Vickers Security Services Limited v Public Procurement Administrative Review Board & 3 others (Civil Appeal E143 & E150 of 2025 (Consolidated)) [2025] KECA 671 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KECA 671 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E143 & E150 OF 2025 (CONSOLIDATED)

W KARANJA, K M'INOTI & LA ACHODE, JJA

APRIL 11, 2025

BETWEEN

VICKERS SECURITY SERVICES LIMITED ..... APPELLANT

AND

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

KENYA REVENUE AUTHORITY ..... 2ND RESPONDENT

ACCOUNTING OFFICER, KENYA REVENUE AUTHORITY .... 3RD RESPONDENT

HATARI SECURITY GUARDS LIMITED ..... 4TH RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Chigiti, J.) dated 21st February 2025 in HCJR No. E003 of 2025 (Consolidated with HCJR No. E006 of 2025)

JUDGMENT

Introduction

1. The central question in this appeal is the extent of the powers of the 1st Respondent, the Public Procurement Administrative Review Board (the Board), when seized of a request for administrative review under section 167 of the Public Procurement and Disposal *Act No. 33 of 2015* (the Act). Can the Board, having heard and dismissed the grounds upon which a request for administrative review is based, nevertheless nullify a procurement on different grounds raised by it suo motu, and without hearing the parties?

2. The Board and the 4th Respondent, Hatari Security Guards Ltd. (Hatari), believe that by dint of the transparency and anti-corruption requirements of Article 227 of the *Constitution* and the Act, as

regards public procurement, the Board has roving powers to nullify any procurement it finds tainted, even on grounds that have not been raised in the request for review. On the other hand, the appellant, Vickers Security Services Ltd. (Vickers); the 2nd Respondent, Kenya Revenue Authority (KRA); and the 3rd Respondent, the Accounting Officer, Kenya Revenue Authority, believe that by dint of Articles 47 and 50 of the *Constitution*, the Board must hear parties if it elects to nullify a procurement on grounds other than those raised and addressed in the request for review.

3. On 21st February 2025, the High Court of Kenya at Nairobi, (Chigiti, J.) rendered a judgment in which it dismissed two consolidated judicial review applications, one by Vickers, and the other by KRA and its Accounting Officer, for orders of certiorari to quash the decision of the Board dated 6th January 2025 and consequential orders of prohibition and mandamus. It was contended that by that decision, the Board unlawfully nullified a procurement on grounds other than those raised by Hatari in a request for review, without hearing Vickers and KRA. That judgment immediately spawned two appeals, namely, Civil Appeal No. E143 of 2025 by Vickers and Civil Appeal No. 150 of 2025 by KRA and its Accounting Officer. At the hearing of the appeals on 26th March 2025, with the consent of the parties, the two appeals were consolidated pursuant to rule 106 of the Court of Appeal Rules.

Background

4. The background to the appeal is as follows. On 27th August 2024 KRA advertised Tender No. KRA/HQS/NCB- 002/2024-2025 and invited bids for provision of security and safety services for a period of three years. The tender covered three particular services, namely:

    i. Lot 1 - Guarding Services

    ii. Lot 2 - Leasing of Security Equipment; and

    iii. Lot 3 - Alarm back-up services.

5. Twelve bidders responded and, after evaluation under the relevant criteria, namely, preliminary evaluation, vendor evaluation, technical evaluation and financial evaluation, Lot 1 was awarded to Vickers, Lot 2 to Biometric Technology Ltd., and Lot 3 to Hatari. As regards Lot 1 which was awarded to Vickers, only Vickers' and Hatari's bids were found to have been responsive to the evaluation criteria. After financial evaluation, the bid by Vickers was ruled the lowest responsive bid at Kshs. 1,182,024,000.00. Vickers and KRA contended that Hatari's financial bid was higher by more than Kshs. 200,000,000.00.

Request for Administrative Review

6. On 17th December 2024, Hatari made a request for administrative review to the Board pursuant to section 167 of the Act, challenging the award of Lot 1 to Vickers. The request for review was based on Hatari's contention that Vickers' bid did not satisfy mandatory requirement No. 20 of The Instruction to Tenderers for Lot 1 because Vickers' agents did not attend a pre-tender site visit of the site of works in six specified sites out of a total of 162 sites.

7. As evidence of Vickers' failure to visit the six sites, Hatari relied on the fact that Vickers' representatives had not signed the occurrence books or site visit registers in those stations. Hatari further pleaded that by failing to attend the site visits in the six stations, Vickers had failed to comply with the mandatory requirements and, therefore, its bid was non-responsive.

8. The Board heard the parties on the administrative review request where the central issue was whether mandatory

requirement No. 20 of the tender demanded signing of occurrence books or site registers. While Hatari maintained that the signing of the occurrence books and site registers were a mandatory pre-condition for evaluating the responsiveness of the tender, Vickers and KRA argued that mandatory requirement No. 20 of the tender only required site visits registers to be stamped by a KRA representative or Local Government Administration officer, which was duly done in the six stations.

The Board's Determination.

9. By a decision rendered on 6th January 2025, the Board found no merit on the specific grounds for review raised by Hatari. However, the Board proceeded suo motu to examine and evaluate Vickers' bid to ascertain its compliance with other aspects of the tender, which had neither been raised by Hatari nor addressed by any of the parties.

10. After undertaking the evaluation, the Board concluded that there were anomalies regarding Vickers' site visit certificates for three stations, namely Hola, Isiolo TSO and Isiolo Warehouse. The Board also found that Vickers' bid did not comply with mandatory requirement No. 2 regarding duly filled and signed price schedules for the Nairobi Region.

11. Ultimately, the Board allowed Hatari's request for administrative review and cancelled and set aside KRA's letter of notification of intention to award tender, dated 22nd December 2024 and addressed to Vickers as the successful bidder for Lot No. 1. Also cancelled and set aside was KRA's letter of even date to all unsuccessful bidders in respect of Lot No. 1.

12. As to how the procurement would be progressed subsequent to the decision, the Board directed as follows:

> "(KRA) be and is hereby ordered to direct the tender Evaluation Committee to undertake re-evaluation at financial evaluation stage including carrying out due diligence exercise with respect to Lot No. 1 for Tender No. KRA/HQS/NCB-002/2024-2025 for Provision of Security and Safety Services (Guarding, Leasing of Security Equipment and Alarm Back-up Service) for a period of three (3) years, taking into consideration the Board's finding in this decision."

13. It is apt to note that as regards Lot No. 1, KRA had found that only Vickers' and Hatari's bids were responsive. To the extent that the Board had ruled Vickers' bid unresponsive and liable to disqualification, in making the order for KRA to undertake re-evaluation at the financial stage, the Board was effectively and for all intents and purposes directing KRA to award the tender for Lot No. 1 to Hatari.

The Judicial Review Application

14. As earlier pointed out, Vickers and KRA were aggrieved and invoking section 175 of the Act, they sought in the High Court judicial review of the Board's decision. They contended that the Board erred by entertaining new issues outside the 14 days period prescribed by section 167(1) of the Act for seeking administrative review and, by failing to find that Hatari, having failed to challenge KRA's decision to award the tender to Vickers within the prescribed time, the award was final and binding. It was further contended that the decision of the Board was irrational, in excess of jurisdiction, and in violation of Articles 10 and 50(1) of the *Constitution* to the extent that the Board raised and determined unpleaded issues without hearing the parties.

