Sharpcut Designers Ltd v Public Procurement Administrative Review Board & 2 others (Civil Appeal E273 of 2025) [2025] KECA 1132 (KLR) (20 June 2025) (Reasons)

Neutral citation: [2025] KECA 1132 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E273 OF 2025

F TUIYOTT, P NYAMWEYA & WK KORIR, JJA

JUNE 20, 2025

BETWEEN

SHARPCUT DESIGNERS LTD ..... APPELLANT

AND

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

CREDIBLE TECHNICAL WORKS LTD ..... 2ND RESPONDENT

MANAGING DIRECTOR, KENYA POWER AND LIGHTING COMPANY PLC ..... 3RD RESPONDENT

REASONS

1. On 19th May 2025, after hearing the appeal herein we dismissed it with costs to the 2nd and 3rd respondents and reserved the reasons for our decision for a later date. We now give the reasons.

2. At the centre of this appeal is Tender No. KP1/9A.3/OT/12/23-24 (“the Tender”) floated by Kenya Power and Lighting Company PLC whose Managing Director is the 2nd respondent in this appeal. The Tender sought the supply of Emergency Restoration Towers (ERTs) and Galvanised Steel Structures for Implementation of Premium Customers Schemes and for various Primary and Secondary Substations. The appellant, Sharpcut Designers Ltd, submitted its bid documents in respect of the Tender on 13th November 2023. However, through a letter dated 28th March 2024, the 2nd respondent disqualified the appellant’s bid at the preliminary examination stage for non-compliance with Form 3.2 and was poised to award the Tender to the 3rd respondent, Credible Technical Works Ltd. Form 3.2 required bidders to state or specify any unresolved cases or litigations by providing a "yes" or "no" answer, and if the answer was in the affirmative, the tenderer was required to specify the pending cases. In the appellant’s case, the answer as to whether there were pending cases was in the affirmative (yes), but the appellant failed to indicate the pending cases or litigations as required.

3. Upon the rejection of its bid, the appellant moved the 1st respondent, the Public Procurement Administrative Review Board (PPARB), seeking a review of the 2nd respondent's decision. However, its application was struck out in limine but was later reinstated by an order of the High Court in Judicial Review No. E104 of 2024 compelling the 1st respondent to hear the application on its merits. Consequently, the 1st respondent heard the appellant's application on merit as directed by the High Court and dismissed it, thereby upholding the 2nd respondent's decision. The appellant, being dissatisfied with the decision of the 1st respondent, filed a fresh judicial review application, being No. 171 of 2024, before the High Court. The application was dismissed by Chigiti, J. on 13th September 2024, giving rise to this appeal.

4. Briefly, the appellant's case before the High Court was that the interrogatory question in Form 3.2 was capable of resulting in a conflicting interpretation, did not affect the substance of the Tender or misled the 2nd respondent and should not have led to the disqualification of their bid at the preliminary stage but should have been subjected to further procedures. In its judgment, the High Court dismissed the appellant's judicial review application, holding that the 1st respondent had acted within the law and in compliance with the constitutional edicts.

5. Before this Court, a record of appeal was initially filed on 20th September 2024 but was rejected by the Registrar of the Court on 22nd September 2024. However, on 7th April 2025, the Court (Musinga (P), Mumbi Ngugi & Tuiyott, JJ.A.) in COACAPPL No. E483 of 2024 set aside the Registrar's order, paving way for this appeal to be admitted for consideration.

6. In this appeal, the appellant raises the following eight (8) grounds of appeal, which we reproduce verbatim as follows:

    i. In exercising his discretion the learned Judge misdirected himself on the application of the principle of fairness under Article 4(1) and 227(1) of *the Constitution* of Kenya, 2010; Section 79(2) and 81 of the *Public Procurement and Asset Disposal Act*, 2015; Regulation 74(1)(h) of the Public Procurement and Asset Disposal Regulations, 2020; Section 4(3)(b)(6) of the *Fair Administrative Action Act*, 2015; Section 72 of the *Interpretation and General Provisions Act*; and ITT 26.1, ITT 27.1, ITT 28 and ITT 29 of the Tender Document to the tender examination, evaluation and award and as a result arrived at a decision that was erroneous.

