



**Benron Insurance Agency v Public Procurement Administrative Review Board & 2 others (Judicial Review E055 of 2026) [2026] KEHC 6211 (KLR) (Judicial Review) (7 May 2026) (Judgment)**

Neutral citation: [2026] KEHC 6211 (KLR)

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

**JUDICIAL REVIEW E055 OF 2026**

**TW OUYA, J**

**MAY 7, 2026**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 7, 9 AND 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT CAP 7L LAWS OF KENYA, AND THE FAIR ADMINISTRATIVE ACTIONS RULES LEGAL NOTICE NO. 165 OF 2024.**

**AND**

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

**AND**

**IN THE MATTER OF: ARTICLES 10 AND 227 (1) OF THE CONSTITUTION OF KENYA 2010, SECTIONS 60(1), 70, 175 OF THE PUBLIC PROCUREMENT ASSET DISPOSAL ACT NO.3 OF 2015.**

**AND**

**IN THE MATTER OF: TENDER NO. KP1/9A.2/PR- Q/001/ LNS/26-27 PREQUALIFICATION TENDER FOR PROVISION OF INSURANCE SERVICES (BROKERS & INSURANCE COMPANIES)**

**AND**

**IN THE MATTER OF: PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD APPLICATION NO. 28 OF 2026.**

**BETWEEN**

**BENRON INSURANCE AGENCY ..... APPLICANT**

**AND**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... 1<sup>ST</sup> RESPONDENT**



**JUDGMENT**

1. The background of the case is that the Applicant lost a bid challenge at the Public Procurement and Administration Review Board in Review Application No. 28 of 2026 on 17<sup>th</sup> March 2026 and has now applied to the High Court to stop the tender process before the new closing date of 31<sup>st</sup> March 2026. The dispute arises from a prequalification tender for insurance services (Brokers & Insurance Companies) for the 2026-2027 period, Tender No. KP1/9A.2/PR-Q/001/INS/26-27 advertised on 10<sup>th</sup> February 2026. The Applicant is challenging a specific scoring criterion in the tender document and a subsequent decision by the Public Procurement Administrative Review Board that upheld that criterion.
2. The Application before the Court was instituted under Certificate of Urgency vide Originating Motion dated 27<sup>th</sup> March 2026 and pursuant to Section 7, 9, 11 and 13 of the Fair Administrative Actions Act Cap 7L, Rules 6, 11, 13 and 14 of the Fair Administrative Actions Rules 2024, Section 3, 60 (1) and 175 of the Public Procurement & Asset Disposal Act, Articles 10, 23 (3) (f) 47 and 227 (1) of *the Constitution* of Kenya 2010 and all other enabling provisions.
3. The Applicant seeks the following ORDERS:
  - i. SPENT
  - ii. SPENT
  - iii. That in the alternative, this Honourable Court be and is hereby pleased to issue an interim Order suspending all procurement proceedings in respect of Tender No. KP7/9A.2/PR-Q/001/INS/26-27 Prequalification Tender for Provision of Insurance Services (Brokers & Insurance Companies) pending the hearing and determination of the instant Originating Motion.
  - iv. That this Honourable Court be and is hereby pleased to issue an Order of CERTIORARI for purposes of being quashed and/or set aside the findings and determination of the 1<sup>st</sup> Respondent at ISSUE B (iv) of the decision dated 17<sup>th</sup> March 2026, at paragraphs 97 to 99 with respect to the tender requirement No. 1 under PART A (3) of the Tender Document.
  - v. That this Honourable Court be and is hereby pleased to issue an Order directing the 1<sup>st</sup> Respondent Board to rehear and re-evaluate ISSUE B (iv) of the decision dated 17<sup>th</sup> March 2026, at paragraphs 97 to 99 with respect to the tender requirement No. 1 under PART A (3) of the Tender Document.
  - vi. That costs of this Motion be provided for.
  - vii. Any such other INCIDENTAL or ALTERNATIVE RELIEFS as this Honorable Court may deem fit, fair and just.
4. The Application is premised on the grounds on the face of it and is further supported by the affidavit of SILVIA ALICE NJERI MBURU sworn on 27<sup>th</sup> March 2026.



