Keller Kustoms Kenya Limited v Public Procurement Administrative Review Board & 3 others (Civil Appeal E001 of 2025) [2025] KECA 243 (KLR) (17 February 2025) (Judgment)

Neutral citation: [2025] KECA 243 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E001 OF 2025

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

FEBRUARY 17, 2025

BETWEEN

KELLER KUSTOMS KENYA LIMITED ..... APPELLANT

AND

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

KENYA PORTS AUTHORITY ..... 2ND RESPONDENT

SAINAJ HOLDING LIMITED ..... 3RD RESPONDENT

HYPER ATLANTIC TRANSPORTER LIMITED ..... 4TH RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (G. Mutai, J.) delivered on 30th December 2024 in Judicial Review Application No. E037 of 2024)

JUDGMENT

1. The genesis of the instant appeal is the publication in May 2024 by the 2nd respondent, Kenya Ports Authority (KPA), of a tender No. KPA/284/2023-24/LP inviting bids for the provision of Boat and Minibus (25 seater) Transport Services for the Port of Lamu. The deadline for KPA's bid was the 16th day of May 2024 at 10:00 a.m.

2. In response to the tender, the appellant, Keller Customs Kenya Limited, submitted a bid on 16th May 2024 expressing its interest to provide the 2nd respondent with both the boat and minibus transport services.

3. By a letter dated 3rd October 2024, the 2nd respondent notified the appellant that it (KPA) had reached a decision to award the tender to the five (5) successful bidders listed in the appendix to the letter, and who included the 3rd respondent, Sainaj Holding Limited. In addition, the 2nd respondent informed

the appellant that its bid was not successful for the reasons therein disclosed, including failure to meet various formal requirements and to supply various documents in support of their bid, but which we need not recite.

4. Dissatisfied with the 2nd respondent's decision, the appellant lodged a Request for Review, being No. 102 of 2024 dated 11th October 2024 with the 1st respondent, the Public Procurement Administrative Review Board, seeking orders that the procurement proceedings commenced by the 2nd respondent and/or its accounting officer be annulled and cancelled; that any and all actions done by the 2nd respondent's accounting officer, including the notifications of award given or made to any tenderer who participated in the tender be annulled, cancelled and set aside; that the 2nd respondent and/or its accounting officer be ordered to commence and undertake a fresh/new procurement process for the tender by making it clear whether the procurement is for both boat and minibus services jointly or for each service separately; that the costs of the proceedings be borne by the 2nd respondent; and any other order that the Board may deem just to grant.

5. In its Request for Review, the appellant had named itself as the applicant and the 2nd respondent (KPA) as the only respondent and had advanced 3 main grounds, namely that the 2nd respondent split up the tender at the award stage, yet the procurement process was for one tender only; that the 2nd respondent's decision to declare the appellants unsuccessful was illegal, unreasonable, unjustified and absolutely without basis; and that the 2nd respondent awarded the tender to unregistered entities.

6. In its response to the appellant's Request for Review, the 2nd respondent filed its Memorandum of Response denying each and every allegation set out in the appellant's Request for Review. According to the 2nd respondent, the grounds advanced by the appellant were unfounded and did not warrant a grant of the orders sought. The 2nd respondent further contended that, in view of the clear instructions provided in the tender documents, the appellant clearly admitted to having not met the requirements set out in the tender documents; that all the reasons cited for the appellant's disqualification constituted mandatory provisions from which no deviation is allowed under law; that there can be no rescue for a bidder who does not meet them; and that the 2nd respondent had affirmed its satisfaction with the registration status of the 2 successful bidders that the appellant alleged were not registered. In view of the foregoing, the 2nd respondent prayed that the appellant's Request for Review be dismissed with costs.

7. Acting on invitation sent to the successful tenderers by the Secretary of the 1st respondent, the 3rd respondent filed a Notice of Appointment of Advocate dated 22nd October 2024 together with a notice of preliminary objection of even date seeking to have the appellant's Request for Review struck out or dismissed on the ground that the Request for Review as lodged was in breach of the mandatory provisions of section 170(b) of the *Public Procurement and Asset Disposal Act*, 2015 (the Act), which requires in mandatory terms that the Request for Review ought to be lodged against, inter alia, the Accounting Officer of the Procuring Entity; and that the Request for Review as instituted was fatally defective, thereby warranting immediate dismissal to avert a miscarriage of justice, and to save the Tribunal's precious time and resources.

8. In response to the 3rd respondent's preliminary objection, the appellant filed its Reply dated 24th October 2024 contending that there was no requirement in law that a Request for Review be lodged against the Accounting Officer of the Procuring Entity; that the only requirement under section 170(b) of the Act is that "... the Accounting Officer of the Procuring Entity is to be a party to the review"; that the Accounting Officer "... is not made a party by being named and/or listed in the heading of the Request for Review, but through notice issued by the Board pursuant to regulation 205(1) of the Public Procurement and Asset Disposal Regulations (the Regulations); that the heading and

structure of the Request for Review is prescribed in the statutory form set out in the 14th Schedule to the Regulations pursuant to regulation 203(1) of the Regulations, which names the parties thus: the applicant as the Review Board; and the respondent as the Procuring Entity; that it complied with the statutory form aforesaid by naming the Procuring Entity as the 2nd respondent and not its Accounting Officer; that it cannot be faulted for complying with the statutory form; that the preliminary objection was filed out of time as regulation 209(1) of the Regulations requires that a notice of preliminary objection be filed within 3 days after parties are notified of the hearing of the Review; and that, therefore, the Board lacked jurisdiction to hear and determine the objection.