15. Also challenged as irrational and unreasonable was the Board's conclusion that the site visit certificates for the three sites it had identified suo motu in Hola and Isiolo were deficient for lack of signatures from Vickers' representatives, yet those very certificates were actually signed and stamped by KRA official or Local Government Administration officers, which was proof that Vickers' representatives had actually visited the sites.

16. It was also contended that had the Board afforded Vickers and KRA an opportunity to be heard on the mandatory price schedule for Nairobi Regions, which issue it had raised suo motu and decided without hearing them, they would have shown that the schedule was duly filled and signed and that, in any event, the names and signatures were not mandatory requirements of the tender documents. Further that such omission were minor deviations under section 79(2) of the Act.

17. The two applicants further criticised the Board for usurping the duties of the Evaluation Committee and in the process failing to impartially evaluate both Vickers and Hatari's bid. They argued that had the Board acted impartially, it would easily have found that even Hatari's site visit forms for Taveta and Lamu stations were neither signed nor did they bear Hatari's representatives' names. KRA maintained that it had treated that as a minor issue for all the tenderers.

18. The Board opposed the judicial review application, contending that under section 173 of the Act, it has power to review procurement processes and give directions to do or redo anything when it becomes apparent that the procurement has not been conducted in accordance with the Act and the tender document and that its mandate includes the power to correct instances where unresponsive bids have been declared successful. It maintained that it had merely corrected an anomaly where Vickers' bid was declared responsive whereas some of its site visit certificates did not bear the names and signatures of its representatives.

19. As regards determination of unpleaded issues, the Board contended that it restricted itself to the issues raised in the request for review, namely, Vickers' compliance with mandatory requirement No. 20. As for Vickers' compliance with Mandatory requirement No. 2, the Board argued that it was an anomaly it observed from the confidential documents. It was also the Boards view that the anomalies it ascribed to Vickers were material departures from the tender document, which could not be categorised as minor deviations under section 79(2) of the Act.

20. Hatari similarly opposed the judicial review application arguing that flowing from the Board's mandate under the Act, it was under obligation to ensure that the impugned procurement process conforms to the principles of public procurement under the *Constitution* and the Act, including responsiveness of the bid. It further contended that the Board was under an obligation to consider and analyse all the evidence presented before it, including confidential documents and determine whether the tender process was conducted lawfully.

21. Hatari further argued that the Board could raise a point of law at any stage, even if the point was not raised by the parties, and that the Board's impugned decision was neither unreasonable nor irrational. It was also contended that the High Court could not entertain a merit review of the Board's decision, but only the process of decision making.

Determination of the High Court

22. After hearing the application, the High Court identified four issues for determination, the first of which is no longer relevant to this appeal. The following are the relevant issues:

ii. whether the Board had jurisdiction and authority to review the procurement process, including the issue of tender responsiveness, and whether it considered issues that were not raised in the request for review or pleaded before it;

ii. whether Vickers' tender complied with all the mandatory requirements of the tender document; and

iii. whether the Board's decision to reject Vickers' tender and cancel the notification letters was lawful, rational and based on a proper interpretation of the law, or if the Board acted outside its mandate.

23. On the issue of jurisdiction, the High Court held that under section 28 of the Act, the Board had jurisdiction to review, hear and determine tendering and asset disposal disputes and that while seised of the dispute, it could not limit itself to what was raised but could wholly interrogate the evaluation process and consider the evidence in order to confirm whether the process culminating in the award was in compliance with the law and the tender document.

24. As regards compliance with the mandatory requirements of the tender, the court upheld the Board's decision that Vickers bid did not fully comply with mandatory requirement No. 20 because its site visit certificates lacked the names of the representatives who conducted site visits in Hola Station, Isiolo TSO and Isiolo Warehouse Station. Further, that the bid did not comply with mandatory requirement No. 2 and that the price schedule for Nairobi Region Security Guards was not compliant. All those deficiencies constituted, in the opinion of the court, material breach of the tender requirements and were not minor deviations that could be waived under section 79(2) of the Act.

25. On the last issue regarding the lawfulness of the Board's decision, the court held that Vickers and KRA had failed to establish that the Board's decision was made pursuant to a process that was irrational, illegal, unreasonable or tainted by procedural impropriety. Accordingly, the court dismissed the judicial review applications with costs.

Appeal to the Court of Appeal

26. As earlier noted, Vickers and KRA were aggrieved and preferred the appeal now before the Court. Vickers raised 10 grounds of appeal which, in its submissions, it combined into three issues. On its part KRA put forth 8 grounds of appeal, which it condensed into 4 issues. Upon careful consideration of the two sets of issues identified by the two appellants, we find that they raise more or less the same issues and therefore we shall proceed on the basis of the issues as framed by vickers.

27. At the hearing of the appeal, the parties were represented by learned counsel as follows. Mr. Muite, SC, led Mr. Mansur, for Vickers; Mr. Lemiso and Mr. Nyapara for KRA; Mr. Kariuki for the Board; while Mr. Mukele appeared with Ms. Karanja for Hatari.

28. The three issues that we have adopted to guide the determination of this appeal are:

i. whether the High Court erred in law in holding that the Board has jurisdiction to consider unpleaded issues not raised in Hatari's request for review;

ii. whether the High Court erred in law and misinterpreted the jurisdiction of the Board under section 167 of the Act; and

iii. whether the High Court erred in law and misdirected itself on what constitutes excess of jurisdiction, irrationality, and unreasonableness in judicial review.

Vickers' Submissions

29. On the first issue, counsel for Vickers, submitted that the High Court erred in holding that the Board had jurisdiction to consider and determine issues that were not raised in Hatari's request for review. It was contended that the Board's decision in that regard was irrational and in excess of its jurisdiction under section 173 of the Act and also a violation of the appellants' right to a fair hearing under Article 50(1) of the *Constitution*.

30. It was further argued that having ruled against Hatari on the only issue it had raised, the Board ought to have dismissed the request for review, but instead, it proceeded, unlawfully, irrationally and in excess of jurisdiction, to determine issues which had neither been raised or addressed by the parties. It was submitted that the issue of duly signed and stamped site visit certificates on the basis of which the Board allowed the request for review and nullified the tender, was raised and determined by the Board itself in the course of preparing its determination, without the courtesy of hearing the parties on the new issues.

31. In support of the submission that the High Court was in error in upholding a decision that was founded on unpleaded issues which the parties had not been afforded an opportunity to address, Vickers relied on the decision of the Supreme Court in Odinga & Another v. IEBC & 2 Others [2017] KESC 31 (KLR); that of this Court in David Siring ole Tukai v. Francis arap Muge & 2 Others [2014] KECA 155 (KLR); and that of the High Court in Republic v. PPARB & 3 others Exp Britam Life Assurance Co (K) Ltd & Another [2018] KEHC 9280 (KLR).

32. Vickers cited the decision of this Court in Njurukani & 2 Others v. Barasa [2023] KEHC 1250 (KLR) on the limited circumstances under which a court may determine unpleaded issues and submitted that the decision of the Board did not satisfy the relevant conditions. It was contended that by proceeding the way it did, the Board condemned Vickers unheard, in violation of Article 50 of the *Constitution* and that the High Court erred in upholding a decision tainted by such illegality.

33. On whether the High Court misapprehended the jurisdiction of the Board, Vickers submitted that the High Court erred by failing to find that in raising and determining new issues outside the 14 days prescribed by section 167(1) of the Act, the Board had acted in excess of its jurisdiction and that what it did was exactly what the High Court decried as "informal request for review" in Republic v. PPARB & 3 others Exp Britam Life Assurance Co (K) Ltd & Another (supra). It was also contended that the Board usurped the role of the Tender Evaluation Committee, whose decision is final and binding if it is not challenged within 14 days and that under the Act, the Board is only supposed to entertain requests for review which are filed within 14 days. In Vickers' view, the issues raised and determined by the Board were raised outside the time prescribed by section 167(1) of the Act and to that extent, the High Court erred in holding that the Board had jurisdiction to proceed as it did.

34. On the last issue as to whether Vickers had established the grounds that would have entitled it to judicial review remedies, counsel submitted that the High Court misapprehended the decision in Pastoli v. Kabale District Local Government Council & Others [2008] 2 EA 300, which it cited, on the meaning and import of excess of jurisdiction, irrationality and unreasonableness in judicial review. It was contended that the High Court erred by failing to hold that the Board had acted in excess of jurisdiction when it determined unpleaded issues without hearing the parties and further, that it constituted procedural impropriety to deny a party the right to natural justice.

35. It was also submitted the High Court erred in failing to find that the Board had acted irrationally and unreasonably when it nullified the tender on the basis that Vickers' site visit certificates for Hola, Isiolo TSO and Isiolo Warehouse stations did not bear the names of its representatives, yet the certificates were signed and stamped by a KRA officer or a Local Government Administration

officer as required by mandatory requirement No 20. Vickers contended that the nullification was also irrational and unreasonable because there was no mandatory requirement in the tender document that its representatives sign the certificates.

36. For the above reasons, Vickers urged the Court to allow the appeal with costs and set aside the orders of the Board.

KRA's Submissions

37. Next, we heard KRA, which was also an appellant and was supporting the appeal by Vickers. It was submitted that by nullifying the tender on the basis of new issues that were not pleaded, and by denying KRA an opportunity to address the new issues, the Board violated its right to fair hearing under Article 50(1) of the Constitution. KRA contended that had the Board given it an opportunity to be heard on the new issues, it would have satisfied the Board that the award of Lot No. 1 to Vickers was proper and valid under the tender document. KRA relied on the decision of the Supreme Court in Githiga & 5 Others v. Kiru Tea Factory Co. Ltd. [2023] KESC 41 (KLR) in which the Court underlined the importance of a fair trial in both criminal and civil proceedings and the fact that a court cannot determine a matter without hearing the parties.

38. It was KRA's further submission that parties are bound by their pleadings, and that it is the pleadings that identify the dispute and guide the court or tribunal in its resolution. Further, that the rules on pleadings ensure that there is fairness in the trial and that no party is ambushed or taken by surprise. The decisions of this Court in Nyamongo & Nyamongo Advocates v. Barclays Bank of Kenya [2014] KECA 744 (KLR), George W. Omondi v. Guilders International Bank Ltd [2015] eKLR and National Assembly, Republic of Kenya & Another v. Matindi & 3 Others (Civil Appeal E326 of 2023) were cited in support of the proposition that a court will not grant a relief that is not founded on the submissions. The decision of the High Court in Accounting Officer, Kenya Ports Authority v. Public Procurement Administrative Review Board & 3 Others [2019] KEHC 2229 (KLR) was also cited for the principle that a court cannot raise suo motu and determine an issue without giving an affected party the opportunity to be heard.

39. As to whether the Board erred by raising new issues outside the fourteen days prescribed by the Act for filing a request for review, KRA submitted that it was not open in law for a tender to be challenged or nullified on an issue that was not raised within the prescribed period. In KRA's view, the Board lacked jurisdiction to entertain such belated issues. The decision of the Supreme Court in Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd. & 2 Others [2012] eKLR was cited in support of the proposition that a court or tribunal has only such jurisdiction as is conferred by the *Constitution* or law and that it cannot arrogate to itself jurisdiction beyond what is so conferred.

40. For the foregoing reasons KRA urged the Court to allow the appeal with costs.

41. The Board opposed the appeal vide submissions dated 11th May 2025. Its learned counsel, Mr. Kariuki, submitted that the judgment of the High Court was legally sound because the role of the court was only restricted to the process of decision making by the Board, rather than the merits of the decision. He cited the decision of this Court in Municipal Council of Mombasa v. Republic & Another [2002] eKLR in support of the

Submission.

42. Regarding whether the Board had jurisdiction to raise and determine new issues after the expiry of the time prescribed in section 167(1) of the Act, counsel submitted that the Board has jurisdiction to review, hear and determine tender and asset-disposal disputes, which was exactly the kind of dispute

before it. He added, on the authority of the decision in Orange Democratic Movement v. Yusuf Ali Mohamed [2018] eKLR, that jurisdiction is conferred by law, not by pleadings, and that in the instant case the Act conferred jurisdiction on the Board to conduct a review.

43. Counsel also supported as valid the view of the High Court that the Board could not limit itself to what was raised by Hatari, but had to wholly interrogate the evaluation process and to consider the evidence so as to confirm whether the process culminating in the award of the tender was in compliance with the law and the tender document. In counsel's view, the power of the Board to conduct an in-depth evaluation of the tender process was not precluded by the prescribed time for making a request for review.

44. On whether the decision of the Board declaring Vickers' site visit certificates deficient due to lack of signatures of the representatives was unreasonable and irrational, counsel submitted that it was not, because the Board merely exercised the power of review vested in it by section 173 of the Act. It was further contended that the Board merely corrected an anomaly where Vickers' bid had been declared responsive to mandatory requirement No. 20 while it was not.

45. It was also submitted that the Board did not violate any of the parties' right to a fair hearing. Further, that judicial review remedies are discretionary in nature and that a court may decline to issue such orders even if they are deserved. Since the refusal of the High Court to award a judicial review remedy was discretion, it was contended, this Court will not readily interfere with exercise of discretion by the High Court. The decision of this Court in Kenya Revenue Authority & 2 others v. Darasa Investments Ltd. [2018] eKLR was cited in support.

46. For the above reasons, the Board urged the Court to dismiss the appeal with costs.

Hatari's Submissions

47. Last but not least, we heard Hatari. Its counsel relied on written submissions dated 21st March 2025. It was contended that the High Court had exercised discretion in dismissing the judicial review applications and that, on the authority of Yooshin Engineering Corporation v Aia Architects Ltd. [2023] KECA 872 (KLR), this Court can only interfere with the decision of the High Court if the exercise of discretion was not judicious, if the decision was clearly wrong, or if the court had misdirected itself by taking into account matters it should not have or failing to take into account matters it should have, and in so doing arrived at a decision which was plainly wrong. Counsel urged the Court not to entertain this appeal because it purports to fault the High Court for failing to subject the decision of the Board to a merit review, whereas in a judicial review application the High Court is not supposed to interrogate the merits of the decision of the Board, but to only inquire into the procedural fairness of the decision of the Board.

48. On whether the Board had jurisdiction to proceed as it did, counsel submitted that Article, 227(1) of the *Constitution*, which requires public procurement to be conducted on the basis of a system that is fair, equitable, transparent, competitive and cost effective, is operationalised by the Act and that sections 28 (a) and 167 of the Act confers on the Board powers to review, hear and determine procurement disputes. In counsel's view, in the exercise of its review jurisdiction, the Board was obliged to consider, inspect or re-examine the bid by Vickers in its entirety, including interrogating all the evidence presented before it. He contended that in conducting the review, the Board was not restricted to mandatory requirement No. 20, but also all other mandatory requirements under the tender document and the Act. Further, to hold otherwise would defeat the purpose of the *Constitution* and the Act and expose public procurements to corruption and manipulation.

49. Turning to whether the High Court erred by upholding the decision of the Board which was based on unpleaded issues, it was submitted that the High Court correctly found that the Board was not limited to issues raised by Hatari, but could wholly interrogate the evaluation process and the evidence. For good measure, counsel added that jurisdiction was not conferred by pleadings, but by the law. He contended that the decision of the supreme Court in Raila Odinga & Another v. IEBC & 2 Others (supra) did not apply and is distinguishable because it arose from an election dispute, which is a sui generis dispute.

50. Next, Hatari submitted that the High Court did not err in upholding the Board's finding that Vickers' bid was non- responsive because a tender can only be awarded if the bid conforms to all the eligibility and other mandatory requirements in the tender document. In this appeal, it was contended that Vickers' bid was non-responsive as regards mandatory requirement Nos. 2 and 20. It was also contended that whether Vickers' bid was responsive was a question of law which the Board was entitled to raise at any stage and pronounce itself on it. In support of the submission, counsel relied on the decision of this Court in Sinopec International Petroleum Service Corporation v. Public Procurement Administrative Review Board & 3 Others [2024] KECA 184 (KLR).

51. Hatari also called to its aid the doctrine of illegality where courts have declined to enforce transactions tainted by illegality, whether or not the illegality was raised or alleged. It was contended that in such cases the court intervenes on its own motion to ensure that its process was not abused through enforcement of transactions that were contrary to public policy. In support of the argument, counsel cited the decision of the English Court of Appeal in Birket v. Arcon Business Machines Ltd [1999] 2 AII ER 429 and that of the High Court in Royal Media Services v. IEBC & 3 Others [2019] eKLR.

52. Lastly, on whether the High Court misapprehended what constitutes excess of jurisdiction, irrationality and unreasonableness in judicial review, Hatari submitted that since the decision of the Board was made within its review mandate under section 79 of the Act, that decision cannot be said to be said to be tainted by the above grounds for judicial review because it was made pursuant to the powers of the Board under section 28 of the Act. On irrationality and unreasonableness, Hatari submitted that for a decision to be described as such, it must be so obviously wrong that no sensible authority could have reached it. It called to its aid in that respect, the decision of the High Court in Republic v. National Water Conservation & Pipeline Corporation & 11 Others [2015] KEHC 7318 (KLR) and submitted that the decision of the Board holding Vickers' bid to be non- responsive cannot be described as irrational or unreasonable.

53. For the foregoing reasons, Hatari urged the Court to dismiss the appeal with costs.

Analysis and Determination

54. We have carefully considered this time-bound appeal, the judgment of the High Court, submissions by learned counsel and the authorities cited. At the end of the day, the three issues conversed by the parties in this appeal boil down to the question whether, taking into account all the circumstances of this appeal, the High Court erred by upholding the decision of the Board that nullified the tender that KRA had awarded to Vickers for Lot No. 1.

55. From the start, there cannot be any question that under the Act, which gives effect to Article 227 of the *Constitution*, the Board has jurisdiction to hear and determine disputes arising from procurements, so long as they meet the stipulated parameters set out in the Act, such as being moved by an aggrieved

party within the meaning of the Act, and within the prescribed time. Article 227 of the *Constitution*, which underpins our public procurement legislation, provides as follows:

> " 227.
>
> (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.
>
> (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented..."

56. We make a few observations from the constitutional framework. First, procurement of goods and services by a public entity is not to be conducted arbitrarily and opaquely. On the contrary, such procurement is to be conducted on the basis of principles and values that are expressly spelt out in the *Constitution*. It is striking how the principles set out in Article 227 closely mirror the national values and principles of governance set out in Article 10 of the *Constitution*, among them participation of the people, equity, equality, non-discrimination, integrity, transparency and accountability. We would venture to suggest that Article 227 constitutes the national values and principles of public procurement, just as Article 10 constitutes the national values and principles of governance generally.

57. The first of the procurement principles is fairness and equity. In our perception, that principle requires the procuring entity to treat all the bidders with impartiality, non-discrimination, and without bias in favour of, or against any one of them. The entity has to be fair to all the bidders, and is required to apply the requirements of its tender document consistently and in similar manner to all the bidders. If there is any penalty to be suffered, or waiver, benefit, or exemption to be conferred, it must accrue to all the bidders across the board, not some of them only. Appreciating that equal treatment may sometimes not translate into equitable treatment, the law specifically provides for disadvantaged or marginalised groups. The bottom-line is that when a procuring entity treats similar bidders differently on the basis of unknown criteria, it cannot be said to have acted fairly and equitably, and would be in violation of a fundamental constitutional value and principle on public procurement.

58. the *Constitution* also requires the process to be transparent. That requirement speaks to openness and scrutiny in the tender process. A procurement process that is consistent with the *Constitution* cannot be secretive or shielded from scrutiny or question. Each bidder is entitled to know the conditions of the tender and to be represented at various stages of the procurement process. Accountability, the antithesis of impunity, springs from a process that is transparent, open and above board.

59. The procurement process must also be competitive. It cannot be restricted to a selected or favoured bidder or a few of them, except where the law, for obvious and compelling reasons, allows single sourcing, within the relevant safeguards. The procurement must be characterised by a spirit of real competition and constructive bidder rivalry. All bidders who consider themselves qualified to offer the goods and services in question must be invited and offered an opportunity to bid. Without competition, there is the risk of price gouging, the charging of exorbitant or excessive prices and usurious rates. It is through competition by bidders that the procuring entity ultimately obtains value for money.

60. Lastly, the procurement must ensure that the goods and services procured by the procuring entity are obtained at cost-effective rates. In other words, the goods and services should not cost the entity an arm and a leg, so to speak. The ultimate result of a procurement that respects the values and principles

of Article 227 is goods and services that are obtained at a cost-effective rate, from which the procuring entity obtains real value for money.

61. The above principles do not bind only the procuring entity and the bidders. They also bind and guide the Board when it is resolving procurement disputes. This is in addition to the procedural fairness principles that bind it as a dispute resolution body.

62. A perusal of the Act confirms that its whole purpose is to give effect to Article 227 of the *Constitution*. The long title to the Act expresses its purposes as follows:

> " An Act of Parliament to give effect to Article 227 of the *Constitution*; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes." (Emphasis added).

63. By dint of section 28 of the Act, the function of the Board is to review, hear and determine tendering and asset disposal disputes, and to perform any other function conferred on it by the Act, Regulations or any other written law. Further, section 167 (1) allows an aggrieved tenderer to seek review from the Board. Sections 28 and 167(1) as provisions of an Act of Parliament, are sufficient to answer the general question whether the Board has jurisdiction to review and determine a procurement dispute. The answer is a resounding yes, it does.

64. But that is only the beginning, rather than the end of the issues raised in this appeal. If it is conceded that the Board has jurisdiction to review, hear and determine public procurement disputes, how does it conduct such review and hearing within the confines of the *Constitution* and the law? The Board and Hatari submitted forcefully that jurisdiction is conferred by law or the *Constitution* and not by pleadings. That is absolutely correct. However, that does not mean that pleadings are irrelevant to a court which has jurisdiction. It cannot possibly be the position that once the Board, or a court of law for that matter, has jurisdiction to entertain a dispute, it is free to conduct proceedings as it wishes.

65. A court or tribunal that is established by law and has jurisdiction in a matter cannot bestride the proceedings like a Colossus. How it resolves disputes over which it has jurisdiction is also closely regulated by the law and the *Constitution*, so as to ensure that the parties in dispute are afforded a fair hearing and a fair trial. In fact, Articles 47 and 50 of the *Constitution*, which provide for fair hearing, are addressed specifically to bodies that have jurisdiction over a dispute, not to those that do not. It is apt to set out those provisions, because of their unequivocal emphasis that the proceedings must be conducted within the law and guarantee the parties a fair hearing. Article 47(1) provides that:

> " 47.
>
> (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." (Emphasis added)."

66. For its part, Article 50(1) provides as follows:

> " 50.
>
> (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body." (Emphasis added).

67. The whole purpose of the rules of procedure is to ensure that proceedings which are conducted before a court that has jurisdiction are conducted in a manner that is focused, efficient, cost-effective, and above all, fair to the parties. In that regard, the rules of pleadings define the parameters of a dispute, identify what the claimant is complaining about, and what the respondent's answer to the complaint is. Indeed, in Esso Petroleum Company Limited v. Southport Corporation [1956] AC 218, which has been cited with approval by our courts, Lord Normand explained the purpose of pleadings in the following terms:

> " The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them."

68. That same view was echoed almost 70 years ago by the former Court of Appeal for Eastern Africa in Gandy v. Caspar Air Charters Ltd [1956] 23 EACA, 139, a decision which is still good law in this jurisdiction:

> the object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given."

69. This Court reiterated the same principle in Mohamed Fugicha v. Methodist Church in Kenya [2016] KECA 273 (KLR) as follows:

> " We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer."

70. Further, it must be borne in mind that the rules of evidence are intended to ensure that the Court and the parties focus on the real issues in dispute and not to waste valuable time and resources on irrelevant issues, extraneous to those raised and identified in the pleadings. Thus, in Kenya Ports Authority v. Kuston (Kenya) Ltd. [2009] 2EA 212 this Court held that:

> " [T]he responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

71. We further bear in mind that although regulation 218 of the Public Procurement and Asset Disposal Regulations, 2020 (the Regulations) provides that the Board is not bound to observe the rules of evidence in hearing a request for review, what that means is that the strict rules of evidence in the *Evidence Act*, Cap 80 do not constrain proceedings before the Board. However, regulation 218 is not a license for the Board to conduct proceedings in a manner that oust the right to a fair hearing that is guaranteed by Articles 47(1) and 50(1) of the *Constitution*. The regulations cannot be interpreted in a manner that voids expressly guaranteed constitutional rights. We must also emphasise that the right to a fair hearing guaranteed by Article 50(1) is not restricted to proceedings before courts of law only, but extends to proceedings before tribunals and "other bodies" that have the responsibility of resolving disputes.

72. It is because of the centrality of pleadings in dispute resolution that our courts have consistently held that as a general rule, the parties themselves define their own dispute and that the court will neither determine issues that have not been framed by the parties, nor raise and determine its own issues. Thus, in Galaxy Paints Co Ltd v. Falcon Guards Ltd. [2000] EA 885, this Court held as follows:

73. The Court reiterated the principle as follows, in Baber Alibhai Mwaji v. Sultan Hashim Lalji & Another [2010] eKLR:

> " A court of law cannot pluck issues literally from the air and purport to make determinations on them. It is the pleadings which determine the issues for determination."

74. In IEBC & Another v. Stephen Mutinda Mule & Others [2014] eKLR, this Court quoted with approval the following incisive passage from the Judgment of the Supreme Court of Malawi in Malawi Railways Ltd v Nyasulu [1998] MWSC 3:

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specified may be raised without notice."

See also the decision of this Court in David Sironga ole Tukai v. Francis Arap Muge & 2 Others [2014] eKLR.

75. Similarly, in Caltex Oil (Kenya) Ltd v. Rono Limited [2016] eKLR, this Court held:

> If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders." (Emphasis added)

76. In Odinga & Another v. IEBC & 2 Others [2017] eKLR 31 (KLR), which the appellant relied on, the Supreme Court cited with approval the following passage from the decision of the Supreme Court of India in Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari & Another [2014] 2 SCR:

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable

nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for declaring the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts." (Emphasis added).

77. The above decision arose in the context of an electoral dispute, which, like public procurement, is regulated by a comprehensive and dedicated legislative framework. Not unlike procurement legislation whose purpose is to rid public procurements of corruption, the purpose of electoral legislation is to uphold democracy and integrity in elections. But even in such critical cases, the Court eloquently declaimed the kind of "roving inquiry" power claimed by the Board while conducting a procurement review. The message was clear and unequivocal: reviews must be conducted within law, not as fishing expeditions.

78. However, it is equally established by consistent decisions of our courts that where the parties address an issue that is not raised in the pleadings and from the conduct of the proceedings, there is no doubt that they have left the unpleaded issue to the court for determination, the Court will validly determine the unpleaded issue. This exception was recognised by the predecessor of this Court in Odd Jobs v. Mubia [1970] EA 476 where it was held that:

> " A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision."

79. Another example of the court validly determining an issue even though it was not pleaded is in Herman P. Steyn v. Charles Thys (*CA No. 86 of 1996*) where this Court held as follows:

> It is true that the finding was an obvious and fundamental departure from the pleadings without any amendment of the same. But in our view the appellant himself introduced the unpleaded issue into the evidence, led evidence thereon, cross-examined the plaintiff vigorously in relation thereto and acquiesced into the unpleaded issue being canvassed and left to the court for a decision. In addition, the defendant also called witnesses in support of his assertion that the money was loaned in Tanzanian Currency. Written submissions followed in which the advocates for both the parties dealt with this issue in detail. In these circumstances, the determination of that issue became an issue at the trial with neither party objecting and both parties fully participating in it."

80. A similar approach was taken by this Court in Richard Nchapi Leiyagu v. IEBC & 2 Others [2014] eKLR, where the Court expressed itself thus:

> " In the present appeal, the record shows that although the issue of the opened ballot box was not pleaded in the petition, the parties addressed it in the evidence that they led and in their submissions. The learned judge pronounced himself on the issue and made findings on it. In short, all the parties proceeded as if the issue had been pleaded. The 3rd respondent should have raised the objection that is being raised now the moment an unpleaded issue was raised before the election court. But what did he do? He acquiesced in the matter and addressed the issue as if it had been pleaded. With respect, it is too late in the day for the 3rd respondent to claim that the issue was not pleaded."

81. The reasoning in Anne Nyagitha v. Samuel Mungai Muceru & 3 Others [2016] eKLR was to the same effect, where this Court held:

> " We agree with counsel for the appellant that the pleadings before the trial court were slovenly drawn. There was no specific prayer for a determination of where the deceased body should be interred. Nonetheless the issue was prominently germane in the evidence adduced by both parties and in the event, although it would have been prudent for the parties to amend the pleadings, it would appear even the appellants acquiesced to the state of affairs and participated in the proceedings by adducing evidence of the deceased will. Taking into account the circumstances obtaining in this case, we are of the view that it fits squarely within the ambit of the holding in the case of Odd Jobs v. Mubea [1970] EA 476."

82. So too in Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v. Salama Beach Hotel Ltd & 3 Others [2017] eKLR this Court proceeded as follows:

> As has been stated time without number, a court will not determine or base its decision on unpleaded issues. However, if it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court may validly determine the unpleaded issue...The parties neither raised the issue of res judicata, nor canvassed or left it to the learned judge to decide...the responsibility of a court is to rule on the evidence or issues on record and not to introduce extraneous matters not dealt with by the parties. (Emphasis added).

83. More recently, in Heineken East Africa Import Co Ltd & Another v. Maxam Ltd [2024] KECA 625 (KLR), the Court reiterated as follows:

> " It is indeed trite that a court should only determine issues raised before it by way of pleadings, and the principle is well settled that a court, even when it has jurisdiction, will not base its decision on unpleaded issues. However, where the parties lead evidence and address the unpleaded issues, and from the cause adopted at trial it appears that the unpleaded issues have been left for the decision of the court, the court will validly determine the unpleaded issues. This exception was set out in Odd Jobs v Mubia (1974) EA 476, wherein it was held that a court may base its decision on an unpleaded issue where it appears from the course followed at the trial, that the issue has been left to the court for determination." (Emphasis added).

84. In Njurukani & 2 Others v. Barasa [2023] KECA 1250 (KLR), this Court affirmed the correctness of the decision in Odd Jobs v. Mubea (supra) and pointed out that the exception whereby a court may decide unpleaded issues is a "narrow" one. The Court addressed, in extenso, the circumstances when a court may determine issues which have not be pleaded. Writing for the Court, Prof. Ngugi, JA., reasoned as follows:

> " It is probably prudent to unpack when the facts of a case would fit within the narrow Odd Jobs exception. In my view, it is only open for a court to base its decision and grant relief on an unpleaded issue where the following conditions are met:
>
> a. When the issue the court seeks to frame for relief is prominently germane in the evidence adduced by both parties and all the relevant matters respecting the issue have litigated and all the potential evidence made available to the court and the only failure was the technical one of failing to request for the specific relief in the pleadings;

b. When the parties exhaustively addressed the issue for which the court seeks to grant a relief;

c. When no useful purpose will be served by the matter being litigated in a different form except to unnecessarily prolong the litigation process;

d. When the dictates of substantive justice compel that relief be granted rather than requiring that a new matter be filed, for example, where the evidence before the court shows that a party is likely to continue suffering oppression by the other party or where the new matter may be time barred;

e. When the relief is incidental or logically consequential from the pleaded matters and the court comes to the conclusion that in spite of the deficiency in the pleadings, the parties knew the case and they proceeded to trial on the issue in question by producing evidence;

f. When the failure to plead the relief was not a product of bad faith, tactical manoeuvre to give an advantage to the unpleading party. In this regard, some of the factors the court considers is whether the party was acting in person as well as the circumstances in which the matter was filed. For example, some matters are filed in an emergency mode where drafting mistakes can be made due to the pressure of time...,and

g. When neither party will suffer objective prejudice if the court grants the relief on the evidence adduced.

These factors are conjunctive not disjunctive: all must be present before a party can benefit from the exception. All these factors are based on an overriding fairness criterion: the need to ensure that the parties went into trial knowing all the rival case and led all the evidence not only in support of their contentions but also in refutation of those of the other side." (Emphasis added)

85. Implicit in all these circumstances is the fact that to determine issues that have not been pleaded or raised by the parties, the court must be satisfied that the constitutional right to a fair hearing has not been compromised and that no party has been exposed to prejudice by that approach.

86. In this appeal, it is crystal clear that the Regulations have provided in Part XV how a request for review is framed, initiated, heard and determined. Regulation 203 (2)(a) requires a party seeking review of a procurement to state the reasons for the review, including any alleged breach of the *Constitution*, the Act or the Regulations and the occurrence of the breach complained of. Further, Schedule 14 to the Regulations, which prescribes the Form for Review, specifically requires the party applying for review to state the grounds upon which review is sought.

87. Upon receipt of the request for review, the Board Secretary is required to immediately notify the procuring entity, which, under regulation 205(3) must within five days of notification or such other period provided, submit a written memorandum of response to the request for review. These provisions define the parameters of the dispute to be resolved in the request for review. The party seeking review must indicate the reasons for review and the provisions of the regulations, the Act or the *Constitution* that are alleged to have been breached. For its part, the procuring entity and any interested parties are to respond, not to anything and everything under the sun, but specifically to the grounds of complaint in the request for review.

88. For purposes of Regulation 203(2) (a), Hatari's request for review to the Board was based on its contention that Vickers' bid did not satisfy mandatory requirement No. 20 of The Instruction to Tenderers for Lot 1 because Vickers' agents did not attend a pre-tender site visit of the site of works in six specified sites out of a total of 162 sites. The six sites in issue were specified as:

i. Migori TSO Station

ii. Bungoma Station

iii. Lwakhakha Station

iv. Webuye RRU Station

v. Diif Station in the Northern Region; and

vi. Buxton Station.

89. The gist of Hatari's objection was encapsulated in paragraphs 26 and 27 of the request for review as follows:

> " 26. It follows that (Vickers), in failing to attend the site visits in aforementioned stations, failed to comply with clause 7 and section III of the (The Instruction to Tenderers) on the mandatory requirement of attending a site visit in all the listed stations in Annex 1 under Lot 1 of the Tender for Provision of Security Guarding Services. The bid, having not met the mandatory requirement was non- responsive.
>
> 27. It stands to reason that since (Vickers') bid was non-responsive, (KRA) should have disqualified it at the technical evaluation stage and should not have considered it at the financial evaluation stage."

90. To prove that Vickers had not visited the six sites as mandatorily required, Hatari relied on the fact that Vickers' agents had not signed occurrence books or site visit registers in those specified stations.

91. That was the whole of Hatari's complaint and it is what KRA and Vickers responded to. We have perused the record and are satisfied that was the issue which the parties addressed before the Board. Hatari never introduced any other new issues before the Board and the Board did not hear the parties on any other issues other than those raised by Hatari regarding visits to the six identified sites.

92. In its decision dated 6th January 2025, the Board found no merit in the complaint raised by Hatari in its application for review and dismissed that particular complaint. In so doing, the Board delivered itself as follows on the issue:

> " 107. From the foregoing, a bid that is responsive to mandatory requirement No. 20 would be that containing site visits forms stamped by KRA or local Government Administration officers for all the 162 stations indicated in Annex 1. Conversely, a bid that does not contain site visit forms stamped by KRA or Local Government Administration officers for all the 162 stations indicated in Annex 1 would be unresponsive to mandatory requirement No. 20.
>
> 108. Taking guidance from the above, it would follow that compliance with mandatory requirement No. 20 is pegged on ascertaining that a bid contains the site visit forms stamped by KRA or Local Government Administration

officers for all the 162 stations set out in Annex 1 and not any other criterion. On that account alone, the Board shall not interrogate the contents of the occurrence books sought to be relied upon by the applicant (Hatari) for the reason that the tender document did not contemplate that the entries in the occurrence books were to play a part in the evaluation of bids with respect to mandatory requirement No. 20. Accordingly, the entry of the interested party's name or failure of such inclusion in the occurrence books is immaterial for purposes of ascertaining the interested party's responsiveness to mandatory requirement No. 20...

113. The Board has keenly examined (Vickers') bid to ascertain its compliance with mandatory requirement No. 20 and observe that for Migori TS), Lwakhakha, Diif, Baxton, Bungoma and Webuye RRU stations, the site visit certificates for these bear the names of the (Vickers') representatives who are indicated to have been present during the site visits as well as the name, signatures and stamps of KRA officials or Local Government Administration officers at the visited station. This in the Board's view satisfied the requirement under mandatory requirement No. 20 as the site visit certificates for those stations were duly stamped and signed either KRA officials or Local Government administration officers." (Emphasis added).

93. Any reasonable person would have expected the Board, having found no merit in the specific complaint laid by Hatari in accordance with the Act and the Regulations, to dismiss the application for review, or at the very least in deference to the *Constitution*, to hear the parties to the dispute if it wished to continue engaging with new matters. Instead, the Board, on its own motion and without hearing the parties, undertook what is called an "in-depth review" of the Vickers' compliance with other mandatory requirements beyond those complained of by Hatari. After undertaking the review, the Board concluded as follows:

> ...the Board has observed that there exists anomalies with respect to (Vickers') site visit certificates for Hola, Isiolo TSO and Isiolo Warehouse Stations:
>
> i. For Hola Station (under Southern Region) (Vickers') site visits certificate was stamped and signed by a Sub-County AP Commander Tana River but the space for the name of (Vickers') representative who visited the stations blank. This raises doubt as to whether (Vickers) sent any representative to attend the site visit at Hola Station
>
> ii. For Isiolo TSO Station (under Norther Region) (Vickers's) site visit certificate was stamped and signed by a KRA official but the space for the name of (Vicker's) representative who visited the station is blank. This raises questions as to whether (Vickers) sent any representative to attend the site visit at Isiolo TSO Station.
>
> iii. For Isiolo Warehouse Station (under Western Region) the (Vickers') site visit certificate was stamped and signed by a KRA official but the space for the name of (Vickers') representative who visited the station is blank. This raises questions as to whether (Vickers) sent any representative to attend the site visit at Isiolo Warehouse Station.

94. Accordingly, the Board declared Vickers' bid unresponsive in the following terms:

> " 115. Mandatory requirement No. 20 required bids to contain duly stamped and signed site visit certificates for all 162 stations without exception. In the present case, (Vickers") did not present all the 162 duly stamped and signed site visit certificates as noted in the foregoing paragraphs and thus) (Vickers') bid was unresponsive to mandatory requirement No. 20.
>
> 116. Vickers having been non-responsive to mandatory requirement No 20. Under the Tender Document ought to have been disqualified as the Preliminary Evaluation Stage. We therefore find fault in the Evaluation Committee's evaluation of (Vickers') bid as it progressed a bid for further evaluation at the Vendor Evaluation Stage instead of disqualifying it at the Preliminary Stage."

95. The myriad of decisions we have set out above required the Board to restrict itself to the pleadings, complaint and issues raised by Hatari and addressed by the Parties. It could only have determined new issues in the circumstances set out in Njurukani & 2 Others v. Barasa (supra). It is common ground that the parties did not raise any of the issues on the basis of which the tender was nullified and that they did not address those issues. The Board did not hear any of the parties on the new issues, and by their conduct, the parties did not leave the matters to the Board to decide. The Board simply ignored the complaint that was before it, and on its own inititive fashioned new issues and determined them without hearing the parties.

96. Hatari and the Board made spirited defence of the Board's peculiar approach, arguing that once Hatari complained of lack of compliance with the mandatory requirements, the issue of compliance with the mandatory requirements was squarely before the Board and it could determine the matter. With respect, we do not agree. The mandatory requirements as listed in the Tender Evaluation Criteria were 30 in number. Hatari complained only of requirement No. 20, which provided as follows:

> " Site visit Form stamped by KRA representative or local Government Administration Officer for all listed stations in Annex 1."

97. Hatari did not raise any complaint regarding the other 29 mandatory requirements. Even as regards mandatory requirement No. 20, Hatari's complaint was restricted to only 6 stations out of the total of 162 stations listed in Annex 1. That is what KRA and Vickers responded to and what the Board was supposed to hear, interrogate and determine. The Board could not, of and by itself, introduce the issue of compliance with any of the other 29 mandatory requirements without hearing the parties. We will go further and suggest that even if Hatari had complained about compliance with mandatory requirement No. 20, the complaint was specific and restricted to only 6 stations. The Board could not, without hearing the parties, proceed to interrogate compliance with all or any of the other 156 stations in respect of which there was no complaint.

98. As if that was not bad enough, the Board went further and purported to determine Vickers' compliance with mandatory requirement No. 2, which again, Hatari had not complained about. Compliance with mandatory requirement No. 2 did not feature anywhere in Hatari's complaint. The least that the Board could have done is to invite the parties to address the issue if it was bent on invalidating the tender on the basis of compliance with that issue.

99. As a matter of fact, reading the grounds on which the Board nullified the tender it is as if the nullification was based on doubt and suspicion, rather than a positive finding of non-compliance. We say so because, in respect of Hola Station, the Board stated Vickers' certificate "raised doubts"; and

in respect of Isiolo TSO and Isiolo Warehouse, that the certificates "raised questions". Surely if the certificates raised doubts or questions, one would have expected the Board, properly directing itself, to hear the parties to clear the doubts or to answer the questions, and nullify the tender only after they had been given the opportunity to clear the doubts and answer the questions, but failed to do so.

100. Hatari and the Board also took cover under the decision of this Court in Sinopec International Petroleum Service Corporation v. Public Procurement Administrative Review Board & 3 Others (supra) in support of the contention that a court can suo motu raise, address and determine an issue of law. In that appeal, this Court raised on its own motion a question whether a tenderer who had quoted in both Kshs and USD had complied with the tender requirement which provided that the bid be in Kshs only. The Court found that to be an issue of law, which it could validly raise and address.

101. While we agree fully with the reasoning of the Court that an issue of jurisdiction may be raised at any time, including by the Court suo motu, the issue of the implication of the right to a fair hearing guaranteed by Articles 47(1) and 50(1) of the *Constitution*, which has featured perversely in this appeal, was not addressed in the decision cited by Hatari. The right to a fair trial is so central in our constitutional system, that, by dint of Article 25 of the *Constitution* it is one of only four rights and fundament freedoms that cannot be abridged under any circumstances.

102. In Zahira Habibullah Shaikh & another v. State of Gujarat & Others 2006 (3) SCC 374, the Supreme Court of India underlined the importance of a fair trial as follows:

> It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted."

103. Similarly, in Mrs. Kalyani Baskar v. Mrs. M. S. Sampoornam (Crim. App. No. 1293 of 2006), the same Court held that:

> 'Fair trial' includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and courts should be jealous in seeing that there is no breach of them."

104. Although the above principles on a fair trial were propounded in the context of criminal trials, they apply writ large to all trials that are required to be conducted within the law. As already pointed out, the guarantee of the right to fair hearing in Article 50(1) is not restricted to trials before courts only.

105. Hatari also invoked the doctrine of non-enforceability of illegal agreements or contracts to justify the nullification of the tender. With respect, we do not see the relevance of the doctrine of illegality in this appeal. None of the parties alleged either before the Board or the High Court that the tender was an illegal contract, and neither the Board nor the High Court found the tender to have been an illegal contract as understood in law. None of them found Vickers to have been involved in any illegality. Failure to comply with a tender requirement may have its consequences, but it is not an illegality as understood in the doctrine of non-enforeabilty of illegal contracts.

106. Ex facie, we cannot see any illegality in the tender or how it can be described as an illegal contract. In any event, it cannot fall from the mouth of Hatari to claim that the contract from which it is seeking to

accrue a benefit is an illegal contract. Moreover, to the extent that some of Hatari's site certificates did not bear the names of its representatives and were not signed by them, which was ground on which the Board nullified the tender, Hatari cannot be heard to allege that the tender was an illegal contract because of the same omission that its own bid suffered from.

107. Taking into account all the circumstances of this appeal, we are persuaded that Vickers and KRA are eminently justified in their complaint that the Board denied them the right to a fair hearing. It determined issues which Hatari had not raised, without giving them an opportunity to be heard. In Githiga & 5 others v. Kiru Tea Factory Co. Ltd [2023] KESC 41 (KLR), the Supreme Court emphasised that the right to a fair hearing is non-derogable and underlined its precepts as follows:

> Procedural fairness in the administration of justice involves the fair hearing rule and the rule against bias. The fair hearing rules require a decision maker to inter alia afford a person an opportunity to be heard before making any decision affecting his/her interests. Likewise, procedural fairness in decision-making requires courts not to deprive any person of their right without due process of the law, a fundamental precept that implies that the right of a person affected by any adverse decision or action is present before a tribunal that pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. Accordingly, the doctrine of due process encompasses the right to be treated fairly, efficiently, and effectively in the administration of justice. This court acknowledged that due process is a fundamental pillar of the rule of law under the *Constitution* that should be observed by all courts in the administration of Justice in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2015] eKLR..."

108. The consequence of denial of the right to a fair hearing or the right to natural justice is to vitiate the resulting decision. In General Medical Council v. Spackman [1943] 2 All ER, 337 it was held that:

> "If the principle of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared no decision."

109. That is consistent with the decision of this Court in Onyango-Oloo v. Attorney General [1986-1989] EA 465, where the Court held that:

> Denial of the right to be heard renders any decision made null and void ab initio."

110. And also in Mbaki & others v. Macharia & Another [2005] 2 EA 206 where it was held that:

> "The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

111. The remedy of judicial review is available to a party aggrieved by a decision that is made in violation of the rules of natural justice or in violation of the right to a fair hearing. In this appeal, Vickers and KRA had demonstrated convincingly that they were denied the right to a fair hearing. In more direct terms, that their constitutional right under Article 50(1) was violated by the Board. However, one defines the terms, to deny a party a fair hearing in the face of Article 50(1) of the *Constitution* is irrational, unreasonable and above all unlawful. We agree with Vickers and KRA that the High Court erred in

upholding the decision of the Board to nullify the tender and denying them the remedies of judicial review that they were eminently entitled to.

112. Although judicial review remedies are discretionary in nature, they cannot be denied without a good reason. As has been stated time and again, discretion must be exercised judiciously and not arbitrarily or capriciously. No court or decision maker has a discretion to violate a party's rights or fundamental freedoms as guaranteed by the *Constitution*. The High Court had no discretion in the circumstance of this appeal to deny the appellants a remedy and thereby sanction violation of the *Constitution*. On merits of the appeal, we have found that the appellants were entitled to the remedies they had sought and there was no discretion on the basis of the exercise of which, they could have been denied remedy.

113. Three issues have caused us considerable anxiety in this appeal. The first is that in its final order after disqualifying Vickers, the Board directed KRA, for all intents and purposes, to proceed and award the tender for Lot No. 1 to Hatari. We say so because only Hatari and Vickers had been declared by KRA qualified to proceed to financial evaluation. With the disqualification of Vickers by the Board, it meant that only Hatari's bid for Lot No. 1 remained to be considered. Secondly, KRA has asserted consistently that Hatari's financial bid was higher than Vickers by more than Ksh. 200,000,000.00. That assertion has not been denied or controverted before us by Hatari. Thirdly, Vickers and KRA have submitted that Hatari's own site visit certificates for Taveta, Lamu TSO, and Lamu Port, among other stations, did not bear the names and signatures of its representatives and that in any event, mandatory regulation No. 20 was crystal clear that it did not require such names and signatures. Hatari did not deny this fact and its only response was that the complaint before the Board was against Vickers, not itself! If the Board has such roving power to review procurements as it has claimed, then nothing could stop it from inquiring whether Hatari had itself complied with what the Board was penalising Vickers for. As it ended up, the decision of the Board benefited Hatari for the exact same omission that it penalised Vickers.

114. How can the Board be said to be advancing the principles of transparency, anti-corruption and cost-effectiveness in public procurements, when it ultimately nullifies a tender, awards it to tenderer who has quoted over Kshs 200,000.000.00 more, and to add insult to injury, has committed the very omissions on the basis of which it has nullified the tender?

115. In nullifying the tender, the Board also purported to be advancing the principles and values of public procurement under Article 227 of the *Constitution*.

Those principles and values cannot be advanced or secured on the basis of violation of other constitutional principles and values, such as the right to a fair hearing under Article 50(1) of the *Constitution*. As has been stated time and again, the *Constitution* must be read and interpreted holistically, not selectively.

116. Courts must keenly watch out for infractions of the law and the *Constitution* that are framed as harmless initiatives taken for the public good, whereas in fact they are founded on blatant violation of express and non-derogable constitutional provisions, like the right to a fair hearing.

Disposition

117. Ultimately, we find merit in the consolidated appeal and allow the same. The decision of the High Court dated February 21, 2025 is hereby set aside. We substitute therefor an order allowing the consolidated application for judicial review. We further issue an order of certiorari and quash the decision of the Board dated 6th January 2025 and an order of mandamus compelling KRA and its Accounting Officer to award the Tender for Lot No. 1 in accordance with the Letter of Intention to

Award tender, dated 2nd December 2024. Vickers and KRA shall have the costs in the High Court and in this Court. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL, 2025.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

K. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.