

REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW NO. E071 OF 2026

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

THE ACCOUNTING OFFICER,

KENYA POWER & LIGHTING COMPANY PLC.....1ST INTERESTED PARTY

KENYA POWER & LIGHTING COMPANY PLC.....2ND INTERESTED PARTY

EX PARTE: ALMIRALL EAST AFRICA LIMITED

JUDGEMENT

1. These Judicial Review proceedings were initiated, by the *ex parte* applicant, under a Motion, dated 13th March 2026, for *certiorari*, *mandamus* and prohibition orders, directed at the respondent and the interested parties, to have a decision, made on 2nd March 2026, by the respondent, with relation to a tender, quashed; to compel the interested parties to annul certain documents in the subject tender, and to commence a fresh tendering process; and to prohibit the interested parties from proceeding with the tender sought to be annulled, on grounds and facts that are set out on the face of the Motion, and in the statutory statement, dated 13th March 2026, plus the affidavit verifying it.
2. The prayer for the *certiorari* order is directed at the respondent, for the purpose of quashing the decision of the said respondent, made on 2nd March 2026, in Application No. 19 of 2026, dismissing that application, which had challenged the tender closing and opening proceedings, on various grounds, and an order for the conduct of a fresh tender closing and opening process.
3. The prayer for a *mandamus* order is directed at the interested parties, and it seeks to compel them to annul Addendum No. 6, dated 28th January 2026, and the tender closing and opening proceedings conducted on 5th February 2026, and to commence a fresh tender opening and closing proceedings. The prayer for the prohibition

order is also directed at the interested parties, to prohibit them from proceeding with the impugned tender process.

4. In the statutory statement, which is really the foundational pleading in Judicial Review proceedings, the *ex parte* applicant has set out the background. The interested parties had invited tenders on or about 29th October 2025, for certain works, with a closing date of 20th November 2025. Litigation arose over the process, before the respondent, and at the High Court, by a party who is not party to these proceedings, but the challenge was dismissed and an appeal was proffered to the Court of Appeal. In the meantime, the interested parties issued Addendum No. 6, dated 28th January 2026, which was addressed to all the tenderers, and a new tender closing date, of 5th February 2026, was announced.
5. The *ex parte* applicant avers that he was locked out of the bid opening ceremony on 5th February 2026, and was denied an opportunity to submit its bid. He contends that that event was conducted in a manner that did not accord with the law, hence he challenged it with the respondent. Its challenge, before the respondent, was dismissed, on 2nd March 2026, on grounds that the tender closing and opening process was legal, and so was the addendum issued by the interested parties. The respondent also directed the interested parties to proceed with the tender process to completion.
6. It is the outcome from that decision that is challenged herein. The decision of the respondent is said to be an abdication of statutory duty, under section 78 of the Public Procurement and Asset Disposal Act, Cap 412C, Laws of Kenya, as it undermines the principles of fairness, transparency and integrity; it is said to be vitiated by multiple errors; it is said to violate the legitimate expectations of the *ex parte* applicant; and the order to let the interested parties proceed with the process would be injurious to the *ex parte* applicant. The application is grounded on breach of the principles in Article 47 of the Constitution, illegality and error of law, irrationality and unreasonableness, procedural unfairness, bad faith and abuse of process and legitimate expectations.
7. Attached to the verifying affidavit are the tender invitation, the tender document, the pleadings filed before the respondent, the

decision of the respondent in the earlier challenge to the tender process, the addendum dated 12th November 2025, the judgement in Milimani HCJR No. E406 of 2025, the addendum dated 28th January 2026, a letter appointing members of the tender opening committee, the pleadings and other filings in Application No. 19 of 2026 and the impugned decision in Application No. 19 of 2026.

8. The respondent has responded by filing a replying affidavit, through Philemon Kiprop, its secretary, sworn on 24th March 2026. He argues that the review proceedings were an appeal in disguise. He points out that the same tender process was unsuccessfully subjected to proceedings before the respondent in PPARB No. 107 of 2025, and Judicial Review proceedings in Milimani HCJR No. E406 of 2025 and Nairobi COACA No. E076 of 2026. He asserts that the decision of the respondent was in keeping with the law.
9. The interested parties have also reacted to the application, vide a replying affidavit of Esther Waithira Waitara, their supply chain officer. They assert that the tender process was carried out in strict adherence with the applicable law. The *ex parte* applicant is accused of bungling the process through needless litigation. It is stated that the bid was not amended, and explains that the addendum merely fixed a fresh date for closing and opening bids. It is averred that there was nothing that stopped the *ex parte* applicant from submitting its bid, by the bid opening date of 5th February 2026. The deponent has attached, to her affidavit, copies of the judgement in Milimani HCJR No. E406 of 2025, the judgement in Nairobi COACA No. E076 of 2026, the minutes of the tender opening event, the tender opening register, the bid security register, the tender securities from various bidders and tender bank guarantees from various bidders.
10. The matter was canvassed by way of written submissions, and I have seen and read written submissions by both sides.
11. In its written submissions, the *ex parte* applicant discusses the affidavits by the respondent and by the interested parties. It is submitted that the *ex parte* applicant was within its constitutional rights to initiate these proceedings, hence it was not abusing process, nor appealing through the backdoor. *Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others* [2016] eKLR is cited. It is also submitted that the decision of the Court of Appeal, in COACA No. E076 of 2026, did not cure the errors made by the