9. In its decision rendered on 4th November 2024, the 1st respondent upheld the 3rd respondent's preliminary objection and struck out the appellant's Request for Review. According to the 1st respondent, which we take the liberty to quote in extenso:

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> "70. From Section 170 above, the necessary parties to a Request for Review are (i) the Applicant; (ii) the Accounting Officer of the concerned Procuring Entity; (iii) the successful tenderer under the subject tender; and (iv) any other party that the Board may determine.
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> 71. The failure to include an Accounting Officer of a Procuring Entity as a party to a Request for Review has been the subject of litigation in multiple cases before superior courts in this country.
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> ....
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> 74. From the above decisions, which are binding on this Board, it is apparent that (i) Section 170 of the Act enlists the parties to a Request for Review in mandatory terms (ii) Omitting to name the parties listed under Section 170 of the Act as parties to Request for Review renders a Request for Review incompetent; and (iii) An incompetent Request for Review is for striking out and is incapable of being cured by an amendment.
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> 75. Turning to the instant Request for Review, the Applicant admittedly did not include the Accounting Officer of Kenya Ports Authority as a party to the Request for Review. However, it was argued on its behalf that the format under which the Request for Review was brought was in consonance with Form contemplated under regulation 203 and the Fourteenth Schedule of the Regulations 2020. ....
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> 79. From the Form above it would appear that the Applicant in a Request for Review would be this Board. It would equally appear that the Respondent would be the Procuring Entity. These representations are set out in the Form under the Fourteenth Schedule are at variance with Section 170 of the Act...
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> 80. Confronted with the above conflict, the Board draws guidance from Section 31(b) of the *Interpretation and General Provisions Act*;... no subsidiary legislation shall be inconsistent with the provisions of an Act...
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> 81. Superior courts in this country have equally held that subsidiary legislation cannot override statute.

82. Drawing guidance from the above pronouncements, which are binding on this Board, we cannot purport to elevate the Form under the Fourteenth Schedule of the Regulations 2020 above the express provisions of Section 170 of the Act on parties to a Request for Review. Accordingly, the provisions of Section 170 of the Act takes precedence over the Regulations 2020. In the present case, we hold that failure to include an Accounting Officer of a Procuring Entity renders a Request for Review defective. ....

88. The Board has found that it lacks the jurisdiction to hear and determine the Request for Review.

89. The upshot of our finding is that the Request for Review dated 11th October 2024 in respect of Tender No. Tender No. KPA/284/2023-24/LP for Provision of Boat and Minibus (25 - Seater) Transport Services for Port of Lamu fails ..."

10. Aggrieved by the 1st respondent's decision, the appellant sought judicial review in the High Court of Kenya at Mombasa in Judicial Review Application No. E037 of 2024 praying for:

"1. An order of certiorari to remove into this Honourable Court and quash the decision of the Public Procurement Administrative Review Board made on 4th November 2024 in Review Application No. 102 of 2024: Keller Kustoms Kenya Limited vs. Kenya Ports Authority being request for review against the decision of the Accounting Officer of Kenya Ports Authority in respect of Tender Number KPA/284/2023-24/LP - PROVISION OF BOAT AND MINIBUS (25-SEATER) TRANSPORT SERVICES FOR PORT OF LAMU).

2. An order of prohibition to prohibit the 1st Interested Party from enforcing and/or executing decision of the Public Procurement Administrative Review Board made on 4th November 2024 in Review Application No. 102 of 2024: Keller Kustoms Kenya Limited vs. Kenya Ports Authority being request for review against the decision of the Accounting Officer of Kenya Ports Authority in respect of Tender Number KPA/284/2023-24/LP - PROVISION OF BOAT AND MINIBUS (25 SEATER) TRANSPORT SERVICES FOR PORT OF LAMU).

3. Pursuant to and upon the grant of the order of certiorari herein there be and is hereby issued an order allowing the Applicant's Request for Review dated 11th October 2024 filed in Review Application No. 102 of 2024: Keller Kustoms Kenya Limited vs. Kenya Ports Authority.

4. In the alternative to prayer (3) above, upon the grant of judicial review order of certiorari quashing the decision of the Public Procurement Administrative Review Board made on 4th November 2024 in Review Application No. 102 of 2024: Keller Kustoms Kenya Limited vs. Kenya Ports Authority in accordance with prayer (1) above, an order of mandamus be and is hereby granted to compel the Respondent to consider on merits the Applicant's Request for Review dated 11th October 2024 filed in Review Application No. 102 of 2024: Keller Kustoms Kenya Limited vs. Kenya Ports Authority being request for

review against the decision of the Accounting Officer of Kenya Ports Authority in respect of Tender Number KPA/284/2023-24/LP - Provision of Boat and Minibus (25 Seater) Transport Services For Port Of Lamu).

5. An order of certiorari to remove into this Honourable Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board made on 4th November 2024 in Review Application No. 102 of 2024: Keller Kustoms Kenya Limited vs. Kenya Ports Authority and substitute thereof with a declaration that section 170 of the *Public Procurement and Asset Disposal Act*, 2015 does not require in mandatory terms or at all that the accounting officer of the procuring entity be listed/named as a respondent in a request for review.

6. An order of certiorari to remove into this Honourable Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board made on 4th November 2024 in Review Application No. 102 of 2024: Keller Kustoms Kenya Limited vs. Kenya Ports Authority and substitute thereof with a declaration that Regulation 203(1) of the Public Procurement and Asset Disposal Regulations, 2020 and the Form set out in the Fourteenth Schedule of the Public Procurement and Asset Disposal Regulations, 2020 do not conflict with, violate and/or contravene section 170 of the *Public Procurement and Asset Disposal Act*, 2015.

