



**Pan African Transformers & Switch Gears Limited & 2 others v Public
Procurement Administrative Review Board & 3 others (Civil Appeal (Application)
E426 of 2022) [2022] KECA 984 (KLR) (9 September 2022) (Judgment)**

Neutral citation: [2022] KECA 984 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E426 OF 2022
DK MUSINGA, LK KIMARU & GWN MACHARIA, JJA
SEPTEMBER 9, 2022**

BETWEEN

**PAN AFRICAN TRANSFORMERS & SWITCH GEARS
LIMITED 1ST APPELLANT
YOCEAN (GROUP) LIMITED 2ND APPELLANT
MAHASHAKTI KENYA LIMITED 3RD APPELLANT**

AND

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 1ST
RESPONDENT
NAIROBI TRANSFORMER MANUFACTURES EA COMPANY
LIMITED 2ND RESPONDENT
KENYA POWER & LIGHTING COMPANY PLC 3RD RESPONDENT
EMPOWER TRANSFORMERS LIMITED 4TH RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya by (Ngaah
Jairus, J.) on the 6th July, 2022 in Judicial Review No. E 079 of 2022)*

JUDGMENT

1. Kenya Power and Lighting Company PLC Limited (the 2nd respondent), the procuring entity, invited sealed tenders from interested eligible persons for supply of distribution Transformers (Manufacturers only). The tender was identified as No. KPI/9A.3/OT/028/21-22. The open tender invited both local and international manufacturers to bid for the tenders. The same was published in My Gov. Newspaper, the “People Daily” Newspaper and the procuring entity’s Website (www.kplc.co.ke) on March 8, 2022.



2. There were several addenda which were published by the procuring entity essentially to clarify certain aspects of the tender.
3. The appellants, who from the pleadings described themselves as local manufacturers of transformers, were aggrieved by some of the specifications in the tender by the procuring entity. They formed the view that, firstly, the specifications went contrary to the *Constitution*, specifically Article 227 thereof, the *Public Procurement and Asset Disposal Act* and Government policies which promote, advance and give preference to local manufacturers in such tenders where it is established that such manufacturers have the technical know-how and capacity. Secondly, the appellants were aggrieved that the tender in question seemed to give preference to international manufacturers to the disadvantage of local manufacturers in that regard. It was the appellants' contention that the technical specifications set out in the tender were designed to specifically exclude them from the said tender, despite the fact that they had substantially invested in the industry for the sole purpose of supplying transformers to the procuring entity.
4. The appellants on April 22, 2022 filed a request for review before the Public Procurement Administrative Review Board (the Board) vide Application NO. 35/2022 seeking the following reliefs from the said Board:
 - a. A declaration that the Tender document in respect of Tender Number KPI/9A.3/OT/028/21-22 for supply of Distribution Transformers (Manufacturers only) violates, and falls short of the provisions of Articles 10 and 227 of the *Constitution* of Kenya and the *Public Procurement and Asset Disposal Act*;
 - b. An order annulling and setting aside the 2nd Respondent's tender documents dated 11th March, 2022 and subsequent Addendum dated 17th March, 2022, 25th March, 2022, and 11th April, 2022 in respect of Tender Number KPI/9A.3/OT/028/21-22 for the supply of Distribution Transformers (Manufacturers only);
 - c. An order directing the 2nd respondent to prepare another Tender document in strict compliance with the provisions of Articles 10 and 227 of the *Constitution* of Kenya, and the *Public Procurement and Asset Disposal Act*, and restricted to local Manufacturers as previously done upon removal of the offending clauses;
2. Any Other or further relief or reliefs as the Board shall deem fit or expedient.”
5. In its decision rendered on May 13, 2022, the Board had this to say in respect of the issues raised by the appellants in their case before it:
 - i. That the decision by the procuring entity to subject the tender to foreign manufacturers through the open tendering method instead of restricted tendering method to local manufacturers was not in violation of the principle of legality, specifically the *Public Procurement and Asset Disposal Act*.
 - ii. That the choice of Procurement method preferred by the procuring entity was not subject to review by the Board as the Board lacks jurisdiction to do so under section 167(1) of the *Public Procurement and Asset Disposal Act*.
 - iii. That the procuring entity did not breach section 155(5)(b) of the *Public Procurement and Asset Disposal Act* as read with Regulation 144 (4) of Regulations 2022 “because transformers are not specialized goods and do not fall under the category of items wholly mined or produced in Kenya.”



- iv. That the Tender was not discriminatory against Local manufacturers as it provided for Tenders to have a 40% local content from goods manufactured/ assembled in Kenya.
 - v. That in evaluating the successful Tenders, the procuring entity had indicated that it would give tenderers offering goods manufactured in Kenya a 20% margin of preference as contrasted with 10% margin of preference to foreign manufacturers.
 - vi. That the technical qualification provided in the said tender was not designed to exclude the appellants from the Tender. The Board noted that the appellants request for change of technical specification by the procuring entity was tantamount to the appellants dictating to the procuring entity the technical specifications.
 - vii. That the procuring entity's addendum to the Tender document issued on 20th April, 2022 uploading technical specifications for Oil and Surge Arrestors was contrary to section 75(5) of the *Public Procurement and Asset Disposal Act* on extension of tender closing dates and therefore the Board ordered the closing dates be extended by a further 14 days.
6. The appellants were aggrieved by the decision and lodged an application for judicial review, seeking orders of certiorari to quash the said decision of the Board, an order of Mandamus to compel the procuring entity to issue the tender for the supply of distribution transformers (Manufacture only) to local manufacturers in compliance with the *Constitution* and the law, and an order of prohibition prohibiting the procuring entity from further executing the tender No. KPI/9A.3/0T/028/21-22 for the supply of distribution Transformers (Manufactures only.)
 7. The application was opposed by the procuring entity.
 8. In its judgment, the High Court (Ngaah, J.) dismissed the application for judicial review on the grounds that the appellants had failed to establish any illegality, irrationality, procedural impropriety and lack of proportionality in the decision made by the Court. In so holding, the learned judge was of the view that instead of the appellants opposing the judicial review application on its four corners, they were challenging the merits or otherwise of the Board's decision which was not a matter for consideration before the High Court.
 9. As regards the challenge to the technical specifications of the tender, the learned judge declined the invitation by the appellants to delve into the merits of the same. The court held thus-

“My assessment of the applicant's application is that as much as it is a judicial review application, it is on the one hand an attack on the requirements in the tender documents, and on the other hand, it is to a greater degree inviting this Honourable Court to interrogate the facts afresh and interpret the relevant provisions of the law in a way that would lead to a conclusion different from that which the respondent reached.

My answer to the applicant's quest to challenge the technical requirements and specifications is that it is not for a judicial review court to interrogate the technical details and specifications of any particular item or items sought to be procured and decide whether the requirements in the tender document with respect to such details are reasonable or not. Ordinarily, a judicial review will not evaluate the evidence presented before a tribunal so as to make its own conclusions. Secondly, the court is, in any event, ill-equipped to weigh or assess the technical aspects of any services that are subject to the procurement process. It is presumed and for this reason, it is left to the procuring entity, which is ideally equipped to prescribe the pertinent technical and specification requirements depending on,



amongst other things, the nature, the quality and quantity of goods or services sought to be procured.”

10. In the end, the learned judge was satisfied that none of the grounds of judicial review had been proved so as to persuade him to exercise his discretion in favor of the appellants. That it could not be said with any sense of conviction that there was any lapse in propriety of the 1st respondent’s proceedings which was the subject matter of the case. Thus, he dismissed the appellants’ Notice of Motion.
11. The appellants were aggrieved by the decision of the High Court which precipitated the instant appeal to this Court. The appellants raised several grounds of appeal challenging the said decision. The said grounds of appeal can be reproduced as hereunder:
12. That the learned Judge erred in law and in fact in: -
 - a. Dismissing the judicial review application on grounds that the same was concerned with the merits of the case when Section 7(2)(1) of the *Fair Administrative Action Act* provides for proportionality as a ground for statutory judicial review and the test of proportionality leads to a “greater intensity of review” that the traditional grounds and thus the consideration of the substantive merits of a decision play a much greater role; proportionality invites the court to evaluate the merit of the decision; and relevant considerations if taken into account in making the impugned decision invite aspects of merit review under Section 7(2)(1) of the *Fair Administrative Action Act*
 - b. Making a finding that the appellants had failed to place before the court in a precise manner the grounds for judicial review in the proceedings before him; failing to apply himself to grounds elucidated by the appellants arising from the impugned decision of the 1st respondent; and making a finding that the substantial part of the application and submissions pertained to deficiencies in the subject tender and not a challenge of the impugned decision of the 1st respondent.
 - c. Misconstruing the law, to wit in respect of the use of confidential documents in proceedings: - in making a finding that the disclosure of confidential documents by the 2nd respondent was in accordance with the provision of Section 67 of the *Public Procurement and Assets Disposal Act* (PPAD Act); that inclusion and consideration of confidential information by the 1st respondent in their impugned decision did not violate the appellant’s right to a fair hearing and did in fact condemn them unheard; in finding that the appellants were not entitled to be made privy to the confidential documents or information despite the provisions of Section 67(4) of the PPAD Act expressly providing that the 1st respondent can provide a summary.
 - d. Misconstruing the evidence and the law in making a finding that in opening the tender process to international bidders that the same was undertaken in accordance in accordance with the Act as follows:
 - in making a finding that Section 167(4) of the PPAD Act expressly prevented one from challenging the choice of procurement, without comprehending the provisions of Section 91 of the PPAD Act; in making a finding that the appellant misapprehended the law when they challenged the procurement method and the preference to be given to local manufactures without comprehending the provisions of Sections 155(5) of the PPAD Act and Regulation 144(4) of 2020 that requires the 2nd respondent as the procuring entity to provide a report to the National Treasury detailing the inability to give preference to local manufactures; in demonstrating outright bias in finding that the appellants sought to be given first priority and lock out international bidders, despite the 2nd respondent failing to undertake due process to



open the tender to international bidder; and by failing to address himself to the issues raised in respect of the impugned decision of the 1st respondent and the outright failings in procedure of the 1st respondent whilst exercising their quasi-judicial authority.

- e. Failing to make a finding that the impugned decision of the 1st respondent violated the following provisions of law: - that opening the tender to international bidders violated the principle of promotion of local industry under Section 3 of the PPAD Act and PPAD Regulations 2020, the Government Strategy Policy on Buy Kenya Build Kenya and the Kenya Government Big 4 Agenda and Article 227 of *the Constitution*; and that the impugned decision violated the provisions of Article 47 of *the Constitution* as read with Section 7(2)(a)(iv), (c), (d), (f), (h)(i)(iii) and (iv), (j), (k), (n) and (o) of the *Fair Administrative Action Act*, 2015 as the 1st respondent abused its discretion by failing to annul the tender which is in contravention of Articles 10 and 227 of *the Constitution*.
 - f. Failing to evaluate the evidence by the appellants and/or consider its elaborate and detailed written submissions in support of the review application.
 - g. Demonstrating an outright bias by failing to consider the issues and evidence between the parties and indeed made biased pronouncements in respect of the matter and making an unjust finding that sets bad precedents in law.
 - h. Demonstrating an outright bias in review of the facts, evidence and grounds set out in the pleadings by failing to address himself to the technical nature and complexities of the proceedings before the 1st respondent.
13. During the hearing of the appeal, the appellants were represented by learned counsel Mr. Kigata, whilst learned counsel, Mr. Ododa was for the 2nd respondent. The parties agreed by consent to have this Court's judgment written on the basis of their written submissions. In this regard, the appellants' submissions are dated 25th July, 2022 and filed on even date. The 1st and 2nd respondents' submissions are dated 19th August, 2022 respectively. The appellants and the 2nd respondents filed a bundle of authorities in support of their respective opposing positions. The 3rd and 4th respondents did not file any pleadings in this appeal and neither did they participate in the proceedings.
 14. We have accordingly carefully considered the record of appeal as well as the respective parties' submissions. In our view, the only issue for determination is whether the learned judge failed to consider the merits of the issues raised before him in the judicial review application.
 15. According to the appellants, the learned judge was unduly restrictive in the interpretation of his mandate while considering the application for judicial review. The appellants argued that the learned judge erred when he failed to consider Article 47 of the *Constitution* and section 7(2) (1) of the *Fair Administrative Action Act* in determining the application. It was the appellants' case that the above statute granted the High Court an expanded mandate when considering an application for judicial review, especially where the proportionality test has been invoked. In that regard, the appellants relied on the decision in *Suchan Investment Limited vs Ministry of National Heritage, Culture and 3 Others* [2016] KLR.
 16. The appellants argued that the tender by the procuring entity breached *the Constitution*, the *Public Procurement and Asset Disposal Act* and the Government policies that promote local industry in preference over international manufacturers. The appellants submitted that the learned judge ought to have considered this issue in the judicial review application.



17. In response, the respondents submitted that the learned judge exercised his jurisdiction correctly. They pointed out that the High Court had no jurisdiction to consider the merits of the Board's decision. That instead, the court was only concerned with the decision-making process. In that regard, the respondents relied on this Court's decision in *Municipal Council of Mombasa vs Republic of Umoja Consultants Ltd* [2002] eKLR.
18. The 2nd respondent submitted that under section 167 (4) of the Public Procurement and Asset Disposal Act, the Board had no jurisdiction to consider the request for review. The sub-section provides as follows: "The following matters shall not be subject to the review of procurement proceedings under subsection (i) –
- i. the choice of procurement method;
 - ii. a termination of a procurement or asset disposal proceedings in accordance with section 62 of the Act; and
 - iii. where a contract is signed in accordance with section 135 of this Act. "
- The Board correctly decided that it did not have jurisdiction to consider the request for review because it had no power to determine the choice and method of procurement.
19. The 1st and 2nd respondents therefore urged the Court to find that both the Board and the High Court did not err in making the determinations that they did.
20. This Court in *Municipal Council of Mombasa vs Republic Exparte Umoja Consultants Ltd & Another* [2002] eKLR held thus:
- "Judicial Review proceedings is concerned with the decision making process not with the merits of the decision itself. The court would concern itself with such issue as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as the court of appeal over the decider which would involve going into the merits of the decision itself such as whether there was or that was not sufficient evidence to support the decision."
21. In this regard therefore, this Court does not find favour with the argument made by the appellants to the effect that both the High Court and this Court in exercise of their jurisdiction under section 175(1) of the *Public Procurement and Asset Disposal Act* can, in the circumstances of this case which was dealing with an issue under section 167(4) of the *Public Procurement and Asset Disposal Act*, delve into the merits of the decision of the review Board. Judicial Review by its very nature is concerned with the decision making process itself and not the merit of the decision.
22. This Court has severally held that in appropriate instances a court has power to consider the merits of the decision sought to be reviewed, in light of the expanded scope of judicial review under the *Constitution* and the *Fair Administrative Action Act*. However, in this case the court was dealing with a jurisdictional issue in terms of section 167(4) of the *Public Procurement and Asset Disposal Act*. The court could not therefore go to a consideration of the merits of the decision made by the Board.
23. Under Section 167(4)(a) PPDA Act, a procurement method is not amenable to review. The issue arose from the complaint by the appellants that the Tender was opened to foreign bidders instead of restricting it to local bidders. On this, we arrive at the conclusion that the appellants were on expedition



- of dictating what procurement method the 2nd respondent should have applied and specifically sought a restricted tender open only to local bidders. Of paramount note is that, the 1st respondent established as a fact that the tender document provided for application of a margin of preference to local manufacturers of transformers and also allowed joint venture participation in the subject tender between local and international manufacturers. What this implied is that, the learned judge correctly held that the tender did not violate Articles 10 and 227 of *the Constitution* as it was indeed consistent with Section 167(4)(a) of the PPDA Act.
24. Effectively, the appellants, in submitting before the High Court that the procuring entity preferred foreign over local bidders were indeed dictating the procurement method and we find no fault in the learned judge's conclusion that that was not a matter subject to judicial review. In our view, the appellants were basically pushing the 2nd respondent to employ a restricted tender instead of an open one which is against the letter and spirit of Section 167(4)(a) of the PPDA Act.
 25. Under Section 60 of the Act, a procuring entity can alter the tender document under certain considerations and therefore there was nothing wrong with the addendum extended to the tender document after the extension of time was given. The appellants had complained of late uploading of specifications of oil surge arresters four days before the closure of the tender. The 1st respondent had no difficulty in curing the same by extending the closing date by 14 days from the date of its decision and ordered the 2nd respondent to conclude the tender process within that period.
 26. Section 60 of the Act provides for specific requirements of a tender. Under subsection (3), the specific requirements, technical or otherwise are set by the procuring entity and cannot therefore be dictated by those intending to tender. It was only the 2nd respondent who was best placed to provide for the specifications of the tender. It follows therefore, that the appellants' submission before the High Court that the tender violated sections 174 and 175 of the Act and that the tender did not meet certain specifications, was misplaced. What was important was that the supply be of merchantable quality as specified in the tender and nothing less. We again conclude that the appellants are, as they were, in the High Court, asking the Court to interrogate the technical details and specifications through reevaluation of the evidence tendered before the 1st respondent, which is not within our mandate or the High Court's.
 27. More importantly is that the appellants have cited the ground of proportionality but in our assessment of their pleadings, the same does not apply in this case. We say so because this is a dispute about a tender document and the specifications therein which to our mind, is not for the appellants to dictate on what the tender document by the procuring entity should constitute. We thus agree with the 1st respondent's decision that agreeing with the appellants' request would be akin to a student setting his/her own exam, which circumstance is not attainable by any proportion.
 28. On the whole, we are of the view that, in the circumstances of this appeal, the invitation by the appellants to the High Court to evaluate the evidence afresh is tantamount to invoking the appellate jurisdiction of that Court as the Court cannot substitute the decision of a tribunal with its own on matters both law and fact. We fully concur with the judgment of the learned judge.
 29. Accordingly, this Court cannot fault the learned judge for reaching the decision that he did when he applied the known principles of "illegality", "irrationality", "procedural irregularity" and "proportionality" in considering the application for judicial review.
 30. The appellants' reliance on section 7(2) (1) of the *Fair Administrative Action Act* is of no help to their case. This is because even in the decision that they have sought to rely on, *Sunchan investment limited vs Ministry of National Heritage & Culture & 3 others* [2016] KLR, the Court held that proportionality



was one of the tests that the court should consider in determining an application for judicial review which the learned judge did in his considered judgment. It should also be noted that the High Court was exercising its jurisdiction under section 175 (ii) of the Procurement and Asset Disposal Act which is a specific legislation that deals with public procurement and asset disposal.

31. We agree with the learned judge that the appellants unprocedurally sought to conflate the merits of the decision and the decision-making process itself and thereby resulted in the clouding of the real issues in controversy which the learned judge was able to see through after evaluating the issues in dispute in the judicial review application.
32. We therefore hold that under section 167 (4) (a) of the *Public Procurement and Asset Disposal Act*, the Board and the High Court had no jurisdiction to inquire into the choice of the procurement method, which is the exclusive mandate of the procuring entity, unless it is established to the satisfaction of the court that the method chosen is so irrational that it is inimical to the law.
33. It was apparent to this Court that instead of the appellants approaching the procuring entity concerned and the Ministry under which the procuring entity is established with a view to lobbying for a change of policy in regard to the requirement of the particular tender, the appellants sought to litigate the same. As correctly pointed out by the learned judge the Board did not have capacity to evaluate the technical requirements and specifications of the tender, which is specifically within the mandate of the procuring entity.
34. The upshot of our findings is that the appeal lacks merit and is hereby dismissed with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF SEPTEMBER, 2022.

D.K. MUSINGA, (P)

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

G. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

