Okoth & Kiplagat Advocates v Public Procurement Administrative Review Board & 3 others (Judicial Review Application E078 of 2026) [2026] KEHC 6171 (KLR) (Judicial Review) (4 May 2026) (Judgment)

Neutral citation: [2026] KEHC 6171 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E078 OF 2026

TW OUYA, J

MAY 4, 2026

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTIONS 7, 9, 10 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

UNDER RULES 9, 11, 13, 15 AND 21 OF THE FAIR ADMINISTRATIVE ACTION RULES, 2024 (LEGAL NOTICE 165 OF 2024)

-AND-

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

-AND-

IN THE MATTER OF: ARTICLES 10, 22, 23, 47, 50 AND 227 OF THE CONSTITUTION OF KENYA, 2010; SECTIONS 3, 28, 44, 60, 70 (3), 75 (1), 79, 80, 86, 87, 167 AND 173 AND 175 OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT NO. 33 OF 2015;

AND THE PUBLIC PROCUREMENT AND ASSET DISPOSAL REGULATIONS 2020

-AND-

IN THE MATTER OF: PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD APPLICATION NO. 24 OF 2026 FILED ON 19TH FEBRUARY 2026, OKOTH & KIPLAGAT ADVOCATES AND THE ACCOUNTING OFFICER, THE NATIONAL TREASURY AND G & A ADVOCATES LLP

BETWEEN

OKOTH & KIPLAGAT ADVOCATES .... EX PARTE APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD .... 1ST RESPONDENT

THA ACCOUNTING OFFICER, THE NATIONAL TREASURY .... 2ND RESPONDENT

THE NATIONAL TREASURY .... 3RD RESPONDENT

AND

G&A ADVOCATES LLP .... INTERESTED PARTY

JUDGMENT

Background

1. The Judicial Review Application before the Court challenges a decision by the 1st Respondent, the Public Procurement Administrative Review Board (PPARB) dated 9th March 2026 in Public Procurement Administrative Review Board Application No. 24 of 2026 which upheld the award of a government legal tender to G & A Advocates LLP, the Interested Party herein.

2. The facts are that the 3rd Respondent, The National Treasury on behalf of the Cabinet Secretary to the National Treasury of Kenya issued a tender No. TNT/SPP/RT/010/2025-2026 for Procurement of Legal Services of Local Counsel on 8th January 2026, with a closing date of 16th January 2026 to represent the Attorney General in an international arbitration matter Jamhuri Holdings Ltd v The Attorney General of the Republic of Kenya. The Applicant and the Interested Party G&A Advocates LLP submitted bids. The Procuring Entity evaluated bids in three stages and awarded the contract to G & A Advocates LLP. The Applicant's bid was found responsive but was not the lowest evaluated. Consequently, the Applicant lost the bid to the Interested Party and were notified of this through an email dated 5th February 2026 containing the Notification of Intention to Award letter (erroneously dated 4th January 2026 instead of 4th February 2026) Reference No. TNT/SPP/RT/010/2025 – 2026 (hereinafter, "the Notification Letter or Regret Letter").

3. Following the unsuccessful tender process, the Applicant appealed to the Review Board though a letter dated 6th February 2026, and were invited for a debrief through a response letter dated 9th February 2026 for a meeting on 10th February 2026 where their appeal was dismissed. Their dissatisfaction with the reasons advanced by the Procuring Entity on why their bid was unsuccessful precipitated into these proceedings. The Applicant, a competing law firm of the Interested Party, argues that the Board's decision should be quashed because it is illegal, irrational, and based on a flawed interpretation of the tender documents. An interim order was granted by this Court, differently constituted by Chigiti J to stay the impugned decision pending determination of the Application.

The Application

4. The Originating Motion before the Court is dated 19th March 2026 and is instituted pursuant to the provisions of Articles 10, 22, 23 (3) (f) 47, 48, 50 (1) and 227 of *the Constitution* of Kenya 2010, Section 175 (1) of the *Public Procurement and Asset Disposal Act* Cap 412C of the Laws of Kenya, Sections 7, 9, 10 and 11 of the *Fair Administrative Action Act* Cap 7L of the Laws of Kenya, Rules 9, 11, 13 and 21 of the Fair Administrative Action Rules, 2024, and all enabling provisions of the law.

5. The Applicant seeks the following reliefs:

i. Spent

ii. That this Honourable Court be pleased to issue an order of Certiorari, to remove into the High Court and quash and/or set aside the Decision of the Public Procurement Administrative Review Board (the 1st Respondent) dated 9th March 2026 in Public Procurement Administrative Review Board Application No. 24 of 2026, in respect of Tender No. TNT/SPP/RT/010/2025-2026 for Procurement of Legal Services of Local Counsel in Respect to the Matter of an Arbitration Under the LCIA Arbitration Rules, 2020 Between Jamhuri Holdings Limited v The Attorney General of the Republic of Kenya, on Behalf of The Cabinet Secretary to The National Treasury of Kenya, and to remit the matter for reconsideration by the 1st Respondent and issuance of appropriate and effective relief(s) on merit, taking into consideration the Judgment of this Honourable Court.

iii. That this Honorable Court be pleased to issue an order of Prohibition, directed at the 2nd and 3rd Respondents, prohibiting them from implementing the Decision of the 1st Respondent dated 9th March 2026 in Public Procurement Administrative Review Board Application No. 24 of 2026, in respect of Tender No. TNT/SPP/RT/010/2025-2026 for Procurement of Legal Services of Local Counsel in Respect to the Matter of an Arbitration Under the LCIA Arbitration Rules, 2020 Between Jamhuri Holdings Limited v The Attorney General of The Republic of Kenya, on Behalf of The Cabinet Secretary to The National Treasury of Kenya.

iv. That this Honorable Court be pleased to issue an order of Certiorari, to remove into the High Court and quash and/or set aside any Contract in respect of respect of Tender No. TNT/SPP/RT/010/2025-2026 for Procurement of Legal Services of Local Counsel in Respect to the Matter of an Arbitration Under the LCIA Arbitration Rules, 2020 Between Jamhuri Holdings Limited v The Attorney General of The Republic of Kenya, on Behalf of The Cabinet Secretary to The National Treasury of Kenya, that may have been illegally signed between the 2nd and 3rd Respondent and the Interested Party during the 14 days standstill period following the decision of the 1st Respondent dated 9th March 2026.

v. Spent

vi. That the costs of these proceedings be provided for.

vii. Such other, further, incidental and/or alternative relief(s) as this Honourable Court may deem just and expedient.

6. The Application is premised on the grounds on the face of it and is further supported by the Affidavit of Dr. Kenneth Kiplagat, a partner at Applicant sworn on even date. The Applicant has enlisted about 30 substantive grounds in support of the Application which can be summarized as hereunder.

7. The Applicant's case is that the core dispute is centred on firm experience against individual experience, where they argue that the Interested Party would not have emerged successful if the evaluation especially at the technical stage was conducted in an objective and quantifiable manner as required under Section 80 of the *Public Procurement and Asset Disposal Act*.

8. It is averred that the 1st Respondent unlawfully and irregularly interpreted the provisions of the Tender Document and specifically Technical Criterion 1 (b), whose proper meaning must be considered alongside other relevant provisions of the Technical Requirements & Evaluation Criteria under the Tender Document. That the Review Board allowed the Interested Party to score maximum points on the first criterion being "Specific Experience of the Firm related to the assignment" by claiming the past experience of one of its partners Mr. Ken Melly who is said to have gained experience while working

at a completely different law firm, Iseme Kamau & Maema Advocates. That the said criterion required the firm's experience not that of its individual partners.

9. It is asserted that the Applicant has directly and successfully handled International Commercial and Investment Treaty Arbitrations and has vast knowledge of the active players in that area of practice. The Applicant strongly opposes the 1st Respondent's decision on the basis that it was illegal and irregular as it amounted to rewriting the tender where they imposed their own interpretation of the clause 1b of the tender document.

10. It is argued that the said decision also violated Procurement Laws, in that, the Board acted ultra vires by effectively rewriting the tender document. It is deposed that under the Public Procurement Act, evaluation must be strictly based on the criteria as written.

11. Further, the deponent asserts that the tender document explicitly separated 'Specific Experience of the Firm' under Criterion 1 from 'Qualifications and competence of key staff' under Criterion C, which required CVs and certificates of the firm's employees. That by allowing individual partner history to count toward firm experience, the Board illegally blurred these distinct categories, rendering Criterion C superfluous. It is contended that the corporate identity requirement was ignored since the Interested Party is a Limited Liability Partnership with a separate legal identity from its partners. That in this regard, the Board ignored this legal fact by giving the Interested Party credit for work done by a different corporate entity.

12. It is also deposed that the decision was marred with irrationality and internal contradiction because the Board's logic defies common sense and is internally inconsistent. It is contended that the Board justified its decision by stating that a law firm is merely a 'vehicle' and that an advocate's personal experience moves with them when they change firms.

13. That on the same breath, there was a requirement under Criterion 1(a) for the firm to have 20 years of experience. They contend that Board correctly denied the Interested Party points here because the firm's registration documents CR13 proved it had only existed for 19 years. However, under the said Criterion 1(b), the Board suddenly flipped its logic, treating the firm as a 'vehicle' to absorb a partner's older experience. It is argued that the Board considered the Interested Party's lawyers individual and cumulative experience garnered over their years of practice in different firms, under Criterion 1 (b) and that if it truly believed a firm is just a 'vehicle' for its lawyers' experience, it should have awarded the Interested Party points for Criterion 1 (a) as well. It is contended that the fact of selectively picking and choosing when to apply this logic makes the decision irrational and biased.

14. It is deposed generally that the impugned Decision is irrational within the meaning of Section 7 (2) (i) of the *Fair Administrative Action Act*, because the reasoning adopted by the 1st Respondent lacked any rational connection to the express provisions of the Tender Document and the applicable statutory framework; that it was unreasonable within the meaning of Section 7 (2) (k) of the *Fair Administrative Action Act*, in that the findings made therein are internally contradictory and devoid of any plausible or intelligible justification and that it also constitutes an outright breach of Article 227 of *the Constitution* since, by allowing a deviation from the set evaluation criteria and addition to the evaluation criteria expressly stated in the tender document, the Review Board acted illegally and irregularly and in violation of the principles of fairness, transparency and competitiveness espoused in *the Constitution*.

15. In response to the Application, the 2nd and 3rd Respondents filed a Replying Affidavit opposing the Application sworn by Dr. Chris Kiptoo, the Principal Secretary for the National Treasury dated 9th

March 2026. It is noted however that although the physical copy in the file is indicated as sworn on 9th March 2026, the Application is dated 19th March 2026.

16. The Respondents state that the Applicant's Originating Motion is misconceived, devoid of merit, and unsustainable in law. They assert that the Applicant challenges the 1st Respondent's (Review Board) decision based on a fundamental misapprehension and misinterpretation of the ruling and outline the legal and procedural basis for the procurement of external legal counsel for an arbitration involving Jamhuri Holdings Limited v The Attorney General stating that they employed the Specially Permitted Procurement Procedure (SPP) and Restricted Tendering citing Section 114A(2)(c) of the PPAD Act because the services were for specialized requirements governed by harmonized international standards under London Court of International Arbitration (LCIA) Rules.

17. He deposes that this process was justified because Regulation 107 entailed a consideration of public interest and national security, given the grave financial exposure that was at stake while Section 102 (1) (a) restricted tendering due to the complex and specialized nature of the services. He deposed that only two firms were invited: M/s G & A Advocates LLP, the Interested Party and M/s Okoth & Kiplagat Advocates, the Applicant and that both bidders were found responsive as they exceeded the 70% minimum pass mark and passed the technical stage with G & A Advocates LLP scoring 98% while Okoth & Kiplagat Advocates scored 76%. That further, G & A Advocates LLP was the lowest evaluated bidder at Kshs. 358,000,000, compared to the Applicant's bid of Kshs. 380,000,000, thereby justifying the awarding of the tender to G & A Advocates LLP on 2nd February 2026, in accordance with the tender document which required awarding the contract to the lowest evaluated tenderer.

18. It is averred that the core of the Applicant's challenge was the evaluation of 'Firm Experience' under the technical criteria where the Applicant argued that G & A Advocates should not have been awarded full marks for experience. They contended that the experience relied upon handling the Cortec Mining Arbitration was acquired by Mr. Ken Melly while he was employed at a different law firm - Iseme Kamau & Maema Advocates – and in finding them compliant, the Applicant claimed the Board violated Clause 39.2 of the Tender Document prohibiting reliance on other firms' experience.

19. It is contended that the Board reviewed the evidence and found that an advocate's experience is personal to the individual and does not vanish when they change firms, that when Mr. Ken Melly moved to G & A Advocates, his professional experience moved with him. That also since Mr. Ken Melly is currently a partner at G & A Advocates, the firm possesses the requisite experience by virtue of employing him.

20. The 2nd & 3rd Respondents' position is that they fully support the Board's interpretation in this regard and assert that awarding the full 20 marks under Clause 1(b) to the Interested Party was lawful and proper, as Mr. Melly is indeed a partner of the firm. The Respondents maintain that the Public Procurement Administrative Review Board (PPARB) duly considered all pleadings, written submissions, and confidential documents and acted within the confines of *the Constitution*, the PPAD Act, and the *Fair Administrative Action Act*.

21. It is averred that the Applicant has failed to demonstrate any illegality, irrationality, procedural impropriety, or unfairness in the Board's decision and that following the Board's dismissal of the Applicant's Request for Review on 9th March 2026, the Accounting Officer proceeded to conclude the tender and the contract was legally cleared by the legal unit and executed by both parties on 17th March 2026.

22. The Interested Party also filed a Replying Affidavit dated 26th March 2026 sworn by Eric Gumbo the Interested Party's Managing Partner, who vehemently opposed the Application on the grounds inter alia that the Applicant has not mounted any procedural challenge to the manner in which

the impugned decision was arrived at. That the Applicant's challenge of the impugned decision is premised on three main contentions being, the alleged illegality where they claim that there was a disregard of Article 227(2) of *the Constitution* and various sections of the *Public Procurement and Asset Disposal Act* (PPADA); misinterpretation, where they argue that the 1st Respondent - the Review Board, misinterpreted 'Criterion I(b)' of the Technical Evaluation Criteria regarding the evaluation of experience; and thirdly irrationality by asserting that the decision dated 9th March, 2026, was illogical, unreasonable and biased.

23. It is deposed that the Application should be dismissed because it is a disguised appeal and amounts to an abuse of the court process. The Applicant has mounted a collateral attack on the Review Board's decision, improperly clothed as a judicial review yet they have raised issues of substance over form and are inviting the Court to re-evaluate technical merits, an exercise outside the scope of judicial review which is limited only to the legality of the process. It is contended that the Application relies on the Supreme Court decision in Dande & 3 Others v Inspector General & Others [2023] eKLR, yet the said decision prohibits courts from re-evaluating the merits of a decision during judicial review proceedings.

24. Another ground of opposition is that the Application is moot and has been overtaken by events. The Interested Party contends that the relief sought is otiose because of three reasons. Firstly, the procurement process is already concluded. The deponent asserts that the contract was executed following the Review Board's decision on 9th March 2026 where the Accounting Officer executed an Engagement Letter on 17th March 2026. Secondly, representation has already commenced where the Interested Party and its King's Counsel, Michael Sullivan, have already assumed representation of Kenya in the arbitral proceedings where they participated in a hearing on 18th March 2026, resulting in a Procedural Order on 25th March 2026. Thirdly, there is no subsisting decision to be stayed since the contract is signed and work has begun. The acts the Applicant seeks to stop have already occurred.

25. It is deposed that there are restrictions on changing counsel under Article 18.3 of the London Court of International Arbitration (LCIA) Rules, after proceedings commence without the Tribunal's approval. That further, disrupting the current representation would likely cause procedural gaps and prejudice the State in the ongoing arbitration.

26. The Interested Party defends the merits of the tender evaluation, specifically regarding Criterion I(b) on firm's experience and mounts a substantive defence arguing that the award was lawful and rational. It is deposed that the Review Board correctly interpreted that a law firm's experience is derived from the collective expertise of its individual professionals and they had evidence of experience such as the fact that their partner, Ken Melly, was recorded as counsel representing the State in Cortec Mining Kenya Limited v. Republic of Kenya (ICSID Award) 4th October 2006 while the Applicant on their part failed to prove direct responsibility in the World Duty Free Company Limited v. Republic of Kenya (ICSID Award, 4 October 2006) since their firm's name Okoth Kiplagat was merely noted as present in a footnote, not as acting counsel.

27. It is averred that the Interested Party was the lowest evaluated bidder, offering a cost saving of Kshs. 30,000,000 thereby upholding the constitutional principle of prudent and efficient use of public resources. That as such, the decision of the 1st Respondent was procedurally sound with the Evaluation Committee properly interpreting and applying the tender criteria and providing justification for the award.

28. It is further deposed that the arbitration involves potential liabilities in the tens of billions so that staying the representation would leave Kenya unrepresented in high-stakes proceedings. It is also argued that the State would lose fees already paid for work done and incur further costs in retendering.

Additionally, the State faces both the risk of an adverse arbitral award and financial loss from disrupted legal services.

29. It is also argued that the Applicant seeks a stay of the Review Board's decision against their appeal, that the said decision was a dismissal and therefore a negative order which as matter of settled law, could not be stayed. The Interested Party prays that the Application be dismissed with costs, arguing that it is an abuse of court process, statute-barred by the fact that the contract is already active, and is legally unsustainable as it attempts to appeal a merit-based decision disguised as a judicial review.

30. In rebuttal, the Applicant filed a further Affidavit dated 8th April 2026 deposed by Dr. Kenneth Kiplagat in which he asserts that their challenge is fundamentally grounded in administrative law, not an appeal on the merits of the tender. He affirms that the issues being raised concern the legality, rationality, and procedural propriety of the Review Board's decision-making process.

31. The Applicant argues that the Court has a duty to scrutinize whether the Board's interpretation of the Tender Document was lawful, rational, and consistent with *the Constitution* at Articles 10, 47, and 227 and the *Public Procurement and Asset Disposal Act* (PPADA). They add further that the core dispute is in the interpretation of Criterion 1(b) and argue that the Review Board and the Interested Party committed a fundamental error of law by conflating 'Firm Experience' with 'Individual Advocate Experience'. It is asserted that Criterion 1(b) expressly required the Firm to demonstrate that it had directly handled qualifying arbitrations and added that the Board made extraneous considerations in unlawfully allowing the Interested Party to rely on the experience of a partner Mr. Ken Melly which was acquired while he was at a different law firm.

32. The Applicant argues that this interpretation renders Technical Criteria C which specifically evaluates individual staff qualifications redundant and that the Tender Document deliberately distinguishes between the experience of the firm - Criteria 1(a) & 1(b) - and the experience of individual staff Criteria C.

33. It is deposed that the Board's approach violates Section 80 (2) and (3) of the PPADA, which mandates that evaluations be objective, quantifiable, and based strictly on the criteria set out in the Tender Document. That their interpretation effectively rewrites the Tender Document.

34. The Applicant vehemently opposes the claim that the matter is moot because the contract was executed on 17th March, 2026. It is argued that the Procuring Entity acted in blatant contravention of the mandatory standstill period under Section 175 of the PPADA by executing the contract before the statutory 14 days' period had lapsed. That further to this, a contract executed pursuant to an unlawful procurement process and in breach of the mandatory standstill period is illegal, null and void from the outset.

35. The Applicant asserts that parties cannot defeat judicial review by rushing to implement decisions. The Court retains jurisdiction to issue orders of Certiorari to quash the decision and the illegal contract, and Prohibition to restrain further implementation. The Applicant also cites a specific incident during the Review Board hearing as evidence of bias and a breach of natural justice where he alleged that towards the close of the proceedings, the Chairperson asked the Interested Party's counsel about the status/progress of the underlying arbitration an issue that was neither pleaded nor formed part of the matters for determination before the Board, and the Applicant was not invited to address it. The Applicant argues this indicates the Board prioritized 'urgency' over justice and tacitly encouraged the illegal execution of the contract during the standstill period.

36. The Applicant dismisses the Interested Party's reliance on being the 'lowest evaluated bidder' and argues that price is only considered after strict compliance with mandatory technical criteria. It

is asserted that an unlawfully evaluated bid cannot be validated simply because it is cheap. That accordingly, the procurement framework prohibits sacrificing competence and technical suitability for price. On the same breath, the Applicant argues that true public interest lies in upholding the rule of law and the integrity of the procurement process, not in sanctioning impunity and illegal contract signing.

37. The Applicant highlights that the 1st Respondent's, the Review Board's own affidavit supports their case because it admits that it relied on experience acquired by an advocate while at a different firm and attributed it to the Interested Party. That the said admission confirms that the evaluation was based on extraneous considerations and 'third-party experience' which violates Section 80 (2) of the PPADA and Clause 39.2 of the Tender Document prohibiting reliance on other firms' experience.

38. The Applicant maintains that the impugned decision is ultra vires, irrational, and procedurally improper. They urge the Court to intervene decisively to quash the decision and the consequent illegal contract, arguing that allowing the status quo would encourage public bodies to violate the mandatory standstill period with impunity.

39. In a rejoinder, the Interested Party filed a Supplementary Affidavit again sworn by Eric Gumbo and dated 14th April 2026 in response to the Applicant's further affidavit of 8th April 2026 in which the Interested Party attacks the validity of the Applicant's Further Affidavit sworn on 8th April 2026 on the basis that it is procedurally flawed because it improperly introduces new facts and allegations that were not contained in the Originating Motion or the Supporting Affidavit. That this violates the settled principles governing further affidavits, which generally prohibit the introduction of new matters at that stage.

40. The Interested Party claims they will suffer prejudice because they have not had sufficient time or opportunity to respond to these new allegations or prepare for trial on these unexpected issues. The Interested Party specifically identifies and rebuts two major new issues raised by the Applicant one being the allegation of bias regarding the Review Board Chairperson and the allegation of illegal contract execution during the standstill Period.

41. On the first issue it is deposed that the Applicant alleged that the Review Board Chairperson improperly asked the Interested Party's Counsel about the status of the arbitration proceedings, without inviting the Applicant to respond, thereby showing bias which allegation, they have dismissed as legally untenable and factually wrong. It is contended that the Applicant was present during the proceedings and failed to object or raise the issue of bias at the time. It is also alleged that the question was posed at the tail end of the proceedings to all counsel present, not just the Interested Party, to inform the Board regarding timelines and urgency. That this was merely a procedural housekeeping matter, not a substantive issue for determination and since the Applicant's counsel was at liberty to address the issue but chose not to, they cannot now fault the Board for their own silence.

42. On the second allegation, it is deposed that the Applicant alleged that the execution of the contract during the 14-day period following the Review Board's decision was unlawful under Section 175(1) of the *Public Procurement and Asset Disposal Act* (PPADA) but the Interested Party argues that Section 175(1) does not prohibit a procuring entity from implementing a tender after the Review Board has rendered its decision.

43. It is contended that the Act expressly suspends proceedings upon the filing of a Request for Review under Section 167, but it does not contain an express Prohibition against implementation after the Board has delivered its Ruling. That consequently, the Respondents acted lawfully by implementing the Board's orders, which directed the conclusion of the tender process. That further, the dismissal of

the Request for Review is a negative order and does not operate as a stay or trigger a standstill period that prevents implementation.

44. The Interested Party urges that these new factual statements at paragraphs 17-23 of the Applicant's affidavit should be expunged from the court record to prevent a miscarriage of justice and unfair prejudice.

45. Finally, the Applicant filed a further affidavit dated 1st April 2026 in response to the 2nd and 3rd Respondents' Replying Affidavit of Dr. Chris Kiptoo. The Applicant dismisses the 2nd and 3rd Respondents' justification for using the Specially Permitted Procurement Procedure (SPP) based on urgency and argues that the reasons for using a specific procurement method being urgency and national security, do not cure the fundamental defects in the evaluation process.

46. It is deposed in rebuttal that the central issue remains the illegality, irregularity, and irrationality of the 1st Respondent's interpretation and application of Criterion 1(b). The Applicant reiterates that the entire procurement process is irreparably flawed because it was founded on an unlawful interpretation of the Tender Document and maintains that once the technical evaluation was conducted based on an unlawful criterion, the subsequent financial evaluation and the final award are also tainted and cannot stand.

47. The Applicant argues that the 1st Respondent effectively introduced a new standard which was that individual advocate experience equates to firm experience which was not contained in the Tender Document. That this amounts to an alteration of the tender document by the Board, an act that is ultra vires and unlawful.

48. The Applicant continues to contest the conflation of 'Firm Experience' with 'Individual Experience' and points out that the Respondents' own affidavit confirms that the experience relied upon by the Interested Party was acquired while their key partner was employed at a different law firm (Iseme Kamau & Maema Advocates). It is argued that this experience could not legally be attributed to the Interested Party under criterion 1(b) on firm experience. The Applicant contends that this experience should only have been evaluated under Technical Criteria C which assesses individual staff qualifications, not under the firm-level criteria.

49. It is asserted that if evaluated correctly, the Interested Party would not have obtained the minimum pass mark under Criterion 1(b), as they lacked the requisite institutional experience distinct from their partners' past employment.

50. The Applicant emphasizes that the Tender Document expressly prohibited bidders from relying on the experience of other firms. By allowing the Interested Party to claim experience acquired at a previous firm, the Board violated this express Prohibition and failed to give effect to the mandatory requirements of the Tender Document and instead relied on extraneous considerations.

51. The Applicant maintains that the Board's decision in dismissing their Request for Review was founded on a clear misinterpretation of the Tender Document and violations of *the Constitution*, the Public Procurement Act, and the Fair Administrative Actions Act. That consequently, the Board's decision cannot be relied upon as a lawful conclusion to the challenge or issues raised. Additionally, that the subsequent execution of the contract referenced in paragraphs 33 and 34 of the Respondents' affidavit is similarly tainted.

52. The parties took directions to canvass the Application by written submissions. The same are now on record. Parties also highlighted their submissions orally in court.

53. Counsel for the Applicant submitted that the Respondents contend the application is an appeal disguised as judicial review. However, Supreme Court jurisprudence establishes that judicial review covers legality, procedural propriety, and rationality, and to certain extents may consider the merits because Judicial Review is a constitutional right enforceable under Article 47 and it now involves some measure of merit analysis, especially to assess proportionality, rationality, and relevant considerations.

54. Counsel submits that the Application challenges the lawfulness and reasonableness of the Review Board's decision without seeking to substitute its own decision and argues that the High Court may conduct a limited substantive review within supervisory jurisdiction, consistent with Supreme Court guidance.

55. Counsel cited a myriad of cases in support of these arguments inter alia, 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), Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Power & Lighting Company Plc & another (Interested Parties); Jamari Enterprises Limited (Ex parte Applicant) (Judicial Review Application E406 of 2025) [2026] KEHC 501 (KLR) (Judicial Review) (27 January 2026) (Judgment), the Court of Appeal decision in the case of Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] KLR, the Supreme Court in Saisi & 7 others v Director of Public Prosecutions & 2 others [2023] KESC 6 (KLR), Republic v Public Procurement Administrative Review Board & another; Celmel Insurance Agency (Exparte) (Application E111 of 2024) [2024] KEHC 13707 (KLR) (Judicial Review) (18 October 2024) (Judgment) and Republic v Public Procurement Administrative Review Board; County Government of Laikipia & 2 others (Interested Parties) (Judicial Review Application 74 of 2018) [2018] KEHC 2068 (KLR) (Judicial Review) (3 December 2018) (Judgment).

56. It is submitted that Section 175(1) of the Public Procurement and Disposal Act provide a 14-day period for Judicial Review after the Board's decision and that the contract was unlawfully executed within the statutory standstill period, undermining the Applicant's right to challenge the decision. Case law confirms execution of contracts before lapse of this period is illegal and renders contracts void. The case of Republic v Public Procurement Administrative Review Board & 2 others Suzan General Trading JLT [2014] KEHC 1800 (KLR), ("the Suzan General Trading Case") is cited in support.

57. It is submitted that the Attorney General's office is deeply implicated as the ultimate beneficiary of the procurement and thus, its participation in the illegal contract breaches constitutional obligations to uphold the rule of law. Counsel argues that courts have warned public officers against sanctioning or benefiting from unlawfulness, with risks of personal liability as held in Republic v Public Procurement Administrative Review Board & Kenya Medical Supplies Authority (KEMSA) Ex Parte Emcure Pharmaceuticals Ltd, JR No. 118 of 2019, (Emcure v KEMSA Case).

58. It is also argued that judicial review's purpose includes ensuring legality of administrative decisions. Key precedents define illegality as misunderstanding or misapplication of law, taking into account irrelevant or failing to consider relevant factors, or acting beyond powers. The Review Board is limited to reviewing compliance with evaluation criteria as per the Tender Document and cannot introduce or amend criteria. Counsel submits that in this case, the 1st Respondent, the Review Board misinterpreted Criterion 1(b) by attributing individual advocate experience to the firm, contrary to the express tender requirements, thus acting ultra vires, and violated Sections 60, 70, 75, 79, 80 and 173 of the Act. This introduction of extraneous criteria compromised fairness and equitability of the procurement process.

59. That further, judicial precedent shows the Review Board must affirm the primacy of the tender document and cannot introduce new evaluation criteria. That post facto and subjective interpretations undermining transparency and accountability violate administrative law principles as held in Republic

v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR. That consequently, the decision was irrational and unreasonable because it lacked a rational basis connecting evidence with conclusions, was internally inconsistent, and relied on extraneous considerations like viewing a law firm as merely a 'vehicle' for individual experience. The decision fell outside a range of lawful and defensible outcomes.

60. It is submitted that the impugned decision breached Articles 10 (national values), 47 (right to fair administrative action), and 227 (procurement principles) of *the Constitution*, where Counsel cited the case of Republic v. Public Procurement Administrative Review Board Nairobi City & Sewerage Company and Another (2019) eKLR in explaining the import of Article 227. It is submitted that it also violated standards of transparency, accountability, and procedural fairness under the *Fair Administrative Action Act* and relevant procurement laws. That the Board's action undermined the constitutional procurement framework by permitting a non-compliant bid to be awarded, violating the guarantees of equality and integrity in public procurement. Counsel for the Applicant cites Republic v Public Procurement Review Board; Leeds Equipment & systems Limited (Interested Party); Kenya Veterinary Vaccines Production Institute [2018] eKLR ("the Leeds Equipment Case") and maintains that the violation defeats the purpose of procurement laws and principles. Counsel also cites Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Kenya Power and Lighting Company Limited [2019] KEHC 9870 (KLR) where the test of irrationality was laid out and Judicial Review Miscellaneous Application No. E039 of 2022 Procurement Administrative Review Board Madison General Insurance Kenya Ltd Accounting Officer KEBS & Another where unreasonableness was explained.

61. Counsel further cites the case of Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] eKLR where the threshold for granting JR reliefs was explored by the court and submitted that the Court should quash the Review Board's decision and prohibit enforcement of the contract to uphold legality, fairness, transparency, to protect the rule of law and restore integrity and accountability in procurement processes. It is asserted that the impugned decision was ultra vires, illegal, irrational, and unreasonable, failing to adhere to the governing legal framework and tender criteria. It contravened constitutional and statutory provisions and should be quashed.

62. Counsel for the Interested Party outlines four issues for the Court to determine being: whether the Review Board's decision was irregular, irrational, or illegal: Whether the Court can entertain reconsideration of merits beyond judicial review limits, whether grounds exist to exercise judicial review discretion and whether the Applicant is entitled to the reliefs sought.

63. Counsel submits that the Applicant has failed to meet the burden to show illegality, irrationality, or procedural impropriety required for judicial review to succeed, citing the Supreme Court of Kenya in Petition No. 28 of 2014, Peninah Nadako Kiliswa v Independent Electoral & Boundaries Commission (IEBC) & 2 others [2015] eKLR and the Ugandan High Court case of Pastoli v. Kabale District Local Government Council and Others [2008] 2 EA 300-301 where these reliefs were defined. That the Application is effectively an appeal disguised as judicial review improperly seeking re-evaluation of factual merit, contrary to legal limits. The Board's decision to attribute Mr. Ken Melly's experience to the Interested Party aligns with law and lawful procurement practice and the Applicant's inconsistent reliance on standards for its own credentials highlights bad faith and misapplication of legal principles about law firm expertise being embodied by its advocates.

64. Counsel asserts on behalf of the Interested Party that the Board's interpretation of the technical criteria, recognizing that a law firm's capability is demonstrated through its individual advocates, is rational, supported by evidence, and coherent with both legal and commercial sensibilities and the Applicant's

contrary interpretation would lead to impractical, artificial results. The Interested Party confirms the Board's decision is neither illogical nor irrational by established Wednesbury unreasonableness standards. Counsel makes reference to the case of Republic v Cabinet Secretary, Ministry of Health & another; Wanyutu & 6 others (Interested Parties); Mummah (Ex parte Applicant) [2023] KEHC 3990 (KLR), in which Chigiti J. cited the English case of Council of Civil Service Unions v Minister for the Civil Service (1985) A.C. 374, 410.

65. On the second issue, Counsel for the Interested Party submits the Court cannot substitute merit-based assessment for judicial review which is limited to legality, rationality, and procedural propriety. The Applicant's attempt to convert the review into a merits appeal or constitutional petition is untenable without proper particularization of constitutional violations as held in the case of Anarita Karimi Njeru v Republic [1979] KEHC 30 (KLR). The Court of Appeal case of OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others [2017] KECA 386 (KLR), and Supreme Court precedent in Edwin Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC are also cited affirming the non-appellate nature of judicial review and rejection of merit re-evaluation without specific pleading of rights violations. It is submitted that the Applicant failed to demonstrate any procedural irregularities justifying intervention, thus dismissal is urged.

66. On the third issue, Counsel for the Interested Party contends that judicial review discretion should not be exercised as the Application is a disguised appeal, the tender process has been fully concluded with the execution of the engagement letter, and the Interested Party is actively representing the Republic of Kenya in arbitration proceedings including securing favourable interlocutory rulings. That the doctrine of mootness applies in this case as explained by the Supreme Court in the Dande case (supra) because no live controversy exists and continuation of the stay orders would disrupt legal representation causing prejudice to the public interest and financial risk to the State. Counsel also submits that there is no need for the Court to waste precious judicial time over proceedings that serve no practical significance as held in Institute for Social Accountability & another v National Assembly & 5 others [2022] KESC 39 (KLR). The right to fair hearing and choice of legal representation under *the Constitution* is emphasized with Counsel asserting that the Interested Party was also the lowest evaluated bidder in supporting the rationality and public interest of the decision.

67. On the fourth issue, it is submitted that since the Applicant has not demonstrated any illegality, irrationality, or procedural impropriety and the Application serves no practical purpose as the tender process and engagement are underway, the Interested Party urges dismissal of the judicial review Application with costs. Counsel asserts that the Court's role requires laying down tools when no grounds for intervention are shown as held in the case of Republic v National Water Conservation & Pipeline Corporation & 11 others [2015] KEHC 7318 (KLR).

68. I have considered the pleadings before the court, the erudite submissions of the parties against the law. The main issue for my determination is whether the Application is merited.

69. As this is a public procurement matter, the focal point is the law under Article 227 of *the Constitution* which provides thus: -

    227. Procurement of public goods and services

    (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

70. Further, the legal framework governing public procurement processes is encapsulated in the *Public Procurement and Asset Disposal Act*, Act No. 33 of 2015 and The Public Procurement and Disposal

Regulations, 2006. The crux of this case involves the 1st Respondent's decision to award the Tender No. TNT/SPP/RT/010/2025-2026 for Procurement of Legal Services of Local Counsel to the Interested Party as against the Applicant herein. Such a process entails administrative action particularly where there is an appeal by the Review Board/1st Respondent.

71. The cause of action that arises from the 1st Respondent's impugned decision, which falls for determination through Judicial review under Article 47 of *the Constitution* which provides:

47. Fair administrative action

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(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.

72. Alongside Article 47 is the *Fair Administrative Action Act*, No. 4 of 2015 which is instrumental in evaluating administrative processes. Section 7 provides as follows:

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to–

(a) A court in accordance with section 8; or

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

73. On the same breath, I am also minded of the scope of Judicial Review as espoused in by the Supreme Court in SGS Kenya Limited v Energy Regulatory Commission & 2 others SC Petition No 2 of 2019 [2020] eKLR as follows:

> " [40] The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic 'Administrative Law', is clear enough, and it is unnecessary to belabour the point.' We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner."

74. Similarly, the Court of Appeal in the case of Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] KLR set out the traditional scope of judicial review as follows:

> " Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the *Fair Administrative Action Act* provides proportionality as a ground for statutory judicial review....The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision."

75. Referencing also the writings in 'Judicial Review' (1997) by Michael Supperstone and James Goudie at pages 3.2 – 3.3, 3.20, Judicial Review was explained as follows:

> "..judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.....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....where any person or body supervisions a power conferred by statute which affects the rights or legitimate expectations of citizens and is of a kind which the law requires to be supervision in accordance with the rules of natural justice, the court has jurisdiction to review the supervision of that power....for a decision to be susceptible to judicial review the decision maker must be empowered by public law to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers and that the decision must affect the private rights of some person or deprive another of some benefit which he had been allowed to enjoy in the future or which he has a legitimate expectation of acquiring or enjoying."

76. The Court of Appeal in Kenya Revenue Authority & 2 others v Darasa Investments Limited also held that the scope of judicial review is concerned with the decision-making process rather than the merit consideration of the decision in issue. Additionally, judicial review does not avail to parties' court room processes to thrash out disputed matters.

77. Without belabouring much on the myriad of authorities that set out precedent in this regard, I summarize that the scope of Judicial Review is limited to the decision-making process weighed against the parameters of unreasonableness, illegality, irrationality and impropriety. In the oft-cited Ugandan High Court case of Pastoli v Kabale District Local Government Council & Others (2008) 2 EA 300, the Court aptly expounded on these parameters thus:

> "In order to succeed in an application for Judicial Review, the applicant had to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: see Council of Civil Service Union v Minister for the Civil Service (1985) AC 2; and also Francis Bahikirwe Muntu and others Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).
>
> 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 Gymnkhana Club (1963) EA 478 at page 479 paragraph "E".
>
> Procedural impropriety is when there is a 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)."

78. Bearing the above authorities in mind, this Court further pays credence to recently established precedent from the apex court, the Supreme Court, where the learned judges clarified the conflicting approaches to the scope of Judicial review, that is, whether it is purely process based as described in the traditional common law administrative approach or to some extent may be merit based. 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), cited by both parties in this case, the Supreme Court outlined the scope of Judicial review and further elucidated the circumstances under which it may be expanded to include inquiry into the merits of administrative action as submitted by the Applicant. The Court held 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."

79. In other words, the Supreme Court permitted a limited merit-review of a public authority's decision but such a course of action could only be undertaken by the court upon satisfying itself that the suit as instituted was predicated on constitutional provisions. Flowing from this decision of the Supreme Court, it can safely be concluded as follows: -

a. The entrenchment of judicial review under *the Constitution* of Kenya, 2010 elevated it to a substantive and justiciable right under *the Constitution* and so judicial review is no longer a strict administrative law remedy but is equally a fundamental constitutional right provided for in *the Constitution*.

b. A party who approaches a court for judicial review reliefs under the provisions of *the Constitution* must and should expect that court to conduct a merit-based review of their case, but if the same is instituted under the provisions of Order 53 of the Civil Procedure Rules and does not raise any issues of violation of rights or *the Constitution* itself, then the court can only limit itself to the process and manner in which the impugned decision was arrived at and not the merits of the said decision.

80 In the present case, I find that the Application as filed did not call for a limited merit-based review of the decision of the 1st Respondent. It is not sufficient that the Applicants have invoked the provisions of *the constitution* and claim that there has been a violation of their constitutional rights and constitutional/ statutory principles to warrant a merit-based determination. Accordingly, I dismiss the Applicant's claim that the Judicial Review in this case permitted or required a merit-based consideration.

81. Having settled this, this Court's primary role is to assess whether the impugned decision was made in accordance with the 1st Respondent's legal mandate, whether the rules of natural justice were adhered to and whether constitutional and statutory procedures were followed. In considering the merits of this case to the extent laid out by the apex court in the Dande Case, the Court must also guard against delving into the realm of an appeal over the decision of the 1st Respondent. I am duly guided by the precedent in Matemu v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012) [2013] KECA 445 (KLR) (26 July 2013) (Judgment), where the Court of Appeal at paragraph 54 made reference to the case of PIL & Another v Union of India and explained that Judicial Review does not entail an appellate process. It stated thus:

> " 54. ... Supreme Court of India in Centre for PIL and Another v Union of India [Petition Writ no. 348 of 2010]) where the Court, in rejecting "merit review" of appointments by the courts, stated thus:
>
> ...33... Judicial review seeks to ensure that the statutory duty of the HPC to recommend under the proviso to Section 4(1) is performed keeping in mind the policy and the purpose of the 2003 Act. We are not sitting in appeal over the opinion of the HPC. What we have to see is whether relevant material and vital aspects having nexus to the object of the 2003 Act were taken into account when the decision to recommend took place on 3rd September, 2010."

82. In Republic v Public Procurement Administrative Review Board, Nairobi Judicial Review Application No. 605 of 2017, Mativo J. (as he then was) clearly drew a distinction between judicial review and an appeal. The learned judge held thus: -

> " 15. There is a long-established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in Judicial Review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the

decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

16. Judicial Review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

17. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji (2014) eKLR:-

"Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines 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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant......."

83. I note that the main contention in this case is the rationality, legality and reasonableness of the Review Board's decision to dismiss the Applicant's appeal which arose from the impugned award of the tender for local legal services to the Interested Party. In a nutshell, the Applicant seeks Certiorari to quash the decision by the Public Procurement Administrative Review Board dated 9th March 2026 and Prohibition orders restraining the Accounting Officer and National Treasury from implementing the decision or signing any contract during the 14-day statutory standstill period.

84. The main issue emanated from the Review Board's interpretation of tender documents. Specifically, the Applicant raises issue with the assessment of the Interested Party under criterion 1(b) on the Firm's Experience relating to the assignment in question. Counsel argued in the Applicant's submissions that the Court has a duty to scrutinize whether the Board's interpretation of the Tender Document was lawful, rational, and consistent with *the Constitution* at Articles 10, 47, and 227 and the *Public Procurement and Asset Disposal Act* (PPADA). They add further that the Review Board and the Interested Party committed a fundamental error of law by conflating 'Firm Experience'

with 'Individual Advocate Experience' because the said Criterion 1(b) expressly required the Firm to demonstrate that it had directly handled qualifying arbitrations and that Clause 39.2 of the Tender Document prohibited reliance on other firms' experience. They added that the Board made extraneous considerations in unlawfully allowing the Interested Party to rely on the experience of a partner Mr. Ken Melly which was acquired while he was at a different law firm. It is also the Applicant's argument that this interpretation renders Technical Criteria C which specifically evaluates individual staff qualifications redundant and that the Tender Document deliberately distinguishes between the experience of the firm - Criteria 1(a) & 1(b) - and the experience of individual staff Criteria C. It is asserted that the Board's approach violates Section 80 (2) and (3) of the PPADA, and the said interpretation effectively rewrites the Tender Document.

85. On their part, the 2nd and 3rd Respondent contended that the experience relied upon by the Interested Party was in conduct of the Cortec Mining Arbitration which was acquired by Mr. Ken Melly while he was employed at Iseme Kamau & Maema Advocates and that the Board reviewed the evidence and found that an advocate's experience is personal to the individual and does not vanish when they change firm; that when Mr. Ken Melly moved to G & A Advocates, his professional experience moved with him and also since he is currently a partner at G & A Advocates, the firm possessed the requisite experience by virtue of employing him.

86. The Interested Party affirmed the Board's decision to attribute Mr. Ken Melly's experience to the Interested Party and submitted that it aligns with the law and lawful procurement practice. They contended that the Applicant's inconsistent reliance on standards for its own credentials highlights bad faith and misapplication of legal principles about law firm expertise being embodied by its advocates.

87. I have considered these submissions and I note that the Applicant is asking this Court to find that there was a wrongful interpretation of the Tender Document particularly on the clauses that required firm experience criterion 1 (b). They argue that the said interpretation was unlawful, irrational and inconsistent with the constitutional statutory principles governing public procurement. In other words, the Applicant is asking this Court to assess whether the Review Board's interpretation was correct and in doing so, to somewhat set out the appropriate interpretation of what firm experience entailed, that is, whether the firm's experience can be attributed to the individual partners or employees or whether it refers to the firm's previous portfolio in handling similar matters as the procurement was intended for.

88. My take on the above is that the Applicant is calling on this Court to conduct a merit review of the Board's interpretation which to my mind is tacitly leading this Court into the realm of an appeal. The facts that are being impugned or brought into question are whether the Applicant and the Interested Party had ever participated in similar cases before to determine whether either of them was best suited for the job. The Applicant says that the Interested Party alleged that it had the requisite experience because Mr. Melly, one of its partners has previously handled a similar matter while in employment at a different firm and so this does not make the Interested Party compliant in this regard. The Interested Party on the other hand argues that the Applicant does not even have any expertise in the matter because they were only mentioned in the footnotes of the World Duty Free Company Limited v. Republic of Kenya (ICSID Award, 4 October 2006) case as being present and not being the actual advocates in the conduct of the said matter.

89. Evidently, from the rival arguments, it can be deduced that the issues in question not only relate to the aspect of wrongful interpretation, but also appears to be facts that are disputed by the parties. My take on this is that where there are facts that are in dispute, Judicial Review may not be an appropriate remedy.

90. I find that it was improper for the Applicant to ride on the limited merit-based avenue expressed by the Supreme Court in the Dande case and ask this Court to scrutinize the Review Board's interpretation of the Tender Document. To do so would mean that this Court is determining the matter on an appeal because the issue of the firm's experience is a technical aspect which would require deeper analysis and consideration. It is clear that the Applicant is asking the Court to re-evaluate the tender document and determine whether the Board's interpretation of the firm's experience was correct and set out which of the pleaded facts are truthful as relates with the firm's experience yet these are substantive issues that will require deeper scrutiny and purposive interpretation to determine what ought to have been the appropriate conclusion. While the Applicant's arguments may raise tenable legal issues that call for the Court's interpretation, that course of action cannot be countenanced by or determined before a Judicial Review Court.

91. In the same vein, this Court has considered the powers of the review board under Section 173 of the Act which provides:

> 173. Powers of Review Board Upon completing a review, the Review Board may do any one or more of the following
>
> a. annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
>
> b. give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
>
> c. substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
>
> d. order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
>
> e. order termination of the procurement process and commencement of a new procurement process.

92 It can be safely concluded that the Review Board acts as an appellate forum for aggrieved parties who participate in public procurement cases. In this case the Applicant. That means, the Board is better placed to understand the issues being raised and to formulate clear interpretation of the said tender document requirements in rendering its decisions. As such, its findings and decisions ought not to be easily and whimsically interfered with by the Judicial Review Court, unless the express parameters of judicial review are established. I anchor this position in the Court of Appeal's decision in Kenya Pipeline Ltd v Hyosung Ebara Company Ltd (2012) eKLR thus:

> " The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by

procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”

93. Flowing from the above, it is the Applicant’s case that the Interested Party would not have emerged successful if the evaluation especially at the technical stage was conducted in an objective and quantifiable manner as required under Section 80 of the *Public Procurement and Asset Disposal Act*. In response, the 2nd and 3rd Respondents supported the Board’s decision and asserted that it was correct in its interpretation and evaluation of the evidence placed before it. I have considered the provisions of Section 80 of the PPADA as follows: -

80. Evaluation of tenders

1. The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3).

2. The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

3. The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

    a. the criteria shall, to the extent possible, be objective and quantifiable;

    b. each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

4. The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

5. The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations.

6. The evaluation shall be carried out within a maximum period of thirty days.

7. The evaluation report shall be signed by each member of evaluation committee.

94. From the material placed before me, I find that there is nothing to demonstrate that the 1st Respondent acted outside the confines of its legal mandate to connote illegality of its decision, or that it made an improper or unreasonable or irrational decision or it violated section 80 of the Act. It is trite that a judicial review court is not required to substitute its own decision with that of the Review Board. The Court is only to consider the process employed in making the decision as guided by the Supreme Court. I find instead that, the Applicant’s argument on the alleged misinterpretation of the tender documents by the Review Board and the allegation that the evaluation was not done in accordance with Section 80 of the Act is asking this Court to venture into the appellate realm which I have already stated is outside the scope of this Court’s mandate.

95. I now turn to the question of the legality of the executed contract. The Applicant decries that the Interested Party proceeded to execute a contract within the mandatory statutory 14-days' standstill period in contravention of Section 175 of the PPADA. The said provisions postulate as follows:

175. Right to judicial review to procurement

1. A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

2. The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

3. The High Court shall determine the judicial review application within forty- five days after such application.

4. A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

5. If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

6. A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

7. Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

96. It is undisputed that following the Board's dismissal of the Applicant's Request for Review on 9th March 2026, the Accounting Officer proceeded to conclude the tender and the contract was legally cleared by the legal unit and executed by both parties on 17th March 2026.

97. It is submitted that Section 175(1) of the Public Procurement and Disposal Act provides a 14-day period for Judicial Review after the Board's decision and the Applicant contends that the contract was unlawfully executed within the statutory standstill period, undermining their (Applicant) right to challenge the decision. It is asserted that execution of contracts before lapse of this period is illegal and renders contracts void as set out by precedent. The Interested Party on the other hand argues that Section 175(1) does not prohibit a procuring entity from implementing a tender after the Review Board has rendered its decision.

98. I have considered these two rival positions against the relevant provisions of the law. Section 175 above stipulates that Judicial Review proceedings will be instituted within 14 days from the date of the Review Board's decision. To my mind, this does not speak to the standstill 14 days' period that the Applicant alluded to. Instead, Section 167 is relevant in advancing this argument. It provides:

167. Request for a review

1. Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

2. A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract:

   Provided that this shall not apply to tenders reserved for women, youth, persons with disabilities and other disadvantaged groups.

3. A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.

4. The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

   a. the choice of a procurement method;

   b. a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and

   c. where a contract is signed in accordance with section 135 of this Act.

99. Further, Section 135 provides: -

135. Creation of procurement contracts

1. The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

2. An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

3. The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

4. No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

5. An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

6. ___\

100 My understanding of the above provisions is first that Section 175(1) provides a 14-days period for instituting Judicial Review proceedings against the decision of the Board, before a Judicial Review court, which decision will be determined before the lapse of 45 days after filing of the said Application. Section 167 provides for the mechanism of administrative review, before the Review Board, within 14 days of notification of the award. This is the relevant provision to the Applicant's argument. That notwithstanding, Section 165 (4) (c) excludes duly executed contracts under Section 135 from the jurisdiction of the Review Board.

101. A keen reading of Section 135 (3) provides that the written contract is to be executed not before fourteen days have lapsed from the date of notification. This to my mind is the mandatory standstill period referred to by the Applicant and is what would likely vitiate the validity of the contract.

102. From the foregoing, I have considered the timelines in this case from the parties' pleadings. The Applicant was notified of their unsuccessful bid through an e-mail dated 5th February 2026. The said Notification of Intention to Award letter is dated 4th February 2026. Two days later, the Applicant appealed to the Review Board though a letter dated 6th February 2026 and were invited for a debrief through a response letter dated 9th February 2026 for a meeting on 10th February 2026. The Board then rendered its decision on 9th March 2026 and the contract was subsequently executed on 17th March, 2026. My consideration of these timelines negates the Applicant's assertions that the contract was executed illegally within the standstill period in a bid to undermine their (Applicant) right to challenge the decision. It is clear that the contract was signed after the Board rendered its decision and way after the date of notification of the award. This means the 14 days had lapsed and the Applicant was never denied an opportunity to be heard as alluded to. Further, there is no apparent illegality in the subsisting contract entered into by the Interested Party and Procuring Entity. Accordingly, I agree with the Interested Party that Section 175 (1) does not prohibit a procuring entity from implementing a tender after the Review Board has rendered its decision. The fact of executing the contract and onboarding the Interested Party as counsel representing the Republic of Kenya was the rightful next steps after the Board's determination.

103. Additionally, having carefully considered the Applicant's prayers, the grounds advanced, and the circumstances of this case, the Court has further considered the Applicant's concerns against the broader public interest. The impugned decision or action touches on matters of public administration and accountability, which demand continuity and stability in the governance of public procurement process.

104. This Court holds the view that the public interest in maintaining the integrity of the public procurement process and safeguarding the rights of the wider citizenry outweighs the individual reliefs sought by the Applicant. Accordingly, the I find that the scales of justice tilt in favour of upholding public interest over the Applicant's private claims. It is also not lost on the Court that a binding legal contract has already been executed to represent the country, and proceedings pursuant to that contract are underway. To halt or withdraw from the contract at this advanced stage would not only disrupt ongoing processes but also prejudice the larger public by undermining the nation's representation and exposing it to potential liability and reputational harm in the ongoing arbitration proceedings. In these circumstances, the Court is satisfied that the public interest in preserving continuity, honouring contractual obligations and safeguarding the country's collective welfare outweighs the individual reliefs sought by the Applicant.

105 From the totality of the material before the Court, my consideration of the impugned decision against the law and the tenets of judicial review, I find no doubt in my mind that the 1st Respondent properly addressed itself on the issues raised before it by the Applicant and rendered an appropriate and

reasonable decision grounded on the law. I further add that the Applicant has failed to demonstrate any illegality, irrationality, procedural impropriety, or unfairness in the Board's decision.

106. In the premises, the Application lacks merit and is consequently dismissed. I make no orders as to costs.

Dated Signed and Delivered Virtually this 4th day of May, 2026.

T. W. OUYA, OGW

JUDGE

In the presence of:

S. Munene for Applicant

Kariuki for 1st, 2nd and 3rd Respondents

Kevin: Court Assistant