respondent. *Jon Florence Maritime Services Limited & another vs. Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) and *Republic vs. Public Procurement Administrative Review Board; Accounting Officer, Kenya Power & Lighting Company PLC & another (Interested Parties); Jamari Enterprises Limited (Ex parte)* [2026] KEHC 501 (KLR) are relied on.

12. It is submitted that the decision, of 2nd March 2026, did not adhere to Article 47 of the Constitution, and that section 7(2)(k) of the Fair Administrative Action Act, Cap. 7L, Laws of Kenya, empowers the court to review such decisions for irrationality or unreasonableness. *Republic vs. Public Procurement Administrative Review Board & 2 others ex parte Pelt Security Services Limited* [2018] eKLR, *Republic vs. National Hospital Insurance Fund Board of Management & another Ex parte Law Society of Kenya* [2019] KEHC 11051 (KLR), *Republic vs. Public Procurement Administrative Review Board & 2 others Ex parte Sanitam Services (EA) Limited* [2013] eKLR, among others, are cited.
13. On error of law and illegality, it is submitted that the respondent failed to exercise jurisdiction, under section 173 of the Public Procurement and Asset Disposal Act, by dismissing its application, on the basis that the tender opening complied with section 24 of the Public Procurement and Asset Disposal Act. *JHG Marine A/S Western Marine Services LD CNPN Northeast Refining & Chemical Engineering Co. Limited/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 others* [2015] eKLR; *Otumba (Ex parte applicant); Rono & another (interested parties)* [2025] KEHC 8957 (KLR) and *Republic vs. Public Procurement Administrative Review Board Ex parte Syner-Chemie Limited & 3 others* [2016] KEHC 1107 (KLR) are cited.
14. It is submitted that there were violations of sections 78, 175 and 227 of the Public Procurement and Asset Disposal Act. On procedural unfairness, it is submitted that the *ex parte* applicant was not afforded a fair hearing, for the respondent considered that it had neither placed a bid nor attended the tender opening process. *Republic vs. Judiciary & 2 others; Waaso Construction Limited (Ex parte)* [2025] KEHC 10847 (KLR) and *Republic vs. Kenya Revenue Authority; Proto Energy Limited (Ex parte)* [2022] KEHC 5 (KLR). On violation of its legitimate expectation, it is submitted that, in violation of that principle, the respondent had refused to adjudicate the claim

regarding the fundamental illegality of the tender closing and opening process, proceeded with the matter despite pendency of active court proceedings, and ordered the tender process to proceed, and thereby shattered its legitimate expectations.

15. On its part, the respondent submits that its decision was wholly in keeping with Article 47 of the Constitution and the Fair Administrative Action Act. It is argued that the application is an appeal disguised as Judicial Review proceedings. On the matter of the decision being illegal irrational or procedurally improper, because of being made during the pendency of Court of Appeal proceedings, it is submitted that there was no order made staying the tendering process, and the pendency of the appeal did not operate as an automatic stay, for section 175 of the Public Procurement and Asset Disposal Act, Order 42 rule 6(1) of the Civil Procedure Rules and Rule 5(2)(b) of the Court of Appeal Rules do not require so.
16. On the legality of Addendum No. 6, it is submitted that the same was issued pursuant to section 75 of the Public Procurement and Asset Disposal Act, essentially to extend the time for the deadline of receipt and closure of bids, as the earlier deadline had been caught in the earlier challenge to the tender. On the opening of the bids, it is argued that the respondent had meticulously examined the relevant law, being section 78 of the Public Procurement and Asset Disposal Act and Regulations 57 and 78 of the Public Procurement and Asset Disposal Regulations, and its findings were definitive and evidence-based. It was noted that the *ex parte* applicant was not a bidder, neither was it represented at the bid-opening event.
17. On the ambiguous notations, it is submitted that the *ex parte* applicant did not provide any evidence that the notations were used selectively, and did not demonstrate that it suffered from any irregularity, if at all there was one. It is submitted that the law does not allow a bystander to challenge a process simply because they disagreed with it, for there must be direct personal and substantial interest. On procedural fairness, it was argued that the *ex parte* applicant was given a fair chance to file pleadings and to be heard, and a decision was rendered based on its input.
18. The interested parties did not file any papers.

