REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

JUDICIAL REVIEW NO. E004 OF 2026

THE PROCUREMENT OFFICER,
MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY ……. 1ST APPLICANT

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY ……. 2ND APPLICANT

VERSUS

LEEGEK LIMITED …… RESPONDENT

JUDGEMENT

1. By a Notice of Motion dated 25th February 2026, the Parte Applicants seek judicial review orders as follows:-

   1) An order of certiorari to remove to this court for purposes of quashing the decision of Hon. Z. J. Nyakundi as contained in the interim orders issued in Chief Magistrate's Court at Kakamega Miscellaneous Application No. E007 of 2026 on the 29th January 2026 in relation to Tender Reference No. MMUST/8340010/2025/26.

2) That costs be provided for.

2. The application is premised on the Statement of Facts dated 2nd February 2026 and the Verifying Affidavit sworn by Scarlet Kavaya the acting head of procurement department of the 2nd Ex Parte Applicant.

3. The gravamen of the application is that the trial Magistrate had usurped the jurisdiction of the Public Procurement Regulatory Authority as he granted orders halting a tendering process upon an application by the Respondent who alleged that they had been unable to successfully tender the bid as the new EGP system was too slow and complex despite the fact that seven other firms were able to successfully bid.

4. It is the Applicant's contention that the trial Magistrate acted without jurisdiction in pronouncing himself in the interim and issuing a determinate conclusive order which purports to extend or renew a contract for a security firm which was not a party to the case before him and by issuing an order that would cripple a procurement process that was fully under the jurisdiction of the Public Procurement Regulatory Authority. They state that seven other security firms were able to successfully bid using the EGP system and have active running bid securities worth millions of shillings and if the Applicants were in any way to halt the automated system, it would expose the third parties to massive financial losses resulting in litigation against them that would expose the public institution to

financial loss. The Applicants contend that the lower court lacks jurisdiction in Judicial Review cases.

5. The Respondent filed a notice of preliminary objection in which it states that the Applicants have no capacity to file the present suit in their own names without authority by the Attorney General, that the application is premature, misleading, misconceived, unmerited and an abuse of the court processes as the Applicants ought to have challenged the impugned orders by way of a deferred appeal, and that this Honourable Court lacks jurisdiction to entertain the Applicants' application.

6. The matter was canvassed through written submissions as directed by the court. The directions were that the preliminary objection and substantive application be canvassed contemporaneously.

7. The court identifies the following issues raised in the preliminary objection which if successful, would dispose of the review proceedings:

a) Whether the Applicants have the capacity to file the present suit.

b) Whether the court has jurisdiction to entertain the application.

c) Whether the Judicial Review application has merit.

8. The 2nd Applicant, a Public University, is a State Corporation governed by the State Corporations Act Cap 446. Section 3 (2) (b) of the State Corporations Act states:-

"(2) A state corporation established under this section shall —

(b)in its corporate name be capable of suing and being sued.

9. There has been several litigation regarding what universities can do without the consent of the Attorney General most notably ***Law Society of Kenya Nairobi Branch v. Malindi Law Society & 6 others [2017] KECA 236 (KLR)*** and ***Republic v. Attorney General; Law Society of Kenya (Interested Party); Ex parte Francis Andrew Moriasi [2019] KEHC 7013 (KLR)***.

10. The court notes that there is a clear distinction between a government department and a parastatal which has autonomy and capacity to sue and be sued in its own name. Looking at Article 156 (4) of the Constitution and Section 25 (1) and (2) of the Offence of the Attorney General Act, there is no law expressly proscribing the 2nd Applicant from filing suit through its inhouse Counsel.

11. It is instructive to note that most recently, in ***Dr. Magare Gikenyi B & 6 others v. Council of Governors & 68 others; Office of the Auditor General & 2 others (Interested Parties) [2026] KEHC 902 (KLR),*** Mohochi J. barred all government entities from procuring private legal firms where in-house legal officers are available. In the present case, Ms. Grace Mburu, the Internal Counsel and Head of Legal Department at the 2nd Applicant institution is the one who filed and prosecuted the judicial review application.

12. The Respondent argues that the Applicants ought to have filed an appeal and cites Section 9 (5) of the Fair Administrative Action Act which states:-

"A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal."

13. It is my considered view that the said submission is misconceived. Section 9 (5) is in express reference to a judicial review decision by the High Court and not by a subordinate court. A subordinate court is subject to supervisory jurisdiction by the High Court which power is conferred upon the court under Article 165 (6) and (7) of the Constitution which state:

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

(7)For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

14. In judicial review and supervisory powers, the High Court does not look at the merits of the case that was before the subordinate court but examines the record of the subordinate court to establish

whether the impugned decision is on the face of it ultra vires, procedurally improper, irrational unreasonable, or improper. In ***Republic v. Judicial Service Commission Ex parte Pareno [2004] 1 KLR 203, at 219***, Nyamu J. stated that:-

"A judicial review court cannot also assume appellate jurisdiction…the court will not, however on 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 of 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 the 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."

15. In **Republic v. Attorney General & 4 others Ex Parte Diamond Hashim Lalji & Ahmed Hasham Lalji [2014] KEHC 3713 (KLR)**, the court held as follows:-

"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…"

16. The judicial review proceedings herein fault the trial Magistrate for not only usurping the powers of the Public Procurement Administrative Review Board, but for making an order in favour of a party that was not enjoined to the suit and which order had the effect of extending or renewing a contract that had expired in favour of the strange party. They contend that by doing so, the learned Magistrate acted in absence of and in excess of jurisdiction.

17. The Respondent places reliance on the case of **Ferdinand Ndungu Waititu v. Independent Electoral & Boundaries Commission**

& 2 others [2013] KECA 460 (KLR) where the Court of Appeal held that:-

"***A party aggrieved by an interlocutory order must await the delivery of the final judgment by the High Court then file an appeal to this Court."***

18. In **Kenya National Examination Council v. The Republic Ex parte Geoffrey Gathenji Njoroge & 9 others [1997] KECA 58 (KLR)**, the Court of Appeal held that an order of certiorari will issue to quash a decision made without or in excess of jurisdiction.

19. The Applicants have preferred judicial review proceedings instead of an appeal. It is trite that there is no limit to the grant of the writ of certiorari as long as the Applicant proves that the cited body acted without or in excess of jurisdiction as the judicial review process concerns the decisions making process and not the merits of the decision.

20. Regarding the submission that this court lacks jurisdiction, it is settled that there are no limits to the grant of the writ of certiorari therefore this court holds that it has the requisite jurisdiction to hear and determine the judicial review proceedings and dismisses the preliminary objection for lack of merit.

21. I note that the Applicants failed to enjoin the Magistrate's Court as the Respondent herein despite seeking orders to quash its decision. It is trite that generally, where one seeks to quash a decision, the

body or official who made the impugned decision must be named as a Respondent and failure to do so would be fatal to application.

22. In their verifying affidavit, the Applicants have annexed a certified true copy of the impugned order dated 28th January 2026 which, on the face of it, contains an apparent irregularity and impropriety in that it halts an on-going procurement process being undertaken by the 2nd Applicant which is a public entity. It also directs that the named third party security provider do continue providing security services to the Respondent pending hearing and determination of the judicial review proceedings. The court is therefore not in doubt as to the nature, subject, and cause of action of these proceedings.

23. The order by the trial Magistrate is made devoid of jurisdiction as it usurps the powers of the Public Procurement Administrative Review Board under Section 28 of the Public Procurement and Asset Disposal Act which states:-

"(1)The functions of the Review Board shall be—

(a)reviewing, hearing and determining tendering and asset disposal disputes; and

(b)to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.

(2)In performance of its functions under subsection (1)(a) of this section, the Review Board shall have powers to develop rules and procedures to be gazetted by the Cabinet Secretary.

(3)The Authority shall provide secretariat and administrative services to the Review Board."

24. Additionally, the order extends a contract in favour of a third party who is not a stranger to the suit thereby acting in excess of its jurisdiction.

25. Further, the trial Magistrate acted without jurisdiction in hearing a Judicial Review Application. As held in the locus classicus case of **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)**, jurisdiction is everything and without it, the court has no power to move a further step. Jurisdiction goes to the root of any dispute before the court and if the court grants orders without jurisdiction, such orders are a nullity.

26. Although the Respondent did not raise the issue of non-joinder of the Senior Principal Magistrate who made the impugned decision, this court has to make a determination on the effect of the non-joinder and whether it renders the Applicants' application fatally defective.

27. In judicial review proceedings, the person or body who made the decision under challenge is a necessary party since the order of certiorari is a prerogative writ that calls upon the decision maker to submit the record of proceedings for the purpose of being quashed. Order 53 Rule 3 (1), (2) and (3) of the Civil Procedure Rules provides:-

"(1)When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

(2)The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

(3)An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion."

28. I have gone through the application and the documents filed by the ex parte Applicants. The Applicants failed to comply with the

express provision of Order 53 (2) and (3) of the Civil Procedure Act. This non-compliance is a substantive oversight that goes to the root of the application. Order 53 (2) is couched in mandatory terms. In **Republic v. Chairperson – Business Premises Rent Tribunal at Nairobi v. Another Ex-parte Suraj Housing & Properties Limited & 2 others [2016] KEHC 4525 (KLR)**, the court quoted in approval, Sachdeva and Bar JJ in **Ex parte Mayfair Bakeries Limited v. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** in which they held that:-

"Where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature……It is recognised that each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration."

29. The Rules require that the trial court that made a decision that is the subject of judicial review proceedings be enjoined and served with the application and even if the court were to apply a purposive approach to interpretation of the said provision, it would not negate the imperative to enjoin the Magistrate that made the decision as it would be a violation of the principle of the right to be heard.

30. In the context of Order 53 (2) of the Civil Procedure Act, the provisions of Article 47 and 50 (1) (2) of the Constitution and the rules of natural justice, the court that made a decision that an Applicant seeks to be quashed is a necessary party to the suit. The rules of natural justice dictate that the trial court be enjoined and be given notice of the proceedings against him where a party files judicial review proceedings against him.

31. Judicial review proceedings are distinct and unique proceedings from other civil suits. In an appeal, the necessary parties are the litigants as an appeal seeks to have the issues and disputes heard on merit. In judicial review proceedings, the High Court exercises supervisory powers and hence the need to enjoin the court that made the decision. In **Republic v. Chief Magistrate's Court at Milimani Law Courts, Director of Public Prosecutions and 2 others (Interested Parties Ex parte Pravin Galot [2020] KEHC 7529 (KLR),** the court stated:-

"59. There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to

exercise such control the power is conferred on superior courts to issue the necessary and appropriate writs.

***60. This power of superintendence conferred by Article 165 (6) of the Constitution, as pointed out by Harries, C.J. in* Dalmia Jain Airways Ltd. v Sukumar Mukherjee*, is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of the Constitution to interfere.*"**

32. It is noted that despite moving the Court under Order 53 of the Civil Procedure Rules, the Applicants utterly disregarded the said rules.

They cited themselves as the Applicants instead of the Republic. Procedurally, they ought to have cited the Republic as the Applicant, the Kakamega Chief Magistrates Court as the Respondent, themselves as the Ex parte Applicants, and Leegek Limited as the Interested Party. For reasons known only to themselves, they opted to file the Motion in the manner they did hence violating the principles of natural justice that one ought not to be condemned unheard. This was a fundamental error that renders the application defective.

33. Be that as it may, Article 159 enjoins the courts to administer substantive justice with no regard to technicalities. In their application, the Applicants cited Article 165 (7) of the Constitution. The said constitutional provisions give the High Court unfettered power to make any order or give any direction it considers appropriate to ensure the administration of justice.

34. In **Republic v. Magistrates Court, Mombasa, Absin Synegy Limited (Interested Party) [2022] KEHC 10 (KLR)**, the Court held:-

“31. Its important to mention that the Constitution requires a purposive approach to statutory interpretation. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law. The often-quoted dissenting judgment of Schreiner JA,

eloquently articulates the importance of context in statutory interpretation:

> ***"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."***

35. This Court cannot shut its eyes to the glaring impropriety in the order dated 4th February 2026 as the trial court may continue to make further orders in excess of its jurisdiction that would impede the cause of justice.

36. For that reason, I will disallow the application for an order of certiorari but invoke Article 159 and 165 (7) of the Constitution to review and set aside the orders of the trial court. In the circumstances, there shall be no order as to costs.

Dated, signed and delivered at Kakamega this 14th day of May 2026.

A. C. BETT
JUDGE

In the presence of:

Ms. Mburu for the Applicants

Mr. Mbaka for the Respondent

Court Assistant: Polycap