



**Energy Sector Contractors' Association v Accounting Officer, Kenya
Electricity Transmission Company Limited & another (Civil Appeal
E387 of 2022) [2022] KECA 976 (KLR) (26 August 2022) (Judgment)**

Neutral citation: [2022] KECA 976 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E387 OF 2022
DK MUSINGA, LK KIMARU & GWN MACHARIA, JJA
AUGUST 26, 2022**

BETWEEN

ENERGY SECTOR CONTRACTORS' ASSOCIATION APPELLANT

AND

**ACCOUNTING OFFICER, KENYA ELECTRICITY TRANSMISSION
COMPANY LIMITED 1ST RESPONDENT**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 2ND
RESPONDENT**

*(Being an appeal against the Judgment of the High Court of Kenya at
Nairobi, Judicial Review Division (J. Ngaah, J.) dated and delivered
on 9th July, 2021 in Judicial Review Application No. E071 of 2021)*

JUDGMENT

1. This is an appeal arising from the judgment of the High Court of Kenya at Nairobi, Judicial Review Division (J. Ngaah, J.) dated and delivered on 9th July, 2021 in Judicial Review Application No. E071 of 2021.
2. The matter is with regard to a procurement contract in respect of Construction of 132Kv Underground Cable Nanyuki-Rumuti Transmission Line Volume 1 and 2 ICB No: Ketraco/pt/009/2021 (subject tender) wherein it is alleged that the procurement process carried out by the 1st Respondent was skewed and favoured foreign firms to the detriment of Kenyan citizen contractors. The second allegation is with regard to the application of the [Public Procurement and Asset Disposal Act](#), 2015 (PPAD Act) on the subject tender and the jurisdiction of the 2nd Respondent, in terms of whether the said bidding document invited or ousted the application of the PPAD Act on the subject



- tender and the jurisdiction of the 2nd Respondent on the ground that the subject tender involved a foreign agency or multilateral agency entity.
3. The background of the case is that the Government of Kenya (the Government) entered into a Multilateral Loan Agreement (the loan agreement) with the African Development Bank (the Bank) under which the Bank would fund the construction of Ethiopia-Kenya Highway Project (the project).
 4. The project was to be implemented by the Kenya Electricity Transmission Company Limited (KETRACO), the procuring entity, and therefore on 18th August, 2020, the Government executed a subsidiary grant agreement with KETRACO for that purpose, and more particularly for the construction of the 132Kv Underground Cable Nanyuki-Rumuti Transmission Line. A general procurement notice with respect to the same, Volume 1 and 2, was undertaken by the procuring entity and published on the Bank's website on 15th July, 2019.
 5. On its part, the procuring entity published a specific procurement notice dated 3rd February, 2021 on its website inviting sealed tenders for the subject tender and which notice made reference to the general procurement notice published on the Bank's website.
 6. Prospective bidders were instructed that a complete set of bidding documents was available on the procuring entity's website; the tender submission deadline was 4th May, 2021. However, on the eve of the deadline, the Appellant lodged a request for review being Application No. 64 of 2021 before the 2nd Respondent seeking the following orders: -
 - a. An order annulling the bidding document for procurement of the subject tender and the entire procurement process in relation thereto.
 - b. An order directing the procuring entity to prepare a new tender document that is devoid of discrimination and one that allows for fair competition.
 - c. An order directing the procuring entity to comply with the law on preference and reservations as set out in *the Constitution* of Kenya, 2010, (*the Constitution*), the PPAD Act and the PPAD Regulations, 2020.
 - d. An order directing the procuring entity to unbundle the subject procurement to allow for a wider participation of Kenyan firms.
 - e. An order awarding costs and incidental to the proceedings.
 - f. Such further or other orders as the Court may deem just.
 7. The primary issue in respect of the application for review was the extent to which the provisions relating to procurement of goods and services in the loan agreement applied to the subject tender, and whether such terms and conditions would be preferred to the provisions of the PPAD Act. It was also urged that the agreement could not override the provisions of *the Constitution* relating to the procurement process.
 8. In this regard, the Appellant was of the firm view that the procurement process was subject to the provisions of the *PPAD* Act and *the Constitution* and therefore must comply with all the provisions therein. On the other hand, the 1st Respondent contended that since the subject tender was wholly financed by the Bank on borrowing of the Government, the subject tender was exempt from the jurisdiction of the 2nd Respondent pursuant to Sections 4(2)(f) and 6 of the PPAD Act as read with Article 2(5) and (6) of *the Constitution*.



9. In its decision delivered on 24th May, 2021, the 2nd Respondent upheld the Appellant's argument and allowed its application for review and dismissed the 1st Respondent's argument. The 2nd Respondent further stated that in as much as the subject tender was said to be based on the terms and conditions of the Multilateral Loan Agreement, the 1st Respondent did not furnish the 2nd Respondent with the Bank's Rules of procedure for procurement and the Multilateral Loan Agreement and therefore the 2nd Respondent could not ascertain whether the intended procurement was subject to the said Rules and whether the omitted documents ousted the application of the PPAD Act as well as its jurisdiction under the Act.
10. In view thereof, the 2nd Respondent allowed the request for review and directed the 1st Respondent to:
 - i. Issue an addendum to the bidding document for the subject tender within seven (7) days of its decision to ensure the bidding document complies with the provisions of the PPAD Act and the Constitution;
 - ii. Extend the deadline of the submission of tenders specified as 4th May, 2021 for a further 30 days from the issuance of an addendum to the bidding document pursuant to order
 - i. above.
 - iii. Allow bidders to withdraw their bids that were submitted before the tender submission deadline of 4th May, 2021 (if they wished to do so) and submit new bids by the new submission deadline referred to order (ii) above.
 - iv. Given that the subject tender procurement process had not been concluded, each party was to bear its own costs.
11. In his judgment, the learned Judge stated that the fundamental question that arose for determination was whether the 2nd Respondent properly interpreted the Multilateral Loan Agreement with particular reference to the provisions relating to procurement, and whether it made an error of law by asking itself the wrong questions with specific reference to Sections 4 and 6 of the PPAD Act and ultimately arriving at the wrong decision. In relation to this question was whether in reaching its decision, the 2nd Respondent acted within its powers under Section 173 of the PPAD Act.
12. According to the learned Judge, evidence showed that the procurement in issue was pegged on some of the terms and conditions of the loan agreement which included terms and conditions relating to procurement for goods and services for which the loan was granted and that the import of the terms and conditions were that the procurement would be in accordance with the Bank's procurement procedures. In this regard, the learned Judge held that the legislature had this sort of circumstances in mind when it came up with sections 4 and 6 of the PPAD Act, and opined that the loan agreement is no doubt a multilateral one. The learned Judge further held that the 2nd Respondent's decision was ultra vires the provisions of sections 4 and 6 of the PPAD Act.
13. In the end, the learned Judge was satisfied that the judicial review application met the threshold for grant of orders of judicial review of certiorari and declaration and allowed the Appellant's Motion dated 8th June, 2021 in terms of prayers (a) and (b) which were that "an order of certiorari do issue against the decision of the 2nd Respondent in request for Review No. 64 of 2021 and a declaration that the subject tender for procurement of 132Kv Underground Cable Nanyuki-Rumuti Transmission line, Volume 1 and 3 is exempt from application of the provisions of the PPAD Act." No orders were made as to costs.



The Appeal

14. The Appellant was aggrieved by the judgment of the trial court and filed this appeal raising nine (9) grounds of appeal reproduced as follows: -
- i. That the learned Judge erred in law and in fact in failing to find that the 1st respondent did not adduce the African Development Bank rules of procurement of goods and services before the 2nd respondent that allegedly ousted its jurisdiction in the impugned tender under Section 4(2)(f) and 4(3) of the *Public Procurement and Asset Disposal Act* (PPAD Act), 2015.
 - ii. That the learned Judge erred in law and in fact in failing to distinguish a financing agreement from a procurement agreement thus arrived at a wrong conclusion in applying the provisions of section 4(2)(f) of the PPAD Act to the impugned tender.
 - iii. That the learned Judge erred in law and in fact in failing to find that under section 6(1) of the PPAD Act, donor conditions even where they are shown to be applicable can only prevail over the provisions of the Act if they conflict with any provisions of the Act, a fact that the 1st respondent did not demonstrate.
 - iv. That the learned Judge erred in law and in fact in finding that where a particular procurement is to be undertaken using proceeds of a grant or loan from a multilateral agency where the Government of Kenya is a party, then section 4(2)(f) of the PPAD Act automatically ousts the jurisdiction of the 2nd respondent, the Kenyan Constitution underpinnings notwithstanding.
 - v. That the learned Judge erred in law and in fact in failing to find and hold that in so far as the money to be used in procurement is public money repayable by Kenyans, the same is subject to scrutiny by the Review Board or the Kenyan courts.
 - vi. That the learned Judge erred in law and in fact in failing to appreciate that the application by the 1st respondent before it was in fact an appeal on the merits of the decision of the 2nd respondent on the impugned tender disguised as a judicial review application.
 - vii. That the learned Judge erred in law and in fact in by ignoring the evidence and submission of the appellant and substituting his own position and thus arrived at a wrong decision.
 - viii. That the learned Judge erred in failing to consider the totality of the evidence tendered by the appellant in the superior court.
 - ix. That the judgment is internally inconsistent and contradictory from several consistent decisions issued by the superior court on similar issues.

Submissions

15. The appeal was largely canvassed by way of written submissions, with brief oral highlight of the same by Mr. Ondieki, learned counsel for the Appellant, and Mr. Muganda, learned counsel for the 1st Respondent. Counsel for the 2nd Respondent indicated by an email to the Court that he would solely rely on his written submissions.

Appellant's submissions

16. The Appellant collapsed grounds (i)-(v) which relate to applicability of the PPAD Act and the jurisdiction of the 2nd Respondent to hear the review application before it. On this, the Appellant submitted that once the question of quashing the decision of the 2nd Respondent was put before the



trial court, it had to make a finding on whether the 2nd Respondent indeed had jurisdiction under Section 4(2)(f) of the PPAD Act, and that the mere fact that the subject tender is a Multilateral Loan Agreement did not automatically oust the jurisdiction of the 2nd Respondent. It placed reliance on the assertion that there are many decided cases where courts have held that the mere fact that a project or tender is financed by funds from a donor cannot be a reason to deprive the Review Board of its jurisdiction and in this case, the 2nd Respondent had oversight and supervisory jurisdiction to hear and determine the dispute of the tender.

17. In this respect, the case of Public Procurement Review Board v. Athi Water Service Board [2016] eKLR was cited to buttress the submission. Thus, according to the Appellant, the only way the jurisdiction of the 2nd Respondent could be ousted was if the 1st Respondent supplied it with the procurement rules that expressly stated that the PPAD Act was not applicable and conversely then, would have meant that the 2nd Respondent did not have requisite jurisdiction.
18. With regard to grounds (vi) and (vii), the Appellant submitted that the judicial review application before the trial court was a merit review/appeal disguised as a judicial review and as such, the learned Judge failed to appreciate what a review application was, thus arrived at a wrong decision.

2nd Respondent's submissions

19. The 2nd Respondent supported the appeal and contended that the learned Judge misdirected himself by treating this matter as an appeal rather than a judicial review application, thereby arriving at a wrong verdict. To this end, the 2nd Respondent cited Municipal Council of Mombasa v. Republic & Another [2002] eKLR and Chief Constable v. Evans [1982] 3 ALL. ER 141 for the proposition that in judicial review the court would only be concerned with the process leading to the making of the decision and not delve into the merits of the decision as this is the province of an appellate court. The case of Kivuku Agencies v. Kenya Airport Authorities Accounting Office & Another [2020] eKLR was also relied on for the proposition that Articles 22, 23 and 47 of *the Constitution* as read with the grounds for review set out under Section 7 of the *Fair Administrative Action Act* allows a fusion of the traditional common law grounds of review to include some merit review in an administrative act, although the court cannot usurp the decision-making power of the administrative body, it can only quash the errors.
20. In this regard, the 2nd Respondent submitted that the learned Judge usurped the decision-making powers of the 2nd Respondent, which is not within the purview of judicial review.

1st Respondent's submissions

21. On its part, the 1st Respondent in rebuttal submitted that this Court lacked jurisdiction to hear the appeal on the ground that the same flies against the express provisions of Section 175(4) of the PPAD Act, which provides that in a judicial review case emanating from a procurement dispute before the 2nd Respondent, a person aggrieved by the decision of the High Court may appeal to this Court within seven (7) days of such decision, where after this Court shall make a decision within forty-five (45) days and which decision shall be final; that since the High Court delivered its judgment of 9th July, 2021, the last day for filing this appeal was 16th July, 2021 and so the appeal ought to have been determined by 31st August, 2021.
22. The 1st Respondent contended that no appeal was filed within the stipulated timelines under Section 175(4) of the PPAD Act and as such, the appeal having been filed out of time was a nullity ab initio and therefore void, as the same was brought three hundred and forty-nine (349) days after the time provided for in law. In this regard, it relied on this Court's decision in Aprim Consultants vs. Parliamentary



Service Commission and the Public Procurement Administrative Review Board, Civil Appeal No. E039 of 2021.

23. It was argued that whereas the Appellant filed an application dated 21st September, 2021 for an order of extension of time within which to file its Memorandum and Record of Appeal, and which order was granted vide a ruling delivered on 28th April 2022 by a single Judge of this Court pursuant to Rule 4 of this Court's Rules, the said ruling was erroneous. The argument was hinged on the findings in the Aprim Case (*supra*) which was basically on the application of Section 175(4) of the PPAD Act, and as such, there was no foundation for grant of such leave. Further, the decision to grant leave for extension of time was premised on this Court's Rules, whereas the PPAD Act speaks directly to the issue of time for filing and disposal of appeals on procurement matters. The 1st Respondent thus urged this Court to reverse the said decision of the single Judge for being in conflict with Section 175(4) of the PPAD Act. Reliance was placed on the case of Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1 and Samuel Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others [2012] eKLR where it was held that jurisdiction is everything, and it goes to the very heart of a matter, such that where a court has no jurisdiction conferred upon it by *the Constitution* or any other written law, it cannot entertain or continue any proceedings.
24. On the issue of the application and interpretation of Sections 4(2)(f) and 6 of the PPAD Act, the 1st Respondent submitted that it is clear from a plain reading of the same that the only consideration was whether the procurement in issue was under a bilateral or multilateral agreement between the Government and any other foreign government, agency, entity or multilateral agency. It was argued that the provision is crystal clear and not ambiguous to the effect that the only inquiry required to be undertaken in determining whether the ouster clause applied was the ascertainment of the existence of a bilateral or multilateral agreement, and the ascertainment of the identity of parties to the bilateral or multilateral agreement.
25. In this regard, the 1st Respondent contended that the learned Judge was correct in holding that the clauses in the loan agreement as read with Section 4(2)(f) and 6(1) of the PPAD Act and Articles 2(5) and (6) of *the Constitution* lead to the inevitable conclusion that the procurement process for the subject tender was not subject to the PPAD Act. The 1st Respondent cited Kenya Medical Supplies Authority vs. Revital Health (EPZ) Limited & 2 Others, Civil Appeal No. 65 of 2016 and Kenya Revenue Authority v. Web Fontaine Group FZ-Lic & 2 Others [2017] eKLR in this regard.
26. The 1st Respondent further relied on the Supreme Court's decision in Council of Governors v. Attorney General & 7 Others [2019] eKLR on the issue of interpretation of statute, where the Court held, inter alia, that in the absence of an express legislative intention to the contrary, the language of the of statute must ordinarily be taken as conclusive.
27. On the issue of the judicial review application, the 1st Respondent contended that the appeal does not seek to challenge the trial court's judgment based on any departure from the traditional grounds of illegality, irrationality or procedural impropriety. To the contrary, it is a clever attempt to delve into the merits of the 2nd Respondent's decision.
28. As to whether this Court should grant the orders sought by the Appellant, the 1st Respondent submitted that the evaluation process of the subject tender had since been completed and the contract awarded to the Consortium of Dong fang Electric International Corporation, which was signed on 24th March 2022, and its performance had already commenced. The 1st Respondent's counsel sought leave during the hearing of the appeal to introduce a Replying Affidavit sworn by one Samwel Rambo on 15th August, 2022 to which the signed contract was annexed.



29. That further, the orders sought in the instant appeal should not be granted due to the prejudice that will be occasioned to the Consortium of Dong fang Electric International Corporation who are not parties to this appeal and any order granted in their absence would seriously prejudice them, given that they are already performing the contract.

Appellant’s rejoinder

30. In regard to the 1st Respondent’s Replying Affidavit filed in response to the Memorandum of Appeal, the Appellant submitted, and rightly so, in our view, that this Court’s Rules do not allow the filing of a Replying Affidavit in response to a memorandum of appeal; that the Replying Affidavit seeks to introduce new evidence that was not part of the evidence for consideration before the trial court and ought to be struck out.
31. On the issue that this Court lacks jurisdiction to entertain the appeal on the ground that the same was filed out of time, the Appellant submitted that in the ruling delivered on 28th April, 2022 the learned Judge found that the Notice of Appeal having been filed on 15th July, 2021 and served on the Respondents, the same was served within time. Counsel further submitted that this Court directed the Appellant to file and serve its Memorandum and Record of Appeal in accordance with Rule 82 of this Court’s Rules and since the ruling was delivered on 28th April, 2022, the Appellant had sixty (60) days from the date of the said ruling to file and serve the record of appeal, which it did.

Analysis and determination

32. We have appraised ourselves with the Record of Appeal and the respective parties’ submissions. In our view, the first issue for our determination is whether this Court has jurisdiction to determine this appeal in view of the provisions of section 175(4) of the *PPAD Act*.
33. The issue of jurisdiction arose as a result of the finding of this Court in the ruling dated 28th April, 2022 of Murgor, JA. that extended time for the Appellant to file both the Memorandum and Record of Appeal. In its arguments before the judge, the 1st Respondent argued that interpretation of Section 175 of the PPAD Act and not Rule 4 of this Court’s Rules was a matter beyond the remit of a single judge and to that extent, the Court agreed and declined the invitation to determine the issue raised under Section 175. The learned Judge stated:

“An application under Rule 4, for extension of time is ordinarily determined by a single judge. Such is the nature of the application that is before me. The respondent’s objection to the determination of this application for the reason that section 175 and not Rule 4 is a matter that is beyond my remit and would require to be canvassed before another forum. I therefore decline the invitation to determine the issue raised with respect to section 175, and will instead address the application as brought.”

We think it is necessary to set out the background of the application for extension of time.

34. The impugned judgment was delivered on 9th July, 2021. The Appellant lodged its Notice of Appeal on 15th July, 2021 and duly served the Respondents within the stipulated timelines. Thereafter on 21st September, 2021, it made an application to this Court seeking extension of time to lodge its Memorandum and Record of appeal, which orders were granted vide the ruling dated 28th April, 2022 of Murgor, J.A.
35. We note from the ruling that the Appellant obtained certified copies of typed proceedings on 12th July, 2021 but was unable to lodge the Record of Appeal until 9th September, 2021 due to alleged



challenges it faced with the court's e-filing system whilst uploading the same. The Appellant stated that it complained to the Registrar but received no response; that it again wrote to the Registrar on 15th September, 2021 requesting for assistance to file an application for extension of time to lodge the appeal as the stipulated period for filing the appeal had already lapsed, and the Registrar responded on the same day informing the Appellant that the e-filing system was up and running.

36. We take further note that the 1st Respondent argued that the reason for the delay advanced by the Appellant was insufficient as the Appellant had not provided any evidence to show the attempts made to file the record and that the Registrar's response that the system was up and running was not indicative that the e-filing system had challenges as alleged by the Appellant. The court acknowledged that the Appellant did not furnish proof of any challenges with the e-filing system and as well, the Registrar's email to it did not point to any challenges with the system. The Court however noted that although the Appellant complained of the said challenges, it eventually was able to file the Record of Appeal, albeit with a delay of two days, which it said was not inordinate.
37. The 1st Respondent complained that it would be prejudiced if time was extended without regard to Section 175(4) of the PPAD Act in which regard the court opted to address the application only under Rule 4 of this Court's Rules and not under Section 175(4) of the PPAD Act. The learned Judge stated that "the question of prejudice on this basis of Section 175(4) does not arise at this juncture."
38. We believe the opportune time has come for this Court to determine whether a party to a public procurement dispute who desires to prefer an appeal from a High Court decision under Section 175(4) of the PPAD Act and who fails to appeal within seven days of the High Court's decision may seek extension of time under Rule 4 of this Court's Rules.
39. Section 175 of the PPAD Act provides as follows: -

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

2. The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.
3. The High Court shall determine the judicial review application within forty-five days after such application.
4. A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.
5. If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties. (Emphasis added).
6. A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.
7. Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party."