    ii. In exercising his discretion the learned Judge misdirected himself on the application of the principles of transparent, accountable, open including public participation under Article 10(2)(c), 201(a), 227(1) and 232(1)(e)(f) of *the Constitution* of Kenya, 2010; Section 3(a)(e)(f) of the *Public Procurement and Asset Disposal Act*, 2015 and the Executive Order No. 2 of 2018 to the tender examination, evaluation and award and as a result arrived at a decision that was erroneous.

    iii. In exercising his discretion the learned Judge misdirected himself on the application of the principle of confidentiality under Section 67 of the *Public Procurement and Asset Disposal Act*, 2015 to employees, agents, members of the board or committees of the 2nd Respondent and as a result arrived at a decision that was erroneous.

    iv. In exercising his discretion the learned Judge misdirected himself on the application of Section 67(3) and 176(1)(f) of the *Public Procurement and Asset Disposal Act*, 2015 to the powers to enforce compliance with confidentiality and as a result arrived at a decision that was erroneous.

    v. In exercising his discretion the learned Judge misdirected himself on the application of Regulation 218 of the Public Procurement and Asset Disposal Regulations, 2020 to the non-

application and observance of the rules of evidence in the Respondent's proceedings and as a result arrived at a decision that was erroneous.

vi. The learned Judge failed to concern himself with whether the Respondent reached an irrational decision that no reasonable administrative board could have reached or abused its powers.

vii. In exercising his discretion the learned Judge misdirected himself in exercising his discretion on the application of the English language meaning of the word version under Article 20(3)(4), 47(1), 227(1) and 259(1)(2) of *the Constitution* of Kenya, 2010 in order to avoid oppressing and punishing the Appellant for deficiencies or contradictions in the Tender Document that were blamed on the 2nd Respondent and as a result arrived at a decision that was erroneous.

viii. It is manifest that the learned Judge was wrong in the exercise of discretion that resulted in injustice.

7. When this appeal was placed before us, learned counsel Mr. Gachuba appeared for the appellant, while learned counsel Mr. Muchai and Mr. Kanyone appeared for the 2nd and 3rd respondents, respectively. Despite being served, the Attorney General representing the 1st respondent was not present.

8. Arguing the case for the appellant, learned counsel Mr. Gachuba commenced by addressing the challenge to the competency of the appeal and submitted that the appeal is competent and this Court has jurisdiction to hear and determine it on merit. According to counsel, under section 57(a) of the *Interpretation and General Provisions Act*, the forty-five days prescribed by section 175(4) of the *Public Procurement and Asset Disposal Act*, 2015 (PP&AD Act) within which the Court ought to make its decision started to run on 8th April 2025 when the Court admitted the appeal. To buttress this submission, counsel relied on Nakumatt Holdings Limited v Commissioner of Value Added Tax [2011] eKLR and Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others v Kilach [2003] KLR 249 to urge that it would be oppressive and an affront to common sense for the court to assert that it lacks jurisdiction to correct a wrong precipitated by it. Mr. Gachuba also relied on Smith v East ELLOE Rural District Council [1965] AC 736 to urge that we overlook the legislative provisions limiting the Court's jurisdiction.

9. Turning to the substance of the appeal, Mr. Gachuba referred to Sonko v County Assembly of Nairobi City & 11 others [2022] KESC 76 (KLR); United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] KECA 39 (KLR) and Mbogo and Another v Shah [1968] EA 93 to urge that an appellate court can interfere with the discretion of the trial court where the Judge misdirects himself in law, misapprehends the facts, takes into account matters that should not be taken into account, fails to take into account matters that ought to be taken into account, or is plainly wrong in the exercise of discretion. Counsel submitted that such an interference is warranted in the circumstances of this case since the learned Judge acted on wrong principles. According to counsel, pursuant to the provisions of Articles 22(1), 23(3)(f), 47(1), 48, 50(1), 159, 165(6)(7) and 258(1) of *the Constitution*, the learned Judge was required to ensure that the 1st and 2nd respondents treated the appellant's tender in a lawful, reasonable and procedurally fair manner. Counsel proceeded to refer to Logbro Properties CC v Bedderson NO & Another 2003 (2) SA 460 (SCA) to urge that the tender process being an administrative process, the tenderer is entitled to a lawful and procedurally fair process.

10. While appreciating the general principle in section 79(1) of the PP&AD Act that non-compliant tenders not meeting the minimum eligibility and other mandatory requirements stipulated in the tender document are regarded as non-responsive, counsel submitted that the learned Judge failed to take cognizance of the general principle that public procurement is subject to certain universally

recognised exceptions. According to counsel, the learned Judge failed to give effect to section 79(2) of the PP&AD Act and Article 43(2)(b) of the UNCITRAL Model Law on Public Procurement which required the 1st and 2nd respondents to regard the appellant's tender as responsive because the deviation was minor and did not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the Tender Document. Counsel maintained that the errors or oversights were correctable as they did not affect the substance of the tender.

11. Mr. Gachuba cited Regina v Soneji & Another [2005] UK HL 49 to urge that the rigid mandatory and discretionary distinction, and its many artificial refinements, have outlived their usefulness and that the emphasis ought to be on the consequences of noncompliance, and informed by the question whether Parliament can fairly be taken to have intended total invalidity. Counsel referred to Transcend Media Group Limited v Communications Authority of Kenya, Application No. 76 of 2018, in support of the proposition that the exception rule was not new to the 1st respondent because it had previously applied it.

    Further urging that there are exceptions to the rule that requires mandatory compliance with a tender document, counsel asserted that sections 81 and 82 of the PP&AD Act and regulation 74(2) of the PP&AD Regulations, 2020 (PP&AD Regulations) were enacted to aid the application of the exception to the general principle set out in section 79 of the PP&AD Act. Counsel, therefore, faulted the learned Judge for failing to take the amendments and regulations into consideration.

12. Mr. Gachuba proceeded to submit that to give effect to the exceptions to the general principle aforesaid, the learned Judge should have considered the principle of "acceptable bid", the no single test principle or approach, the flexibility versus uniformity principle or approach, the procedure versus merit approach and the principle of inconsequential irregularities. Counsel maintained that the learned Judge failed to take into account these principles as established by the Supreme Court of South Africa in Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd 2008 (2) SA 638 (SCA), and urged that determination of whether a bid ought to be regarded as acceptable should not be made solely based on compliance with formal bid requirements but must also be determined in the light of the requirements of fairness, equity, transparency, competitiveness and cost effectiveness.

13. Additionally, Mr. Gachuba argued that the learned Judge failed to distinguish between internal irregularity and unlawful irregularity. In urging this point, counsel submitted that the import of the distinction between "internal irregularity" and "unlawful irregularity" is that non-compliance with the former has no legal consequences while non-compliance with the latter invariably leads to invalidity. Counsel urged that the appellant was entitled to a fair process and that the alleged irregularities were inconsequential. Relying on AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive SASSA (No 2) 2014 (6) BCLR 641 (CC), counsel submitted that an inconsequential irregularity is one which, if corrected, would still yield the same outcome. Ultimately, counsel urged that the learned Judge misdirected himself in law, acted on the wrong principles, and consequently arrived at the wrong conclusion, and urged us to interfere with the exercise of discretion and allow the appeal with costs.

14. The 1st respondent did not participate in the appeal.

15. In opposing the appeal, learned counsel, Mr. Muchai for the 2nd respondent submitted that even though the appellant submitted Form 3.2, which was mandatory, the Form was not correctly filled and did not therefore comply with all of the mandatory requirements under the preliminary evaluation criteria of the Tender Document and was, therefore, properly disqualified. In urging that the learned Judge and the 1st respondent properly exercised their discretion, counsel referred to Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 Others [2024] KECA 184 (KLR) to urge that a bid is only responsive if it meets all requirements set

out in the bid document. Counsel proceeded to submit that the learned Judge properly appreciated and correctly applied the law, and the appeal should be dismissed with costs.