7. An order of certiorari to remove into this Honourable Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board made on 4th November 2024 in Review Application No. 102 of 2024: Keller Kustoms Kenya Limited vs. Kenya Ports Authority and substitute thereof with a declaration that the Applicant's Request for Review dated 11th October 2024 filed in Review Application No. 102 of 2024: Keller Kustoms Kenya Limited vs. Kenya Ports Authority was filed in compliance with section 167(1) of the *Public Procurement and Asset Disposal Act*, 2015, Regulation 203(1) of the Public Procurement and Asset Disposal Regulations, 2020 and the Form set out in the Fourteenth Schedule of the Public Procurement and Asset Disposal Regulations, 2020 and therefore the same was not defective for failing to list and/or name the accounting officer of the procuring entity or the successful tenderers as respondents to the said Request for Review.

8. Costs of the proceedings be provided for."

11. The appellant's application was supported by the annexed affidavit of its Director, Jane Mumbi Abeid, sworn on 13th November 2024 essentially deposing to the grounds on which it was anchored, and which the appellant grouped into four main heads, namely: that the 1st respondent's decision was not arrived at in accordance with the law and was therefore illegal; that the 2nd respondent acted unfairly and unreasonably; that the 1st respondent breached the appellant's legitimate expectation that the 1st respondent would hear and determine its Request for Review on its merits; and that the 1st respondent violated the appellant's right to fair hearing, the right to fair administrative action and the rules of natural justice.

12. The 1st respondent filed a replying affidavit sworn on 2nd December 2024 by James Kilaka (its Acting Secretary) stating that the 1st respondent's decision was reasonable, rational and lawful, and without

overreaching its mandate and jurisdiction; that the 1st respondent observed the rules of natural justice in exercise of its statutory mandate and ensured that all parties to the Request for Review application were granted an opportunity to be heard on all issues raised in their pleadings, and by considering and interrogating all the evidential documents and information before it before determining the Request for Review application; and that the appellant had failed to demonstrate any elements of illegality, irrationality, procedural impropriety and/or unfairness in the manner in which the 1st respondent considered and interrogated the evidence, documents, pleadings and information before arriving at its decision, and the manner in which the parties were notified of the completion of the Request for Review application by the 1st respondent when the decision was transmitted to all parties to the application via email on 4th November 2024. He urged the court to dismiss the application with costs.

13. Likewise, the 2nd respondent filed a replying affidavit of Daniel Amuyunzu (its Principal Supplies Officer, Tenders) sworn on 13th December 2024. According to the deponent, the 1st respondent upheld the doctrine of stare decisis when it dismissed the appellant's Request for Review for failing to include the 2nd respondent's Accounting Officer as a party in accordance with the law. The deponent further contended that the 1st respondent's decision was lawful; that the 1st respondent acted fairly and reasonably by dismissing the appellant's Request for Review for failing to include the Accounting Officer as a respondent; that, despite the fact that the appellant had a legitimate expectation that the 1st respondent would proceed to hear and determine its Request for Review, the 1st respondent cannot be required to act against clear and mandatory statutory provisions just to meet the appellant's expectations; that the 1st respondent did not violate the appellant's rights in any way whatsoever; and that the application lacks merits and the appellant should not benefit from the orders sought. Likewise, he urged the court to dismiss the appellant's application with costs.

14. In its judgment dated 30th December 2024, the High Court (Gregory Mutai, J.) dismissed the appellant's application with orders that the parties bear their own costs. In the concluding words of the learned Judge:

> "102. From the foregoing, it is clear that I have not found merit in the application. I cannot fault the Respondent for making a decision which, in my view, properly reflected the law. The decision is not illegal or irrational, or fraught with procedural impropriety. The rules of natural justice were not breached as the Ex parte Applicant was afforded an opportunity to be heard. The judicial review application is thus dismissed.
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> 103. In closing, I must state that judicial review proceedings are concerned with process and rarely with merit. I cannot fault the process in the proceedings before the Board. I am satisfied that it accorded with the law."

15. Further aggrieved, the appellant moved to this Court on appeal on 7 grounds set out in its memorandum of appeal dated 2nd January 2025 faulting the learned Judge for: failing to find and hold that the 1st respondent lacked jurisdiction to hear and determine the 3rd respondent's preliminary objection; holding that the 1st respondent's decision was arrived at in accordance with the law; holding that the 1st respondent acted fairly and reasonably; holding that the 1st respondent did not breach the appellant's legitimate expectation; holding that the 1st respondent did not breach the appellant's constitutional rights to fair hearing and fair administrative action; failing to properly construe, appreciate and interpret the issues raised by the appellant; and for holding that judicial review is mainly concerned with process and rarely with merits.

16. In support of the appeal, learned counsel for the appellant, M/s. Oluga & Company, filed written submissions, a case digest and bundle of authorities dated 14th January 2025. Counsel cited the cases

of Kenya Ports Authority v Modern Holdings (EA) Limited [2017] eKLR, highlighting the principle that jurisdiction is such a fundamental matter that it can be raised at any time, in any manner, even for the first time on appeal, or even viva voce; and Jacqeline Okeyo Manani & 5 Others v Attorney General & Another [2018] eKLR, submitting that it is trite law that, for a rule or regulation to be declared void for reason of inconsistency with the parent Act, there must be clear and irreconcilable tension or inconsistency.

17. On her part, learned State counsel for the 1st respondent, Ms. E. Kagoi, filed written submissions, a case digest and a bundle of authorities dated 16th January 2025. Counsel relied on the cases of Republic v Kenya Revenue Authority; Proto Energy Limited (Ex parte) [2022] KEHC 5 (KLR) highlighting the principle that statutory words override an expectation howsoever founded; and that a decision maker cannot be required to act against clear provisions of a statute just to meet one party's expectations, otherwise the decision would be outrightly illegal under violation of the principle of legality; and Saisi & 7 Others v Director of Public Prosecutions & 2 Others [2023] KESC 6 (KLR) where the Court stated that the intention was never to transform judicial review into a full-fledged inquiry into the merits of a matter; that neither was the intention to convert a judicial review court into an appellate court; and that the merits of a case are best analysed in a trial or on appeal after hearing testimonies, cross- examination of witnesses and examination of the evidence.

18. Likewise, learned counsel for the 2nd respondent, M/s. Alakonya & Associates, filed written submissions, a list of authorities and case digest dated 21st January 2025. Counsel cited the cases of David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR, highlighting the principle that a court will not grant a remedy which has not been applied for; and that it will not determine issues not pleaded by the parties; that a decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice; James Oyodi T/A Betoyo Contractors & Another v Elroba Enterprises Limited & 8 Others [2019] eKLR where this Court held that the PPADA (the Act) requires that the Accounting Officer of the Procuring Entity as opposed to the Procuring Entity be the required party to review proceedings; Proto Energy Limited (Ex parte) (supra) reiterating the foregoing submissions by the State counsel on the binding effect of statutory provisions weighed against an individual's legitimate expectations; and Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR where this stated that judicial review is concerned with the decision-making process, not with the merits itself.

19. Having carefully considered the record of appeal, the grounds on which it is anchored, the rival submissions of learned counsel, the cited authorities and the law, we form the view that five (5) issues commend themselves for our determination, namely:

    (i) whether the 1st respondent had jurisdiction to hear and determine the 3rd respondent's preliminary objection;

    (ii) whether the 1st respondent's decision was in accordance with the law;

    (iii) whether, in reaching its decision, the 1st respondent acted fairly and reasonably;

    (iv) whether the 1st respondent acted in breach of the appellant's legitimate expectation; and

    (v) whether the 1st respondent acted in breach of the appellant's constitutional rights to fair hearing and fair administrative action.

20. On the 1st issue as to the 1st respondent jurisdiction to hear and determine the 3rd respondent's preliminary objection, the learned Judge had this to say:

> " 98. When the Ex parte Applicant filed the substantive application before this Court, it did not rely on the alleged delay of the 2nd Interested Party to file the Notice of the Preliminary Objection. This was only raised at the submissions stage. In my view, the Ex parte Applicant is bound by its pleadings. Further, as has often been said, submissions are not pleadings. ....
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> 99. Raising the said issue at the submission stage does not bespeak confidence on the part of the Ex parte Applicant on the merits of its judicial review application. The submissions on the part of the 1st Interested Party that the said ground was an afterthought cannot, therefore, be easily dismissed."

21. Taking issue with the learned Judge's finding, counsel for the appellant submitted that the 1st respondent had no jurisdiction to hear and determine the 3rd respondent's preliminary objection on the grounds that it was filed out of time, and in breach of regulation 209(1) of the Regulations. According to counsel, it was not mandatory to plead the 1st respondent's lack of jurisdiction in the judicial review application as it is now well settled that jurisdictional challenge can be raised at any time and in any manner, and that it can even be raised by the court suo motu (see Kenya Ports Authority v Modern Holdings (EA) Limited (supra).

22. In addition to the foregoing, counsel submitted that failure to raise the jurisdictional issue in its application could not, of itself, confer jurisdiction on the 1st respondent when such jurisdiction did not exist in the first place; and that the issue of jurisdiction was properly raised in the High Court through the appellant's written submissions, and that it was not an afterthought because it had been raised at the hearing before the 1st respondent.

23. The learned State counsel was of a different view and submitted that the appellant's allegation that the 1st respondent lacked jurisdiction to entertain the 3rd respondent's preliminary objection ought to have been raised in the substantive Notice of Motion in the High Court; and that the appellant raising the issue in submissions was an afterthought and a desperate attempt to sneak allegations in the proceedings that ought to be presented with evidence and the parties given an opportunity to respond thereto.

24. On their part, learned counsel for the 2nd respondent submitted that the jurisdictional issue was not raised for determination in the High Court; that it was neither included in the appellant's statutory statement nor in their substantive Notice of Motion; and that it was only raised in their submissions. In the circumstances, it was a knee- jerk reaction and an afterthought on the part of the appellant. According to counsel, submissions are not pleadings, and a party is bound by its own pleadings. In conclusion, counsel contended that the High Court could not therefore proceed to hear and determine an issue not raised by the appellant in their pleadings (see David Sironga Ole Tukai v Francis Arap Muge & 2 Others (supra)).

25. Regulation 209 requires any party notified of the hearing of the Request for Review to file its objection thereto (if any) within 3 days of the notification. The regulation reads:

> 209. Preliminary objections

(1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within three days from the date of notification.

26. It is noteworthy that the 3rd respondent's preliminary objection to the 1st respondent's jurisdiction to hear and determine the appellant's Request for Review was raised on 23rd October 2024 despite having been notified of the hearing on 18th October 2024, two (2) days after the period prescribed under regulation 209(1) read with regulation 206(1). The belated preliminary objection prompted the appellant's jurisdictional challenge to hear and determine the objection on the grounds that it was filed outside the time prescribed by regulation 209. We also take to mind the fact that the 1st respondent did not pronounce itself on the appellant's jurisdictional challenge in its decision rendered on 4th November 2024, which the appellant sought to be reviewed in the High Court of Kenya at Mombasa in JR Application No. E037 of 2024.

27. Be that as it may, the appellant did not advance the 1st respondent's failure or neglect to pronounce itself on the jurisdictional challenge aforesaid as one of its ground for review by the High Court. No such ground is contained in the appellant's statutory statement or in its Notice of Motion. Instead, the jurisdictional challenge features for the first time in the High Court at the tail end of the proceedings and, in particular, in the appellant counsel's written submissions. To what effect though?

28. We hasten to observe that jurisdictional challenges may be raised at any stage in the proceedings, including in final submissions, even though it is generally considered best practice to raise them earlier in the proceedings, as a court may be less inclined to entertain such challenges at the final stage of the proceedings unless there are compelling reasons to do so. Moreover, the right to fair hearing and to fair administrative action demand that parties affected by a judicial or quasi-judicial decision be accorded the opportunity to be heard.

29. In Kenya Ports Authority v Modern Holdings [E.A] Limited (Supra), this Court held that:

> " We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:
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> '... at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.'
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> (See All Progressive Grand Alliance (APGA) v. Senator Christiana N.D. Anyanwu & 2 others, LER [2014] SC. 20/2013 Supreme Court of Nigeria)."

30. In Aluochier v Independent Electoral and Boundaries Commission & 17 others [2022] KESC 77 (KLR), the Supreme Court also held that:

> "It is equally now firmly established that a point of jurisdiction can be raised at any time, formally by a notice of preliminary objection, grounds of opposition, viva voce during arguments or by the Court suo motu because challenging the jurisdiction of a Court is a threshold issue. Jurisdiction can only be conferred on a court by either *the Constitution* or statute. A court cannot expand its jurisdiction through judicial craft or innovation."

31. To our mind, regulation 209 appears to go against the impermeable grain of the immutable principle that a jurisdictional challenge may be raised at any stage in the proceedings as was the case here. In our considered view, it matters not that it came two days later than the due date as reckoned pursuant

to regulation 209 as read with regulation 206. In any event, even if the jurisdictional issue was not raised by any party in good time or at all, the 1st respondent had power to consider and determine the jurisdictional issue suo motu, provided that the parties were accorded the opportunity to be heard thereon.

32. Consequently, though the appellant's objection to the 1st respondent's jurisdiction to consider the 3rd respondent's preliminary objection to the appellant's Request for Review on account of its belated filing ought to have been determined, the issue was inconsequential, more so in view of the fundamental omission by the appellant to join the 2nd respondent's Accounting Officer as a party to its Request for Review as mandated by section 170 of the Act. And that is the fundamental issue to which the 1st respondent was mandated to address itself. Accordingly, we form the view that the learned Judge was at fault in finding that the jurisdictional issue was raised in the appellant's submissions and that, therefore, it ought not to have been determined. Be that as it may, there are other fundamental issues that determine the outcome of the instant appeal.

33. Turning to the 2nd issue as to whether the 1st respondent's decision was in accord with statute law, we take the liberty to cite in extenso the learned Judge's pronouncement on the matter thus:

> 76. It is common ground that the Ex parte Applicant did not make the Accounting Officer of the Procuring Entity a party in the proceedings before the Public Procurement Administrative Review Board. Was this a fatal omission on its part? In its ruling, the Board determined that it was. However, it was acknowledged that the Board had previously agreed to hear and went ahead to determine other similar matters even though the Accounting Officers of the Procuring Entity weren't made parties. The Board noted that having been made aware of the decisions of the High Court and the Court of Appeal, it would no longer do so. The question then is whether, in so doing, the proceedings were tainted by illegality, which would give this Court jurisdiction to exercise its power of judicial review.
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> ... .
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> 80. In its decision, the Respondent observed that it had, in its previous determinations, heard and determined Requests for Review filed against Procuring Entities rather than the Accounting Officers. It justified its departure from the said decisions on the ground that, as an inferior tribunal, it was bound by the decision of the High Court and the Court of Appeal, which were brought to its attention.
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> 81. This Court notes that the question of whether the Accounting Officer of a Procuring Entity is a mandatory party to a Request for Review has been the subject of several decisions of the High Court and the Court of Appeal.
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> ... .
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> 84. The latter decision was appealed to the Court of Appeal. The said Court, upon hearing the parties thereto, held as follows in James Oyondi t/a Betoyo Contractors & another v El Roba Enterprises Limited & 8 others [2019] eKLR:-
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> > 'It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replace it, the PPADA, requires that the accounting officer of the procuring entity, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board's importation of the law of agency floundered. When the procuring

> entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply.'

85. I agree with the foregoing decisions. I will add that the requirement that the Accounting Officer be added as a party was deliberate. It seems to me that such a requirement was driven by the need to improve accountability and to bring ownership to the procurement proceedings so that it would be easy to tell who is to receive bouquets for successful procurement and barbs for botched procurement.

... .

89. It would appear to me that under the doctrine of stare decisis, the Respondent had no option but to follow the above decisions. Having done so, the Respondent cannot possibly be accused of acting illegally or arriving at a decision in a way that does not follow the law. The upshot of the foregoing is that I find no merit in the Ex parte Applicant's first ground. In light of the foregoing, I am unable to agree that failing to sue the accounting officer is a minor procedural technicality that can be cured by amendment.

