



**Public Procurement Administrative Board v Four M Insurance Brokers Limited & 3 others
(Civil Appeal E1009 of 2023) [2024] KECA 79 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KECA 79 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E1009 OF 2023
MA WARSAME, S OLE KANTAI & P NYAMWEYA, JJA
FEBRUARY 9, 2024**

BETWEEN

PUBLIC PROCUREMENT ADMINISTRATIVE BOARD APPELLANT

AND

FOUR M INSURANCE BROKERS LIMITED 1ST RESPONDENT

SEDGWICK KENYA INSURANCE BROKERS LIMITED 2ND RESPONDENT

**THE MANAGING DIRECTOR, KENYA PIPELINE COMPANY
LIMITED 3RD RESPONDENT**

KENYA PIPELINE COMPANY LIMITED 4TH RESPONDENT

(Being an appeal from the Judgment and Orders of the High Court of Kenya at Nairobi the Honourable Justice John Chigiti (SC) dated and delivered on the 18th day of December 2023 in JR Application Number E.121 of 2023)

JUDGMENT

1. The 3rd and 4th respondents advertised Tender No. KPC/PU/OT- 298/Finance/NBI/22-23 for the provision of insurance brokerage services in the local dailies. At the end of the preliminary evaluation, the 1st and 2nd respondents' bids along with 29 others were found to be responsive. The 1st and 2nd respondents together with 15 others were also found responsive to the technical evaluation criteria and were eligible to proceed to the financial evaluation stage. The 2nd respondent's bid was evaluated as the lowest at this stage. Tenderers were notified of the outcome whereupon the 2nd respondent vide the letter of Notification of Intention dated 7th June 2023 was notified of being the successful tenderer with respect to All Risks Industrial Insurance Policy and two other policies under the advertised Tender.
2. By a letter dated 21st June 2023, the 3rd respondent informed the 2nd respondent that it had been awarded three (3) insurance policies and which award the 2nd respondent accepted by a letter dated 26th



- June 2023, which was sent to the 3rd and 4th respondents by an email on 26th June 2023. The 3rd and 4th respondents subsequent to the award proceeded to enter into contracts with the 2nd respondent in respect of all the policies except one, the All Risks Industrial Insurance Policy.
3. Subsequently by a letter dated 7th September 2023 and sent to the 3rd and 4th respondents via an email on 8th September 2023, the Applicant communicated and forwarded to the respondents, Old Mutual General Insurance Kenya Limited's confirmation of cover for the subject tender as the underwriter, Swiss Reinsurance Company Ltd's approval, support and confirmation of the subject tender as the lead local reinsurer of Old Mutual General Insurance Kenya Limited, and that the underwriter was ready to take up the cover from 12th November 2023 upon expiry of the current all risks industrial insurance cover on 11th November 2023. It appears that the 3rd and 4th respondent instead awarded the tender to the 1st respondent on 7th September 2023, and entered into a contract for the all risks industrial insurance cover with the 1st respondent on 2nd October 2023.
 4. Consequently, the 2nd respondent filed a request for Review before the appellant on 12th October 2023, being PPARB Application No.77 of 2023, within 14 days of 28th September 2023, the date the 2nd respondent became aware of the occurrence of the alleged breach. The appellant made its ruling on 2nd November 2023 and inter alia ordered that the letter of award to the 1st respondent dated 7th September 2023 and contract dated 2nd October 2023 for the All Risk Industrial Insurance Policy in relation to Tender No. KPC/PU/OT- 298/FinancE/NBI/22-23 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025 signed between the 3rd and 4th respondents on one hand and the 1st respondent be nullified and set aside. The 3rd respondent was also directed to extend the validity period of Tender No. KPC/PU/OT-298/Finance/NBI/22-23 for Provision of 2025 Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025 for a further thirty (30) days period from the date of its expiry, and to make good the anomalies that the appellant had pointed out and proceed to conclude the procurement proceedings and execute a contract with the successful tenderer for the Tender No. KPC/PU/OT-298/Finance/NBI/22-23.
 5. The 1st respondent thereafter instituted judicial review proceedings before the High Court at Nairobi on 6th November 2023, being Judicial Review Application No. E121 of 2023. The proceedings were opposed by the Attorney General through an affidavit sworn by James Kilaka, a procurement professional and the appellant's Acting Secretary. In a judgment delivered on 18th December 2023, the application for judicial review was allowed. The learned Judge of the High Court held, inter alia, that the Request for Review by the 2nd respondent offended Section 167(1) of the Act and Regulation 203(2)(c)(iii) of the Public Procurement and Asset Disposal Regulations, 2020 and that the appellant lacked jurisdiction to hear and determine the 2nd respondent's Request for Review for the reason that the contract dated 2nd October 2023 had already been signed between the 1st respondent and the 3rd and 4th respondents.
 6. Further, that the 2nd respondent lacked the requisite capacity to provide cover to the 4th respondent at the price set out in 2nd respondent's bid document and it sought to adjust/vary the price and qualifications that had been set out in the bid document after the event, which was an act of illegality for want of approval in accordance with Section 139(1)(a) of the Act. The High Court consequently granted an order of certiorari quashing the appellant's decision dated 2nd November 2023, an order of prohibition directed at the 3rd and 4th respondents prohibiting them from implementing the said decision, and an order of mandamus directed at the 3rd and 4th respondents to proceed with the implementation and performance of the contract dated 2nd October 2023 entered into with the 1st respondent.



7. The appellant has now instituted the present appeal against the said judgment of the High Court and from its submissions dated 14th January 2024, the appellant reduces its grounds of appeal to the following three issues:
 - a. Whether the judicial review court erred in law in determining that the appellant lacked the jurisdiction to hear and determine the Request for Review Application by the 2nd respondent.
 - b. Whether the Learned Judge erred in law in granting the orders sought by the 1st Respondent in the Judicial Review Application.
 - c. Whether the Learned Judge considered extraneous matters and erred in law in consideration of matters that were never pleaded or adduced un evidence by the parties.
8. On the first ground, the Attorney General submits that the learned Judge misdirected himself and misapprehended the law by finding that the appellant lacked jurisdiction to determine the Request for Review for the reason that a contract had been signed between the 3rd and 4th respondents and 1st respondent, without even interrogating whether the contract complied with the provisions of the Public Procurement and Asset Disposal Act, 2015 (the Act). The Attorney General posits that the limits of the appellant's jurisdiction are well laid out under section 167(1) and (4) of the Act as read with regulation 203(2)(c)(iii) of the Public Procurement and Asset Disposal Regulations, 2020 (the Regulations). That the Request for Review was rightfully considered within the limits of the law by the appellant as no contract or valid procurement contract, if any, existed between the 1st respondent and the 3rd and 4th respondents within the meaning of the provisions of section 135 of the Act consequent to which the 2nd respondent had a right to be heard by the appellant.
9. The Attorney General faults the 3rd and 4th respondents for conducting an illegality in signing a contract with the 1st respondent who was not the lowest evaluated bidder as per section 86(1) and the successful tenderer notified under section
 87. Further, he submits that not only did the learned Judge misdirect himself on the fact that the 2nd respondent had signified its refusal under section 136(1) of the Act in writing but he also misapprehended the provisions of section 136(1) by stating in his judgment that no such provisions exist as to the same and that the 2nd respondent's intimation to the 3rd and 4th respondents that they could not place cover was a misstatement of the facts having only considered the 2nd respondent's evidence in part.
10. The appellant maintains that the Request for review was done within 14 days of occurrence of the breach. This is because the Request for Review was filed on 12th October 2023, whereas the 2nd respondent came to know of the breach, not on the 21st June 2023 as found by the Judge but on 28th September, 2023 when the breach occurred, upon receiving market information that an award had been given to the 1st respondent on the 7th September 2023. Additionally, they argue that the judge misapprehended the appellant's decision on the preliminary objection dated 13th October 2023 in faulting the appellant for deciding the objection based on facts and not the law. To the contrary, they submit that the appellant rendered its decision on the law and not consideration of the facts.
11. They rely on Judicial Review No.589 of 2017 Lordship Africa Limited vs Public Procurement Administrative Review Board and 2 Others [2018] eKLR which was upheld in Civil Appeal No.35 of 208 Ederman Property Limited vs Lordship Africa Limited & 2 Ors [2019] eKLR by stating that the jurisdiction of the appellant cannot be ousted merely by the existence of a contract but only where such contract is signed as contemplated under section 135 as provided under section 167(4) (c) of



- the Act. The appellants also submit that the conduct of the 3rd and 4th respondents go against the doctrine of legitimate expectation and the constitutional principle of fairness and accountability under Article 227(1) of *the Constitution*. For this, the case of Republic vs Kenya Revenue Authority ex parte Universal Corporation Ltd [2016] eKLR is cited.
12. On the second issue framed for determination, the appellant faults the judge for granting the orders sought by the 1st respondent in the judicial review application as the 1st respondent did not sufficiently satisfy the parameters for orders of judicial review with respect to illegality, irrationality and procedural impropriety. That the decision of the appellant was within the reasonableness test set out in Council of Civil Service Unions v Minister for Civil Service [1984] 3All ER 935 and the principle in Associated Provincial Picture Houses Ltd vs Wednesbury Corporation (1948) KB 223.
 13. The appellant postulates that the purpose of judicial review concerns itself with the decision-making process but not the merits of the decision of which the application is made as held in Republic vs Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR. To the appellant, the judicial review application was an appeal disguised as a judicial review application as found in Kenya Pipeline Company Limited vs Hyosung Ebara Company Limited and 2 others [2012]eKLR.
 14. The appellant reiterates the jurisdiction of the appellant in line with the appellant’s mandate under section 173 of the Act. The appellant adds that the appellant’s final orders to nullify the contract dated 2nd October 2023 to extend the tender validity period of the All Risk Industrial Insurance Policy in relation to the tender and to order the 3rd respondent to make good on the anomalies in the procurement proceedings and to execute the contract with the 2nd respondent as the successful tenderer were all acts done within the confines of the law. Thus, the learned judge erred in allowing the contract between the 1st and 3rd and 4th respondents which goes against the constitutional principles of cost-effectiveness in Article 227(1) of *the Constitution*, the principle of public finance on the use of public resources in a prudent and responsible way in Article 201(d) of *the Constitution* as read with section 3(a),(e),(f) and (h) of the Act on maximization on the value of money and section 86(1)(a) of the Act. The submissions also refer to Republic vs Public Procurement Administrative Review Board & 2 Others ex parte International Research and Development Actions Ltd [2017] eKLR and Lordship Africa Limited vs Public Procurement Administrative Review Board & 2 Others [2018] eKLR with the former on prudent use of public resources and the latter on the importance of notifications.
 15. On whether the learned Judge considered extraneous matters and erred in law in consideration of matters that were never pleaded or adduced in evidence by the parties, the appellant urges that the learned Judge departed from the pleadings and evidence adduced by the 1st and 2nd respondents and considered extraneous matters thus arriving at a wrong finding. That instead of focusing on the decision making process of the appellant, the judge took into consideration extraneous matters such as the 2nd respondent’s inability to place cover with respect to the subject tender, the communication by the 2nd respondent’s re-insurers and reliance on issues that were never pleaded or adduced by the parties to draw an erroneous conclusion that has far reaching effect to the appellant’s exercise of its jurisdiction and wide powers under section 173 of the Act.
 16. In conclusion, the appellant prays that the appeal be allowed, the judgment and decree of the High Court be set aside in entirety, the decision of the appellant in the Request for Review be upheld and costs of the appeal be provided for.
 17. The 2nd respondent supports the appeal. In the submissions dated 25th January 2024, the 2nd respondent joins issue with the issues framed and submitted by the appellant. In addressing the question whether the judicial review court erred in law in determining that the appellant did not have the jurisdiction



to hear and determine the Request for Review Application No.77 of 2023 by the 2nd respondent, the 2nd respondent focuses on two sub issues.

18. The first of them is the validity of the contract signed on 2nd October 2023 between the 1st respondent and the 3rd and 4th respondents. On this, it is their position that the contract is a nullity for being signed contrary to the provisions of section 167(4)(c) of the Act as read with section 135 and section 176(1)(k) of the Act. This is because the contract was not signed within the period specified in the notification of intention of award and was signed beyond the 14-day period after notification of the Award took place. However, that the timeline is still inconsequential for the contract was issued devoid of any notices contrary to sections 87 and 135(3) and 135(6)(h) of the Act. Moreover, that the contract was not signed between the successful tenderer, that is, the 2nd respondent but instead signed with the 1st respondent who was not the successful bidder as per the notification of intention of award and despite the fact that it had also explicitly expressed their refusal to contract under the provisions of section 136 of the Act. That the judge's finding was Public Procurement and Asset Disposal therefore in furtherance of an illegality.
19. The other sub issue is the jurisdiction of the appellant to hear and determine the Request for Review Application derived from section 135 and 167(4)(c) of the Act. The 2nd respondent reiterates the court's jurisdiction on the Request for Review being filed upon discovery of breach after receiving market information.
20. The 2nd respondent echoes the appellant's arguments by restating that the learned judge erred in granting the orders sought by the 1st respondent in the judicial review proceedings. They cite Ndung'u, J. in Republic vs Public Procurement Regulatory Authority & Another; Auto Terminal Japan Limited (Exparte Applicant); Auditor General & Another (Interested Parties) (Judicial Review 55 of 2022) [2022]KEHC 10782 (KLR) (Judicial Review) (27 May 2022) (Judgment) and Mativo, J. in Republic vs Public Procurement Administrative Review Board; Shenzen Instrument Co. Limited & Another (Interested Party) Ex parte Kenya Power and Lighting Company Limited [2019] eKLR to the effect that specialized bodies should not be interfered with in exercise of the statutory mandate with the court only exercising supervisory mandate and that the judicial review court should be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the body.
21. In addition, the 2nd respondent submits that proof of jurisdiction can be seen in the appellant's decision and that all parties to the Request for Review were heard by the appellant. Further, that the appellant took into consideration all relevant matters, that is the responsiveness of tenders pursuant to the provisions of section 79 of the Act at all levels of the tender evaluation process pursuant to section 80 of the Act; the notification of intention to award pursuant to section 87 of the Act; acceptance of award by the 2nd respondent in terms of section 87(2) of the Act; the refusal to contract by the 2nd respondent and 1st respondent with respect to the All Risks Industrial Policy pursuant to section 136 of the Act; the signing of the impugned contract of 2nd October, 2023 contrary to sections 87 and 135 of the Act.
22. It is also the 2nd respondent's position that the learned Judge erred in law and fact for the reason that the Learned Judge considered extraneous matters in making its decision. Among the extraneous matters were, thorough misdirection in asserting that the 2nd respondent lacked capacity to offer cover; taking an erroneous position that on 11th October 2023, the 2nd respondent's re-insurer had informed the 4th respondent would place cover at the indicated sums which information was objected to by the 2nd respondent for the reason that no evidence on the same was placed before court; and reliance on considerations never pleaded or adduced in evidence and drawing an erroneous conclusion with serious ramification on the appellant's wide powers under section 173 of the Act. Accordingly, the learned Judge's decision goes against constitutional principles under Article 227.



23. Further, that the 1st respondent's bid was tainted with illegality contrary to section 20 of the [Insurance Act](#). This is because the 1st respondent's underwriter's lead insurer is an international re-insurer not registered under the provisions of the [Insurance Act](#).

24. The 2nd respondent urges us to find merit in the appeal and allow it.

25. On their part, the 1st, 3rd and 4th respondents oppose the appeal.

The 1st respondent's submissions are dated 17th January 2024, and they address four issues raised by the appellant's memorandum of appeal. The first issue was on the findings by the learned Judge on contentious issues in the judicial review application, and the 1st respondent submitted that the learned Judge correctly held that the 2nd respondent's underwriter, Swiss Reinsurance, informed the 4th respondent that it would only place cover on behalf of the 2nd respondent at USD 2,237,039 FY 2023/24 and USD 2,535,583 - FY 2024/2025, and that this was a clear expression on the part of the 2nd respondent that it lacked requisite capacity to provide cover to the 4th respondent, at the price set out in its bid document, and thus unable to enter into a contract as per its bid document.

26. Further, that the 1st respondent's underwriter's ability to place cover as per its bid document in response to the tender was never an issue of contention for the judge to make a finding on, as is being argued by the appellant, and none of the parties presented it as an issue to be decided upon. The 1st respondent maintained that the learned Judge made a clear finding at that there existed a contract signed on the 2nd October 2023 between the 1st respondent and the 3rd and 4th respondent, and that once a procurement contract had been duly signed, then the Appellant lacked jurisdiction to hear any request for review on the tender process within the provisions of Section 167(4)(c) of the Act.

27. The second issue raised by the 1st respondent was that of the proceedings before the appellant, and its view was that the 2nd respondent's Request for Review before the appellant sought to challenge the 4th respondent's action in respect to the tender process of the subject tender, and the holding by the superior court was right and factual in the sense that there was indeed an acceptance letter dated 26th June 2023 and not 21st June 2023 as contended by the appellant, and that the learned Judge committed no error in holding that the tenderer or candidate aggrieved by the decision of the 4th respondent ought to have filed its request for review before the Appellant within 14 days from 7th June 2023, which in this case was on 21st June 2023. That after the 21st June 2023, the judge rightly held that the procurement process entered the contract phase within the meaning of section 135 (6)(h) of the Act.

28. Furthermore, on the date of the alleged breaches, the 1st respondent having been given a notification of award on 7th September 2023, any request for review as against the 3rd and 4th respondents action ought to have been filed within 14 days of 7th September 2023, which was on 21st September 2023, and since the request for review was seeking to nullify the 1st respondent's procurement contract, it was thus filed out of time, thus denying the appellant jurisdiction to hear and determine the Request for Review dated 12th October 2023. Lastly that the date of 28th September 2023 when the 2nd respondent alleged it became aware of the award of the subject tender to the 1st respondent is the date when the 2nd respondent communicated to the 3rd and 4th respondents about the alleged market information, and this cannot be taken to be the date when they became aware of the alleged award of the subject tender.

29. The third issue submitted on by the 1st respondent was on the judicial interpretation of the Public Procurement and Assets Disposal Act as read together with [the Constitution](#) of Kenya, and that the learned Judge was right in his finding that the appellant cannot impose a new requirement that new notifications of intention to award should be issued yet such a requirement is non-existent within the provisions of Section 136 of the Act. The 1st respondent also supported the holding by the learned



Judge that the appellant erred in holding that the 3rd and 4th respondents ought to have cancelled in writing the award made to the 2nd respondent prior to awarding the subject tender to the next successful bidder, as no provision in law was cited by the appellant or the 2nd respondent to support this position. In addition, that the contentions by the 3rd and 4th respondent, that the 2nd respondent's reinsurer through a letter dated 11th October 2023 confirmed that they can place cover at a contract price that was higher than what the 2nd respondent had quoted without complying with Section 82 of the Act was uncontroverted by either the appellant or the 2nd respondents.

30. Lastly, with respect to issues arising post the superior court's judgment of 18th December 2023, the 1st respondent submitted that upon the delivery of the impugned Judgment, which in essence validated the contract between the 1st respondent and the 3rd and 4th respondents, premiums were duly paid in performance of the contract, and this therefore means that the contract in place is being performed as expected of the parties privy thereto. Additionally, it was submitted that claims on losses are already being made as against the risks covered and the insurer is in the process of assessing the damages and the compensation to be made. Therefore, that considering that the 1st respondent together with the 3rd and 4th respondents have entered into contracts with other third parties in performance of the contract, they are likely to be exposed to unsurmountable damages should this Court find in favour of the appellant. Reliance was placed on the decision of this Court in the case of *East African Cables Limited vs Public Procurement Complaints, Review and Appeals Board & another* [2007] eKLR to urge that it would be superfluous to cancel a contract that is being performed or executed to completion as in this case.
31. The 3rd and 4th respondents filed joint submissions dated 26th January 2024 which respond to each of the grounds contained in the memorandum of appeal.
32. They submit that contrary to the appellant's assertions, the issue of whether the 2nd respondent was unable to place the All Industrial Risk Insurance Policy Cover necessitating the application of section 136 of the Act was considered and properly determined by the High Court. Therefore, in view of the foregoing default by the 2nd respondent, the 4th respondent could not contract with it within the requisite period. The request by the 4th respondent to the 2nd respondent to be provided with a performance bond prior to the signing of a contract has a legal basis in section 142 (1)(2) and (3) of the Act and Regulation 135(1) of the Regulations. Also, that the provision of the tender security was a mandatory requirement under section 9 (1)(f) and 70(1) of the Act as read with Regulation 68(1) and the Eighth Schedule of the Regulations.
33. From the above version of events, the 3rd and 4th respondent point out that the 2nd respondent would have had a legal basis to file a request for review to challenge what the appellant claims was the 4th respondent's indecision to contract with the 2nd respondent, if it had provided the documents requested by the 4th respondent in its aforesaid letter dated 21st June 2023 within the three days period indicated therein and the 4th respondent had failed or refused to enter into a contract with it within the timeline provided in the said letter. In that case, they ask, why fail to comply with conditions precedent to the contract within the required period in the month of June 2023 and then wait until 12th October 2023 to file a request for review before the appellant? Such a request, they answer, would clearly be outside the timelines set under section 167(1) of the Act.
34. The 3rd and 4th respondents indicate that the issues raised in some of the grounds of appeal were not in issue before the appellant and therefore could not be an issue before the High Court. These include the determination as regards the 1st respondent or its underwriter's capacity to delivery on its obligations under the contract signed by the 1st and 4th respondents on 2nd October 2023; and the existence of the said contract which the appellant purported to nullify. They also suggest that the appellant appears to be confusing the letter of acceptance with the acceptance of the award given to the 4th respondent by



- the 2nd respondent in response thereto through its letter dated 26th June 2023. That this is the letter that the procurement entity should issue to the successful bidder under section 70(2) of the Act after the lapse of the 14 days, beyond which this standstill period cannot be reintroduced. They are categorical that the window for the 2nd respondent to file the Request for Review with the appellant lapsed at midnight on 21st June 2023.
35. This is to say that once the 2nd respondent declined to sign the contract, by failing to provide the performance security and through the contents of its letter dated 30th June 2023, it brought upon itself the consequences prescribed by law and by the tender document, which are self-executing. This is because there is no legal obligation placed on the procuring entity under the aforesaid section 136 of the Act to first communicate with the affected successful tenderer, to inform him that it is going to move as directed by law to the next lowest bidder. Reference is made to Public Procurement Complaints, Review and Appeals Board Application No.4/2006 of 26th January 2006 between Mantrac Kenya Limited and Nzoia Sugar Company Limited. It is therefore submitted that if section 136 of the Act was misapplied by the 4th respondent, as alleged, then it is curious that the 2nd respondent would complain about the award to the 2nd respondent while ignoring the fact that Zamara and Macly Insurance Brokers had previously been contacted by the 4th respondent on 30th June 2023 to confirm their availability to place cover.
36. The 3rd and 4th respondents reiterate that the appellant did not only lack jurisdiction to hear and determine the request for review by the 2nd respondent because a contract existed at the time of the request and also the window for filing such request had lapsed in view of section 167(1) of the Act and Regulation 203 (2)(c.ii) of the Regulations. Further that the contract entered into by the 3rd and 4th respondent after midnight on 21st June 2023 satisfied the requirements of section 135(3) of the Act. In essence, the 3rd and 4th respondents agree with the reasoning and findings of the High Court and assert that the learned Judge did not make any error in making conclusions in his judgment on the various issues raised.
37. The 3rd and 4th respondents urge that the decisions cited by the appellant - Republic v Public Procurement Administrative Review Board & 2 Others ex parte International Research and Development Actions Ltd [2017] eKLR; Lordship Africa Limited vs Public Procurement Administrative Review Board & 2 Others [2018] eKLR and Civil Appeal No.35 of 208 Ederman Property Limited vs Lordship Africa Limited & 2 Ors [2019] eKLR are inapplicable to the matter at hand. They add that a decision is only an authority for what it actually decides and not for what logically follows from the various observations made in it. That a slight difference in facts and circumstances can make all the difference as was noted in Republic vs Kenyatta University ex parte Martha Waihuni Ndungu [2019] eKLR
38. From the issues framed by the appellant, the main issues for determination in this appeal are, in our view;
- a. whether the appellant had jurisdiction to hear and determine the request for review application by the 2nd respondent.
 - b. Whether the learned Judge erred in granting the orders sought by the 1st respondent in the judicial review application.
39. Rule 31 of the Court of Appeal Rules 2022 mandates us to reconsider the evidence on record and determine whether the learned judge made the correct conclusion under the circumstances. Where exercise of judicial discretion is involved by the learned Judge, we can only ascertain if it was done



judiciously and not capriciously, with a caution not to merely overturn the same if we would have been persuaded differently by the facts and evidence adduced before the court.