5. The deponent avers that the Applicant Benron Insurance Agency is a duly licensed insurance agent/broker. She deposes that the Applicant filed a Request for Review Application No. 28 of 2026; Benron Insurance Agency vs The Accounting Officer, Kenya Power & Lighting Company PLC & Another dated 24<sup>th</sup> February 2026 on the basis that Tender No. KPI/9A.2/PRQ/OO /INS/26-27 Prequalification Tender for Provision of Insurance Services (Brokers & Insurance Companies) as advertised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 10<sup>th</sup> February 2026 is restrictive and prohibits open competition and participation of eligible candidate contract to procurement law and best practices.
6. The 1<sup>st</sup> Respondent then reviewed and analyzed the Request for Review and delivered its decision on 17<sup>th</sup> March 2026 by directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to amend specific clauses of its tender document as per the certain parameters set out in its orders.
7. In the present instance, Applicant is now challenging the 1<sup>st</sup> Respondent's decision rendered on 17<sup>th</sup> March 2026 to uphold Section III Part A (3) 1 of the tender document. The deponent raises three main legal arguments against this decision. She avers that the said section entailed retrospective punishment and the clause allegedly penalizes bidders for past "misdeeds" that have nothing to do with the current tender. She avers that in procurement law, evaluation criteria must be strictly relevant to the specific tender.
8. She asserts that the clause restricts open competition and relies on PPRA Circular No. 03/2023, which presumably advises procuring entities against using restrictive or anti-competitive tender requirements.
9. She contends that the decision is vague and lacks specificity as to the risk notes the Procuring Entity is referring to. She states that the said section is ambiguous to the extent that it purports to deny much needed marks to insurance brokers on account of vague past actions that are not subject of the present tender.
10. It is deposed that in procurement, criteria must be clear, objective and predictable so bidders know exactly how they will be scored. That further, KPLC issued an addendum on 24<sup>th</sup> March 2026, setting a new closing date for the tender just one week later on 31<sup>st</sup> March 2026. The Applicant argues that if the court doesn't act immediately, the flawed tender will close, prejudicing eligible bidders.
11. In response to the Application, 1<sup>st</sup> Respondent filed a Replying Affidavit dated 29<sup>th</sup> April 2026 and sworn by Philemon Kiprop, the Secretary of the Public Procurement Administrative Review Board. The 1<sup>st</sup> Respondent urges the Court to dismiss Benron Insurance Agency the ex-parte Applicant's judicial review application on two main fronts: Firstly, that the Application is an "appeal" disguised as a "judicial review" application and the court lacks the jurisdiction to hear and determine the same. That even if the court were to be said to have jurisdiction, the 1<sup>st</sup> Respondent's decision was legally sound, rational, and procedurally fair, meaning the Applicant has not met the threshold required for judicial review of illegality, irrationality, or procedural impropriety.
12. It is averred that on 24<sup>th</sup> February 2026, Benron Insurance Agency field a Request for Review Application No. 28 of 2006 before the 1<sup>st</sup> Respondent and considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act in rendering its decision. The Applicant outlines a summary of the findings and determination of the PPARB regarding the specific tender clauses.
13. It is contended that the 1<sup>st</sup> Respondent's Decision dated 17<sup>th</sup> March 2026 in Request for Review No. 28 of 2026 was sound, reasonable, lawful, procedurally fair and rational and that according to the



procurement laws, decisions of the PPARB are appealed to the High Court under Section 175 of the *Public Procurement and Asset Disposal Act* - PPADA.

14. The Respondent asserts that Judicial Review, does not look at the merits of a case but only at the process and whether it was legal, rational, and fair and contends that its Decision dated 17<sup>th</sup> March 2026 in Request for Review No. 28 of 2026 took into account all the issues raised. The deponent affirmatively states that the decision was sound, reasonable, and lawful and that the 1<sup>st</sup> Respondent acted within the confines of *the Constitution*, the Act, Regulations 2020, the Fair Administrative Actions Act and the rule of law in its findings. That notably, the PPARB did not just side with the Applicant but also made a balanced finding.
15. The Respondent argues that the Applicant is unhappy with the outcome of the review and is using Judicial Review to bypass the strict timelines and rules of a normal appeal and denies further that the 1<sup>st</sup> Respondent overreached its mandate or arbitrarily revised the tender document. That instead, it only directed the Procuring Entity to amend specific clauses to align with the law.
16. It is asserted that the ex parte Applicant has failed to demonstrate any elements of illegality, error of law, irrationality, unreasonableness, procedural unfairness, ultra vires, bad faith and abuse of process, or violation of legitimate process in the manner in which the Respondent considered and interrogated the evidence, documents, pleadings, and information before it in arriving at its Decision dated 17<sup>th</sup> March 2026 in Request for Review No. 28 of 2026.
17. It is deposed that even if the Court should find that the Application is merited and allow the prayers, the 1<sup>st</sup> Respondent's fallback argument regarding costs is reliant on Section 175(7) of the PPADA, which states that if a PPARB decision is set aside, no costs shall be awarded to any party.
18. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a Replying Affidavit sworn by Roselyn Mose, the Manager Insurance Services dated 13<sup>th</sup> April 2026.
19. The Respondents deny all allegations in the Application which emanated from Tender No. KP1/9A.2/PR-Q/001/INS/26-27 for insurance services. It is averred that the Applicant sought a review due to alleged inconsistencies with constitutional provisions and procurement laws during the tendering process. The deponent stated that the 3<sup>rd</sup> Respondent, through its website and My GOV Newspaper dated 10<sup>th</sup> February 2026 advertised Tender No. KP1/9A.2/PR-Q/001/INS/26-27 for prequalification for Provision of Insurance Services (Brokers & Insurance Companies).
20. It is deposed that on 17<sup>th</sup> March 2026, the 1<sup>st</sup> Respondent required amendments to certain tender clauses to ensure compliance, which the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents executed as outlined in their addendum dated 24<sup>th</sup> March 2026. The Respondents affirm the 1<sup>st</sup> Respondent's decision as valid, asserting that their risk documentation is adequate for safeguarding their interests.
21. Parties took directions to canvass the Application by way of written submissions. The ex-parte Applicant's submissions are dated 16<sup>th</sup> April 2026 which identify three issues for determination as follows: Whether Section III Part A (3) violates the legal principles on fair, equitable, transparent, and competitive procurement; Whether the 1<sup>st</sup> Respondent's decision in respect of Section III Part A (3) of the said tender documents was illegal, irrational, and procedurally unfair; and Whether the Applicant is entitled to the judicial review orders sought.
22. In their submissions, the Applicant references Section III Part A (3) (1) of the tender document, which states, "Brokers who have exposed the procuring entity in the past by failing to scrutinize and countercheck policy documents and clauses to confirm alignment with KPLC's risk notes in the tender documents will score zero (0) under this criterion", and objects the same on the grounds that it seeks to



- punish bidders for past, unrelated alleged misdeeds. It is also submitted that the Procuring Entity relies on risk notes that are neither defined nor provided in the tender document, making it impossible for bidders to understand the standard they are being held to. The case of Minister of Social Development and Others v Phoenix Cash & Carry Pmb CC (189/06, 244/06) [2007] ZASCA 26; [2007] 3 All SA 115 (SCA); 2007 (9) BCLR 982 (SCA) (27 March 2007) is cited in support.
23. Counsel for the Applicant submits that terms like "exposed the procuring entity" are subjective and lack objective, quantifiable benchmarks required by law. That in the same vein, the tender requirement and the Board's decision violate several constitutional and statutory provisions such as Article 227(1) mandating fair, equitable, and transparent procurement) and Article 47 right to fair administrative action.
  24. Counsel for the Applicant asserts on the second issue that the tender requirement contravenes Sections 60 (1), 70 (3), and 80 (3) of the *Public Procurement and Asset Disposal Act*, which require tender criteria to be objective, quantifiable, and prepared in a manner that promotes fair competition alongside the case of Microhouse Technologies Ltd v Public Procurement Administrative Review Board & 2 others [2016] KEHC 2273 (KLR) which affirmed the Board's duty to ensure processes align with principles of fairness and competitiveness.
  25. Counsel for the Applicant contends that the Board's decision to uphold an arbitrary and vague evaluation criterion was irrational and procedurally unfair because it is not objective or quantifiable contrary to the provisions of Section 80 (3) of the Act. The case of Republic v Public Procurement Administrative Review Board Ex parte Hoggers Limited [2015] KEHC 4968 (KLR), is cited where this Honourable Court stated that upholding an evaluation based on arbitrary or irrational criteria is itself an irrational decision. It is urged that the orders sought be granted.
  26. The 1<sup>st</sup> Respondent filed submissions dated 30<sup>th</sup> April 2026. Counsel raised two issues for determination being: whether the Applicants are entitled to the orders sought under Judicial Review and whether the Applicants are entitled to an award of costs.
  27. Counsel submitted on the scope of Judicial Review as set forth by Lord Diplock in the persuasive authority of Council for Civil Service Unions v Minister for Civil Service [1985] AC 374 at 401 D and stated that the public procurement is governed by Section 175 of the PPADA which allows the High Court to examine the legality of the decision of the Public Procurement Administrative Review Board (PPARB). It was submitted that the scope of this review is generally limited to the process rather than the merits of a procurement decision, focusing on whether decisions were made lawfully, rationally, and in a procedurally fair manner, not whether the decision itself was "correct" and that in this case, the Review Board exercised its statutory mandate under Section 67 (3) (e) and rendered a reasoned decision in accordance with the tender document and the enabling Act.
  28. Relying on Republic v National Transport & Safety Authority & 10 Others Exparte James Maina Mugo [2015] eKLR the Respondent asserts the court lacks jurisdiction to re-evaluate evidence or reassess factual findings made by a specialized body and asserts that the Application is a disguised appeal.
  29. Citing the Court of Appeal decision in Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others [2012] KECA 104 (KLR), counsel submits that the Board is a specialized tribunal whose decisions should not be lightly interfered with by the court. Counsel for the 1<sup>st</sup> Respondent references Associated Provincial Picture Houses Ltd. v Wednesbury Corporation (1948) UK, the Wednesbury case to emphasize that judicial review focuses on legality and reasonableness rather than a re-evaluation of the merits of the case.



30. It is further submitted that even if the Applicant's case were to succeed, the Applicant is not entitled to legal costs because of the statutory prohibition under Section 175(7) of the [Public Procurement and Asset Disposal Act](#) (2015) which explicitly forbids the High Court from imposing costs on either party if a Board's decision is quashed. The cases of Republic v Public Procurement Administrative Review Board & 3 others; Astonea Construction Limited (Exparte Applicant) (Miscellaneous Civil Application E143 of 2023) [2024] KEHC 14754 (KLR) (Judicial Review) (31 October 2024) (Ruling) and Nairobi HCCJR No. E063 of 2021 - Republic v Public Procurement Administrative Review Board Ex parte Sports, Arts and Social Development Fund are cited in support.
31. It is also submitted that the word "shall" in the Act creates a mandatory obligation that the court must follow, leaving no room for discretion to award costs as held in Republic versus Kenyatta University Exparte Ochieng Ora Domnick and 7 others [2018] eKLR.
32. The 1<sup>st</sup> Respondent requests the Court to decline the prayers sought by the Applicant due to a lack of jurisdiction and to dismiss the request for costs as it is legally barred by statute.
33. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent filed submissions dated 19<sup>th</sup> April 2026. Counsel outlined the background of the case and isolated two issues for determination as follows: whether there's a proper Judicial Review Application before this Honourable Court; and whether the Applicant has demonstrated grounds for judicial review.
34. Counsel submitted that Judicial Review proceedings are governed by Sections 8 and 9 of the [Law Reform Act](#) (Cap 26) and the Civil Procedure Rules, 2010. That under Order 53 rule 1 of the Civil Procedure Rules, 2010 an Applicant must seek leave of the court by way of Chamber Summons supported by a Statement of Facts and a Verifying Affidavit.
35. Counsel submitted that Application is fatally defective and should be struck out based on strict procedural requirements for Judicial Review asserting that the requirement for leave is not a procedural technicality but a substantive safeguard as held by the Court of Appeal in Commissioner General, Kenya Revenue Authority through Republic v Silvano Onema Owaki t/a Marenga Filling Station (2001) KECA 34 (KLR). The cases of Speaker of the National Assembly v Karume (1992) KECA 42 (KLR), Republic v County Council of Kwale & another; Kondo & 57 others (Ex parte) (1998) KEHC 2 (KLR).
36. The Respondents assert the Applicant failed to seek or obtain this mandatory leave or file foundational documents comprising the Chamber Summons, Statement of Facts, and Verifying Affidavit. The case of Republic v Land Disputes Tribunal Court Central Division & 2 others Ex-parte Kaka Nzoka (2006) eKLR was cited where the court emphasized that Judicial Review Proceedings are anchored on the documents filed at the leave stage.
37. Counsel submits that by filing a Notice of Motion directly, the Applicant improperly treated the matter as an originating process rather than following the mandatory two-stage framework required by law. Counsel cited the case of Charpenel Enterprises Limited v County Government of Kwale (2025) KEHC (19696) (KLR) where the Court held that failure to adhere to the procedural requirements under Order 53 renders the proceedings fatally defective.
38. Counsel for the Respondents contend that the Applicant is incorrectly seeking an appeal rather than a review. The Court of Appeal decision in Municipal Council of Mombasa v Republic & Umoja Consultants Ltd (2002) KECA 148 is cited in support of this argument. It is further submitted that judicial review is strictly limited to the decision-making process that is, the legality, jurisdiction, and natural justice rather than the correctness of the decision. That in this case, the Applicant is asking the Court to re-evaluate evidence and override the Board's decision, which falls under appellate



jurisdiction, not judicial review and that the Board acted objectively, heard all parties and stayed within its legal boundaries.

39. It is submitted on the issue of costs that under Section 27 (1) of the *Civil Procedure Act*, costs follow the event, meaning the successful party should be awarded their legal expenses. Counsel cites the case of *Party of Independent Candidate of Kenya v. Mutula Kilonzo & 2 others*, and argues that the award of costs is a matter of discretion of the Judge to be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at. Counsel urged the Court to strike out the application and order the Applicant to pay the costs of the proceedings.
40. From the pleadings before the Court and the rival submissions of the parties, the main issue for determination is whether the Application is merited and whether the prayers sought ought to be granted. The court will consider the following issues:
- i. Whether the Application is an appeal disguised as a review thereby not warranting a judicial review jurisdiction
  - ii. Whether this court should conduct a merit review of the Review Board's decision or a process review.
  - iii. Costs.
41. The facts of this case are not in dispute. The Applicant's case is that on 24<sup>th</sup> February 2026, they challenged various tender clauses before the 1<sup>st</sup> Respondent (the Board), alleging they were inconsistent with *the Constitution* and the Public Procurement and Assets Disposal Act (PPADA). The Board then rendered its decision on 17<sup>th</sup> March 2026 directing the Procuring Entity to amend specific mandatory and technical requirements. to align with the law.
42. Subsequently, the Respondents issued an addendum on 24<sup>th</sup> March 2026, to comply with the Board's orders. The Applicant now specifically challenges paragraphs 97 to 99 of the Board's decision and is asking this Court to determine whether the PPARB's Order was a lawful exercise of review powers or an unconstitutional usurpation of the Procuring Entity's mandate to design its own tender documents. They allege that the PPARB exceeded its jurisdiction by acting as a tender committee and rewriting the tender documents instead of just reviewing them.
43. As a preliminary issue I will consider whether the Court has jurisdiction over this matter as a Judicial Review forum. Counsel for the Respondent submitted that the present suit was an appeal disguised as a judicial review. They contend that judicial review is strictly limited to the decision-making process that is, the legality, jurisdiction, and natural justice rather than the correctness of the decision and assert that the Board acted objectively, heard all parties and stayed within its legal boundaries.
44. I have considered the scope of judicial authorities. It is trite that Judicial Review is a public law remedy whose parameters entail a consideration of the legality, rationality and procedural fairness of administrative action. Judicial review does not govern a consideration of the error of fact or law made by an administrative authority or a specialized tribunal such as the 1<sup>st</sup> Respondent herein.
45. The Supreme Court in the case of *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), outlined the scope of Judicial review thus:- .
78. However, the entrenchment of judicial review under *the Constitution* of Kenya 2010 elevated it to a substantive and justiciable right under *the Constitution*. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined



in *the Constitution*. Thus, article 47 provides that 'every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.....

81. The entrenchment of judicial review in *the Constitution* has led to the emergence of divergent views on the scope of judicial review. The first group postulates that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself while the second group opine that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes.....
85. It is clear from the above decisions that when a party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se.....
87. With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under *the Constitution* if it limits itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the Jirongo and Praxedes Saisi cases speaks succinctly to this issue. That is also why, the question below is pertinent to the present appeal.”
46. The above decision posits that the Court must make a distinction between a matter that is meant for judicial review and one that is meant for appeal. Further, the Supreme Court expanded the scope of judicial review to entail a merit based review where the court has been approached under the provisions of *the constitution*, i.e. where the Applicant claims constitutional violations. The above distinction displays in the pleadings of the parties herein and in particular, the facts of the case and the issues in contention.
47. In the present case, the ex-parte Applicant has approached the court through an Originating Motion. The Applicant also pleads that the 1<sup>st</sup> Respondent’s decision is vague and lacks specificity as to the risk notes the Procuring Entity is referring to and that the ambiguity of the impugned sections of the tender document purports to deny much needed marks to insurance brokers on account of vague past actions that are not subject of the present tender.
48. It is undisputed that the Board allowed the Applicant’s review and gave specific directions. However, the Applicant still appears to be dissatisfied by this determination. The Applicant contends that the 1<sup>st</sup> Respondent PPARB exceeded its jurisdiction by acting as a tender committee and rewriting the tender documents instead of just reviewing them. In effect, it appears to this court that on the one hand, the Applicant sought a review of the tender document specifications before the 1<sup>st</sup> Respondent on the premise that some of the clauses were likely to prejudice brokers while on the other hand, once the 1<sup>st</sup> Respondent made a determination of their Review on its merit and rendered a favorable decision in support of their contentions and thereby directed that the tender documents be amended by the 2<sup>nd</sup>



and 3<sup>rd</sup> Respondents to comply with their Orders, the Applicant now asserts that the 1<sup>st</sup> Respondent usurped its powers and rewrote the tender documents.

49. From the above, it is clear to the Court that the grounds upon which the Applicant premises the prayers they are seeking require a merit-based consideration. They assert that there were sections of the tender document that introduced a de facto punishment and exclusion mechanism within its technical scoring, on the basis of “risk notes” that have not been disclosed to bidders. That this is adversely punitive and bars participation by eligible firms who cannot know, from the tender document itself, what historical allegation will be raised against them and on what evidence thereby stifling competition and falling short of the standard of public procurement.
50. What the Applicants are asking this Court to do is to engage in a merit-based review of the issues that emanated from the tender process and the review board’s determination. This position cannot be allowed by the Judicial Review court. In arriving at the above finding, I am guided by the case of Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others [2012] KECA 104 (KLR) where the Court warned against whimsically interfering with the decisions of specialized statutory tribunals established to deal with all complaints of breach of duty by a procuring entity.
51. The 1<sup>st</sup> Respondent in this case is conferred with wide powers to include, giving directions to the accounting officer of a procuring entity with respect to anything to be done in the procurement proceedings. Consequently, the administrative review envisaged under the Act is indeed an appeal from the 1<sup>st</sup> Respondent’s nature, it follows that its decisions in matters within its jurisdiction should not be lightly interfered with.
52. Courts have often warned against a judicial review court delving into the realm of appeals. Lord Hailsham LC in Chief Constable of North Wales Police v Evans (1982) 3 All ER at pg 141 explained the remedy of judicial review as follows:

“It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual Judges for that of the authority constituted by law to decide the matters in question. The court will not, however, on a judicial review application act as a “Court of Appeal” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body’s jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power.”

53. Based on the above decision, it is my view that this Application does not meet the threshold of judicial review because the Applicant is asking this Court to consider a merit-based review which cannot be countenanced by the court unless the Applicant approached the court under the provisions of *the constitution*. Secondly, the Application is evidently an appeal disguised as a judicial review which again this Court cannot consider. See the case of Republic vs. Public Procurement Administrative Review Board, Nairobi Judicial Review Application No. 605 of 2017 on the distinction between appeal and review.
54. Further to the above, the Court has considered the legality and competence of the Application. Since the Applicant purported to seek a review of the legality, propriety and reasonableness of the 1<sup>st</sup>



Respondent's decision, it ought to have approached the court through the provisions of Order 53 of the Civil Procedure Code. These provisions are succinct on the issue of leave and the appropriate documents to be filed by the Applicant in moving the court. It is a legal and mandatory requirement that a party first seeks leave of the court before moving the court through a substantive motion. (See the case of Felix Kiprono Mategei v Attorney General, Petition No. 337 of 2018, and Gwaro v State Law (Judicial Review E011 of 2024) [2024] KEHC 8468 (KLR) on the importance of leave of court.)

55. Although fashioned as an originating motion, it is clear that the Applicant's prayers and pleadings should have taken the direction of Order 53 if indeed the Applicant was challenging the Board's decision to uphold an arbitrary and vague evaluation criterion on grounds of irrationality and procedural unfairness. These grounds do not raise any constitutional questions other than the general requirement for fair administrative action under Article 47 of *the Constitution* that is common to all Judicial Review matters. This means that the correct process was that leave ought to have first been obtained under order 53 Rule 1 and not the manner of an originating motion as per the norm for merit-based judicial review. This was not the case in this present suit and it makes the Application incompetent before the Court.
56. While exercising caution and restraint in delving into the legality of the board's decision, this court does not lose sight to the fact that the finding of the Review Board which was in favor of the Applicant and essentially directed for amendment and removal of the offending aspects of the tender documents; to wit "exposed the procuring entity" which has since been implemented.
57. With regard to costs the court makes a finding in the spirit of section 175 that each party to bear their costs.
58. In the final analysis, I find that the Application lacks merit and is hereby dismissed in the following terms:
  - i. Application is incompetently before the court for want of leave of the court as a preliminary requirement under Order 53.
  - ii. The Application is an appeal that is disguised as a judicial review.
  - iii. That the subject matter for review before the 1<sup>st</sup> Respondent was addressed and the offending aspects of the tender documents expunged by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents
  - iv. That the Applicant has not demonstrated any of the traditional, statutory or constitutional grounds warranting the grant of judicial review orders sought.
  - v. That the Review Board's decision was consistent with Articles 10, 47, and 227.
  - vi. That the Applicant has not demonstrated any of the traditional, statutory or constitutional grounds warranting the grant of judicial review orders sought.
  - vii. Each party shall bear their own costs

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7<sup>TH</sup> DAY OF MAY 2026.**

**T.W. OUYA**

**JUDGE**

In the Presence of:

Mosagwe for the Applicant

Ms Gathenya for the 1<sup>st</sup> Respondent



No Appearance for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Kelvin: Court Assistant

