



**Four M Insurance Brokers Limited v Public Procurement  
Administrative Review Board & 3 others (Civil Appeal (Application)  
E1009 of 2023) [2024] KECA 1212 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1212 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E1009 OF 2023  
S OLE KANTAI, PM GACHOKA & JW LESSIT, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**FOUR M INSURANCE BROKERS LIMITED ..... APPLICANT**

**AND**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD .... 1<sup>ST</sup>  
RESPONDENT**

**THE MANAGING DIRECTOR, KENYA PIPELINE COMPANY  
LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**SEDGWICK KENYA INSURANCE BROKERS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**KENYA PIPELINE COMPANY LIMITED ..... 4<sup>TH</sup> RESPONDENT**

*(An application for review against the judgment and decree of this Court (Warsame, Kantai & Nyamweya, JJ.A.) delivered on 9th February, 2024 in Nairobi Civil Appeal No. E1009 of 2023)*

**RULING**

1. Before us is an application by way of Notice of Motion expressed to be brought under Articles 10, 20, 25, 48, 159 and 259 of the Constitution, sections 3A and 3B of the Appellate Jurisdiction Act, section 3 of the Judicature Act, rule 1(2) of the Court of Appeal Rules, sections 88, 135 and regulation 203(2) (C) (iii) of the Public Procurement & Asset Disposal Act, 2015. In it, the applicant seeks for review and or setting aside of the judgment of this Court delivered on 9<sup>th</sup> February, 2024. In its words, it is an application seeking “residual jurisdiction of this Court to review and set aside the judgment and decree of this Court issued on 9<sup>th</sup> February, 2024 in this appeal namely Civil Appeal No. E1009 of 2023 to correct the injustice occasioned in the impugned judgment”.



2. The application is supported by the grounds on the body of the Motion and the supporting affidavit of the applicant. The facts giving rise to the application are that the applicant is dissatisfied with the judgment of this Court in Civil Appeal No. E1009 of 2023 delivered on 9<sup>th</sup> February, 2024. In it, this Court set aside the findings of the High Court (Chigiti, J.) in Nairobi HC JR No. E121 of 2023. Resultantly, the findings of the 1<sup>st</sup> respondent in PPARB No. 77 of 2023 were reinstated and upheld.
3. The applicant argued that the impugned judgment is incapable of execution because the tender validity period for the all-risk industrial insurance policy emanating from tender no. KPC/PU/OT-298/Finance/NBI/23-26 for the provision of insurance brokerage services for the period 1<sup>st</sup> July, 2023 to 30<sup>th</sup> June, 2025 had expired. The applicant added that when the impugned judgment was delivered, no stay had been sought to allow the validity of the tender to run. It noted that the tender validity was only extended once for a period of thirty days from 25<sup>th</sup> October, 2023. Therefore, and absent stay, the applicant and the 3<sup>rd</sup> and 4<sup>th</sup> respondents continued with the performance of their contract dated 2<sup>nd</sup> October, 2023. Thus, the tender validity period had expired.
4. The applicant stated that the application was merited for the following reasons: that the disputed judgment is a nullity and shall be compelled to violate sections 88 and 171 of the *Public Procurement and Asset Disposal Act* and the *Constitution* of Kenya; that there is no tender to be considered given the expiry of the tender validity period; and that this Court erred in holding that the 1<sup>st</sup> respondent had jurisdiction to hear the request for review filed by the 2<sup>nd</sup> respondent on 12<sup>th</sup> October, 2023.
5. In addition, the applicant stated that the tender process had satisfied the requirements of section 135 (3) of the relevant Act. Thus, the contract executed by the 3<sup>rd</sup> and 4<sup>th</sup> respondents was valid. For this reason, no responsibility was owed to the 2<sup>nd</sup> respondent, who in writing, intimated that it was unable to provide the insurance policy cover by the 30<sup>th</sup> of June, 2023; and the request for review was in breach of section 167 (4) (c) of the Act and regulation 203 (2) (c) (iii) thereunder as the contract, dated 2<sup>nd</sup> October, 2023, complied with section 135 (3) of the *Act*.
6. Further the applicant argued that this Court erred in holding that section 136 of the Act was not appropriately invoked as that section does not mandatorily presuppose that a written contract between the successful bidder and procuring entity must exist before the section is invoked by the procuring entity. To the applicant, this is because section 142 (1) of the Act mandates that a written contract between the successful bidder and the procuring entity shall exist only when the successful bidder submits a performance bond and that the 2<sup>nd</sup> respondent failed to comply with section 142 (1) of the *Act*. In the premised circumstances, the 4<sup>th</sup> respondent proceeded to contract the next successful bidder when the 2<sup>nd</sup> respondent expressed that it was unable to place the cover.
7. The applicant continued that the application ought to be allowed for the following reasons: that the Court erred in holding that additional evidence was not produced by a supplementary record of appeal; that additional evidence could be produced by way of affidavit and the documents were relied upon during the hearing of the appeal on 29<sup>th</sup> January, 2024; and there is real likelihood of a miscarriage of justice occasioned upon the applicant, the 3<sup>rd</sup> and 4<sup>th</sup> respondents if the judgment is not set aside.
8. The application was opposed by the 1<sup>st</sup> respondent. In its replying affidavit sworn on 23<sup>rd</sup> February, 2024 by James Kilaka, the 1<sup>st</sup> respondent's secretary it urged us to dismiss the application on the following grounds: that the judgment, the subject of this application, is devoid of error; the judgment is executable as the tender validity period is salvageable; the extension of the tender validity period is under the preserve of the procuring entity as provided in section 173 of the Act and can be effected even after expiry has occurred; the application had not met the threshold for grant of the orders sought;



- that the entertainment of the review application is a direct contravention of section 174 (4) and (5) of the Act; and that the issues herein have been comprehensively canvassed before different fora.
9. The 2<sup>nd</sup> respondent similarly opposed the application. Relying on the affidavit of Sammy Kiragu, its managing director, sworn on 23<sup>rd</sup> February, 2024, the 2<sup>nd</sup> respondent prayed that the application be dismissed with costs for the following reasons: that guided by a reading of section 175 (4) of the Act, the statutory period for hearing and determining the procurement dispute herein lapsed on 12<sup>th</sup> February, 2024; that jurisdiction before this Court is non-existent by effluxion of time; the disputed judgment was final and as such, this Court is functus officio; and that a notice of appeal dated 19<sup>th</sup> February, 2024 seeking to appeal before the Supreme Court, had been filed. In light of this, where an appeal is preferred, this Court cannot exercise its residual jurisdiction.
  10. The 3<sup>rd</sup> and 4<sup>th</sup> respondents supported the application. In their joint replying affidavit dated 23<sup>rd</sup> February, 2024 sworn by Maureen Mwenje, the 4<sup>th</sup> respondent's employee, the respondents urged this Court to allow the application for the following reasons: the contract entered between the 1<sup>st</sup> and 4<sup>th</sup> respondents was executed in accordance with section 135 (3) of the Public Procurement and Asset Disposal Act; that they were not mandatorily required by law to issue fresh notifications to unsuccessful bidders before awarding the tender to another bidder; that this Court held that its contract with the applicant was valid; and that this Court failed to properly analyze the evidence and consequently erred in holding that a successful tenderer must refuse to enter into a contract before the award is made to the next bidder.
  11. Adding further, had it contracted the 2<sup>nd</sup> respondent, it argued that the 3<sup>rd</sup> respondent would have been found criminally liable by dint of section 45 (2) (b) and 48 of the Anti-Corruption and Economic Crimes Act; the failure by the 2<sup>nd</sup> respondent to furnish a performance bond was tantamount to a refusal to sign the contract as envisaged in section 136 of the Act; they further acknowledged receipt of the 2<sup>nd</sup> respondent's letter explaining that it could not furnish the performance bond at the price indicated; the letter amounted to a refusal to enter into the contract; that they requested for a three month extension period; and the circumstances compelled the respondents to award the contract to the lowest bidder as explained in their submissions.
  12. The application was virtually heard on 30<sup>th</sup> April, 2024 with learned counsel Mr. Ayisi Austin for the applicant, learned counsel Mr. Munene Wanjohi for the 1<sup>st</sup> respondent, learned counsel Miss Desman Nungo for the 2<sup>nd</sup> respondent and learned counsel Mr. Edwin Waudu for the 3<sup>rd</sup> and 4<sup>th</sup> respondents.
  13. The applicant filed its written submissions and case digest dated 24<sup>th</sup> February, 2024. The applicant summarized the facts giving rise to this application to submit that the issues raised herein warrant an invocation of this Court's residual jurisdiction. For that reason, the principle of finality did not arise here. It reiterated the grounds in support from the contents of its application and affidavit. It relied on rule 31 of the Court of Appeal rules, Article 159 of the Constitution and the case of Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR in fortifying those arguments.
  14. The 1<sup>st</sup> respondent filed its written submissions dated 24<sup>th</sup> February, 2024. It argued that by dint of section 175 (4) and (5) of the Public Procurement and Asset Disposal Act, the Court lacked jurisdiction to hear and determine the subject matter. Several decisions were cited in support of that argument. On whether the application was merited, the 1<sup>st</sup> respondent submitted in the negative. In its view, there were no apparent errors on the face of the record, fraud, bias or injustices occasioned. In addition, the tender was capable of execution. It relied on several decisions in support of that proposition.



15. The 2<sup>nd</sup> respondent filed its written submissions and a list of authorities both dated 23<sup>rd</sup> February, 2024. It submitted that this Court’s jurisdiction to hear and determine procurement matters is statutorily limited to 45 days. In view of this, the Court lacked jurisdiction after 12<sup>th</sup> February, 2024 to hear and determine the dispute in totality as the statutory bound period could not be extended for re-litigation.
16. On the merits or otherwise of the application, the 2<sup>nd</sup> respondent submitted that the power to review did not apply as the grounds for review were not coherent as to justify the exception to the doctrine of finality. On the execution of the judgment, the 2<sup>nd</sup> respondent submitted that it was for the 3<sup>rd</sup> respondent to comply and not this Court to supervise and deal with execution. It opined that the applicant’s remedy lay in making the necessary application before the 1<sup>st</sup> respondent. It argued that the Court properly interpreted the law and arrived at a just conclusion.
17. The 3<sup>rd</sup> and 4<sup>th</sup> respondents filed their joint written submissions dated 24<sup>th</sup> February, 2024, a list of authorities dated 24<sup>th</sup> February, 2024 and a further list of authorities dated 25<sup>th</sup> February, 2024. They submitted that the notice of appeal as filed by themselves was not a bar to this Court determining the present application since it was filed by a different party. Regarding section 174 (4) of the [Public Procurement and Asset Disposal Act](#), they submitted that the same was not applicable herein as it was a review and not a second appeal. Be that as it may, this Court had inherent powers to invoke jurisdiction to correct an injustice.
18. Citing several authorities, which we have considered and will refer to when necessary, they regurgitated the contents of their replying affidavit to submit that the impugned judgment was marred with apparent errors that needed the intervention of this Court. They urged this Court to allow the application.
19. We have extensively considered the application, the rival affidavits and the elaborate rival submissions thereto. The applicant seeks leave of this Court to invoke its residual jurisdiction and disturb the findings of the Court (Warsame, Kantai & Nyamweya, JJ.A.) delivered on 9<sup>th</sup> February, 2024. The first issue for determination is whether the applicant was barred from pursuing the application herein in light of the notice of appeal to the Supreme Court dated 19<sup>th</sup> February, 2024 filed by the 3<sup>rd</sup> and 4<sup>th</sup> respondents.
20. We note that while the applicant filed the present application, the 3<sup>rd</sup> and 4<sup>th</sup> respondents filed the notice of appeal. This application has been filed by the applicant and not the 3<sup>rd</sup> and 4<sup>th</sup> respondents, though they support the application. Accordingly, we do not think that this point is relevant for the determination of this application and we reject that argument.
21. The 1<sup>st</sup> and 2<sup>nd</sup> respondent raised a point of law for determination. According to the parties, the applicant could not pursue an application in this manner because of the mandatory nature of section 175 (4) and (5) of the [Public Procurement and Asset Disposal Act](#). It was contended that this Court is functus officio. The provisions relied upon provide as follows:
  - “(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.
  - (5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.”



22. The above provision has been the subject of discussion before this Court. In *Aprim Consultants v Parliamentary Service Commission & Another*, CA. No. E039 of 2021, the Court expressed itself as follows:

“A perusal of section 175 of the Act reveals Parliament’s unmistakable intention to constrict the time taken for the filing, hearing and determination of public procurement disputes in keeping with the Act’s avowed intent and object of expeditious resolution of those disputes. Parliament was thus fully engaged and intentional in setting the timelines in the Section. But it did not stop there. In one of the rarer instances where all discretion is totally shut out, Parliament expressly enacted a consequence to follow default or failure to file or to decide within the prescribed times: the decision of the Board would crystallize and be invested with finality. Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law.” (Emphasis added).”

23. Similarly, In *The Consortium of TSK Electronica Y Electricidad S.A. & Ansaldoenergia v. PPARB & 3 Others*, CA. No. E012 of 2022 the Court stated thus:

“Our appreciation of section 175(4) is that a person aggrieved by a decision of the High Court arising from a judicial review decision in a procurement matter under this Act and who desires to prefer an appeal to this Court must do so within a period of 7 days from the decision of the High Court. Thereafter, this Court must hear and make a determination of the appeal within 45 days from the date of its filing. These timelines are cast in stone and cannot be varied. The strict time frames under this section underscore the intention of Parliament to ensure that disputes relating to Public Procurements and Assets Disposal are disposed of expeditiously.”

24. It is clear that those decisions address a situation where a party is challenging a decision of the High Court. The applicant is seeking a review and such an application is governed by the rules of this Court and there is no time limit that is set for such an application and therefore the authorities are not relevant for this kind of application.

25. Having disposed of the preliminary issues, we now determine the application on its merits. One of the leading decision on this issue is the often quoted case of *Benjob Amalgamated Ltd v Kenya Commercial Bank Limited* [2014] eKLR, where after reviewing decisions from different jurisdictions on the question of review this Court stated as follows:

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various



authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).”

26. Flowing from this, the Supreme Court in *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR, established the following principles:

“Consequently, drawing from the case law above, particularly Mbogo and Another vs. Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court;
- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically;
- v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review;
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and as a result, a wrong decision was arrived at; or it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

27. Finally, the Court of Appeal in *National Bank of Kenya v Ndungu Njau* [1997] eKLR observed as follows in respect of reviews applications:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

28. From the above decisions, the general principle is that after passing judgment, a court becomes *functus officio*. The effect of this position in law is that in the circumstances, a Court cannot purport to revisit its own judgment on its merits or exercise a judicial power over the same matter unless provided by law.

29. In precis, the applicant’s application justifying the application of the residual jurisdiction of this Court can be summarized as follows: the impugned judgment is incapable of execution because the tender validity period had expired; no stay had been sought to allow the validity of the tender to run; absent stay, the applicant and the 3<sup>rd</sup> and 4<sup>th</sup> respondents continued with the performance of their contract dated 2<sup>nd</sup> October, 2024; the disputed judgment is a nullity and shall compel the applicant to violate section 88 and 171 of the Public Procurement and Asset Disposals Act and the *Constitution* of Kenya; there is no tender to be considered given the expiry of the tender validity period; this Court erred in



holding that the 1<sup>st</sup> respondent had jurisdiction to hear the request for review; the request for review was in breach of section 167 (4) (c) of the Act and its regulations under regulation 203 (2) (c) (iii) as the contract, dated 2<sup>nd</sup> October, 2023, complied with section 135 (3) of the Act; the tender process had satisfied the requirements of section 135 (3) of the relevant Act; the contract executed by the 3<sup>rd</sup> and 4<sup>th</sup> respondents was valid; section 136 of the *Public Procurement and Asset Disposal Act* did not mandatorily presuppose that a written contract between the successful bidder and procuring entity must exist when the section is invoked by the procuring entity. This is because section 142 (1) mandates that a written contract between the successful bidder and the procuring entity shall exist only when the successful bidder submits a performance bond; the 2<sup>nd</sup> respondent failed to comply with section 142 (1) of the Act; the Court erred in holding that additional evidence was not produced by a supplementary record of appeal; that additional evidence could be produced by way of affidavit and was done so; the documents were relied upon during the hearing of the appeal on 29<sup>th</sup> January, 2024; and there is real likelihood of a miscarriage of justice occasioned upon the applicant, the 3<sup>rd</sup> and 4<sup>th</sup> respondents if the judgment is not set aside.

30. With due respect to the applicant and the 3<sup>rd</sup> and 4<sup>th</sup> respondents, the above grounds need no rocket science to establish that on face value, these are grounds for appeal and not review. We say so because none of the above grounds speak to the correction of an apparent error or omission on the part of the Court. It is clear that an application for review is not a further appeal where a party tries to take a second bite at the cherry. This is exactly what the applicant, the 3<sup>rd</sup> and the 4<sup>th</sup> respondents are advancing. The mere fact that they do not agree with the judgement of the Court does not as of right qualify them to review the said decision. Indeed, there is no injustice apparent on the face of the record but on the contrary, the some of the parties are benefitting from the continuous delay of this matter in the Court. The applicant has not satisfied us that the judges misdirected themselves and that a wrong decision was arrived at. What is urged before us are purely grounds of appeal that go to the merits or otherwise of the issues before the Court.
31. It is clear to us that this application is only meant to prolong the dispute through legal craft and which benefits some of the parties. The 4<sup>th</sup> respondent owes a duty to the public to comply with the orders of the Court and to ensure that there is compliance with the Public Procurement and Asset Disposal Act. It should not be seen to participate in attempts to frustrate the procurement process.
32. Our conclusion thus is that the application, which is an appeal disguised as an application for review, is not only incompetent but also unmerited. Consequently, it is hereby dismissed with costs to the 2<sup>nd</sup> respondent.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.**

**S. Ole KANTAI**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCIArb.**

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**JUDGE OF APPEAL**



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

Signed

**DEPUTY REGISTRAR.**