40. From the record, it emerges that two issues presented themselves for determination before the High Court. First, whether the appellant had jurisdiction and second, whether the 1st respondent was entitled to the orders sought. In addressing the appellant's jurisdiction, the court noted that its jurisdiction flowed from the provisions of Section 167(1) of the Act. Noting that the notification letter for the successful tenderer was issued to the 2nd respondent on 7th June 2023, the period provided for under section 87 lapsed on 21st June 2023. The judge went further to state that even if the offending event occurred on 7th September 2023, the request for review by any aggrieved party ought to have been filed within fourteen days of the award, on 21st September 2023. The Judge therefore concluded that given that a contract was already in place having been executed on 2nd October 2023, the appellant lacked jurisdiction.
41. In our view, the main contention is resolving the jurisdictional impasse of the appellant is the interpretation of section 167(1) of the Act. The said provision provides as follows:

“ 167 (1) Request for a review

- (1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.
- (4) The following matters shall not be subject to the review of procurement proceedings under subsection (1 (c) where a contract is signed in accordance with section 135 of this Act.” (Emphasis ours)

42. Jurisdiction is everything and is the starting point for the exercise of any judicial authority. In Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR, the Supreme Court aptly captured the issue as follows:

“(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”



This position in effect extends to the quasi-judicial bodies such as the appellant. The appellant is established under section 27 of the Act. Its functions are stated in section 27 to include reviewing, hearing and determining tendering and asset disposal disputes.

43. Looking at the circumstances of the case, we note that without going to the facts of the issue, as the interpretation of some of the facts is contested, it is trite that the dispute at hand related to “tendering and asset disposal dispute” within the meaning of section 28(1) (b) of the Act.
44. The bone of contention between the parties on this issue is twofold. The first one is the tabulation of the fourteen day period and the second one is the validity of the signed contract. On the fourteen- day period, it is evident that the Request for Review was not made within 14 days of the notification of award but rather on the occurrence of a breach, which the appellant submits was on 28th September 2023.
45. We are constrained to have a broader interpretation of the words “or date of occurrence of the alleged breach at any stage of the procurement process” as set out in section 167(1) of the Act. This provision in our view, encompassed situations such as the appellant’s where allegations of breach arise or become known after the lapse of time for notification of award. A narrow construction of the jurisdiction of the appellant will have untold ramifications in the sense that it will leave the litigants aggrieved with no obvious recourse.
46. Specifically with respect to procurement disputes, the question of how the date of occurrence of a breach is to be determined, was the subject of the persuasive decision by Elias JA of the English Court of Appeal in *SITA vs Manchester Waste Management Authority* (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in *Uniplex (UK) Ltd vs NHS Business Services Authority* (2010) 2 CMLR 47 extensively discussed when time starts to run with respect to a breach in procurement proceedings as follows:

“.....In *Uniplex*, the Court of Justice decided to adopt a test of discoverability, not a test which would result in time running from the happening of an event of which the victim might not know. The paragraphs of the judgment in *Uniplex* which I wish to emphasise are paragraphs 30 and 31:

- “30 However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.
31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings.”

The threshold therefore in determining the date of occurrence of a breach is the date of actual or constructive knowledge of the breach by an applicant. This indeed is one of the key reasons for the notification and standstill requirements in the award of tenders, so as to allow for informed and effective challenges to award decisions before the contracts are concluded.



47. The answer then to the question of the date of occurrence can only be answered with reference to the 2nd respondent's knowledge of the alleged breach, and it is our view that the learned Judge of the superior Court in this respect erred in finding that time should start running from 7th September 2023 when the 1st respondent was notified of the award, and ought to have considered the averments by the 2nd respondents that it only came to learn of the developments on 28th September 2023. We accordingly find that the time for filing the request for review under Section 167(1) of the Act started running a day after the 28th September 2023 when the record reflects that the 2nd respondent became aware of the breach, and that the Request for Review was filed within the 14 days standstill period in consonance with Section 167(1) of the Act read with Regulation 203 (2) (c) (iii) of Regulations 2020. The appellant therefore had jurisdiction to hear and determine the Request for Review.
48. On the second limb of jurisdiction relating to the existence of a signed contract, we note that the learned Judge of the superior Court held as follows on this issue:-
- “... In Republic vs. Public Procurement Administrative Review Board ex-
 217. parte Madison General Insurance Kenya Limited; Vice Chancellor Kenyatta University & Another (Interested Parties) (2022) eKLR where Justice Ngaah held as follows:-
- “it could be that indeed the contract was invalid, but in my humble view, considering the provisions of Section 167(4)(c) once a contract has been signed, the appropriate forum before which the question of validity of a signed contract can be determined is this Honorable Court.
- It does not necessarily follow that an aggrieved party is left without a remedy merely because a contract is signed. Grievances arising out of a signed contract will certainly be addressed but not before the Public Procurement Administrative Review Board. They will be addressed before the court which only has the jurisdiction to determine such disputes related to the alleged grievances.”
218. The Board lacked jurisdiction to hear and determine the application by the 2nd Respondent under Section 167(4) of the Act, to entertain the application given that there was already a signed contract – signed on 2nd October 2023, between the ex-parte Applicant and the 3rd and 4th Respondent.
219. Given that the Contract was executed between the Applicant and the 4th Respondent, on 2nd October 2023, the Board lacked jurisdiction to adjudicate over any request for review filed after the execution of a contract pursuant to the provisions of Section 167(4)(c) of the Act and I so hold...”
49. As already observed, the appellant's jurisdiction emanates from Section 167(1) of the Act. Section 167(4) provides matters that shall not be subject to the jurisdiction of the appellant and, Section 167(4) (c) of the Act specifically, ousts the appellant's jurisdiction where a contract is signed in accordance with Section 135 of the Act. Section 135 in this regard sets out various requirements to be met in the creation and signing of procurement contracts, and an ordinary and purposive interpretation of section 167(4) is that the appellant is required to inquire into whether a procurement contract has been signed in accordance with section 135 of the Act when deciding on whether it has jurisdiction to hear and determine a request for review filed before it in cases where a contract has already been signed, and



its jurisdiction is only ousted once this preliminary inquiry establishes that the provisions on creation of a procurement contract under Section 135 of the Act have been met, or where it makes an error as to the existence of this statutory precondition.

50. Indeed in the case of *Ederman Property Limited v Lordship Africa Limited & 2 others* [2019] eKLR, where a similar question arose as to whether the Appellant had properly declined jurisdiction in a case where a contract had been signed, this Court stated thus: -

“...The learned Judge who heard the motion identified as an important question the determination of whether the 2nd respondent committed an error of law when it declined jurisdiction to entertain the application for review because a contract had already been entered into and the application was filed outside fourteen (14) days.....

The review body is not allowed to consider a review where a contract has been signed in accordance with Section 135 of the Act. The learned Judge considered the manner in which the 2nd respondent on receiving the request for review had entertained it where it found that it had no jurisdiction to entertain the request for review in the face of a contract that had been signed between the appellant and the 3rd respondent. The Judge reviewed a number of decisions on the issue of jurisdiction which the 2nd respondent had found it lacked. The Judge distinguished the provisions of Section 167(4) (c) of the Act and Section 135 of the Act. Section 135 states that a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity of the successful tenderer. Section 135(3) provides that.....

Having reviewed the provisions of the said Sections 135 and 167 of the Act, the Judge found at paragraph 73 of the judgment that:

“In this case, the review board makes no reference to whether or not the contract allegedly signed was in accordance with Section 135 of the Act. From the above cited case law, it is clear that the review board should have first determined whether the contract in question was signed in accordance with Section 135 of the Act. This is so because the mere fact that a contract has been signed does not necessarily deprive the respondent of the jurisdiction to entertain the request for review. In other words, before the review board makes a determination that it has no jurisdiction to entertain the request by virtue of sect 167 (4) (c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with Section 135 of the Act and the failure to do so in my view would amount to improper deprivation of jurisdiction; in my further view improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction”....

We fully agree with the conclusion reached by the Judge in this respect. It was the duty of the 2nd respondent to satisfy itself that the 3rd respondent had followed the law on procurement and rules of natural justice in awarding the tender to the appellant and finding that the 1st respondent’s tender bid was unsuccessful...”

51. We adopt and agree with this reasoning. Put another way, section 164(7) implies a jurisdiction on the part of the appellant to entertain an application as to whether a contract is signed in accordance with Article 135, and is meant to address the obvious mischief of the signing of illegal procurement contracts so as to oust the jurisdiction of the appellant. The Learned Judge of the superior Court therefore



adopted a restrictive interpretation of the provisions of Section 167(4) (c) of the Act and erred in not appreciating and considering the existence of the condition- precedent to the ouster of the appellant's jurisdiction where a contract has been signed. Accordingly, it is our finding that that the Learned Judge erred in law in holding that the appellant had no jurisdiction solely on the basis that a procurement contract had been signed without checking on compliance with Section 135 of the Act.

52. As to whether the learned Judge erred in granting the orders sought by the 1st respondent in the judicial review application, it is notable that even after finding that the appellant lacked jurisdiction, the learned Judge proceeded to review the merits of the appellant's decision on two aspects, which formed the basis of his orders allowing the 1st respondent's application. Firstly, with respect to what the learned Judge termed "the controversial price adjustment issue", and after reviewing the various correspondence exchanged between the 2nd respondent and 3rd and 4th respondents on the underwriting of the policy cover and applicable premiums, and considering the provisions of the Act on pricing and performance bonds, the learned Judge held as follows:

"225. The foregoing is a clear expression on the part of the 2nd Respondent that it lacked the requisite capacity to provide cover to the 4th Respondent at the price set out in its bid document and it was seeking to adjust the price and qualifications that had been set out in the bid document after the event.

226. It is this court's finding that decision of the Board that the 2nd Respondent did not refuse to sign a contract with the 4th Respondent but had only made an "Award Adjustment" in its letter dated 30th June 2023 to the 4th Respondent amounts to a fundamental and incurable illegality for want of an express approval or amendment by the procuring entity. This court has the jurisdiction to issue judicial review orders to attend to illegalities like this within the principles as set out in the Pastoli case."

53. The Judge in this respect pointed out that section 139 (1) (a) of the Act provides that an amendment or a variation to a contract resulting from a procurement proceeding is effective only if the variation or amendment has been approved in writing by the respective tender awarding authority within a procuring entity, and there was no evidence of an approved variation or amendment in writing, and that:

"230. In any event. Having found that there was no contract signed between the 2nd Applicant and the 4th Respondent it is this court's finding and I so hold that there was nothing to vary or amend and this argument must fail.

231. It is this court's finding that there was no contract that had been formed between the 2nd Respondent and the 4th Respondent within Section 135 of The PPOA Act and I so hold."

54. It was not in dispute that the 2nd respondent and 4th respondent had not entered into a written contract, and this was in fact the cause and subject matter of the 2nd respondent's Request for Review before the appellant. Therefore, any implications, considerations and findings as regards a contract between the 2nd respondent and 3rd and 4th respondent were not only without factual basis but also irrelevant, and we find the holdings by the learned Judge in this regard to be inherently contradictory and at variance. In particular, the aspect of change in the pricing of the contract by the 2nd respondent, as found by the learned Judge, could not arise before the contract was drawn up and the pricing specified therein, so as to make a determination if it differed from the price in the bid document.



55. The learned Judge in this respect cited section 82 of the Act which is only applicable during the stages of tendering and evaluation of tenders, and not after an award is given. The learned Judge also appears to have conflated the performance bond required to be given after an award with the price of the contract, and it is notable in this regard that section 135(2) of the Act provides that a written contract shall be based on the tender documents and any clarifications that emanate from the procurement proceedings. Similarly, variations can only be made to a contract once drawn and signed by the parties, and not to an award, which is clearly stated in section 87 of the Act to be a notification of intention to enter into a contract.
56. Secondly, on the contract subsequently entered into between the 1st respondent and 3rd and 4th respondents on 2nd October 2023, the learned Judge, after having acknowledged that there was no signed agreement between the 2nd respondent and the 4th respondent, then found that “the procurement process proceeded with the next lowest evaluated tenderer without any illegality” and held as follows:
- “234. The Board cannot impose a new requirement that new notifications of intention should be issued on the said respondents a purported legal requirement which is not prescribed under Section 136 of the Act or anywhere else in the said Act or by the Regulations. To place a requirement for the issuance of new Notifications of Intention would amount to an act ultra vires its powers on the part of the Board.
235. This court has to attend to the question whether or not the procuring entity was under a duty to expressly cancel the award in writing that had failed before entering into a new contract. The argument that the holding by the Board that the 3rd and 4th Respondents ought to have cancelled in writing the award made to the 2nd Respondent prior to awarding the relevant tender to the next successful bidder is misplaced since the PPAD Act does not make such a provision.
236. Section 136 (1) of The PPDA Act stipulates that if the person submitting the successful tender refuses to enter into a written contract in writing as required under Section 135 and Section 64 of this Act. He or she shall forfeit his or her tender security and the procurement process shall proceed with the next lowest evaluated tenderer. The Act does not make any provision for the express cancellation of the Award and I so hold.”
57. We are in agreement with the finding that there is no express legal requirement for the cancellation of an award to a successful tenderer before an award is made to another tenderer, but we hold the view that there is an express requirement under section 136 of the Act that the successful tenderer must first refuse to enter into a written contract. This in turn presupposes the existence of a written contract, and that the same has been availed to the successful tender. The key requirements and procedures in sections 134 and 135 of the Act in this regard are that the accounting officer of the procuring entity shall be responsible for preparation of the written contract in line with the award decision after an award has been made; the written contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and by the successful tenderer; and the written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification, provided that a contract shall be signed within the tender validity period.



The learned Judge, having acknowledged that there was no evidence of a written contract between the 2nd respondent and 3rd and 4th respondents, then it also followed that it was not legally possible for the 2nd respondent to refuse to sign the written contract, and consequently no new award could legally be made to the 1st respondent in the circumstances. The learned Judge's findings are therefore not supported by the evidence and the law, and there was thus no legal basis for the orders granted in the subject judicial review application

58. The logical consequence of our findings is that this appeal has merit.
59. Before we conclude, we need to comment of the submissions by the 1st respondent that the contract dated 2nd October 2023 is being performed because premiums have allegedly been paid and claims raised against loss and assessment of damages is underway for compensation. The 1st respondent in this respect filed a Notice of Motion application dated 23rd January 2024, which application was allowed on 29th January 2024 to adduce additional evidence in this respect by way of a supplementary record of appeal. However, no evidence has been tendered before us to prove such alleged performance of the said contract. We cannot therefore make any findings or recommendations on the 1st respondent's claims in the circumstances, as they remain unsubstantiated.
60. In the end, we are persuaded that this appeal should succeed, and it is accordingly allowed in terms of the following orders:
- a. That the Judgment and Orders of the High Court of Kenya at Nairobi by the Justice John Chigiti (SC) dated and delivered on the 18th day of December 2023 in Judicial Review Application Number E.121 of 2023 be and are hereby set aside in their entirety.
 - b. That the decision of the appellant, delivered and dated at Nairobi on 2nd November 2023 in PPARB Application No.77 of 2023 is accordingly reinstated and upheld.
 - c. Owing to the nature of the appellant and the public nature of procurement processes, we do not find it appropriate to burden any party with costs. As such, each party shall bear its own costs.
61. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

M. WARSAME

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed



DEPUTY REGISTRAR