90. Is the fact that the Regulations in force currently were promulgated in 2020 after the decisions of the High Court and the Court of Appeal were made of any import? Although counsel made elaborate submissions for the Ex parte Applicant on this point, he failed to demonstrate in what way the previous Regulations differed from those of 2020. Since his point, as I understood it, was that the 2020 Regulations negated the need for the Accounting Officer to be made a party to the Request for Review, it would have been helpful for him to demonstrate how that was the case.

91. Whereas I agree with the Ex parte Applicant's counsel that the Act and the Regulations must be read together, one cannot be blind to the hierarchy of the written law; Acts of Parliament are of a higher order than regulations. Regulations must thus be read to give meaning to statutory provisions and not vice versa. This is the essence of section 31(b) of the *Interpretation and General Provisions Act*.

92. Although it has been said that the 2020 Regulations changed the law, or at the very least modified how it should be applied, I am unable to agree that express provisions of an Act of Parliament can be amended through amendment of regulations."

34. On the instant issue, counsel for the appellant submitted at length the view that it is not correct that section 170(b) of the Act requires in mandatory terms that a request for review ought to be lodged against the Accounting Officer of the Procuring Entity; that the heading to section 170 of the Act refers to "parties to review" and not "parties to the Request for Review"; that there is good reason why the framers of the Act created a clear distinction between "Request for Review" and "review"; and that the "review" referred to in section 170 refers to the proceedings before the Review Board and not the pleading used to originate the proceedings before the Review Board; that the "review" referred to in section 170 is different from "Request for Review" in regulation 203(1), which is actually the pleading used to invoke the jurisdiction of the Review Board.

35. Counsel further submitted that section 170 of the Act is a substantive provision rather than a procedural provision; that the section only lists the parties to the review, but does not provide for what a Request for Review should look like; that the form and nature of the Request for Review is provided for in section 167 of the Act, which stipulates that the Request for Review should be lodged "in such manner as may be prescribed"; and that the "manner as may be prescribed" is found in regulation 203)1) of the Regulations, which provides that a Request for Review under section 167(1) of the Act shall be in the Form Set out in the 14th Schedule to the Regulations.

36. Learned counsel contended that the person indicated in the Form set out in the 14th Schedule as the respondent to a Request for Review is the Procuring Entity and not the Accounting Officer; that the appellant cannot be faulted for presenting its Request for Review in the manner prescribed; that, once the Request for Review is filed, the Review Board takes over and ensures that the Accounting Officer of the Procuring Entity becomes a party to the review proceedings as required under section 170 of the Act; that the Board does so through a notice sent to the Accounting Officer pursuant to section 168 of the Act and regulation 205(1) of the Regulations; that procurement proceedings before the 1st respondent are sui generis in nature and should not be compared with ordinary court proceedings where the persons named in the heading of the originating pleading, such as a plaint, are the ones considered to be the parties to the case; and that there was no prejudice in naming the Procuring Entity as the respondent to the Request for Review in accordance with the Form set out in the 14th Schedule.

37. Finally, counsel took issue with the judicial authorities relied on by the learned Judge, arguing that they were made per incuriam in 2019 before promulgation of the Regulations in 2020, and without proper legal interpretation.

38. On their part, counsel for the 1st respondent reiterated the contents of paragraphs 85 to 102 of the impugned judgment and paragraphs 14 to 33 of their replying affidavit, which we have taken to mind.

39. Counsel for the 2nd respondent submitted that section 170 of the Act lists the parties to a Request for Review, which includes the Accounting Officer of the Procuring Entity; and that failure to include the Accounting Officer of the 2nd respondent as a party to the appellant's Request for Review was a major procedural infraction not curable by an amendment, and amounted to violating the Accounting Officer's rights to be heard. Citing the case of James Oyodi T/A Betoyo Contractors & Another v Elroba Enterprises Limited & 8 Others (supra), counsel submitted that the 1st respondent was bound by the provisions of section 170 of the Act and the principle of stare decisis.

40. It is not in dispute that the appellant did not name the 2nd respondent's Accounting Officer as a respondent to its Request for Review. Its simple explanation was that joinder of the Accounting Officer would be effected by the 1st respondent's notice to the relevant parties of the appellant's Request for Review pursuant to section 168 of the Act read with regulation 205(1) of the Regulations. Counsel's argument that those specified in section 170 as "parties to the review" need not be named in the Request for Review, and that the notification of the Request for Review is what constitutes them as parties to the proceedings is, in our respectful view, a misperception that finds no sound logic or locale for reason in the realm of statutory interpretation.

41. Section 168 of the Act reads:

> 168. Notification of review and suspension of proceedings
>
> Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the

Review Board and the suspension of the procurement proceedings in such manner as may be prescribed.

42. To our mind, the only reason why the 1st respondent is mandated by section 168 of the Act to notify the Accounting Officer of a Procuring Entity of a Request for Review is so that the Accounting Officer would be party to the review as required by section 170 of the Act, which is couched in mandatory terms and reads:

> 170. Parties to review
>
> The parties to a review shall be—
>
> a. the person who requested the review;
>
> b. the accounting officer of a procuring entity;
>
> c. the tenderer notified as successful by the procuring entity; and
>
> d. such other persons as the Review Board may determine.

43. Faced with a similar issue as to who ought to be named as party to a Request for Review under the Act in El Roba Enterprises Limited & 5 others v James Oyondi t/a Betoyo Contractors & 5 others [2018] KEHC 5078 (KLR), Ogola, J. correctly held that:

> "
>
> " 35. In my view, there must be a reason as to why Parliament saw it fit to introduce the accounting officer of the procuring entity as a necessary party to the review. A keen reading of Section 170 of the Act reveals that the term "shall" is used. According to the Black's law dictionary the term "shall" is defined as "has a duty to; more broadly, is required". As such the provision should be read in mandatory terms that the accounting officer of a procuring entity must be a party to a review.
>
> ... .
>
> 37. Parties form an integral part of the trial process and if a party is omitted that ought not to be omitted then the trial cannot be sustained. In this case, the omission of the accounting officer of the procuring entity from the applications filed before the 5th Respondent is not a procedural technicality. The Applicants (the 1st and 2nd Respondents herein) in the review applications ought to have included the accounting officer of the procuring entity in the proceedings before the 5th Respondent. The failure to do so meant that the 5th Respondent could not entertain the proceedings before it. The 5th Respondent ought to have found review applications No. 76 of 2017 and 77 of 2017 to be incompetent and dismissed the applications."

44. This Court in James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] KECA 916 (KLR) had this to say on the matter:

> " It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replaced it, the PPADA, requires that the accounting officer of the procuring entity be the party. ...the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the

review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive.

When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply."

45. Section 31 of the *Interpretation and General Provisions Act* (Cap.2) provides:

> 31. General provisions with respect to power to make subsidiary legislation
>
> Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—
>
> (a) ... ...;
>
> (b) no subsidiary legislation shall be inconsistent with the provisions of an Act;

46. Our reading of sections 168 and 170 of the Act, regulation 205(1) of the Regulations and section 31 of Cap. 2, as well as the afore-cited judicial authorities, leaves no room for any doubt that the appellant's failure to comply with the mandatory provisions of section 170 of the Act and name the 2nd respondent's Accounting Officer in its Request for Review was fatal and rendered its Request incompetent. Accordingly, the appellant's contention that the 1st respondents' decision was not according to law does not hold.

47. On the 3rd issue as to whether the 1st respondent acted fairly and reasonably, the learned Judge posed the same question and concluded thus:

> '94. Did the Respondent act unfairly and unreasonably? The Ex parte Applicant argued that it used the form in the Regulation. Counsel for the Ex parte Applicant urged that his client should not be penalized for complying with the law. Although this argument is persuasive to a point, I cannot help but notice that the Ex parte Applicant did not list the Respondent, that is to say, the Public Procurement Administrative Review Board as the Applicant as would have been the case had it followed the form strictly. In my view, the form given in the Regulations is for the guidance of the parties and may be modified as necessary. In the circumstances I find no merit in this ground as well."

48. The appellant's complaint on this account was that the 1st respondent acted unfairly and unreasonably by "punishing" it for "complying with the law by lodging its request for review in the prescribed manner"; that the 1st respondent did not specify which other form the appellant ought to have used other than the Form set out in the 14th Schedule to the Regulations; that the 1st respondent's past decisions excused non-compliance with section 170 by holding that failure to list the successful tenderer as a respondent under section 170(c) of the Act is not fatal; and that the 1st respondent's decision in the instant case was discriminatory, unjustified and unreasonable because "there was no basis in law to elevate section 170(b) of the Act over section 170(c) by making section 170(b) mandatory.

49. In response, counsel for the 1st respondent submitted that the 1st respondent did not skip any step before it rendered its decision; that the process was not flawed as all parties were given the opportunity to file their documents and present their respective cases; that the 1st respondent relied on the relevant statute and was guided by the decisions of the High Court and the Court of Appeal; and that the 1st

respondent's decision was sound, fair and reasonable as it did not go against the weight of the evidence before it.

50. On their part, counsel for the 2nd respondent highlighted the contents of the afore-cited paragraph 94 of the impugned judgement with nothing more to add.

51. In our respectful view, we are not persuaded by the appellant's contention that, since the 1st respondent had previously departed from the mandatory provisions of section 170 of the Act and allowed incompetent Requests for Review, it ought to have done the same in its favour and disregard the clear and mandatory provisions of section 170 to list the Accounting Officer of the Procuring Entity as a party to its Request for Review. Accordingly, we find nothing to suggest that the learned Judge was at fault in reaching his conclusion in its case in this regard. Put differently, the 1st respondent's previous failure to adhere to the mandatory provisions of section 170 of the Act does not justify continued breaches of clear provisions of the law to please errant applicants for Review.

52. Turning to the 4th issue as to whether the 1st respondent acted in breach of the appellant's legitimate expectation, the learned Judge had this to say:

> " 95. The Ex parte Applicant urged that its legitimate expectation that its Request for Review would be heard on merit was denied. My reading of the decision of the Respondent was that it heard both the Preliminary Objection and the Request for Review on merits. That being the case, it is incorrect for the Ex parte Applicant to state that it was denied its legitimate expectation that it would be heard on merit. The only thing that the Respondent failed to do was to render a decision on merits in respect of the latter. In my view, that would have been unnecessary; having determined, as it did, that the Request for Review was fatally defective.
>
> 96. The foregoing notwithstanding, I agree with the submissions of the 1st Interested Party that there can be no legitimate expectation of an action contrary to the statute."

53. Claiming that the 1st respondent acted in breach of the appellant's legitimate expectation, the appellant faulted the learned Judge for not agreeing with its contention. Counsel submitted that the appellant had a legitimate expectation that, upon presenting its Request for Review, the 1st respondent would hear and determine the same on the merits; and that the 1st respondent breached and violated the appellant's legitimate expectation by striking out its Request for Review, yet "the same was presented in the manner prescribed in the law"

54. In reply, counsel for the 1st respondent reiterated the afore-cited paragraphs 95 and 96 of the impugned judgment. Citing the case of Proto Energy Limited (Ex parte (supra), counsel submitted that a decision maker cannot be required to act against statute law to meet a party's expectations; and that to do so would render his/her decision a nullity.

55. In the same vein, counsel for the 2nd respondent cited the Proto Energy case and argued that the 1st respondent could not act against the clear and mandatory provisions of section 170 of the Act just to meet the appellant's expectations.

56. To our mind, the learned Judge was by no means at fault in reaching his decision on this issue. We hasten to observe that the term "legitimate expectation" is often tossed around in pleadings and submissions as though it was a mere wish to be met by a decision maker or judicial officer as a matter of duty regardless of the legality of the expectation. Far from it, it is the expectation that those making judicial

or quasi-judicial decisions would do so in accord with the law, the principles and doctrines that guide the administration of justice and fair administrative action. Put differently, it is the legal principle that protects people from having their expectations violated by public authorities and is based on the idea that State agencies and authorities should act in a predictable way and keep their promises. In principle, the appellant is entitled to the legitimate expectation that the 1st respondent should make decision in determination of Requests for Review in accordance with the Act.

57. In Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) [2022] KEHC 5 (KLR), Mativo, J. (as he then was) held that:

> "
>
> "62... In adjudicating legitimate expectation claims, the court follows a two-step approach. First, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. Second, if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.
>
> 63. The first step in the analysis has both an objective and a subjective dimension. First, it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not. Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation....
>
> ... .
>
> 67. Statutory words override an expectation howsoever founded. A decision maker cannot be required to act against clear provisions of a statute just to meet one's expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute."

58. In Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR), the Supreme Court summed up the guiding principles in consideration of the legitimacy of an expectation as follows:

> "(269) The emerging principles may be succinctly set out as follows:
>
> a. there must be an express, clear and unambiguous promise given by a public authority;
>
> b. the expectation itself must be reasonable;
>
> c. the representation must be one which it was competent and lawful for the decision-maker to make; and

d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*."

59. On the authority of the afore-cited cases, we form the view that the appellant's expectation that its incompetent Request for Review should have been determined on its merits; that the 1st respondent should have excused the fatal defects thereof; and that the 1st respondent should not have insisted on adherence to the mandatory provisions of section 170 of the Act, was unfounded, it has no place in law, and cannot stand. In conclusion, its legitimate expectation, if any, was by no means breached or violated as claimed or at all.

60. Turning to the 5th and final issue as to whether the 1st respondent acted in breach of the appellant's constitutional rights to fair hearing and fair administrative action, the learned Judge found as a fact that:

> " 97. .... [The appellant] took part in the proceedings before the Respondent and was afforded every opportunity to present its case."

61. Taking issue with the learned Judge's finding, the appellant submitted that the 1st respondent found that the Form set out in the 14th Schedule is at variance with section 170 of the Act while the issue was not pleaded or raised by any party; that the 1st respondent arrived at that conclusion suo motu without affording the appellant an opportunity to be heard on the issue; that the conclusion by the learned Judge that the issue of variance was raised, and that the appellant's counsel responded to it is not supported by the 1st respondent's decision; that such a substantial issue cannot be raised from the bar; and that the 1st respondent did not have the jurisdiction to declare that the Regulations were at variance with the Act, which is a preserve of the High Court. Counsel cited the case of Jacqeline

Okeyo Manani & 5 Others v Attorney General & Another (supra) and submitted that, for a rule or regulation to be declared void for inconsistency with the parent Act, there must be clear and irreconcilable tension or inconsistency.

62. On their part, counsel for the 1st respondent submitted that the 1st respondent observed the rules of natural justice and ensured that all the parties were granted an opportunity to be heard on all issues raised in their pleadings, the evidential documents, and the parties' arguments before determination of the Request for Review.

63. Likewise, counsel for the 2nd respondent submitted that the appellant was accorded an opportunity to be heard during the proceedings before the 1st respondent; that the issue of the variance between the Act and the Regulations was raised in the proceedings and captured in paragraphs 40 to 42 of the 1st respondent's decision; that in response to that issue, as captured in paragraph 50 of the decision, counsel for the appellant stated that there was no conflict between section 170 of the Act and regulation 203 of the Regulations; and that the 1st respondent upheld the appellant's constitutional right to fair hearing and fair administrative action.

64. We need not belabour the clear evidence of the meticulous and comprehensive process undertaken by the 1st respondent in receiving the appellant's Request for Review; in duly notifying the relevant parties; in receiving their pleadings and responses; in admitting the 3rd respondent's preliminary objection on the incompetence of the appellant's Request for Review; in hearing the parties and their submissions; and in determining both the preliminary objection and the Request for Review in accord with regulation 209 of the Regulations. With all due respect, the appellant's complaint that the 1st respondent did not accord it a fair hearing or fair administrative action is unfounded.

65. We have considered the record as put to us, addressed ourselves to the reasoning in the impugned judgment, the grounds on which the instant appeal was founded, the submissions of the respective counsel, the cited authorities and the law. Our considered and respectful view is that the appeal fails and is hereby dismissed with costs to the respondents.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF FEBRUARY, 2025.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL