Sicpa SA v Public Procurement Administrative Review Board & 2 others (Civil Appeal E474 of 2024) [2024] KECA 939 (KLR) (2 August 2024) (Judgment)

Neutral citation: [2024] KECA 939 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E474 OF 2024

DK MUSINGA, S OLE KANTAI & JM MATIVO, JJA

AUGUST 2, 2024

BETWEEN

SICPA SA ..... APPELLANT

AND

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

ACCOUNTING OFFICER KENYA BUREAU OF STANDARDS .... 2ND RESPONDENT

KENYA BUREAU OF STANDARDS ..... 3RD RESPONDENT

(Being an Appeal against the Judgment and decree of the High Court of Kenya at Nairobi (Ngaah, J.) dated 14th day of June 2024 in Judicial Review App. No. E101 of 2024)

Constitutionality of a procurement clause disqualifying prospective bidders involved in irregularities of government contracts.

The appellant contested the clause where the tender document provided that the tenderer or its associated must not have been convicted or have paid any fines anywhere in the world, directly or indirectly for any irregularities regarding Government contracts such as bribery or organizational deficiency. They argued that it should be expunged because it offended the Constitution and the PPAD Act. The court held that a Procuring Entity was permitted to customize its bid document to suit its needs. The Procuring Entity acted lawfully by ensuring that all bidders, whether from Kenya or from other jurisdictions, who may have committed malpractices relating to the matters cited in the impugned clause did not take advantage of the absence of such a clause. Such a clause not only enjoyed constitutional underpinning under articles 10 and 227 of the Constitution, but was also aimed at ensuring that public procurement and asset disposal was not polluted by unethical and unscrupulous tenderers. The tender being an international tender, it was important that the bidders thereof be entities of proven 'corporate hygiene' both in Kenya and in the countries where they were incorporated at or other countries where they operated.

Reported by Robai Nasike

Civil Practice and Procedure *– appeals – appeal against the judgment of the High Court – failure to consider material evidence in a judgment – claim that the High Court judgment was based on unsupported evidence since the court failed to consider material evidence – whether the High Court, in making its judgment, failed to consider material facts and evidence.*

Constitutional Law *– fundamental rights and freedoms – non-discrimination – claim that a tender clause in a procurement process discriminated against one bidder – whether a tender clause that required a tenderer or its associates not to have been convicted or have paid any fines anywhere in the world, directly or indirectly, for any irregularities regarding government contracts such as bribery or organizational deficiency, was discriminatory – Constitution of Kenya, 2010, article 10 and 227.*

Procurement Law *– procurement process – tender – tender clauses – a clause that sought to bar a prospective bidder who had been fined, convicted or paid any fines anywhere in the world, directly or indirectly for any irregularities regarding government contracts such as bribery or organizational deficiency – whether a clause that sought to bar a prospective bidder who had been fined, convicted or paid any fines anywhere in the world, directly or indirectly for any irregularities regarding government contracts such as bribery or organizational deficiency, offended the provisions of the Public Procurement and Asset Disposal Act – Public Procurement and Asset Disposal Act, sections 41, 55, 58, 62 and 80 (3).*

Procurement Law *– procurement process – tenderer – disqualification of a tenderer – where an international entity was disqualified on grounds that there was a settlement between it and its country arising from organizational deficiency – claim that the term organizational deficiency could not be applied since it was a term not recognized under Kenyan laws – whether it was demonstrated that organizational deficiency in Switzerland was innocuous or of no consequence in public procurement in Kenya – whether the Procuring Entity acted lawfully by ensuring that all bidders, whether from Kenya or from other jurisdictions, who may have committed malpractices relating to the matters cited in the tender clause did not take advantage of the absence of such a clause.*

Brief facts

The 2nd and 3rd respondents advertised an open international tender in a local newspaper being a tender for Provision of Printing KEBS Standardization Stickers. SICPA SA, (the appellant), obtained a copy of the Tender Documents, and became a candidate in the subject tender within the meaning of the definition of a candidate under section 2 of the Public Procurement and Asset Disposal Act (the PPAD Act). However, the appellant noted that the tender document provided that the tenderer or its associated must not have been convicted or have paid any fines anywhere in the world, directly or indirectly for any irregularities regarding Government contracts such as bribery or organizational deficiency. The appellant's complaint regarding the clause was disregarded by the 2nd and 3rd respondent.

The appellant officially contested the clause at the Public Procurement and Administrative Review Board (1st respondent), essentially contending that the clause was a departure from previous tender documents and should be expunged. It contended that the clause offended the spirit of the Constitution set out in articles 10, 27, 50, 201 and 227 and sections 3, 62, 70 (1) - (4) and 80 (3) of the PPAD Act and regulation 68 (4). The 1st respondent held that the 2nd respondent bore the responsibility of preparing Tender Documents while consulting the relevant user department to populate the evaluation criteria, and it had the latitude to customize the standard procurement and asset disposal tender document to suit its needs, provided the latitude was subject to the law. The 1st respondent found that the appellant had failed to demonstrate any breach of the law. Aggrieved, the appellant filed a High Court seeking orders of *certiorari*, *mandamus* and prohibition. The High Court affirmed the 1st respondent's decision, finding that there was nothing to suggest that the decision was tainted with procedural impropriety. The High Court affirmed the Review Board's decision culminating in the instant appeal.

Issues

i. Whether the High Court, in making its judgment, failed to consider material facts and evidence.

ii. Whether a tender clause that required a tenderer or its associates not to have been convicted or have paid any fines anywhere in the world, directly or indirectly, for any irregularities regarding government contracts such as bribery or organizational deficiency, was discriminatory.

iii. Whether a clause that sought to bar a prospective bidder who had been fined, convicted or paid any fines anywhere in the world, directly or indirectly for any irregularities regarding government contracts such as bribery or organizational deficiency, offended the provisions of the Public Procurement and Asset Disposal Act.

Held

1. The requirement for a court to consider and weigh all the evidence did not mean that the judgment must also include a complete embodiment of all the evidence led, as if it comprised a transcript of the proceedings. All it meant was that the summary of the evidence led had to entail a complete embodiment of all the material evidence led. In order to determine whether there was any merit in the accusation that some evidence was disregarded, the appellate court had to consider the evidence presented in the trial court, juxtapose it against the judgment by the trial court, and the 1st appellate court and finally determine whether there was any basis for interfering with the judgment.
2. Where the appellate court was of the view that a particular fact was so material that it should have been dealt with in the judgment, but such fact was completely absent from the judgment or merely referred to without being dealt with when it should have, that would amount to a misdirection on the part of the trial court. The Court of Appeal must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection, was so material as to affect the judgment, in the sense that it justified interference with it. The 1st respondent and the High Court considered all the material before them. There was no misdirection on the part of the High Court. Therefore, there was no merit in the argument that the High Court did not consider the appellant's evidence or that the decision was unsupported by evidence. The 1st respondent considered all the material presented to it.
3. Judicial review was entrenched in article 47 of the Constitution. The Fair Administrative Action Act expanded the scope of judicial review grounds beyond those traditionally recognized by the common law. A reading of the impugned clause left no doubt that it applied to all bidders without any exception as opposed to a particular bidder. The trial court was correct in its finding to that effect. Accordingly, no cogent evidence was adduced to support the assertion that the impugned clause only targeted the appellant. Accordingly, the appellant's argument that the clause only referred to it lacked merit. In any event, despite taking the view that the application before the trial court was a judicial review application, a reading of the judgment showed that the trial court addressed the merits of each party's case. Therefore, there was no misdirection that could occasion injustice to the appellant.
4. The Constitution only prohibited unfair discrimination. Notably, the impugned clause required a tenderer or its associates not to have been convicted or paid any fines anywhere in the world, directly or indirectly, for any irregularities regarding government contracts such as bribery or organizational deficiency. That was only one of the many other eligibility criteria set out in the tender document as a pre- qualification. There was nothing on record to suggest that the clause only applied to the appellant and not to all prospective bidders. A clause setting out eligibility requirements could not be said to be discriminatory unless it specifically barred a particular person or entity and allowed others in similar situations. The appellant maintained that the fine it paid in Switzerland did not amount to culpability. If that was the case, one wondered why then it found the clause offensive in Kenya. There was nothing wrong or unconstitutional or impermissibly discriminatory on the impugned clause. If anything, the clause met the constitutional muster in articles 10 and 227.
5. A jurisdictional error arose when a decision-maker exceeded the authority or power conferred upon it. It meant that the decision-maker had failed to comply with an essential condition to or limit on the valid exercise of power, and that rendered the decision invalid. A reading of the entire record showed that there was no attempt before the Court of Appeal to demonstrate that the 1st respondent exceeded

its authority or failed to comply with an essential condition in the exercise of its functions. The 1st respondent's proceedings clearly showed that the 1st respondent properly discharged its functions in accordance with the PPAD Act.

6. The 1st respondent had not failed to interpret or apply the law correctly. A judicial review court was not required to interfere with the findings of a trial court just because it could have arrived at a different conclusion. What was important was that the court had to be satisfied that there was a misdirection which occasioned injustice.

7. An error of law referred to any ruling, decision, or process that conflicted with the principles of the law. An error of the law implied failure to correctly apply the law, leading to a violation of the litigants' rights. There was nothing in the appellant's arguments or in the High Court judgment that suggested that it suffered from an error of law. The 1st respondent's decision did not suffer from unreasonableness. Both the High Court and 1st respondent carefully considered all the evidence tendered by the parties.

8. The appellant maintained that the term "organizational deficiency" was not defined under Kenya's law. That could be so. However, not all terminologies were defined in law. It was also not demonstrated that a set of facts or circumstances or an act or omission arising from "organizational deficiency" could not constitute an offence known to the law or misconduct which could taint a procurement process. If any person bore the burden of explaining what the said terminology meant, it was the appellant and not the court. The appellant could not purport to blame a terminology which it was not called upon to define.

9. Under Swiss law, companies were liable in cases where the company's inadequate organisation meant that an offence was not prevented. If criminal charges were brought against a company in Switzerland, they were often for "defective organization". That was due to the two-tier system in which – in line with article 102 of the Swiss Criminal Code – corporate criminal liability was regulated.

10. Kenya did not have similar provisions in its statutes. However, it had not been demonstrated that the so called "organizational deficiency" could not lead to the commission of an offence known to the law in Kenya. Much as the appellant blamed the 1st respondent and the High Court for failing to interrogate the terminology, it was not lost to the Court of Appeal that the appellant never availed to the Board and the High Court the details of the alleged settlement with the Attorney General of Switzerland for them to appreciate what the settlement entailed and whether there was any malpractice. The appellant was heavily guarded in making a full disclosure of such crucial facts, yet it expected the courts below to make a finding that the said clause was unfairly targeting it. Therefore, the two courts below could not be blamed for failing to define that terminology. Conversely, the appellant had an evidential burden to prove that the term had no adverse consequences to it and therefore its use was unfair.

11. A clause that sought to bar a prospective bidder who had been fined, convicted or paid any fines anywhere in the world, directly or indirectly for any irregularities regarding government contracts such as bribery or organizational deficiency could not be said to offend the provisions of sections 2, 41, 55, 58, 62 and 80 (3) of the PPAD Act. Such a clause was underpinned by articles 10 and 227 of the Constitution, section 3 of the PPAD Act and the Public Finance Management Act, all of which lay down the principles of public procurement and disposal of public goods and management and use of public finance.

12. The attempt to invoke section 41 of the PPAD Act was inappropriate. That provision dealt with debarment which was essentially a different process, and it was not a bar to the mandatory eligibility clauses in a bid document. All bids had mandatory eligibility criteria. The appellant never attached the entire tender document but only exhibited some pages. It would have been prudent to avail the entire document to the court. Nevertheless, clause 3 of the document attached by the appellant had explicit clauses relating to fraud and corruption which the appellant was not complaining about. Clause 4.6 of the same documents also provided more instances of ineligibility where a tenderer had been sanctioned by PPRA or was under suspension or debarment. The appellant's argument in opposition to the impugned clause was tantamount to suggesting that ineligibility clauses in a bid document were

unconstitutional and contrary to the law. That was not so. The appellant's argument challenging the impugned clause had no merit, and the attempt to hide behind section 41 of the Act did not help at all, otherwise, entertaining the said argument was tantamount to saying no bid document should contain mandatory eligibility criteria.

13. A Procuring Entity was permitted to customize its bid document to suit its needs. That was an international tender which was open to tenderers from any part of the world. The Procuring Entity acted lawfully by ensuring that all bidders, whether from Kenya or from other jurisdictions, who may have committed malpractices relating to the matters cited in the impugned clause did not take advantage of the absence of such a clause. Such a clause not only enjoyed constitutional underpinning under articles 10 and 227, but was also aimed at ensuring that public procurement and asset disposal was not polluted by unethical and unscrupulous tenderers.
14. The tender being an international tender, it was important that the bidders thereof be entities of proven 'corporate hygiene' both in Kenya and in the countries where they were incorporated at or other countries where they operated. One of the guiding principles of public procurement under section 3(g) of the PPAD Act was adherence to international norms. It was not demonstrated that organizational deficiency in Switzerland was innocuous or of no consequence in public procurement in Kenya.
15. Judicial review orders were discretionary and were not granted automatically, hence a court could even refuse to grant them even where the requisite threshold had been attained since the court had to weigh one thing against another and see whether or not the remedy was the most efficacious in the circumstances obtaining, and since the discretion of the court was a judicial one, it must be exercised on evidence of sound legal principles. Further, whenever the court was vested with discretion to do certain acts as mandated by statute, the same had to be exercised judiciously and not in an arbitrary and capricious manner. Once that was demonstrable from the record, it would be difficult for the appellate court to interfere with the exercise of the lower court's discretion. There was no misdirection at all on the part of the High Court in the exercise of its discretion in refusing to grant the judicial review orders sought.

Appeal dismissed.

Orders

Costs to the respondents.

Citations

Cases

Kenya

1. *Dande & 3 others v Inspector General, National Police Service & 5 others* Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated); [2023] KESC 40 (KLR) - (Mentioned)
2. *Mohammed Abduba Dida v Debate Media Limited & another* Petition 324 of 2017; [2017] KEHC 8963 (KLR) - (Mentioned)
3. *Republic v Judicial Service Commission ex parte Pareno* Miscellaneous Civil Application 1025 of 2003; [2004] KEHC 2684 (KLR) - (Mentioned)
4. *Republic v Public Procurement Administrative Review Board Ex P Gibb Africa Limited & another* Judicial Review 92 of 2011; [2012] KEHC 381 (KLR) - (Followed)
5. *Republic v Public Procurement Administrative Review Board; Sicpa SA (Exparte); Accounting Officer, Kenya Bureau of Standards & another (Interested Parties)* Judicial Review Application No E101 of 2024; [2024] KEHC 7157 (KLR) - (Mentioned)
6. *Republic v Speaker of the Senate & Senate Ex parte Afrison Export Import Limited & Huelands Limited* Miscellaneous Civil Application 182 of 2018; [2018] KEHC 9509 (KLR) - (Mentioned)

South Africa

1. *Allpay Consolidated Investment Holding (PTY) Ltd and 13 Others v CEO of South Africa Social Security Agency and 17 others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC - (Mentioned)
2. *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000) - (Mentioned)
3. *Britestone PTE Ltd v Smith & Associates Far East Ltd* [2007] 4SLR (R) 855 - (Mentioned)

United Kingdom

1. *Anisminic Ltd v Foreign Compensation Commission* [1968] App LR 12/17; [1969] AC 147 - (Applied)
2. *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 - (Mentioned)
3. *R v Wilkes* 1770 ER 327 - (Mentioned)
4. *Rheir Shpping Co SA v Edmunds* [1985] I WLR 948; [1985] 2 All ER 712; [1985] UKHL 15 - (Mentioned)

Statutes

Kenya

1. Anti- Corruption and Economic Crimes Act (cap 65) In general- (Cited)
2. Anti-Bribery Act (cap 79B) In general -(Cited)
3. Civil Procedure Rules (2010) order 53 rule 3(1)- (Interpreted)
4. Companies Act (cap 486) In general - (Cited)
5. Constitution of Kenya articles 10, 27, 50, 201, 227- (Interpreted)
6. Law Reform Act (cap 26) sections 8, 9 - (Interpreted)
7. Penal Code (cap 63) In general - (Cited)
8. Public Procurement and Asset Disposal Act (cap 412 C) sections 2, 3, 41, 55, 58, 62, 70 (1)-(4); 80(3) - (Interpreted)
9. Public Procurement and Asset Disposal Regulations, 2022 (cap 412C Sub Leg) regulations 47, 68(4) - (Interpreted)
10. Standards Act (cap 496) In general - (Cited)

Advocates

Mr Paul Muite SC and Mr Marete for the appellant

Mr Munene Wanjohi for the 1st respondent

Ms Maina for the 2nd and 3rd respondents

JUDGMENT

1. The factual background which elicited the litigation before the Public Procurement Administrative Review Board (the 1st respondent) and the judicial review proceedings before the High Court, which culminated in the judgment the subject of this appeal are essentially straight forward and uncontested. The 2nd respondent is the accounting officer of the 3rd respondent (the Procuring Entity), a public body established under section 3 of the *Standards Act*.

2. On 26 March 2024, the 2nd and 3rdrespondents advertised an open international tender in a local newspaper being Tender No: KEB/T029/2023/2024 for Provision of Printing KEBS Standardization Stickers. Following the said invitation, SICPA SA, (the appellant), obtained a copy of the Tender Documents, and it became a candidate in the subject tender within the meaning of the definition of a candidate under section 2 of the *Public Procurement and Asset Disposal Act* (the PPAD Act). However, the appellant noted that the tender document at section 111- Evaluation and Qualification Criteria-Tenderers Eligibility and Qualifications provided as follows:

a. ....

b. Clause 2 Mandatory Requirements, Sub-Clause 11 (VIII)-

> "The tenderer or of its associates (sic) must not have been convicted or paid any fines anywhere in the world, directly or indirectly for any irregularities regarding Government contracts such as bribery or organizational deficiency. (Emphasis added)

3. It was the appellant's view that the above clause was a flagrant departure from both previous tenders and the Standard Tender Document published by the Public Procurement Regulatory Authority (PPRA). However, its complaint to the 2nd and 3rd respondents about this clause was to no avail.

4. On 9 April 2024, the appellant filed a Request for Review before the 1st respondent, being application No 29 of 2024, essentially contending that the said clause was a departure from previous tender documents. It disclosed that it had previously entered into what it described as a settlement with the Hon Attorney General of Switzerland pursuant to which it resolved a dispute relating to "organizational deficiency", a terminology it claimed is undefined in Kenyan Law. Nevertheless, it maintained that the said settlement was not an admission of culpability nor was it ever convicted or fined anywhere in the world for engaging in irregularities relating to government procurement, and it had never been debarred in terms of section 41 of the *PPAD Act.*

5. It averred that the inclusion of the said clause was unnecessary because the Standard Tender Document Provided by PPRA adequately addresses questions of corruption as contemplated under section 62 of the PPAD Act and regulation 47 of the *Public Procurement and Asset Disposal Regulations*, 2022 (the Regulations). It contended that the said clause offends the spirit of the *Constitution* set out in articles 10, 27, 50, 201 and 227 and sections 3, 62, 70(1)-(4) and 80(3) of the *PPAD* Act and regulation 68(4). It prayed that the said clause be expunged from the tender document. Alternatively, the tender be nullified and the procuring entity be directed to prepare fresh tender documents excluding the offending clause. Lastly, it prayed for costs of the application and such other orders as the Review Board my grant.

6. In their Memorandum of Response dated 12 April 2024, the 2nd and 3rd respondents denied the allegations in the Request for Review and maintained that the bid document as drafted complied with the provisions of the Constitution, the Act and the Regulations.

7. The Review Board in the impugned decision dated 30 April 2024 identified two issues namely: whether a procuring entity has discretion to customize the Standard Procurement and Asset Disposal Tender Document supplied by PAPRA and what the appropriate orders to issue were. After analyzing the impugned clause, provisions of the Constitution, the Act and the Regulations, the 1st respondent held that the 2nd respondent bears the responsibility of preparing Tender Documents while consulting the relevant user department to populate the evaluation criteria, and it has the latitude to customize the standard procurement and asset disposal tender document to suit its needs, provided the latitude is subject to the law. It also noted that the subject tender was an international one, and the appellant had failed to prove that the tender document was at variance with the standard document for procurement of non-consulting services. Lastly, the appellant had failed to demonstrate any breach of the law.

8. Aggrieved by the above verdict, the appellant filed High Court judicial review No E101 of 2024 seeking orders of *certiorari* to quash the said decision, *mandamus* to compel the respondents to expunge the said clause from the Tender Document, and prohibition to bar the 2nd and 3rd respondents from conducting any procurement process on the basis of the impugned tender. It also prayed for any other

relief the court could grant plus costs of the suit. The application was premised on sections 8 and 9 of the *Law Reform Act* and order 53, rule 3(1) of the *Civil Procedure Rules*, 2010.

9. In support of the application, the appellant argued that the procuring entity deliberately manipulated and edited the tender document with the sole intention of disqualifying it from the tender, therefore its action was unfair, unlawful, and subjective. It reiterated its grounds before the Review Board and maintained that the concept of "organizational deficiency" is a regulatory matter under the Swiss law, by which companies are expected to continually maintain vigilance. The appellant insisted that at the time of entering into the aforesaid settlement with the Office of the Attorney General of Switzerland, it had long addressed any concerns Swiss law may have raised against it relating to organizational deficiency, a fact that the Attorney General acknowledged and recorded it in the settlement. It argued that the term "organizational deficiency" is peculiar to Swiss law and is not contemplated under any laws in Kenya, including the *Companies Act*, the *Penal Code*, the *Anti-Bribery Act* and the *Anti-Corruption and Economic Crimes Act*.

10. It was also the appellant's case that "organizational deficiency" is not akin to an act of bribery or corruption, but, its inclusion in the bid document effectively debars it from participating in the tender yet it has not been debarred under section 41 of the *PPAD Act.* It contended that the 1st respondent's decision was *ultra vires* sections 2, 41, 55, 58, 62 and 80(3) of the *PPAD* Act and regulation 47; that it was tainted by a jurisdictional error, and premised on an error of law and fact. Lastly, the 1st respondent abused its power and the decision was irrational.

11. The High Court (Ngaah, J), in the judgment delivered on June 14, 2024 the subject of this appeal held that the 1st respondent addressed each and every question raised by the appellant; that the appellant's application was more of an appeal than a judicial review application; the appellant was inviting the court to interpret the law differently from the interpretation given by the 1st respondent and substitute its own decision; and, that the court was being invited to interrogate the merits of the decision as opposed to the decision making process. Also, the learned judge held that there is nothing in the decision to suggest that the 1st respondent did not understand the law that regulates its powers; nor could the decision be said to be so outrageous that it defied logic or accepted moral standards that no sensible person applying his mind to the same facts could have arrived at the same decision. The learned judge found nothing to suggest that the decision suffered from procedural impropriety. Accordingly, the learned judge affirmed the Review Board's decision.

12. Aggrieved by the High Court decision, the appellant filed a notice of appeal dated June 14, 2024 and a memorandum of appeal dated June 21, 2024, seeking orders that the appeal be allowed with costs; that the prayers sought in Judicial Review Application No E101 of 2024 *R v The Public Procurement Administrative Review Board* be allowed; and the costs of and incidental to this appeal be awarded to the appellant.

13. In its memorandum of appeal, the appellant cites 18 grounds which, for the sake of brevity, we have abridged as follows: (a) the learned judge failed to appreciate that the proceedings before him were underpinned by articles 10, 27, 50, 201 and 227 of the Constitution; (b) whether the term "organizational deficiency" creates an impermissible discrimination against the appellant; (c) whether the learned judge erred in failing to delve into the merits of the dispute and or in holding that before him was an appeal as opposed to a judicial review; (d) whether the learned judge erred in holding that whether the 1st respondent failed to interpret the law correctly; (e) whether the learned judge failed to appreciate that the 1st respondent's decision was not supported by evidence; (f) whether the 1st respondent's decision violate sections 2, 41, 55, 58, 62 and 80(3) of the PPAD Act; (g)whether the learned judge's decision is tainted by errors of law or suffers from jurisdictional error; (h) whether the

learned judge failed to interrogate the meaning of the phrase "organizational deficiency"; (i) whether the learned judge disregarded the material before him; and, (j) whether 1st respondent's decision was supported by evidence.

14. During the virtual hearing of the appeal on 18 July 2024, Mr Paul Muite SC together and Mr Marete represented the appellant. Learned Counsel Mr Munene Wanjohi represented the 1st respondent, while Ms Maina appeared for the 2nd and 3rd respondents.

15. In support of the appeal, the appellant essentially highlighted its written submissions dated 16 July 2024. Its salient points are that the learned judge misapprehended the scope of his jurisdiction and failed to appreciate that the appellant had cited violation of articles 10, 27, 50, 201 and 227 of the *Constitution*. It stressed that the rationale for anchoring procurement of public goods and services in the Constitution was to close corruption loopholes as exemplified by articles 10 and 227 which underscore transparency, competitiveness and accountability. The appellant maintained that the impugned clause targeted it, and it potentially locked it out of the procurement, yet it has never been subjected to the debarment process under section 41 of the *PPAD Act*. It contended that the term "organisational deficiency" is not synonymous with corruption or any known criminal offence, and it only refers to loopholes in a corporation's organizational structure that needs to be closed. It maintained that though it entered into a settlement with the Attorney General of Switzerland regarding its "organizational deficiency", that did not amount to admission of culpability.

16. The appellant maintained that judicial review does not oust the jurisdiction of the court to interpret and apply article 227. It was its submission that courts should delve into the substance of the dispute in public procurement cases, and faulted the trial judge for failing to consider the merits of the case and the pleadings. For this proposition, it cited the Supreme Court holding in *Dande & 3 others v Inspector General, National Police Service and 5 Others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) that a court decision should be based on the pleadings and the applicable procedure.

17. It was also contended that order 53 of the *Civil Procedure Rules, 2010* does not limit the court's jurisdiction under section 175 of the *PPAD Act*, therefore there was no bar to the court to consider all aspects of the appellant's case. The appellant maintained that the learned judge restricted the scope of his jurisdiction, and did not appreciate the expanded scope of the court's jurisdiction in judicial review proceedings under the *2010 Constitution*.

18. Also, the appellant contended that the impugned decision was discriminatory; that it was tainted by glaring errors of fact and law; and it was unsupported by evidence. It argued that it had demonstrated before the 1st respondent and before the High Court that:- (a) the term "organizational deficiency" did not feature anywhere in the lexicon of Kenyan law; (b) the term was not included in the Standard Tender Document; (c) the inclusion of the said term violated section 58 of the Act which provides that all tender documents must be as published by the PPRA; (d) the payment of a fine in its settlement of an enquiry by the office of the Attorney General of Switzerland was a business decision which did not amount to culpability; (e) the term "organizational deficiency" was discriminatory; (f) the inclusion of the said clause as a mandatory eligibility criteria sealed the appellant's fate and it was effectively debarred hence it had no choice but to move the 1st respondent contrary to the suggestion that it could have gone ahead to bid and await the evaluation process in order to challenge the outcome.

19. The appellant further submitted that the said clause was not anchored in law, and no attempt was made to explain what it entails in law, nor is the said term contemplated in the definition at section 2 of the *PPAD Act*. The appellant argued that even though section 3(g) of the *PPAD Act* requires public procurement and asset disposal to be guided by principles governing the procurement profession and

international norms, it was not demonstrated that "organizational deficiency" is an international norm. The appellant maintained that there was no evidence to justify the inclusion of the said term, therefore, it was unreasonable and irrational for the 1st respondent to state that the appellant was at liberty to submit its tender and let its responsiveness be determined at evaluation stage. The appellant further submitted that it would be unreasonable and irrational to require a bidder to knowingly submit a bid, knowing it would fail the test of section 79(1) of the *PPAD Act*, and cited the High Court decision in *R v The Public Procurement Administrative Review Board Ex P Gibb Africa Limited & Another* [2012] eKLR which held that a bidder ought to challenge anomalies in a tender document once he detects the same instead of participating in the procurement process and challenge it after being declared unsuccessful at the end of the evaluation process.

20. In addition, the appellant argued that any evaluation criteria populated in a Standard Tender Document must comply with the Eligibility Criteria set out at section 55 of the *PPAD Act* and the Regulations thereunder. Further, in its decision, the 1st respondent sanctioned the 2nd and 3rd Respondents' departure from the requirements of section 58 of the *PPAD Act* which provides in mandatory terms that a procuring entity shall use standard procurement and asset disposal documents issued by the PPRA in all procurement and asset disposal proceedings. Therefore, by purporting to include eligibility and evaluation criteria that was not provided in the Standard Tender documents published by the PPRA, and by endorsing such an action by the procuring entity, the 1st respondent acted ultra vires section 58 of the *PPAD Act*. The appellant also submitted that the 1st respondent acted ultra- vires section 41 of the *PPAD Act* by sanctioning the inclusion and use of subjective criteria in the tender document thereby changing the eligibility criteria to include terms that would render the appellant debarred contrary to the law.

21. Lastly, the appellant maintained that the learned judge failed to appreciate that the 1st respondent's decision violated the *Constitution*, the *PPAD Act* and the Regulations, and as a consequence failed to give life to the aspirations in article 227 which require objectivity and fairness. For that submission, the appellant cited *Allpay Consolidated Investment Holding (PTY) Ltd and 13 Others v CEO of South Africa Social Security Agency and 17 others* [2013] ZACC 42 in support of the proposition that the purpose of a tender is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive. It contended that the said objectives cannot be achieved so long as the clause complained of remains in the tender document.

22. The 1st respondent's written submissions are dated 16 July 2024 in which it maintained that the tenderers were subjected to the same requirements and therefore there was no discrimination against the appellants as alleged, and that the 1st respondent properly discharged its mandate under sections 28 and 173 of the *PPAD Act* in determining the Request for Review.

23. The 2nd and 3rd respondents relied on the replying affidavit sworn by Jane Ndinya on 16 July 2024, and their written submissions dated 15 July 2024. They contended that the subject tender has since been cancelled, and therefore, this appeal has been rendered moot. Further, Clause 9 of the Preface of Standard Tender Document No 7 allows a procuring entity to amend a tender document to suit the needs of a procuring entity, provided the procuring entity makes no changes to instructions to tenderers and general conditions of the contract. It maintained that the term "organisational deficiency" did not target the appellant as alleged, and the appellant's assertion is too speculative.

24. In its rejoinder, the appellant submitted that any eligibility criteria in a tender document must comply with sections 55 and 58 of the *PPAD Act.* On mootness, the appellant asserted that under section 175 of the *PPAD Act*, the 1st respondent's decision is final and binding , therefore there is a possibility of the procuring entity re-introducing the same clause in other tenders. Responding to the argument

that clause 9 of the Standard Tender Document No 7 allows a procuring entity to amend a tender document to suit its needs, the appellant maintained that the liberty to customize a tender document is not liberty to legislate or create a barrier, rather, it is limited in scope.

25. We have considered the record of appeal, the parties' diametrically opposed submissions, the authorities cited, and the law. We will address the issues highlighted earlier, though not in any order of preference.

26. The appellant faults the learned judge for failing to consider all the evidence. Undeniably, when evaluating evidence and submissions, it is imperative that a court considers the totality thereof, and not in a selective manner. The conclusion reached by a court must account for all the material before it. However, the best indication that a court has applied its mind in the proper manner is to be found in its reasons for the judgment, including its reasons for the acceptance and/or the rejection of the evidence and the submissions or parts thereof.

27. However, by requiring a court to consider and weigh all the evidence does not mean that the judgment must also include a complete embodiment of all the evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led. Stated differently, in order to determine whether there is any merit in the accusation that some evidence was disregarded, this court must consider the evidence presented in the trial court, juxtapose it against the judgment by the trial court, and the 1st appellate court and finally determine whether there is any basis for interfering with the judgment.

28. If this court is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. This court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference with. We have gone through the submissions and evidence tendered before the 1st respondent and the material presented before the High Court. We have also read the judgments by the 1st respondent and the High Court, the evaluation of the evidence and submissions and the reasons for the decisions. We are satisfied that the 1st respondent and the High Court considered all the material before them. We find no misdirection on the part of the learned judge. Therefore, there is no merit in the argument that the High Court did not consider the appellant's evidence or that the decision is unsupported by evidence. We also find that the 1st respondent considered all the material presented to it.

29. The other ground urged by the appellant is that the learned judge failed to appreciate that the proceedings before him were underpinned by articles 10, 27, 50, 201 and 227 of the *Constitution*, and also failed to delve into the merits of the dispute. We understand this argument to mean that the applicant's application raised constitutional questions which required merit interrogation as opposed to the traditional judicial review applications which are primarily determined on procedural impropriety as opposed to the merits of the decision. In the impugned judgment, the learned judge cited the Supreme Court decision in *Dande & 3 others v Inspector General, National Police Service & 5 others*(*supra*), and the principle enunciated in the said case which is, if a party approaches a court under the provisions of the Constitution, then the court ought to carry out a merit review of the case. However, if a party a approaches the court under order 53 of the *Civil Procedure Rules* and does not claim violation of rights or the Constitution, then the court can only limit itself to the process followed in arriving at the decision and not the merits of the decision.

30. After citing the above decision, the learned judge correctly noted that the appellant had anchored its application on sections 8 and 9 of the *Law Reform Act* and order 53 of the *Civil Procedure Rules* and proceeded to state as follows:

> "66. ..., even if the question of the merits of the respondent's decision was to be out of equation, I would still be hesitant to exercise my discretion in favour of the applicant and grant the reliefs sought. The applicant's case is based on its apprehension that tender requirements are designed to bar it from participating in the procurement. This is clear from paragraph 8 of the affidavit verifying the facts relied upon in which the applicant's representative has sworn as follows:
>
> > "8. Upon carefully perusing the Tender Documents the *ex parte* applicant was shocked to realize that the Interested Parties have deliberately manipulated and edited the same in a manner that effectively disqualifies and renders the applicant debarred and ineligible to participate in the said tender, by inserting an unfair, unlawful, and subjective requirement into the tender document at Section 111- Evaluation and Qualification Criteria- Tenderers Eligibility and Qualifications Documents in the following Clauses of the tender document:
> >
> > a. Clause 1 on Eligibility Sub-Clause 1 (xii): b) Clause 2 Mandatory Requirements, Sub-Clause 11 (VIII) to wit "The tenderer or of its associates (sic) must not have been convicted or paid any fines anywhere in the world, directly or indirectly for any irregularities regarding Government contracts such as bribery or organizational deficiency"

67. For the avoidance of doubt, this point has been emphasised in paragraph 18 of the applicant's written submissions where it has been submitted that:

> "18. Applicant therefore being reasonably apprehensive that the inclusion of this term as mandatory eligibility criteria was aimed at preventing it from bidding in a tender for it is eminently qualified raised the matter with the procuring entity which outrightly rejected its contention that the inclusion of the term was against the law."

68. The assumption that can be logically drawn from the foregoing deposition and submission is that the applicant is only apprehensive because it has hitherto been found liable for all or any of vices prescribed in the impugned clause and, therefore, it may not meet the threshold. If this is not the case, why would it be apprehensive of a requirement in the tender document that least concerns it?

69. But the applicant has gone further to disabuse any notion that it may be culpable and, in a way, demonstrated its innocence in paragraph 10 of the affidavit sworn on its behalf. In that paragraph, it has been sworn as follows: "10. It was the *ex parte* applicant's contention before the PPARB that:

a. The aforesaid offending clause which is the only material departure from previously deployed Tender Documents is patently targeted at the *ex parte* applicant as it is in the public domain that in April 2023, it entered a settlement with the Office of the Attorney General in Switzerland on organizational deficiency.

b. The *ex parte* applicant had made this known to the procuring entity when it sought clarity on the matter of the inclusion of the term "organizational deficiency" in the subject tender documents.

c. The *ex parte* applicant's settlement with the Office of the Attorney General was not an admission of culpability nor did it imply that the Applicant has been directly or indirectly convicted anywhere in the world for any irregularities regarding Government contracts such as bribery or other similar vice.

d. Indeed the *ex parte* applicant has not been convicted or paid fines anywhere in the world for corruption or bribery."

70. These depositions would appear to betray the applicant's apprehension but they also go to show that the applicant would not be affected by the requirement in the impugned clause. If that be the case, the burden upon the applicant of answering the question why it would then be seeking to stop the procurement process or have the impugned clause expunged has not been discharged to my satisfaction.

71. Section 167(1) of the PPA which the applicant invoked in seeking for review of the procuring entity's decision contemplates that a candidate, like the applicant, or a tenderer has either suffered or risks suffering loss or damage due to a breach of duty on the part of the procuring entity. This section reads as follows:

> 167. 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.

72. If the applicant is taken at its own word, and there is no reason why it should not, that it is free of the vices prescribed in the impugned clause and, therefore, logically, its bid would not be encumbered by the particular mandatory requirement in the tender document disqualifying tenderers because of these vices, where is the damage or loss the applicant has suffered or risk suffering as a result of the impugned clause? What would be the basis for such a claim of loss or damage or for the risk of such loss or damage if the applicant has a clean bill of health, so to speak?

73. The point is, the consideration of whether, in view of the applicant's own depositions and submissions with respect to the offending clause, the applicant was entitled to initiate a request for review under section 167(1) of the PPADA which, as noted, is particular as to the circumstances under which such a request for review may be made, is a relevant consideration in exercise of my discretion against granting the reliefs sought.

74. In the final analysis, I am not satisfied that the respondent's decision is tainted by any of the grounds of judicial review as explained in *Council of Civil Service Unions versus Minister for the Civil Service* (1985) AC....."

31. As the above excerpt shows, the learned judge correctly noted that before him was an application premised on sections 8 and 9 of the Law Reform Act and order53 of the *Civil Procedure Rules*. The learned judge failed to appreciate that even though the application was not anchored on the Constitution, the grounds in support of the application and in the submissions, the appellant had invoked the provisions of the Constitution. Accordingly, in line with the *Dande case* (*supra*), the court was obligated to undertake a merit review.

32. Judicial Review in now entrenched in article 47 of the *Constitution*. The Fair Administrative Action Act expanded the scope of judicial review grounds beyond those traditionally recognized by the common law. As was held by the South African Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) at 33 cited by the High Court in *Republic v Speaker of the Senate & another ex parte Afrison Export Import Limited & another* [2018] eKLR, "the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the *Constitution* and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution." The entrenchment of the power of Judicial Review as a constitutional principle should of necessity expand the scope of the remedy. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes.

33. The question is whether the learned judge by correctly stating that the appellant had only cited the provisions of the sections 8 and 9 of the *Law Reform Act* and order 53, failed to appreciate that in its grounds, the appellant had invoked the *Constitution*, amounted to a misdirection which occasioned injustice to the appellant, meriting this Court's intervention. A reading of the above excerpt shows that the learned judge understood the gravamen of the appellant's case. For example, he was categorical that the appellant's claim was based on apprehension that the clause only targeted it. After making the said observation, the learned judge found no merit in the appellant's claim. The key question is whether the appellant proved by evidence that the said clause as drafted was targeting it. Undisputedly, cases stand or fall on the basis of evidence. Lord Brandon in *Rheir Shpping Co SA v Edmunds* [1955] IWLR 948 at 955 aptly summed it as follows:

> " No Judge likes to decide a case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take."

34. Whether one likes it or not, the legal burden of proof is consciously, or unconsciously, is the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah, JA in *Britestone PTE Ltd v Smith & Associates Far East Ltd* [2007] 4SLR (R) 855 at 59: that "the

court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."

35. Turning to this case, a reading of the impugned clause leaves no doubt that it applies to all bidders without any exception as opposed to a particular bidder. In our view, the trial court was correct in its finding to that effect. Accordingly, we find that no cogent evidence was adduced to support the assertion that the said clause only targeted the appellant. Accordingly, the appellant's argument that the said clause only referred to it lacks merit. In any event, despite taking the view that before him was a judicial review application, a reading of the judgment shows that the learned judge addressed the merits of each parties' case. Therefore, we find no misdirection that could occasion injustice to the appellant.

36. The other contestation urged by the appellant is that the impugned clause discriminated against it contrary to article 27, and that it offended the dictates of article 227. The guiding principles for establishing whether a law, policy or decision is discriminatory are clear. First is to establish whether the law, policy, decision, act or omission differentiates between different persons in the same class or category. The second step entails establishing whether the differentiation amounts to discrimination. This is because not every differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. (See the High Court in *Mohammed Abduba Dida v Debate Media Limited & another* [2017] eKLR citing the South Africa Constitutional Court in Harksen v Lane No and others [1997] ZACC 12).

37. The Constitution only prohibits unfair discrimination. Notably, the impugned clause required a tenderer or its associates not to have been convicted or paid any fines anywhere in the world, directly or indirectly, for any irregularities regarding government contracts such as bribery or organizational deficiency. This is only one of the many other eligibility criteria set out in the tender document as a pre- qualification. We find nothing on record to suggest that the said clause only applies to the appellant and not to all prospective bidders. A clause setting out eligibility requirements cannot be said to be discriminatory unless it specifically bars a particular person or entity and allows others in similar situations. The appellant maintains that the fine it paid in Switzerland did not amount to culpability. If that is the case, one wonders why then it finds the clause offensive in Kenya. We find nothing wrong or unconstitutional or impermissibly discriminatory on the impugned clause. If anything, the clause meets the constitutional muster in articles 10 and 227.

38. The appellant also faulted the learned judge for failing to delve into the merits of the decision. Granted, the learned judge remarked that what was before him was more of an appeal as opposed to a judicial review application. However, as the above excerpt shows, from paragraphs 66 to 70 of the judgment, the learned judge considered the merits of the case and made a determination. Accordingly, we find no misdirection at all in the manner the learned judge addressed the issues raised in the above excerpt.

39. The other ground urged by the appellant is that the 1st respondent's decision suffered from jurisdictional error. A jurisdictional error arises when a decision-maker exceeds the authority or power conferred upon it. It means that the decision-maker has failed to comply with an essential condition to or limit on the valid exercise of power, and this renders the decision invalid. A reading of the entire record shows that there was no attempt before us to demonstrate that the 1st respondent exceeded its authority or failed to comply with an essential condition in the exercise of its functions. The 1st respondent's proceedings clearly show that the 1st respondent properly discharged its functions in accordance with the *PPAD Act*.

40. Closely related to the argument that the decision suffered from a jurisdictional error is the appellant's ground that the learned judge erred in holding that whether the 1st respondent failed to interpret the law correctly is irrelevant. We have examined the manner in which the 1st respondent interpreted the

provisions of the *PPAD Act*. We are not persuaded that the 1st respondent failed to interpret or apply the law correctly. A judicial review court is not required to interfere with the findings of a trial court just because it could have arrived at a different conclusion. What is important is that the Court must be satisfied that there was a misdirection which occasioned injustice.

41. It has also been argued that the decision suffers from an error of law. An error of law refers to any ruling, decision, or process that conflicts with the principles of the law. An error of the law implies failure to correctly apply the law, leading to a violation of the litigants' rights. (See *Anisminic Ltd v Foreign Compensation Commission* [1968] App LR 12/17, [1969] AC 147). We find nothing in the appellant's arguments or in the High Court judgment to suggest that it suffers from an error of law. We also find that the 1st respondent's decision does not suffer from unreasonableness. The test of Wednesbury unreasonableness has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated. (See *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 (at [821].

42. It is also the appellant's argument that the 1st respondent's decision was not based on evidence. We have carefully studied both the 1st respondent's decision and the High Court decision. Both decisions have carefully considered all the evidence tendered by the parties.

43. The appellant maintained that the term "organizational deficiency" is not defined under our law. That may be so. However, not all terminologies are defined in law. But it was also not demonstrated that a set of facts or circumstances or an act or omission arising from "organizational deficiency" cannot constitute an offence known to the law or misconduct which may taint a procurement process. If any person bore the burden of explaining what the said terminology means, it was the appellant and not the court. The appellant cannot now in this appeal purport to blame a terminology which it was not called upon to define.

44. The above notwithstanding, under Swiss law, companies are liable in cases where the company's inadequate organisation meant that an offence was not prevented. If criminal charges are brought against a company in Switzerland, they are often for "defective organization". This is due to the two-tier system in which – in line with article 102 of the Swiss Criminal Code – corporate criminal liability is regulated as follows:

    i. Secondary liability applies to all offences or crimes that are committed within a company, but for which no natural person can be held accountable due to inadequate organization. The primary liability applies to the natural person; the company is only liable if it is so inadequately organized that it is not possible to identify the person responsible. The company is not accused of having committed a crime in the course of its activities, but of the fact that it is not clear who is responsible for the offence.

    ii. Primary or 'parallel' corporate criminal liability applies in cases of specific offences, including supporting a criminal organisation, financing terrorism, money laundering, active and passive corruption involving Swiss officials, bribery of foreign officials and bribery of private individuals. Essentially, it applies to cases where Switzerland is bound by international law to apply corporate criminal liability. The liability applies if a company has not taken all the reasonable organisational measures that are required to prevent the criminal offence in question. The accusation is therefore that, due to inadequate organisation, it was not possible to prevent the crime. The company is then liable irrespective of the criminal liability of the natural person – both the natural and the legal person can be convicted.

45. Granted, we do not have similar provisions in our statutes. However, it has not been demonstrated that the so called "organizational deficiency" cannot lead to the commission of an offence known to the law in Kenya. It has been argued that the learned Judge failed to interrogate the said terminology. Much as the appellant blames the 1st respondent and the High Court for failing to interrogate the said terminology, it is not lost to us that the appellant never availed to the Board and the High Court the details of the alleged settlement with the Attorney General of Switzerland for them to appreciate what the settlement entailed and whether there was any malpractice. The appellant was heavily guarded in making a full disclosure of such crucial facts, yet it expected the courts below to make a finding that the said clause was unfairly targeting it. Therefore, we cannot blame the two courts below for failing to define the said terminology. Conversely, the appellant had an evidential burden to prove that the term had no adverse consequences to it and therefore its use was unfair.

46. The appellant also argued that the impugned clause offends sections 2, 41, 55, 58, 62 and 80(3) of the *PPAD Act*. We have carefully read the 1st respondent's decision. In our view, a clause seeking to bar a prospective bidder who has been fined, convicted or paid any fines anywhere in the world, directly or indirectly for any irregularities regarding government contracts such as bribery or organizational deficiency cannot be said to offend the above provisions. Such a clause is underpinned by articles 10 and 227 of the *Constitution*, section 3 of the *PPAD Act* and the Public Finance Management Act, all of which lay down the principles of public procurement and disposal of public goods and management and use of public finance.

47. The attempt to invoke section 41 of the *PPAD Act* is, in our view, inappropriate. This provision deals with debarment which is essentially a different process, and it is not a bar to the mandatory eligibility clauses in a bid document. All bids have a mandatory eligibility criteria. We note that the appellant never attached the entire tender document but only exhibited some pages. It would have been prudent to avail the entire document to the Court. Nevertheless, we note that clause 3 of the document attached by the appellant has explicit clauses relating to fraud and corruption which the appellant is not complaining about. Clause 4.6 of the same documents also provides more instances of ineligibility where a tenderer has been sanctioned by PPRA or is under suspension or debarment. The appellant's argument in opposition to the impugned clause is tantamount to suggesting that ineligibility clauses in a bid document are unconstitutional and contrary to the law. We do not think so. One wonders whether the eligibility clauses referred to above contained in the document provided by PPRA are also unconstitutional since they bar an ineligible tenderer before going through the evaluation stage or even going through a debarment under section 41. The appellant's argument challenging the impugned clause has no merit, and the attempt to hide behind section 41 of the Act does not help at all, otherwise, entertaining the said argument is tantamount to saying no bid document should contain mandatory eligibility criteria.

48. The next important question is whether a procuring entity has the latitude to populate the bid document with provisions to suit its peculiar needs. In its decision, the 1st respondent after carefully addressing sections 9, 58 and 70 of the Act and Regulation 68, at paragraph 44 of its decision stated:

> " 44. The authority publishes various Standard Tender Documents on its website and specific for tenders of the kind of subject tender, it has published Standard Tender Document for Non-consulting Services, Document No 7 whose preface provides as follows:
>
> .....This document will be customized to suit the needs of the procuring entity. No changes should be made to Instructions To Tenderers (ITT) and the General Conditions of Contract (GCC). These two sections will be modified

to suit the Procuring Entity's requirement in the Tender Data Sheet (TDS) and in the Special Conditions of Contract (SCC) respectively".

49. On the same subject, at paragraph 45 of the impugned judgment, the 1st respondent had this to say:

> "...Document No. 7 also provides Guidelines on the preparation of the Preliminary Evaluation Criteria in following words:-
>
> The Procuring Entity will provide the Preliminary Evaluation Criteria. To facilitate this, a template may be attached or clearly described information and a list of documents to be submitted by Tenderers to enable preliminary evaluation of the Tender."

50. We agree with the above finding. A Procuring Entity is permitted to customize its bid document to suit its needs. This was an international tender which is open to tenderers from any part of the world. The Procuring Entity acted lawfully by ensuring that all bidders, whether from Kenya or from other jurisdictions, who may have committed malpractices relating to the matters cited in the impugned clause do not take advantage of the absence of such a clause. In our view, such a clause not only enjoys constitutional underpinning under articles 10 and 227, but is also aimed at ensuring that public procumbent and asset disposal is not polluted by unethical and unscrupulous tenderers. This being an international tender, it was important that the bidders thereof be entities of proven 'corporate hygiene' both in Kenya and in the countries where they are incorporated at or other countries where they operate. One of the guiding principles of public procurement under section 3(g) of the *PPAD Act* is adherence to international norms. It was not demonstrated that organizational deficiency in Switzerland as we have cited above is innocuous or of no consequence in public procurement in Kenya. We therefore affirm the concurrent findings by the High Court and the 1st respondent on the issue under consideration.

51. In any event, it is trite that judicial review orders are discretionary. Emphasizing the discretionary nature of judicial review remedies, this court in *Republic v Judicial Service Commission ex parte Pareno* [2014] eKLR held that judicial review orders are discretionary and are not granted automatically, hence a court may even refuse to grant them even where the requisite threshold has been attained since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining, and since the discretion of the court is a judicial one , it must be exercised on evidence of sound legal principles. Further, whenever the court is vested with discretion to do certain acts as mandated by statute, the same has to be exercised judiciously and not in an arbitrary and capricious manner. Once the foregoing is demonstrable from the record, it will be difficult for the appellate court to interfere with the exercise of the lower court's discretion. See *R v Wilkes* 1770 ER 327. We find no misdirection at all on the part of the learned judge in the exercise of his discretion in refusing to grant the judicial review orders sought.

52. Arising from our analysis of the facts and the issues discussed above and the conclusions arrived at, it is our finding that this appeal is devoid of merit. Accordingly, we dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST, 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR