [2004] 1 KLR 203, the Court held:
- “ The test for bias is whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the Applicant was not possible.”
129. The mere fact that the committee reached a conclusion adverse to the Applicant does not constitute bias. The Evaluation Committee was properly constituted under the Act, performed its statutory mandate, and accorded the Applicant a fair hearing. The Board correctly found no breach of the *nemo iudex* principle.
130. In responding to The Applicant’s contention that the Evaluation Committee should not have considered the alleged breach of a previous contract because the same matter is pending determination in Milimani High Court Commercial Case No. HCCOMM E632 of 2025.
131. It submits that the sub judice rule applies to proceedings before courts, not to administrative processes. Section 6 of the *Civil Procedure Act*, Cap 21, Laws of Kenya provides:
- “ No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under



the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

132. The provision explicitly refers to courts and suits or proceedings. The due diligence exercise conducted by the Evaluation Committee is not a “suit” or “proceeding” before a court. It is an administrative function mandated by statute.
133. In *Republic v Director of Public Prosecutions & another Ex parte Patrick Mwangi Ngugi* [2018] eKLR, the Court held:

“The sub judice rule is concerned with the stay of proceedings in a court of law where there are parallel proceedings in another court of competent jurisdiction. It does not operate to prevent administrative bodies from performing their statutory functions.”
134. It submits that the matters in issue are different. In PPARB No. 98 of 2025, the Board expressly distinguished between the commercial dispute and the procurement dispute. At paragraph 122 of that decision, the Board stated:

“The matters in the High Court concern alleged breaches of contract. In contrast, the present Request for Review revolves around the propriety of the due diligence process undertaken by the Respondents in the subject tender.”
135. The High Court in HCJRMISC E142 of 2025 upheld this distinction and found no illegality, irrationality, or procedural impropriety in the Board’s decision-making process regarding the sub judice issue.
136. It submits that the due diligence mandate under Section 83 of the Act is distinct from and independent of any contractual dispute. The Act requires procuring entities to verify the qualifications, experience, and integrity of bidders before award.
137. This verification process cannot be held hostage by a bidder’s strategic filing of litigation to shield itself from legitimate scrutiny.
138. The Applicant did not challenge the Board’s finding on sub judice in PPARB No. 98 of 2025, nor did it raise the issue in the subsequent Judicial Review proceedings.
139. Having accepted the benefit of the Board’s decision directing a fresh due diligence, the Applicant cannot now seek to prevent the very exercise it successfully sought.
140. The subject tender involves pre-export verification of conformity services, which directly impacts public safety and consumer protection. Article 46 of *the Constitution* guarantees consumers the right to goods and services of reasonable quality.
141. The procurement process must proceed without undue delay. Allowing a bidder to stall the process by invoking sub judice in respect of a separate contractual dispute would undermine the constitutional principles of efficiency, transparency, and accountability enshrined in Article 227 of *the Constitution*.
142. On the “fresh due diligence” issue it submits that The Board’s finding that a fresh due diligence was conducted is amply supported by the evidence. As deposed in the Replying Affidavit of PHILEMON KIPROP at paragraphs 14-18, the Evaluation Committee:
 - a. Obtained documentation from the Procuring Entity through verifiable channels on 9th January 2026;



- b. By letter dated 9th January 2026, invited the Applicant to respond to adverse material;
 - c. Received the Applicant's response on 15th January 2026;
 - d. Considered the response and made a reasoned recommendation.
143. The Applicant's own letter dated 15th January 2026, responding to the Evaluation Committee's letter of 9th January 2026, is an acknowledgment that a fresh process was undertaken.
144. The Applicant cannot now claim that no fresh due diligence occurred when it actively participated in the process.
145. The test for unreasonableness in Judicial Review is the Wednesbury standard, established in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. A decision is unreasonable if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."
146. The Board's finding that a fresh due diligence was conducted is not only reasonable but is the only logical conclusion based on the documentary evidence.
147. On consideration of Tender Requirement No. 14: At paragraph 114 of its decision, the Board considered that due diligence was critical to verify the accuracy of information provided by bidders, including disclosures regarding similar services as required in Mandatory Requirement No. 14.
148. The Board did not re-evaluate the tender or base its decision on Requirement No. 14. It simply observed that due diligence necessarily involves verifying information provided by bidders.
149. In *Republic v Public Procurement Administrative Review Board & another Ex parte Syner-Chemie (K) Limited* [2023] KEHC 25678 (KLR), the Court held:
- “A decision-maker is entitled to consider all relevant information in the exercise of its mandate. The fact that a particular factor is mentioned in the reasoning does not mean it formed the basis of the decision.”
150. On failure to address *nemo iudex in causa sua* and *sub judice* the Board did address these issues implicitly by affirming the due diligence process and finding that it complied with the law and the directions in PPARB No. 98 of 2025.
151. The Applicant is essentially demanding that the Board address these issues in a particular manner that favours its case. It submits that this is not a ground for Judicial Review.
152. In *Republic v National Environment Management Authority Ex parte Sound Equipment Limited* [2024] KEHC 1456 (KLR), the Court held:
- “A decision-maker is not required to address every single argument raised by a party; what matters is whether the decision-maker considered the substance of the matter and arrived at a reasoned decision.”
153. The Board properly analysed the evidence, applied the correct legal principles, and arrived at a reasoned conclusion.



154. In *Kenya Revenue Authority v Tradewise Limited* [2021] KECA 156 (KLR), the Court of Appeal held:

“For a legitimate expectation to arise, there must be a representation, either express or implied, that is clear, unambiguous, and devoid of qualification. The representation must be one that it was within the authority of the public body to make.”

155. It argues that the Applicant has not pointed to any representation by the Board that it would rule in its favour or apply the doctrines of *nemo iudex* and *sub iudice* in the manner advocated by the Applicant.

156. The Applicant's expectation that the Board would uphold the law is precisely what happened: The Board applied the law correctly and upheld the due diligence process.

157. Article 47 of *the Constitution* guarantees fair administrative action. In *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR, the Court of Appeal held:

“Article 47 of *the Constitution* enshrines the right to fair administrative action. It requires administrative action to be expeditious, efficient, lawful, reasonable and procedurally fair.”

158. The Applicant was afforded:

- a. An opportunity to respond to adverse material (letter of 9th January 2026);
- b. An opportunity to be heard before the Board in PPARB No. 14 of 2026;
- c. A reasoned decision from the Board

159. Article 227 of *the Constitution* requires procurement processes to be fair, equitable, transparent, competitive, and cost-effective. In *Republic v Public Procurement Administrative Review Board & another Ex parte Kenya Agricultural and Livestock Research Organization* [2019] eKLR, the Court held:

“The constitutional principles under Article 227 are intended to ensure that public funds are expended in a manner that achieves value for money and protects the public interest.”

160. The Board's decision upholds these principles by ensuring that only bidders who pass due diligence are pre-qualified.

161. In *Republic v Attorney General & another Ex parte Njuguna* [2020] eKLR, the Court held that Judicial Review orders are discretionary and may be refused where:

- a. The Applicant has delayed unreasonably in seeking relief;
- b. The Applicant has not come to court with clean hands;
- c. Granting the remedy would cause public inconvenience or prejudice third parties.

162. The Applicant has not come to court with clean hands. The adverse findings against it raise serious integrity concerns. Granting the orders sought would prejudice:

- a. The 3rd to 11th Interested Parties, who have successfully completed the prequalification process;
- b. The public, who deserve assurance that PVoC services are provided by qualified and reputable entities;



- c. The procurement process itself, which has been pending for over a year.
163. In *Lavington Security Limited v Public Procurement Administrative Review Board [2025] KEHC 11901 (KLR)*, the Court emphasized:
- “Judicial Review must balance individual rights against public interest considerations. Where public interest weighs heavily in favour of upholding a decision, the court may decline to grant discretionary remedies even where some procedural impropriety is established.”
164. Here, public interest weighs heavily in favour of upholding the Board's decision.
165. It argues that the Board's decision of 17th February 2026 was Lawful: It applied the correct legal framework under the Act, the Regulations, and *the Constitution*, Rational: It was based on evidence and logical reasoning, not caprice or whim and Procedurally fair: All parties were heard, and the decision was reasoned.

The 1st and 2nd Interested Parties Case;

166. It is the 1st and 2nd Interested Parties case that the Applicant submitted its bid for prequalification in Tender No. KEBS/PRE-Q/T006//2025/2028 PREQUALIFICATIONS FOR PRE-EXPORT VERIFICATION OF CONFORMITY TO STANDARDS SERVICES, THE YEAR 2025-2028 advertised by the 2nd Interested Party.
167. By a letter dated 24th April, 2025, the 1st and 2nd Interested Parties informed the Applicant that it had been prequalified “subject to successful due diligence.”
168. Subsequently a due diligence exercise was carried out by the duly appointed Tender Evaluation Committee. By a letter dated 23rd September, 2025, the Applicant herein was disqualified on account of information obtained during due diligence exercise regarding breaches of contract with the 2nd Interested Party.
169. Aggrieved, the Applicant contested the said decision before the 1st Respondent by way of a Request for Review filed in Application 98 of 2025.
170. A Decision was issued on 27th October, 2025, by the 1st Respondent allowing the Request for Review and ordering, inter alia, that the 1st Interested Party reconvenes the Evaluation Committee for conduct of a fresh due diligence exercise within 21 days. Aggrieved by the Decision in Application 98 of 2025, the 1st and 2nd Interested Parties filed a Judicial Review Application no. E142 of 2025.
171. By a judgment of 19th December, 2025, the High Court upheld the Decision in Application 98 of 2025.
172. In abiding with the Decision in Application 98 of 2025, the 1st Interested Party reconvened the Evaluation Committee upon which a fresh due diligence exercise was conducted.
173. By a letter dated 22nd January, 2026, the Applicant was informed that it had been disqualified on account of adverse information obtained during due diligence.
174. The Applicant filed a Request for Review before the 1st Respondent in Application 14 of 2026 on the basis of which a Decision was issued on 17th February, 2026 dismissing the request for Review.
175. Section 46(1) of the *Public Procurement and Asset Disposal Act*, Cap 412C and Regulation 29 of the Public Procurement and Asset Disposal Regulations provide for *the constitution* of the evaluating committee as an adhoc committee comprising members of staff from the procuring entity.



176. Section 80 of the Act and Regulation 30 of the Regulations govern the conduct of members of the Evaluation Committee during tender evaluation.
177. To enable the realization of the objectives of tender evaluation, the conduct of an evaluation committee is further governed by principles of fairness and independence as provided in *the Constitution* and the *Fair Administrative Action Act*.
178. The question of nemo judex in causa sua in the context of an Evaluation Committee constituted under the framework of Section 46 of the Act falls within the exceptions to nemo judex in causa sua as determined by the Supreme Court in *Popat & 7 others v Capital Markets Authority* [2020] KESC 3 (KLR)
179. It is their case Without prejudice to the above, that the Applicant is barred from pleading nemo judex in causa sua by the doctrine of issue estoppel for the following reasons:
- a. In Order C of the Decision in Application 98 of 2025, 1st Respondent ordered that:

The 1st Respondent be and is hereby directed to reconvene the Evaluation Committee and undertake a fresh due diligence exercise on the Applicant in strict compliance with the provisions of the Tender Document, the Act, the Regulations 2020, *the Constitution*, while taking into account the findings and observations of this Board in this decision within twenty-one (21) days from the date hereof.
 - b. That among the observations and findings that the Evaluation Committee was bound to take into account was the observation in paragraph 142 of the Decision wherein the 1st Respondent stated:

“the evaluation committee in exercising an administrative function, was under an obligation to accord the Applicant a fair hearing before making a decision that adversely affected its interests.”
180. The High Court in Judicial Review Application E142 of 2025 upheld Order C as issued by the 1st Respondent and further held in paragraphs 129 and 130 as follows:
- “... The Board correctly appreciated that due diligence, though an evaluative function, constitutes administrative action subject to the imperatives of Article 47 of *the Constitution* and the *Fair Administrative Action Act*.... I reiterate that where an evaluation Committee relies on adverse material to disqualify a bidder, fairness demands that the affected party be afforded an opportunity to respond.”
181. The Applicant never challenged these findings and orders either through Judicial Review or appeal to the Court of Appeal. It is their case that where the 1st and 2nd Interested Parties have already implemented ORDER C of the Decision in Application 98 of 2025, issue estoppel bars the Applicant from pleading nemo judex in causa sua merely because they are unhappy with the outcome of the fresh due diligence ordered. See the Supreme Court decision in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] KESC 53 (KLR) where the Supreme Court affirmed “... Issue estoppel “prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or Judicial Review route”.

On the issue of Sub judice;



182. It is their case that sub-judice does not apply to this case for the following reasons:
- a. In the cause of hearing Application 98 of 2025, the 1st Respondent was duly informed of the existence of Milimani High Court Commercial Cases No. E632 of 2025 World Standardization, Certification & Testing Group (Shenzhen) Co. Ltd VS Kenya Bureau of Standards. Consequently, the 1st Respondent drew a distinction between the causes of action in Commercial Case E632 of 2025 and the Request for Review before it as follows:

“The matters in the High Court concern alleged breaches of contract. In contrast, the present Request for review revolves around the propriety of the due diligence process undertaken by the Respondents in the subject tender.... (Paragraph 122)”
 - b. The High Court in JR E142 of 2025 upheld the Decision of the 1st Respondent and found no illegality, irrationality or procedural impropriety in the Decision-making process in determining the issue of subjudice at paragraph 103 of the Judgment)
183. According to them where the Applicant stayed clear of the issue and never submitted on it both at the High Court and before the 1st Respondent, issue estoppel applies to the matter which is already conclusively determined as enunciated in the Supreme Court decision in Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] KESC 53 (KLR).
184. Accordingly, to them this court would effectively be sitting on appeal over the Decisions of Application 98 of 2025 and JR E142 were it to delve into the question of sub-judice at this stage.
185. It is their case that it is not true that the 1st Respondent was unreasonable for considering Tender Requirement No.14 while the same was not mentioned among the reasons for disqualification. Paragraph 114 of the Decision of 17th February, 2025 is clear that the 1st Respondent considered that a due diligence exercise was critical to verify the accuracy of information provided by a bidder which included disclosures regarding similar services provided by a bidder as required in Mandatory requirement 14 of the Tender. By so stating, the 1st Respondent did not in any way venture into a re-evaluation exercise.
186. They argue that there is no demonstration of material error of law, breach of legitimate expectation, unfairness, illegality, irrationality, unreasonableness, procedural impropriety or any error of law as to warrant the issuance of the Judicial Review orders sought.
187. It is further their case that the 1st Respondent reviewed the fresh due diligence exercise conducted and found the same to have been conducted in compliance with the law and that the Applicant was accorded an opportunity to be heard. Accordingly, there is no basis to grant the Judicial Review orders sought.

The 1st and 2nd Interested Parties Submissions;

188. The 1st and 2nd Interested Parties submit that The Supreme Court in *Popat & 7 others v Capital Markets Authority* [2020] KESC 3 (KLR) enunciated the doctrine of *nemo iudex in causa sua* as follows:
- “The natural justice *nemo iudex in causa sua esse* principle is one of the fundamental principles in literally all common law jurisdictions. It is an exemplification of Lord Hewart, CJ’s famous maxim in the case of *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, [1923] ALL ER Rep 233 that justice should not only be done but also be seen to be done.



This principle is obviously blurred when one presides in the adjudication of one's cause or in a process one has an interest in. As the US Supreme Court stated in the case of *Re Murchison*, 349 U.S. 133, 136 (1955), cited to us by counsel for the petitioners, no person should be allowed to be a judge in his own cause or in a cause he has an interest in its outcome. Interest here includes a situation where one desires or is keen on obtaining a given result. A prosecutor, for example, has an interest in the conviction of a suspect he hauls into court.”

189. The Supreme Court, however, proceeded to affirm that the doctrine is subject to exceptions. One key exception is where a contested mandate is given in statute. The Supreme Court held:

“An important exception to the *nemo iudex in causa sua* esse principle raised in this case is where the overlap of functions is a creature of statute and as long as the constitutionality of the statute is not in issue. Enunciating this exception in the Canadian case of *Re W. D. Latimer Co. and Attorney General for Ontario* (1973), 2 O.R. (2d) 391, affirmed sub nom. *Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129, Dubin, JA stated:

Where by statute the tribunal is authorized to perform tripartite functions, disqualification [on the ground of bias] must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task.”

190. Equally in the circumstances of this case, the Applicant alleges that an evaluation committee whose membership is drawn from staff of a procuring entity cannot preside over a complaint raised against the same procuring entity.

191. The argument is flawed as an evaluation committee is not an investigative body to preside over complaints and neither was there any complaint raised against the 2nd Interested Party that the evaluation committee was required to investigate.

192. Be that as it may, where the evaluation committee received adverse information and was mandated to grant a fair hearing to the Applicant by dint of Article 47 of *the Constitution*, and as held in the Decision of 27th October, 2025 and further upheld by the High Court, such mandate fell within the exceptions to the *nemo iudex in causa sua* doctrine for the following reasons:

- a. Section 46(1) of the *Public Procurement and Asset Disposal Act*, Cap 412C (hereinafter referred to as ‘the Act’) and Regulation 29 of the Public Procurement and Asset Disposal Regulations (hereinafter referred to as ‘the Regulations’) provide for *the constitution* of the evaluating committee as an adhoc committee comprising members of staff from the procuring entity.
- b. The Applicant has not challenged the constitutionality of Section 46 of the Act.
- c. As held by the High Court in JR E142 of 2025, during tender evaluation, the Evaluation Committee plays both an evaluative and administrative function.
- d. The fresh due diligence exercise was done in execution of orders issued by the 1st Respondent in Application 98 of 2025.
- e. The Applicant did not challenge the findings of the 1st Respondent and the High Court regarding the role of the Evaluation committee and the respective orders for conduct of a fresh due diligence exercise.



193. On the issue of the doctrine of issue estoppel barred the Applicant from pleading the doctrine of *nemo iudex in causa sua* it relied on the Halsbury's Laws of England, Volume 12A, 5th Edition, 2015. The Supreme Court in *John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) had occasion to examine the doctrine of issue estoppel as a sub-set of *res judicata* as follows:

1603. Basis for doctrine of *res judicata*

... *res judicata* also embraces 'issue estoppel', a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue.