19. The remit of a court, exercising Judicial Review jurisdiction, has been discussed in a number of cases.
20. In *Municipal Council of Mombasa vs. Republic, Umoja Consultants Limited* [2002] eKLR, the court discussed what ought to be considered when judicial review orders are sought. It should be about the process leading up to the making of the impugned decision. That would naturally raise the issue of jurisdiction, to make the decision, as the first criteria. The next would be issues around natural justice, whether the parties affected had been given an opportunity to be heard prior to the decision-making. The issue of what was considered, and an assessment of whether what was considered was relevant. It would not be a review of the merits of the decision, but the process of decision-making. *Pastoli vs. Kabale Local Government Council & others* [2008] 2 EA 300 brought into the matrix consideration of issues around illegality, irrationality and procedural impropriety. These summarise jurisdiction, natural justice and fair administrative action.
21. Regarding prohibition, it was said, in *Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] KECA 58 (KLR), that it is directed at an inferior tribunal or body, forbidding it from acting or continuing to act in excess of jurisdiction or absence of it, or from departing from the rules of natural justice. It is not a merit review exercise, and the court does not seek to correct the decision or course or practice or procedure of the inferior tribunal or body. It would issue where there is assumption of unlawful jurisdiction or excess jurisdiction. The function of the order is to forbid encroachment into jurisdiction, and to prevent implementation of orders or decisions made outside jurisdiction.
22. Let me start with the easier part, and that is with respect to the prayers sought against the interested parties, for *mandamus* and prohibition.
23. In the first place, an interested party is a lesser or peripheral party in Judicial Review proceedings. The principal party is the respondent, who is the party that ought to respond to the application, for it would be the decision or act of the respondent that would be under challenge. Orders are sought against the principal party. An interested party is a party who is not central or principal to the

dispute, but rather one who is likely to be affected by the decision of the court.

24. In this case, the challenge is to the decision of the respondent, and not that of the interested parties. However, the decision of the court on the Judicial Review would affect them, for the tender, the subject of the proceedings, was invited by them, and it was in respect of their activities. That is why they were made interested parties rather than respondents. If the challenge, in these Judicial Review proceedings, were to be to their own decisions or acts, then they would have been made respondents. Once the *ex parte* applicant chose to make them interested parties, rather than respondents, it could not, thereafter, seek orders against them, as interested parties, as if they were respondents.
25. Secondly, the foundation of Judicial Review proceedings is the statutory statement. This is the pleading in Judicial Review, and that is why it has to be verified by an affidavit, which presents the evidential basis for the claim in the statement. The statement herein sets out the facts in paragraphs 7 to 20. The grounds for Judicial Review are set out in paragraphs 21 to 31 of the statement. These grounds only address the decision of the respondent, which was rendered on 2nd March 2026. Not a single one of them are on the decisions or acts of the interested parties, which sparked off the proceedings before the respondent. There would, therefore, be no basis, in the pleadings, for orders to be sought against the interested parties, for parties are bound by their pleadings.
26. Thirdly, the issues, the subject of the prayers against the interested parties, were placed before the respondent, and they were litigated at that stage, and a decision was made on them. The *ex parte* applicant has challenged that decision, by the respondent, on those same issues, in these proceedings, and it cannot frame prayers against the interested parties over matters that were decided by the respondent, and, therefore, these Judicial Review proceedings can only be limited to the issues that were decided upon by the respondent, and orders can only be addressed to the said decision.
27. Let me now advert to the prayer for orders against the respondent, for *certiorari*, to quash the decision of 2nd March 2026, which dismissed the *ex parte* applicant's request for review, concerning the tender the subject of the proceedings.

28. The case, by the *ex parte* applicant, before the respondent, was essentially around the tender closing and opening proceedings. The review sought was for the purpose of annulling those proceedings, and any resultant evaluation, recommendation and award arising thereafter, and to direct a fresh tender closing and opening process to be undertaken.
29. At the hearing of the review proceedings, before the respondent, the *ex parte* applicant raised issues around the tender opening proceedings, arguing that they were not-public, opaque, restricted and partisan. It was also argued that the mandatory particulars, including tender prices and status of bid security, were not announced. It was also submitted that a proper tender opening register was not prepared, completed, maintained and availed; which prevented auditability, undermined accountability and constituted procedural impropriety. It was argued that those lapses rendered the procurement process neither fair, transparent nor competitively neutral.
30. The other issue raised regarded the decision to proceed with the tender, while there was an appeal pending at the Court of Appeal, and specifically that Addendum No. 6, which enabled the tender closing and opening of bids, was issued during the period when aggrieved parties, in the High Court, had the 7-day window for filing a notice of appeal. The *lis pendens* doctrine was cited.
31. It should be of some note that the *ex parte* applicant did not actively participate in the tendering process, by way of placing a bid. It averred that it only downloaded the tender documents. Its name was not in the list of those who submitted bids, and whose bids were up for consideration. It had an interest in the tendering process, to the extent that it considered applying, but was not directly interested in the tender closing and opening proceedings, as it had submitted no bid. So, whatever happened at the tender closing and opening proceedings did not affect it in anyway. It has not demonstrated that it suffered any prejudice or loss from that process. It would have been of some interest, if it had applied, and a case could be made from that around legitimate expectation, and all. However, to the extent that the *ex parte* applicant was not a tenderer could raise, in a sense, *locus standi* issues, with respect to Judicial Review proceedings mounted on the basis of Order 53.

32. The *ex parte* applicant has pleaded that it was locked out of the bid opening ceremony on 5th February 2026, and was denied an opportunity to submit its bid. I have not come across any coherent articulation of how it was locked out, and denied an opportunity to submit its bid.
33. The bidding process opened on 29th October 2025, and was supposed to close on 20th November 2025. The *ex parte* applicant had the opportunity, between 29th October 2025 and 20th November 2025, to place its bid. The closure, scheduled for 20th November 2025, did not happen, because of the intervention through PPARB Application No. 107 of 2025 and Milimani HCJR No. E406 of 2025. When the proceedings, in Milimani HCJR No. E406 of 2025, terminated on 27th January 2026, the tender closing date was extended, by Addendum No. 6, to 5th February 2026. There was time for the *ex parte* applicant, between 20th November 2025 and 5th February 2026, to submit its bid. It has not provided any material to suggest that the interested parties did something to lock it out of the process, or to deny it opportunity to submit a bid.
34. As to the matter of what exactly transpired at the tender closing and opening ceremony, the *ex parte* applicant could not authoritatively speak to that, as it was not party to it. It never submitted a bid, as discussed above, and it never sent a representative. Its case could only be speculative.
35. On whether the process was illegal or irregular, to the extent of having been undertaken during pendency of appellate proceedings, at the Court of Appeal, with respect to an appeal arising from the decision of the High Court, in respect of the earlier challenge of the tender process by another party, it has not been demonstrated that the respondent was wrong, in holding that the interested parties were not restrained from carrying out the tender opening process, for there was no stay order, stopping the process, and the *lis pendens* and *sub judice* principles have not been established to have been of application, in the circumstances.
36. On the alleged gaps pointed out by the *ex parte* applicant, about registers, securities and what transpired at the tender opening ceremony, I note, from the impugned decision of the respondent, that the records of the interested parties, relating to that process, were

availed, and were perused, and its findings were based on those records. The tender opening minutes were considered. It revealed that 5 of the bidders were represented, but the *ex parte* applicant was not. Those bidders participated in the retrieval of the bid securities, which were clearly and properly labelled. It was also noted that the tender closed on 5th February 2026 at 10.00 AM and opened the same day, 10 minutes later, and 35 bidders were established to have had submitted bids successfully. The respondent had access to the records, and was satisfied by them, and was better placed to evaluate whether that process complied with the relevant law or not.

37. The *ex parte* applicant has not demonstrated that the decision by the respondent, of 2nd March 2026, was tainted by illegality and error of law, irrationality and unreasonableness, procedural unfairness, and bad faith and abuse of process, in view of what I have discussed above. I find and hold that the case by the *ex parte* applicant is very long on allegations, but extremely short on proof.

38. I am not persuaded, therefore, that the application, for the Judicial Review orders of *certiorari*, *mandamus* and prohibition, is substantiated or established, and I find that it lacks merit. It is hereby dismissed. The Motion herein, dated 13th March 2026, is disposed of in those terms. Orders accordingly.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT
MILIMANI, NAIROBI, THIS 17TH DAY OF APRIL 2026.**

**W MUSYOKA
JUDGE**

Mr. Abdirahman, Court Assistant.

Advocates

Mr. Kiprono, the Advocate for the *ex parte* applicant.

Ms. Wamuyu, instructed by the Attorney-General, for the respondent.

Mr. Maanzo, the Advocate for the 2nd respondent.