16. For the 3rd respondent, Mr. Kanyone, asserted that the completion of Form 3.2 was a mandatory requirement for the appellant's bid to succeed in the preliminary evaluation stage. Counsel argued that the appellant's failure to properly complete Form 3.2 constituted a substantial error that warranted disqualification by the 2nd respondent. Mr. Kanyone contends that, although section 79(2) of the PP&AD Act allows for exceptions of minor defects, the provision does not apply to mandatory requirements in a tender document. He argued that permitting minor errors in mandatory requirements would result in "injustice", undermine tender conditions, materially impact the procurement process, and potentially provide an undue advantage. Furthermore, disqualification is not solely confined to adjustments in the tender amount, as suggested by the appellant, but that failure to comply with other mandatory requirements can also lead to a bidder's disqualification.

17. Regarding section 81 of the PP&AD Act, Mr. Kanyone submitted that it grants the procuring entity the discretion to request clarifications from bidders, but does not impose an obligation to do so. Consequently, he maintained that it was not mandatory for the 2nd respondent to seek clarification from any bidder. Counsel further submitted that both the 1st respondent and the High Court correctly concluded that the procurement process was conducted openly, transparently, and accountably. He submitted that the High Court rightfully declared the appellant's bid unresponsive, as it did not meet the mandatory preliminary evaluation criteria. Mr. Kanyone consequently urged that we dismiss the appeal with costs.

18. We have reviewed the record and submissions by all counsel in line with our mandate, as captured in Sonko v County Assembly of Nairobi City & 11 Others [2022] KESC 76 (KLR, which require that we re-evaluate the evidence and in doing so, we:

> " ...should accord deference to the trial Judge's conclusions of fact and only interfere with those conclusions if it appears" to us "that the trial judge has failed to take into account any relevant facts or circumstances or based the conclusions on no evidence at all, or misapprehended the evidence, or acted on wrong principles in reaching the conclusions."

19. Alive to the aforesaid mandate, in our view, the following two issues arise for our determination in this appeal: first, whether the appeal was time-barred under section 175 of the PP&AD Act; and second, whether the learned Judge misdirected himself in arriving at the conclusion he reached.

20. In dealing with the first issue, we start by observing that the judgment which is the subject of this appeal was delivered by the High Court on 13th September 2024. The appellant filed the record of appeal on 20th September 2024, which was rejected by the Registrar of the Court on 22nd September 2024 because the tenth line had not been marked. The appellant then filed an application dated 23rd September 2024, which the Court determined vide a ruling dated 7th April 2025, rescinding the order of the Registrar, and granting the appellant leave to upload a properly marked record of appeal. It is the appellant's contention that under section 57(a) of the *Interpretation and General Provisions Act*, the forty-five days within which this Court ought to determine the appeal as prescribed in section 175(4) of the PP&AD Act started to run on 8th April 2025 and were to lapse on 22nd May, 2025.

21. It is imperative that we reproduce section 175 of the PP&AD Act, which provides as follows:

> " 175. Right to judicial review to procurement:

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

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

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

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

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

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

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

22. The manner of the interpretation and application of section 175 of the PP&AD Act, specifically sub-section 4 thereof, is not novel. This Court has in the past reiterated that the said provision is couched in mandatory terms and does leave the Court with any discretion whatsoever to enlarge time. For instance, in Aprim Consultants v Parliamentary Service Commission & Another [2021] KECA 1090 (KLR), the Court while decrying the practical difficulties of meeting the timelines set by the Act nevertheless proceeded to hold that:

> " 15. That said, is it open for the High Court, no matter how reasonable its premises, to nonetheless go on and flout the timeliness or proceed as if they did not exist? Are the timelines a question such as leave the Courts with a degree of discretion, or are they to be construed as being inflexibility binding?
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> 16. We think, with respect, that the provisions of section 175 are couched in terms that are plain and unambiguous, admitting to no interpretive wriggle room. The Section sets strict timelines for applicants, the High Court and this Court in a sequential manner;
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> 1. A person aggrieved must file seek judicial review of the Boards' decision within 14 days.

2. The High Court must determine the judicial review application within 45 days.

3. A person aggrieved by the decision of the High Court must appeal to the Court of Appeal within 7 days

4. The Court of Appeal must make a decision within 45 days.

16. All of these timelines are patently tight. They also greatly constrict the usual timelines for the filing and determination of proceedings. For this Court, for instance, ordinary appeals are initiated by filing of a notice of appeal within 14 days of the decision appealed from. This is followed by a lodging of the record of appeal some 60 days thereafter. There is no set time within which an appeal is to be heard. It is the decision following hearing of the appeal that is required to be rendered within 90 days by dint of rule 32(1), but the Court may still deliver its judgment outside that period for reasons to be recorded."