194. The Supreme court proceeded to affirm the position adopted by the Supreme Court in India that:

"...it is clear that the rule of *res judicata* is mandatory in its Application and should be invoked in the interest of public policy and finality. The matter which have actually been decided would also apply to the matters which have been impliedly and constructively decided by the court. These principles are to be applied to preserve the doctrine of finality rather than frustrate the same. The doctrine of *res judicata* is the combined result of public policy so as to prevent repeated taxing of a person to litigation. It is primarily founded on the following three maxims: (1) *nemo debet bis vexari pro una et eadem causa*: no man should be vexed twice for the same cause. (2) *interest reipublicae ut sit finis litium*: it is in the interest of the State that there should be an end to a litigation; and (3) *res judicata pro veritate occipitur*: a judicial decision must be accepted as correct..."

195. They submit that the Applicant is barred from pleading *nemo iudex in causa sua* by the doctrine of issue estoppel for the following reasons:

a. In Order C of the Decision in Application 98 of 2025, 1st Respondent ordered that:

The 1st Respondent be and is hereby directed to reconvene the Evaluation Committee and undertake a fresh due diligence exercise on the Applicant in strict compliance with the provisions of the Tender Document, the Act, the Regulations 2020, *the Constitution*, while taking into account the findings and observations of this Board in this decision within- twenty-one (21) days from the date hereof.

b. That among the observations and findings that the Evaluation Committee was bound to take into account was the observation in paragraph 142 of the Decision wherein the 1st Respondent stated:

"the evaluation committee in exercising an administrative function, was under an obligation to accord the Applicant a fair hearing before making a decision that adversely affected its interests."

c. The High Court in Judicial Review Application E142 of 2025 upheld Order C as issued by the 1st Respondent and further held in paragraphs 129 and 130 as follows:

"...The Board correctly appreciated that due diligence, though an evaluative function, constitutes administrative action subject to the imperatives of Article 47



of *the Constitution* and the *Fair Administrative Action Act*...I reiterate that where an evaluation Committee relies on adverse material to disqualify a bidder, fairness demands that the affected party be afforded an opportunity to respond.”

- d. The Applicant never challenged these findings and orders either in Judicial Review or appeal to the Court of Appeal.
 - e. That by dint of the above findings, the Evaluation Committee was to conduct a fresh due diligence exercise and afford the Applicant an opportunity to respond in the event of any adverse material to be considered. It is this very function that the Applicant claims to undermine the legal doctrine of *nemo iudex in causa sua* despite affirming that the Evaluation Committee had failed to accord it a fair hearing.
 - f. Where the 1st and 2nd Interested Parties have already implemented ORDER C of the Decision in Application 98 of 2025, issue estoppel bars the Applicant from pleading *nemo iudex in causa sua* merely because they are unhappy with the outcome of the fresh due diligence ordered.
196. Reliance is placed in the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] KESC 53 (KLR):
- “ ... Issue estoppel “prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or Judicial Review route.”
197. The Applicant cites sub-judice on the basis that during the fresh due diligence exercise, the evaluation committee invited it to make representations over breaches of contract that are subject of litigation in *Milimani High Court Commercial Cases No. E632 of 2025 World Standardization, Certification & Testing Group (Shenzhen) Co. Ltd VS Kenya Bureau of Standards* (hereinafter referred to as ‘Commercial Case E632 of 2025’). The information sought was the same adverse material upon which the Applicant was disqualified by a letter of 23rd September, 2025 prompting its filing of Application 98 of 2025. The 1st and 2nd Interested Parties raised the issue of sub-judice on the same premises before the 1st Respondent in Application 98 of 2025 and later JR E142 of 2025.
198. It is their submission that sub-judice does not apply to this case for the following reasons:
- a. In the cause of hearing Application 98 of 2025, the 1st Respondent was duly informed of the existence of Commercial Case E632 of 2025. Consequently, the 1st Respondent drew a distinction between the causes of action in Commercial Case E632 of 2025 and the Request for Review before it as follows: The matters in the High Court concern alleged breaches of contract. In contrast, the present Request for review revolves around the propriety of the due diligence process undertaken by the Respondents in the subject tender.
 - b. The High Court in JR E142 of 2025 upheld the Decision of the 1st Respondent and found no illegality, irrationality or procedural impropriety in the Decision-making process in determining the issue of subjudice.
 - c. Where the Applicant stayed clear of the issue and never submitted on it both at the High Court and before the 1st Respondent, issue estoppel applies to the issue as it is conclusively determined. See the Supreme Court decision in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] KESC 53 (KLR).



- d. This court would effectively be sitting on appeal over the Decisions of Application 98 of 2025 and JR E142 were it to delve into the question of sub-judice at this stage.
199. The Judicial Review orders sought are premised on the basis that the Decision in Application 14 of 2026 undermined the established legal doctrines of *nemo iudex in causa sua* and *sub judice*. The exposition above disapproves the Applicant.
200. They submit that there is no demonstration of material error of law, unreasonableness, breach of legitimate expectation, unfairness, illegality, irrationality, unreasonableness, procedural impropriety or any other basis as to warrant the issuance of the Judicial Review orders sought.

The 3rd Interested Parties Case;

201. It opposes the Application and argues that the Originating Motion herein should be dismissed with costs to the 3rd Interested Party, and the decision of the Review Board in PPARB Application No. 14 of 2026 dated 17th February 2026 be upheld.
202. The 1st and 2nd Interested Parties (Kenya Bureau of Standards) invited tenders through the open tendering method pursuant to Tender No. KEBS/PREQ/T006/2025/2028 for the Pre-Qualification for Provision of Pre-Export Verification of Conformity (PVoC) to Standards Services the Year 2025-2028 (hereinafter "the subject tender").
203. The subject tender was divided into eight zones, and interested bidders were permitted to apply for any or all of the zones. It is its case that following the evaluation process, the 3rd Interested Party was among the ten tenderers found to be responsive and recommended for pre-qualification, subject to the outcome of a due diligence exercise.
204. The 3rd Interested Party successfully passed the due diligence exercise and was duly pre-qualified for the subject tender.
205. It argues that it has a legitimate interest in the conclusion of the pre-qualification process and the protection of the integrity of the procurement exercise.
206. The Applicant previously challenged its disqualification from the subject tender through PPARB Application No. 98 of 2025, in which the Public Procurement Administrative Review Board (hereinafter "the Review Board") found that the Applicant had not been afforded an opportunity to be heard before adverse findings were made against it during the due diligence exercise.
207. The Review Board directed the 1st Interested Party to reconvene the Evaluation Committee and undertake a fresh due diligence exercise on the Applicant.
208. The 1st and 2nd Interested Parties challenged the Review Board's decision at the High Court in Milimani High Court Case No. HCJRMISC E142 of 2025, wherein the High Court (Aburili, J) substantially upheld the Review Board's orders and directed the 1st and 2nd Interested Parties to proceed with the pre-qualification process in compliance with the Review Board's orders and the High Court's judgment.
209. Pursuant to the directions of the Review Board and the High Court, the Evaluation Committee of the 2nd Interested Party conducted a fresh due diligence exercise on the Applicant and ultimately recommended that the Applicant should not be pre-qualified.
210. On 27th January 2026, the Applicant herein filed another Request for Review before the Review Board in PPARB Application No. 14 of 2026.
211. The Request for Review was opposed by the 1st 2nd and 3rd Interested Parties herein.



212. On 17th February 2026 delivered its decision dismissing the Applicant's Request for Review after finding that the Evaluation Committee conducted the due diligence exercise in accordance with the requirements of *the Constitution*, the *Public Procurement and Asset Disposal Act*, and the Regulations 2020.
213. It believes that the Review Board correctly found that the due diligence exercise was conducted in compliance with its earlier order in PPARB Application No. 98 of 2025, as upheld by the High Court in HCJRMISC E142 of 2025.
214. The Applicant's Originating Motion is without merit and ought to be dismissed with costs for the reasons set out herein below.
215. The Evaluation Committee is a technical body constituted under the *Public Procurement and Asset Disposal Act* for the specific purpose of evaluating tenders and conducting due diligence.
216. The fact that its membership is drawn from officers of the Procuring Entity does not, in law, disqualify it from performing the statutory functions expressly conferred upon it by the Act.
217. The Evaluation Committee's conduct of due diligence, including the consideration of information provided by the Procuring Entity regarding the Applicant's past contract performance, is not only permissible but is in fact mandated by Section 83(2) of the Act, which expressly authorizes the obtaining of confidential references from persons with whom the tenderer has had prior engagements.
218. The doctrine of nemo iudex in causa sua is principally applicable to judicial and quasi-judicial proceedings, and its Application to a statutory evaluation committee carrying out a technical due diligence exercise under express legislative authority is misplaced.
219. The Evaluation Committee was not adjudicating a dispute between the Applicant and the Procuring Entity; it was performing a statutory function of verifying the Applicant's qualifications and integrity as required by law.
220. The pendency of Milimani High Court Case No. HCCOMM E632 of 2025, in which the Applicant has challenged the termination of a previous contract, does not bar the Evaluation Committee from considering the Applicant's past contract performance as part of the due diligence exercise.
221. The due diligence process under Section 83 of the Act is a distinct statutory process from the contractual dispute pending before the High Court. The Evaluation Committee's mandate to verify the qualifications and integrity of bidders cannot be held hostage by the Applicant's strategic filing of litigation to shield itself from legitimate scrutiny.
222. The sub judice rule, as stipulated under Section 6 of the *Civil Procedure Act*, operates to stay proceedings in a court where a matter is pending in another court of competent jurisdiction. It does not operate to prevent a statutory body from performing its mandated functions under an entirely different statutory framework.
223. The public procurement due diligence process and the contractual dispute before the High Court are not proceedings between the same parties on the same issues within the meaning of the sub judice doctrine.
224. The Evaluation Committee obtained the documentation relied upon during the due diligence exercise from the Procuring Entity using verifiable channels, thereby establishing a proper paper trail consistent with Section 83(2) of the Act;



225. The Evaluation Committee afforded the Applicant an opportunity to be heard by inviting it, through a letter dated 9th January 2026, to respond to the adverse material within seven days, which the Applicant duly did through its letter dated 15th January 2026;
226. The Evaluation Committee considered the Applicant's response alongside the adverse information and arrived at a reasoned decision that the concerns were not satisfactorily addressed;
227. The due diligence exercise was conducted in compliance with the findings and directions of the Review Board in PPARB Application No. 98 of 2025 and the Judgment of the High Court in HCJRMISC E142 of 2025.
228. The adverse findings that formed the basis of the Applicant's disqualification relate to serious integrity concerns involving two consignments previously certified by the Applicant during the performance of a previous contract.
229. These include the certification of 24,300 substandard universal extensions posing a national safety hazard, and the misrepresentation of consignment contents where 1,050 cartons certified as TV Guards were found to contain predominantly power extension sockets. I verily believe that these findings go to the heart of the Applicant's integrity and competence as a provider of Pre-Export Verification of Conformity services, a function that directly impacts public safety and consumer protection.
230. Section 83 of the Act, read together with Regulation 80 of the Public Procurement and Asset Disposal Regulations, 2020, mandates the conduct of due diligence as a prerequisite for pre-qualification, and that negative due diligence findings constitute a valid basis for disqualification.
231. Under Article 46 of *the Constitution*, consumers have a right to goods and services of reasonable quality. The subject tender concerns the provision of PVOC services, which serve as a critical gateway for ensuring that goods imported into Kenya meet established standards.
232. Allowing a bidder with demonstrated integrity concerns relating to the very same services to be pre-qualified would undermine the constitutional imperative of consumer protection and public safety.
233. The Review Board duly considered all the arguments and pleadings before it. The Review Board's decision demonstrates a thorough analysis of the legal provisions governing due diligence under Section 83 of the Act and Regulation 80 of the Regulations, the constitutional framework under Article 227, and the procedural requirements of fair hearing as articulated by the High Court in HCJRMISC E142 of 2025.
234. The Review Board was correct in its findings from paragraph 104 of its decision that the Respondents conducted a fresh due diligence exercise. The Applicant's own letter dated 15th January 2026 is an acknowledgment that a fresh process was undertaken, as the Applicant responded to the Evaluation Committee's letter of 9th January 2026 inviting it to address the adverse material.
235. The Applicant's complaint is not truly about the absence of due diligence but rather about the outcome of the exercise.
236. The Review Board's consideration of Mandatory Requirement No. 14 of the tender document (which required bidders to duly fill and sign historical contract non-performance and pending litigation and litigation history) was well within the Review Board's mandate. I verily believe that the requirement for disclosure of historical contract non-performance is directly relevant to the due diligence exercise and is not an extraneous matter as the Applicant contends.



237. The Applicant's claim that the Review Board's decision violated its legitimate expectation is misconceived for the following reasons:
- a. The Review Board upheld the law by carefully analyzing the conduct of the due diligence exercise against the requirements of the Act, the Regulations, and *the Constitution*.
 - b. The Review Board found that the Evaluation Committee complied with the directions issued in PPARB Application No. 98 of 2025 and the judgment in HCJRMISC E142 of 2025.
 - c. The Applicant's expectation that the Review Board would automatically rule in its favour and direct its pre-qualification does not constitute a legitimate expectation cognizable in law.
238. The Judicial Review orders sought herein by the Applicant are wholly discretionary and that the circumstances and conduct of the Applicant herein do not justify the exercise of such discretion in the Applicant's favour. The Applicant has failed to demonstrate any errors of law, irrationality, unreasonableness, breach of legitimate expectations, unfairness or constitutional breach in the Review Board's decision that would warrant the intervention of this Honourable Court by way of Judicial Review.
239. The Review Board's decision was lawful, rational, and procedurally sound, and there exists no basis for this Honourable Court to quash or otherwise disturb it.

Analysis and determination;

Upon perusing the pleadings and the rival submissions of the parties herein alongside the authorities cited, this court finds the following to be the issues for determination:

1. Whether this court has jurisdiction
2. Whether this court can conduct a merit review
3. Whether or not the Applicant is entitled to the orders sought.
4. Who will bear the costs of the suit.

Whether this court has jurisdiction

240. Jurisdiction is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". Black's Law Dictionary, 9th Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.
241. In Words and Phrases Legally Defined Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."



242. A Court acting without jurisdiction is acting in vain. All it engages in is nullity, Nyarangi, JA, in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

“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...

Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

29. On the source of a Court’s jurisdiction, the Supreme Court of Kenya in Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission (2011) eKLR held that: -

29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid down in judicial precedent”

30. Later, in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others (2012) eKLR Supreme Court stated as follows: -

A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law 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 counsels for the first and second 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 ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

32. From the foregoing, it is sufficiently settled that a Court’s jurisdiction is derived from *the Constitution*, an Act of Parliament or a settled judicial precedent.

243. Article 165(6) of *the Constitution* of Kenya stipulates as follows:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

244. It is my finding that this court is vested with jurisdiction owing to the nature of the reliefs sought. The Application is substantially anchored in the provisions of the *Public procurement and asset disposal act* as well as article 227 of *the constitution*.

245. Article 165 of *the constitution* gives the court to power to attend to the Application.



Whether this court can conduct a merit review:

246. The Supreme Court's in Petition No. 6(E007) of 2022 Edwin Dande & Others v The Inspector General, National Police Service & Others addressed the issue of 'Whether the scope of Judicial Review has evolved to include determination of merit review of an administrative decision' [page 29]. The summary is as follows:

- (a) Prior to the promulgation of *the Constitution* in 2010, Judicial Review was found in Sections 8 & 9 of the *Law Reform Act* and Order 53 of the CPR that addressed the procedural basis [see paragraph 77-page 30].
- (b) Judicial Review was entrenched in *the Constitution* of 2010 to a substantive and justiciable right under Article 47 [see paragraph 78-page 30]. The court concluded at paragraph 85 [see page 33] and held as follows:

'It is clear from the above decisions that when party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the Court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se.

247. The Applicant in the instant case has moved the court through the provisions of Articles 23 and 47 of *the Constitution* of Kenya, 2010; Sections 7, 9, 10, and 11 of the Fair Administrative Act (Cap 7 L), Rules 11, 13, and 14 and 13 of the Fair Administrative Action Rules, 2024; Sections 175(1), and (3) of the *Public Procurement and Asset Disposal Act* (Cap 412C) and all other enabling provisions of law.

248. The Applicant raises issues around the right to fair hearing under Article 47, the right to legitimate expectation under article 47 of *the constitution* inter Alia.

249. This court holds the view that this case meets the principles that create room for a merit review and I so hold.

The next issue is whether or not the Applicant is entitled to the orders sought.

250. Judicial Review jurisdiction was discussed in the case of Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR) where it was held that;

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

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to



be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

251. In the case of *Municipal Council of Mombasa-Versus-Umoja Consultants Ltd (2002) Eklr* where the Court of Appeal where the Court of Appeal had held as follows;

“Judicial Review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issue as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.....The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

252. The Applicant is aggrieved since, the Board went ahead to affirm the Evaluation Committee’s decision to make a conclusion on the basis of an undetermined case at the High Court, as well as to sit on a matter where the Committee was technically speaking the complainant and the judge at the same time.

253. The Applicant argued that the Board, through its decision, sanctioned the departure from the established legal doctrines of *nemo judex in causa sua* and *sub judice*, without any justification whatsoever.

254. In order to settle this issue, the court has the duty to determine whether or not the Applicant’s case that the Board, in arriving at its decision of 17th February 2026 acted against the legal doctrine of *nemo judex in causa sua* has merit.

255. In so doing, the court has considered the Applicant’s argument that the Evaluation Committee with membership drawn from the Procuring Entity purported to sit and determine a complaint by the very Procuring Entity.

256. The doctrine of *nemo judex in causa sua* is principally applicable to judicial and quasi-judicial proceedings. It does not apply to a statutory evaluation committee carrying out a technical due diligence exercise under express legislative authority. In PPARB No. 98 of 2025, the Board directed that the Evaluation Committee be reconvened to conduct a fresh due diligence.

257. The High Court in HCJRMISC E142 of 2025 upheld this order. The Applicant did not challenge the propriety of having the same committee conduct the fresh exercise.

258. Having accepted the remedy, the Applicant cannot at this hour challenge the composition of the same committee it embraced and subjected itself to just because it lost before it.

259. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] KESC 53 (KLR) affirmed:

“Issue estoppel prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or Judicial Review route.”

260. The Evaluation Committee that is in any event properly constituted under the Act, performed its statutory mandate, and accorded the Applicant a fair hearing.



261. The Board correctly found no breach of the nemo iudex principle. The Decision of 17th February, 2026 did not undermine the established legal doctrine of nemo iudex in causa sua.
262. The Supreme Court in *Popat & 7 others v Capital Markets Authority* [2020] KESC 3 (KLR) enunciated the doctrine of nemo iudex in causa sua as follows:
- “The natural justice nemo iudex in causa sua esse principle is one of the fundamental principles in literally all common law jurisdictions. It is an exemplification of Lord Hewart, CJ’s famous maxim in the case of *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, [1923] ALL ER Rep 233 that justice should not only be done but also be seen to be done.
- This principle is obviously blurred when one presides in the adjudication of one’s cause or in a process one has an interest in. As the US Supreme Court stated in the case of *Re Murchison*, 349 U.S. 133, 136 (1955), cited to us by counsel for the petitioners, no person should be allowed to be a judge in his own cause or in a cause he has an interest in its outcome. Interest here includes a situation where one desires or is keen on obtaining a given result. A prosecutor, for example, has an interest in the conviction of a suspect he hauls into court.
263. The Supreme Court, however, proceeded to affirm that the doctrine is subject to exceptions. One key exception is where a contested mandate is given in statute. The Supreme Court held:
- “An important exception to the nemo iudex in causa sua esse principle raised in this case is where the overlap of functions is a creature of statute and as long as the constitutionality of the statute is not in issue. Enunciating this exception in the Canadian case of *Re W. D. Latimer Co. and Attorney General for Ontario* (1973), 2 O.R. (2d) 391, affirmed sub nom. *Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129, Dubin, JA stated:
- Where by statute the tribunal is authorized to perform tripartite functions, disqualification [on the ground of bias] must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task.”
264. Section 46(1) of the *Public Procurement and Asset Disposal Act*, Cap 412C (hereinafter referred to as ‘the Act’) and Regulation 29 of the Public Procurement and Asset Disposal Regulations (hereinafter referred to as ‘the Regulations’) provide for *the constitution* of the evaluating committee as an adhoc committee comprising members of staff from the procuring entity.
265. Where the evaluation committee received adverse information and was mandated to grant a fair hearing to the Applicant by dint of Article 47 of *the Constitution*, and as held in the Decision of 27th October, 2025 and further upheld by the High Court, such mandate fell within the exceptions to the nemo iudex in causa sua doctrine for the following reasons.
266. The fresh due diligence exercise was done in execution of orders issued by the 1st Respondent in Application 98 of 2025.
267. Regulation 29 of the Public Procurement and Asset Disposal Regulations provide for *the constitution* of the evaluating committee as an adhoc committee comprising members of staff from the procuring entity.



268. Section 80 of the Act and Regulation 30 of the Regulations govern the conduct of members of the Evaluation Committee during tender evaluation.
269. The question of *nemo iudex in causa sua* in the context of an Evaluation Committee constituted under the framework of Section 46 of the Act falls within the exceptions to *nemo iudex in causa sua*.
270. The Evaluation Committee is a statutory body established by law. Section 46(1) of the [Public Procurement and Asset Disposal Act](#), No. 33 of 2015, Laws of Kenya (hereinafter "the Act") provides:
- “(1) An accounting officer shall ensure that a tender is evaluated by an evaluation committee appointed by the accounting officer on ad-hoc basis.”
271. The composition of the Evaluation Committee as comprising members of staff from the procuring entity is not a matter of choice but of statutory prescription. Regulation 29 of the Public Procurement and Asset Disposal Regulations, 2020 reinforces this position by providing for the appointment of evaluation committee members from within the procuring entity.
272. The Supreme Court of Kenya in *Popat & 7 others v Capital Markets Authority* [2020] KESC 3 (KLR) addressed this very principle. The Court held:
- “The mere overlap of roles by a statutory body carrying out investigative and adjudicative functions is not, without more, a ground for finding a breach of the *nemo iudex in causa sua* principle. What is required is that the body must demonstrate that it has complied with the procedural fairness requirements set out in Article 47 of [the Constitution](#) and the [Fair Administrative Action Act](#).”
273. In Order C of the Decision in Application 98 of 2025, 1st Respondent ordered that:
- “The 1st Respondent be and is hereby directed to reconvene the Evaluation Committee and undertake a fresh due diligence exercise on the Applicant in strict compliance with the provisions of the Tender Document, the Act, the Regulations 2020, [the Constitution](#), while taking into account the findings and observations of this Board in this decision within twenty-one (21) days from the date hereof.”
274. Among the observations and findings that the Evaluation Committee was bound to take into account was the observation in paragraph 142 of the Decision wherein the 1st Respondent stated:
- “the evaluation committee in exercising an administrative function, was under an obligation to accord the Applicant a fair hearing before making a decision that adversely affected its interests.”
275. The High Court in Judicial Review Application E142 of 2025 upheld Order C as issued by the 1st Respondent and further held in paragraphs 129 and 130 as follows:
- “.... The Board correctly appreciated that due diligence, though an evaluative function, constitutes administrative action subject to the imperatives of Article 47 of [the Constitution](#) and the [Fair Administrative Action Act](#).... I reiterate that where an evaluation Committee relies on adverse material to disqualify a bidder, fairness demands that the affected party be afforded an opportunity to respond.”



276. In Kenya Human Rights Commission vs Non-Governmental Organizations Co-ordination Board [2016] eKLR a case in which the powers of the same Respondent were in question, in which the learned Judge expressed himself inter alia as follows:

“As to what constitutes fair administrative action, the court in *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1*, stated thus:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...” [Emphasis supplied]

Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of *the Constitution*. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional Judicial Review grounds. The *Fair Administrative Action Act, 2015* must be viewed in that light.

277. Article 47 (1) of *the Constitution* states as follows;

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”

Article 47(2)

“If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

278. The twin rules of natural Justice that no man shall be a Judge in his own cause (*Nemo Judex in causa sua*) is a cardinal principle of law which is fundamental in our Justice system. It is at the heart of and at the core and the embodiment of the duty to act fairly.

279. The Applicant's argument that an evaluation committee whose membership is drawn from staff of a procuring entity cannot preside over a complaint raised against the same procuring entity is misplaced.

280. The Applicant has also mounted an issue that the Respondent breached the Subjudice rule:

281. Section 6 of the *Civil Procedure Act*, Cap 21, Laws of Kenya provides:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between



the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

282. The Evaluation Committee was not adjudicating a dispute between the Applicant and the Procuring Entity; it was performing a statutory function of verifying the Applicant’s qualifications and integrity as required by law.
283. The pendency of Milimani High Court Case No. HCCOMM E632 of 2025, in which the Applicant had challenged the termination of a previous contract, does not bar the Evaluation Committee from considering the Applicant’s past contract performance as part of the due diligence exercise.
284. The due diligence process under Section 83 of the Act is a distinct statutory process from the contractual dispute pending before the High Court.
285. The Evaluation Committee’s mandate to verify the qualifications and integrity of bidders cannot be held hostage by the Applicant’s strategic filing of litigation to shield itself from legitimate scrutiny.
286. The sub judice rule, as stipulated under Section 6 of the *Civil Procedure Act*, operates to stay proceedings in a court where a matter is pending in another court of competent jurisdiction.
287. It does not operate to prevent a statutory body from performing its mandated functions under an entirely different statutory framework.
288. The public procurement due diligence process and the contractual dispute before the High Court are not proceedings between the same parties on the same issues within the meaning of the sub judice doctrine.
289. The court does not find any illegality in the Board’s conduct in so far as the applicability of the doctrine of sub judice in respect of the Evaluation Committee’s considering the issue of an alleged breach of contract by the Applicant when the matter is still pending determination before a court of law in Milimani High Court Case No. HCCOMM E632 of 2025.
290. The sub judice rule applies to proceedings before courts, not to administrative processes.
291. In PPARB No. 98 of 2025, the Board expressly distinguished between the commercial dispute and the procurement dispute. At paragraph 122 of that decision, the Board stated:

“The matters in the High Court concern alleged breaches of contract. In contrast, the present Request for Review revolves around the propriety of the due diligence process undertaken by the Respondents in the subject tender.”
292. The High Court in HCJRMISC E142 of 2025 upheld this distinction and found no illegality, irrationality, or procedural impropriety in the Board’s decision-making process regarding the sub judice issue.
293. The Applicant did not challenge the Board’s finding on sub judice in PPARB No. 98 of 2025, nor did it raise the issue in the subsequent Judicial Review proceedings.
294. On the “fresh due diligence” issue: The Board’s finding that a fresh due diligence was conducted is amply supported by the evidence. As deposed in the Replying Affidavit of PHILEMON KIPROP at paragraphs 14-18, the Evaluation Committee:
 - a. Obtained documentation from the Procuring Entity through verifiable channels on 9th January 2026;



- b. By letter dated 9th January 2026, invited the Applicant to respond to adverse material;
 - c. Received the Applicant's response on 15th January 2026;
 - d. Considered the response and made a reasoned recommendation.
295. The Applicant's own letter dated 15th January 2026, responding to the Evaluation Committee's letter of 9th January 2026, is an acknowledgment that a fresh process was undertaken.
296. The Applicant cannot now claim that no fresh due diligence occurred when it actively participated in the process. Having accepted the benefit of the Board's decision directing a fresh due diligence, the Applicant cannot now seek to prevent the very exercise it successfully sought. The Applicant is seeking to blow hot and cold air at the same time.
297. On consideration of Tender Requirement No. 14: At paragraph 114 of its decision, the Board considered that due diligence was critical to verify the accuracy of information provided by bidders, including disclosures regarding similar services as required in Mandatory Requirement No. 14.
298. The Board did not re-evaluate the tender or base its decision on Requirement No. 14. It simply observed that due diligence necessarily involves verifying information provided by bidders.
299. The Board properly analysed the evidence, applied the correct legal principles, and arrived at a reasoned conclusion and the court finds no breach of the subjudice rule, no illegality, irregularity or any impropriety in the way the process was rolled out.
300. Article 47 of *the Constitution* guarantees fair administrative action. In *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR, the Court of Appeal held:
- “Article 47 of *the Constitution* enshrines the right to fair administrative action. It requires administrative action to be expeditious, efficient, lawful, reasonable and procedurally fair.”
301. The Applicant was afforded an opportunity to respond to adverse material (letter of 9th January 2026), An opportunity to be heard before the Board in PPARB No. 14 of 2026 and reasoned decision from the Board.

The Applicant also sought a relief of prohibition:

302. In the case of *Republic v Principal Kadhi, Mombasa & Another Ex-parte Alibhai Adamali Dar & 2 others* [2022] which provides that:
- “The Order of "Prohibition" issues where there are assumption of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi's Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction." (... ..) "Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself.”



303. Having failed to establish that it is entitled to the order of certiorari, it is this court's finding and I so hold that an order of prohibition will serve no useful purpose. It is declined.

Legitimate expectation;

304. According to De Smith, Woolf & Jowell, "Judicial Review of Administrative Action" 6th Edn. Sweet & Maxwell page 609:

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectation sought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

305. Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR paragraph 55; It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate "in the sense of an expectation which will be protected by law". This was the view adopted in Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] Eklr where it was held that:

"...legitimate expectation, however strong it may be, cannot prevail against express provisions of *the Constitution*. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends *the Constitution*, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise."

306. It is this court's finding and I so hold that the Board did not offend the Applicant's legitimate expectation nor violate the doctrines of nemo judex in causa sua and sub judice in its decision dated 17th February 2026.

Disposition;

307. In finally determining whether the Applicant has proven its case, I am guided by The Supreme Court in Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) KLR where it was held as follows:

"(49) Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

308. It is my finding and I so hold that the Applicant has not proven its case. It is this court's finding that the Applicant has failed to prove its case.

Order;

The Application is dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH APRIL, 2026



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J. CHIGITI (SC)
JUDGE