40. The application of Section 175 of the PPAD Act has severally been litigated before this Court, with lead decisions being, inter alia, the case of *Aprim Consultants vs. Parliamentary Service Commission & Another*, (supra) (Aprim case), *The Consortium of TSK Electronica Y Electronica S.A. & Ansaldoenergia vs. Public Procurement Administrative Review Board & 3 Others*, Civil Application. No. E012 of 2022 (TSK Electronica case) which was delivered on 28th February 2022 and the case of *ADK Technologies Limited in Consortium with Computer Technologies Ltd vs. Public Procurement Administrative Review Board & 4 Others*, Civil Appeal No. E598 of 2021 (ADK Technologies case) which was delivered on 4th March 2022.
41. In the *Aprim case*, this Court stated that Section 175 of the PPAD Act was couched in mandatory terms with no latitude for extension of the timelines provided therein. The Court expressed itself thus: -
- “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.”
42. In the *ADK Technologies case*, this Court differently constituted held that the reasoning in the Aprim case applies with equal force to Section 175(4) which addresses procurement appeals in this Court. Likewise, in the TSK Electronica case, the Court agreed with the reasoning in the Aprim case, and 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.” (Emphasis added)
43. In this case, the delay in filing the appeal was occasioned by the Appellant, since after obtaining certified copies of the typed proceedings on 12th July, 2021 and lodging its Notice of Appeal on 15th July, 2021 which was within the stipulated timeline as provided for by Section 175(4) of the PPAD Act, it delayed until 9th September, 2021 which was fifty-eight (58 days) from the date of its lodging of the Notice of Appeal. The Appellant’s excuse for the delay was that it faced challenges whilst lodging the appeal electronically, but no evidential proof was provided of its attempt to lodge the appeal. Even assuming there were technical challenges in the electronic filing of the appeal, the Appellant could have presented to the Court’s registry a hard copy of the memorandum and record of appeal before expiry of the



statutory period of seven days, since certified copies of the High Court proceedings had been issued on 12th July, 2021.

44. Section 175(4) of the *PPAD Act* is couched in mandatory terms, such that if no appeal is filed within the time provided, the decision of the board is deemed final. In this case, the board's decision had been overturned by the High Court and therefore the failure to file an appeal and prosecute it within the statutory period meant that the High Court decision became final. As restated in the cited cases, the mischief sought to be cured is unwarranted delay in disposal of public procurement disputes. What this means is that if a party fails to comply with the prescribed time lines under the Act, this Court becomes stripped of jurisdiction to deal with the appeal. It cannot arrogate itself powers which the parent statute, the PPAD Act, clearly provides should be exercised within a given time frame. The Court has no jurisdiction to extend time in such a matter under Rule 4 of its Rules.
45. We restate the legal position that any decision made without jurisdiction is of no legal effect. It cannot be validated by whatever justification. It can neither be cured under Article 159(2)(d) of *the Constitution* that calls on courts to overlook procedural technicalities, nor the inherent jurisdiction of the Court. That has been enunciated in several decisions. For instance, in *Samuel Macharia & Anor v. Kenya Commercial Bank Limited & 2 Others* [2012] eKLR the Supreme Court had this to say:
- “A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within the authority to prescribe the jurisdiction of such a court or tribunal by statute law.”
46. We are minded that jurisdiction of a court goes to the very heart of a matter, without which a court has to down its tools. This was settled as well in the renowned case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* (supra).
47. We now come to the conclusion that appeals to this Court on matters that touch on judicial review under the PPAD Act are not subject to extension of time under the Rules of this Court and cannot therefore be considered and determined on the same level as ordinary appeals. It implies therefore, that the assumption that the Appellant had sixty (60) days within which it could lodge and serve its Memorandum and Record of Appeal as directed in accordance with Rule 82 of the Court of Appeal Rules cannot stand. For avoidance of doubt, by the time the Appellant allegedly attempted to lodge the appeal on 9th September, 2021, the forty-five (45) days within which this Court had to hear and determine this matter had already lapsed.
48. In view of the foregoing, we find and hold that we have no jurisdiction to determine this appeal. Having arrived at that conclusion, we cannot pronounce ourselves on the other grounds of the appeal. The



appeal is for striking out, which we hereby do. The Appellant shall bear the 1st Respondent's costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