23. Our brother, Gatembu, JA., in Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & another; Public Procurement Administrative Review Board (Interested Party) [2017] KECA 565 (KLR) had the following to say concerning the application of section 175 of the PP&AD Act:

" 136. Section 175 of the Act as a whole provides for an elaborate time bound process for escalating the dispute from the Review Board (which must complete its review within 21 days after receiving the request), to seeking judicial review to the High Court (which must be done within 14 days from the date of the decision of the Review Board); to the High Court (which has 45 days after such application to make its decision). A person aggrieved by the decision of High Court may appeal to the Court of Appeal within 7 days of the High Court decision. The Court of appeal shall make a decision within 45 days which decision shall be final.

137. The importance of the timelines is buttressed by Section 175(5), which provides that the decision of the Review Board shall be final and binding to all the parties should the High Court or the Court of Appeal fail to make a decision within the prescribed timelines."

24. We are persuaded by the views in the cited decisions. They represent the proper interpretation of section 175 of the PP&AD Act. Additionally, we also associate ourselves with the views adopted in Aprim Consultants v Parliamentary Service Commission & Another (supra) that in enacting section 175 as is currently couched, Parliament intended to completely deprive the Court of the discretion to extend time by inserting sub- section 5 which in all intents and purposes provided for the consequences of failure to abide by the timelines set in subsections 1 to 4.

25. Adopting the foregoing reasoning on the interpretation of section 175 of the PP&AD Act, it is evident that we cannot accept the submission by Mr. Gachuba that time started running on 8th April 2025. Once the High Court delivered its judgment on 13th September 2024, the appellant was required to file an appeal within 7 days thereof, that is, by 20th September 2024. In this case, though there were concerted efforts on the part of the appellant to comply with these timelines, the appeal was not admitted on time. The appeal would later be admitted pursuant to this Court's ruling of 7th April 2025, which was way beyond the stipulated timelines under section 175(4) of the PP&AD Act.

26. As we have already stated, we do not possess the discretion to extend the timelines as is beseeched of us by the appellant. And to be sure, the Court in Nai E483 of 2024 merely granted leave to the appellant to upload a properly marked record of appeal. It did not and could not extend the statutory timeline. Doing so would in itself contradict the express provisions of section 175(5) of the PP&AD Act, which took effect the moment sub-section 4 was not complied with and upon the lapse of 45 days from 20th September 2024. Even though the mistake herein was majorly occasioned by the Court, we can only apologise to the appellant, but our hands remain tied by the statutory provisions which leave us no discretion to enlarge time. We must therefore decline the invitation to render a decision which goes against the express provisions of a statute and which will result in an unwarranted contradiction of statutory provisions. For this reason alone, this appeal should fail and be struck out.

27. The above finding renders the other issues set for determination moot. However, given that the parties majorly addressed us on the merits of the appeal, we find it prudent to render ourselves on the merit of the appeal in appreciation of the Court's critical role in the judicial hierarchy. We do so while cognizant that there is no longer a live controversy between the parties as the substratum of the appeal has been dispensed with and that the ensuing discussion will have no actual or practical impact on the rights of the parties and is only for academic purposes. The direction we adopt finds fort in the rationale expounded in Redhill Heights Investments Limited v Suzanne Achieng Butler & 4 Others [2018] KECA 776 (KLR) thus:

> "(12) The effect of a finding of mootness is that the Court is without jurisdiction to render a decision resulting in the dismissal of the suit. Nevertheless, as stated in para 14.3 of the National Assembly of Kenya case, (supra) the Court has a discretion to decide cases, otherwise moot, if some of the circumstances mentioned in that case obtain, including the need for formulation or illumination of the controlling legal principles to guide the bench, the bar and the public."

28. With regard to section 79 of the PP&AD Act, the appellant asserted that the learned Judge failed to appreciate that the general principles of public procurement are subject to certain universally recognised exceptions. According to counsel, section 79(2) of the PP&AD Act and Article 43(2)(b) of the UNCITRAL Model Law on Public Procurement required the 1st and 2nd respondents to regard the appellant's tender responsive as it was not affected by the minor deviations that did not materially alter the terms in the Tender Document. Counsel also urged that section 81 and 82 of the PP&AD Act and regulation 74(2) of the PP&AD Regulations were enacted to aid the application of the exception to the general principle set out in section 79(1) of the PP&AD Act. Counsel also submitted that the learned Judge should have considered the principle of "acceptable bid", the no single test principle or approach, the flexibility versus uniformity principle or approach, the procedure versus merit approach and the principle of inconsequential irregularities. Lastly, counsel argued that the learned Judge failed to distinguish between internal irregularity and unlawful irregularity.

29. For the 2nd respondent, it was urged that Form 3.2 was mandatory, but was not properly filled, and, therefore, offended the mandatory requirements under the preliminary evaluation criteria of the Tender Document and was correctly disqualified. The 2nd respondent maintained that a bid only qualifies as responsive if it meets all requirements as set out in the bid documents. Similarly, the 3rd respondent asserted that the completion of Form 3.2 was a mandatory requirement for the appellant's bid to succeed at the preliminary evaluation stage. Therefore, the appellant's failure to properly complete Form 3.2 constituted a substantial error that warranted disqualification by the 2nd respondent. According to the 3rd respondent, although section 79(2) of the PP&AD Act allows

exceptions for minor defects, it does not apply to mandatory requirements in a tender document. In answer to the appellant's contention that the 2nd respondent ought to have sought clarification, the 3rd respondent argued that although section 81 of the PP&DA Act grants the procuring entity the discretion to request clarifications from bidders, the provision does not impose an obligation on the procuring entity to do so. Consequently, the 3rd respondent maintained that the 2nd respondent was not obligated to seek clarification from the appellant.

30. In determining whether or not to grant judicial review reliefs sought before him, the learned Judge was exercising judicial discretion. On an appeal before this Court arising from the exercise of judicial discretion, we are guided by the principle that this Court will not interfere with exercise of discretion by the trial court unless it is apparent that it misdirected itself in law, or considered matters it ought not to have considered, or failed to take into account matters it ought to have taken into account, or arrived at a wrong decision - see Mbogo and Another v Shah (supra). The Supreme Court in Saisi & 7 Others v Director of Public Prosecutions & 2 Others [2023] KESC 6 (KLR) delineated the scope of judicial review powers as follows:

> " Be that as it may, it is the court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialized institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised." (Emphasis supplied).

31. Flowing from the foregoing, the duty of the High Court was to ensure that the appellant was given fair treatment by the 1st respondent. In doing so, the High Court was not to substitute its own decision for that of the 1st respondent but was bound by the law to limit itself to the decision-making process and not the merits of the decision itself.

32. In as far as interpretation of tender documents and the application of section 82 of the PP&AD Act is concerned, this Court in OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others [2017] KECA 386 (KLR) held that:

> " We have highlighted above the portions of section 82 to emphasize the fact that the aggregate score and the scores for individual factors are to be arrived at in accordance with the

procedures and criteria set out in the request for proposals itself. Each procuring entity is left to determine the criteria in the Request for Proposal."

33. In this appeal, we agree with the finding of the learned Judge, to wit, that every tender is determined within its provisions. A tendering entity must be allowed to design its own terms and conditions, and bids will be considered within the set terms and conditions as put in place from time to time. This case was not an exception. We hear the appellant agitating for a measured mode of interpreting and applying the statutory provisions to tender documents. In that regard, we only wish to refer to the Supreme Court's wisdom in SGS Kenya Limited v Energy Regulatory Commission & 2 Others [2020] KESC 64 (KLR) that:

> " 42. From the two contending propositions, it emerges, in our view, that tribunals, in their primary category, are specialized bodies charged with programming and regulatory tasks of the socio- economic, administrative and operational domains. Membership in such tribunals generally reflects the essential skills required for the specific tasks in view. The Public Procurement Administrative Review Board falls within this category. It is endowed with requisite experience from its membership, and has access to relevant information and expertise, to enable it to dispose of matters related to procurement. The question is: whether it is bound by its previous decision, as it takes decisions on different matters lately coming up.
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> 43. Such a variegated range of implementation scenarios, it is apparent to us, calls for flexibility in the regulatory scheme. In principle, matters on the agenda of an administrative tribunal will merit determination on the basis of the claims of each case, and will depend on the special factual dynamics. The relevant factors of materiality, and of urgency, will require individualised response in many cases: and in these circumstances, a strict application of standard rules of procedure or evidence may negate the fundamental policy-object. On this account, the specialized tribunal should have the capacity to identify relevant factors of merit; be able to apply pertinent skills; and have the liberty to prescribe solutions, depending on the facts of each case. Such a tribunal should fully take into account any factors of change, in relation to different cases occurring at different times: without being bound by some particular determination of the past.
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> 43. We would agree with the 1st respondent that administrative decision-makers should have significant flexibility, in responding to changes that affect the subject-matter before them. Matters before an administrative tribunal should be determined on a case-to-case basis, depending on the facts in place."

34. The above excerpt speaks clearly to the inherent powers of the 2nd respondent in the first instance and the 1st respondent in the second instance when executing their roles as administrative bodies. We add that where a tender document is clear as to the mandatory requirements and optional requirements, parties are bound to abide by those requirements.

35. The appellant submitted extensively on the principles which, according to counsel, ought to have informed the 1st respondent's interpretation of the Tender Document in ascertaining whether the appellant's tender was responsive. In our view, the appellant seems to be inviting the Court to entertain a qualitative examination of evidence and arguments that were before the 1st respondent as regards the

specifications of the Tender Document, a function beyond the remit of the judicial review jurisdiction. This is because sections 28 and 173 of the PP&AD Act bestows upon the 1st respondent the jurisdiction and power to hear a tender dispute and review a tender, where an issue is raised as to whether the tender is responsive or whether it was evaluated in accordance with the PP&AD Act. We must reiterate that a bid must be considered responsive or otherwise within the express provisions of the terms of the tender. The obligation to determine what is mandatory and its importance in the tendering process remains with the tendering entity. We must only add that such mandatory terms must be express and certain and within the express procedural and statutory safeguards of the PP&AD Act. To this extent, we refer with approval to the views of Chigiti,J. in Vickers Security Services Limited & 2 Others v Public Procurement Administrative Review Board; Hatari Security Guards Limited (Interested Party) [2025] KEHC 1648 (KLR) thus:

> "125. Certainty in public procurement refers to the predictability and clarity of the rules and procedures governing the awarding of contracts. A well-structured procurement process builds confidence among stakeholders, especially suppliers, who need to understand how decisions are made and what criteria will be used to evaluate their bids.
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> 126. If the court was to allow for parties to continue failing to comply with multiple requirements provided for in tender documents then the same would be unfair to tenders as there would be no certainty on what exactly the rules and procedures of any tender are."

36. In our view, it does not matter that the appellant would regard the requirements under section 79 of the PP&AD Act and in the tender document as 'technicalities' that, in its view, ought to have been overlooked. The important point remains that, in finding that the appellant's bid was non-responsive, the 1st respondent considered the law and the requirements that the tenderers were under an obligation to meet. The discretionary power remains with the procuring entity to determine what clarifications it will seek from a bidder and what the mandatory terms of the tender are. Indeed, asking a tenderer to clarify its bid can at times be unfair to other tenderers and the discretion to seek clarification should be exercised by the bidding entity with circumspection. The concern of a review court should strictly concern the fairness of the process as opposed to overreaching and re-determining the terms of the tender.

37. On the foregoing grounds, even though moot, we would still have dismissed this appeal. We find nothing to suggest that either the 1st respondent or the High Court did not correctly understand the applicable law. In the same breadth, we fail to find the decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. We would therefore affirm the findings of the learned Judge, if only the appeal had been properly before us.

38. Consequently, the appeal is struck out for reasons that it offends section 175(4) of the PP&AD Act. As earlier decided, the 2nd and 3rd respondents shall have the costs of the appeal from the appellant.

39. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2025.

F. TUIYOTT

JUDGE OF APPEAL

.....

P. NYAMWEYA

JUDGE OF APPEAL

.....

W. KORIR

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR