



**Republic v Public Procurement and Administrative Review Board & another;  
Accounting Officer Kenya Electricity Generating Company PLC & 5 others  
(Interested Parties); Joymaxc Enterprises (Exparte Applicant) (Judicial Review  
E283 of 2024) [2025] KEHC 705 (KLR) (Judicial Review) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 705 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW E283 OF 2024  
JM CHIGITI, J  
JANUARY 31, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

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

**PEESAM LTD ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**THE ACCOUNTING OFFICER KENYA ELECTRICITY GENERATING  
COMPANY PLC ..... INTERESTED PARTY**

**KENYA ELECTRICITY GENERATING COMPANY PLC INTERESTED PARTY**

**BROOKLYN CLEANING ..... INTERESTED PARTY**

**CLEANMARK LIMITED ..... INTERESTED PARTY**

**ZUZUMZ LIMITED ..... INTERESTED PARTY**

**DIAMOND SPARKLE LIMITED ..... INTERESTED PARTY**

**AND**

**JOYMAXC ENTERPRISES ..... EXPARTE APPLICANT**



## JUDGMENT

1. The Application before this court for determination is the Notice of Motion dated 24<sup>th</sup> December, 2024 wherein the Applicant is seeking the following Orders:

1. That this Honorable Court be pleased to grant the ex-parte applicant an order of certiorari seeking to remove into this Honorable Court and quash the entire decision of the Public Procurement Administrative Review Board, the 1<sup>st</sup> respondent herein, delivered on 13/12/2024 cancelling and setting aside the Letters of Notification of Intent to Award dated 13/11/2024 issued by the 1<sup>st</sup> Interested Party to successful bidders with respect to Tender No.KGN-ADM-007-2024 for Provision of Cleaning, Garbage Management and Gardening Services for Ken Gen premises for the Year 2024- 2026(Re-tender).
  2. That this Honorable Court be pleased to grant the ex-parte applicant an order of certiorari seeking to remove into this Honorable Court and quash the entire decision of the Public Procurement Administrative Review Board, the 1<sup>st</sup> respondent herein, delivered on 13/12/2024 cancelling and setting aside the Letter of Notification of Intent to Award dated 13/11/2024 issued by the 1<sup>st</sup> Interested party to the Applicant and to all other unsuccessful tenderers with respect to Tender No.KGN-ADM-007-2024 for Provision of Cleaning, Garbage Management and Gardening Services for Ken Gen premises for the Year 2024-2026(Re-Tender) be and are hereby cancelled and set aside.
  3. That this Honorable Court be pleased to grant the ex-parte applicant an order of prohibition to stop the 1<sup>st</sup> Interested Party from directing the Evaluation Committee of the Procuring Entity from admitting the 2<sup>nd</sup> respondent and all other bidders who progressed to the Financial Evaluation stage back into the procurement process and re- evaluating their tenders at the Financial Evaluation stage and proceed with the procurement process while taking into account the findings of the Board in this decision.
  4. That the costs of this application to be provided for.
2. It is predicated on the statutory statement dated 20<sup>th</sup> December, 2024, a verifying affidavit and further affidavit sworn by Joyce Moraa Oyaro sworn on 20<sup>th</sup> December, 2024 and 9<sup>th</sup> January, 2025 respectively and written submissions dated 9<sup>th</sup> January, 2025 respectively.
3. It is the Applicant's case that they were the successful tenderer in respect of Tender No. KGN-ADM-007-2024 for provision of Cleaning, Garbage Management and Gardening Services for KenGen Premises for the Year 2024-2026 (Re-Tender).
4. It is its case that the 1<sup>st</sup> Respondent in a decision dated 13<sup>th</sup> December, 2024 in Review Application no. 116/2024 issued the following orders:
- a. The Letters of notification of Intent to Award dated 13/11/2024 issued by the 1<sup>st</sup> Interested Party to successful bidders with respect to Tender No. KGN-ADM-007-2024 for provision of Cleaning, Garbage Management -and Gardening Services for Ken Gen premises for the Year 2024 – 2026 (Re-Tender) be and are hereby cancelled and set aside.
  - b. The Letter of Notification of Intent to Award dated 13/11/2024 issued by the 1<sup>st</sup> Interested party to the Applicant and to all other unsuccessful tenderers with respect to Tender No.KGN-ADM-007-2024 for Provision of Cleaning, Garbage Management and Gardening Services for



Ken Gen premises for the Year 2024- 2026 (Re-Tender) be and are hereby cancelled-and set aside.

- c. The 1<sup>st</sup> Interested Party is hereby ordered to direct the Evaluation Committee of the Procuring Entity to admit the Applicant and all other bidders who progressed to the Financial Evaluation stage back into the procurement process and re-evaluate their tenders at the Financial Evaluation stage and proceed with the procurement process to its logical conclusion in accordance with the law while taking into account the findings of the-Board in this decision.
  - d. For certainty the re-evaluation ordered at C above shall be carried out and completed within 30 days from the date of this decision while taking note of the provisions of section 175 of the Act.
5. It argues that the 1<sup>st</sup> Respondent in arriving at the decision erroneously found that the procuring entity failed to evaluate the 2<sup>nd</sup> Respondent's bid at the financial evaluations stage in accordance with the procedures and criteria set out in the Tender document as read with section 86(1)(a) of the Act and Regulation 77(3) of the Act.
  6. It is its case that the decision by the 1<sup>st</sup> Respondent was unlawful, unreasonable, irrational and made ultra vires in flagrant breach of sections 80(2) ,86(1)(a) of the Public Procurement and Assets Disposal [Act No.33 of 2015](#) as read together with Articles 227 of [the constitution](#) and void ab initio.
  7. It argues that the 1<sup>st</sup> Respondent stated that the “bidders were not aware of the above criteria used in computing the sums relied upon and determining if a tender was responsive or not at the financial evaluation stage under Appendix 4 and 8 of the Tender document. The board having studied both the blank Tender document and Evaluation Report observes that the criterion used and tabulations of tender prices and evaluation of bids at the Financial Evaluation stage with regard to appendix 4 and 8 of the Tender Document was not provided for in the Tender Document”
  8. The Applicant avers that the 1<sup>st</sup> Respondent stated that “The breach or otherwise on compliance with a Statutory minimum wage requirement in light of Mandatory Requirement no. 9 at page that 36 of the Tender Document and clause 4 at page 3 of 4 of the PPRA Circular no. 07/2023 dated 27<sup>th</sup> October 2023 renders it a matter for a future claim in the event as successful tenderer fails to abide by the set of statutory minimum wage. In saying so we note that the clause 1.8 of section VIII General Conditions of Contract at page 174 of the Tender Document provides for Taxes and Duties whereby the service provider, subcontractors and their personnel shall pay such taxes, duties, fees and other impositions as may be levied under the applicable law, the amount which is deemed to have been included in the contract price.”
  9. The Applicant's case is that all the bidders including the 2<sup>nd</sup> Respondent were satisfied with the Tender Evaluation Criteria and at no stage did any of the bidder seek clarification or review under section 167 (1) of the PPAD Act on the criteria to be used in computing the sums relied upon in determining if a tender was responsive or not at the Financial Evaluation stage under Appendix 4 and 8 of the Tender Document.
  10. The Applicant is persuaded that the 2<sup>nd</sup> Respondent's complaint in respect of the Tender Evaluation Criteria is an afterthought and would not have arisen had it been successful and that the 1<sup>st</sup> Respondent cannot delve into the arena in purporting to impose the same upon the Procuring Entity in a way that compromises the Applicant's interest as the successful tenderer.
  11. The Applicant contends that the 1<sup>st</sup> Respondent overlooked the capacity of a tenderer to perform as established by the Procuring Entity and only concentrate on the fact that it quoted the lowest figures relative to the Applicant in its financials which is the height of folly, defies logic or any acceptable moral



standards and contrary to the rational that efficiency in service delivery ought to be paramount and that its decision meets the test of unreasonableness as outlined in the case of Council of Civil Service Unions Vs Minister for the Civil Service (1984) 3 ALL ER 935 citing the Associated Provincial Picture Houses Ltd vs Wednesbury Corporation (1984) K.B. 223.

12. It is the Applicant's case that the 1<sup>st</sup> Respondent acted ultra vires in purporting to compel the 1<sup>st</sup> and 2<sup>nd</sup> interested Parties to adopt its version of a Tender Evaluation Criteria as proposed by the 2<sup>nd</sup> Respondent and places reliance on the case of Republic vs Public Procurement Administrative Review Board & 2 Others Exparte Numerical Machining Complex Ltd where Lady Justice Aburili quoted Odunga, J who stated as follows:

“The effect of compelling the applicant to award the tender to the Interested party was to compel the applicant to ignore the aforesaid provisions. The 1<sup>st</sup> Respondent in my view, had no power to compel the applicant to act unlawfully. By so doing it clearly exceeded its jurisdiction. It could only issue such directions and make decisions that the applicant itself was lawfully permitted to issue or make”

13. Reliance is placed in the case of Mombasa ELC Misc Application 90/2020-R-V-Principal Kadhi Mombasa, Murtaza Turabali Patel & Others where it was held that:

“In a nutshell Judicial Review is the means by which High Court judges scrutinize public law functions intervening as a matter of discretion to quash, prevent, require and/or classify not because they disagree with the judgment but so as to right a recognizable public law wrong. This public law wrong could be unlawfulness, Wednesbury unreasonableness or irrationality, unfair hearing, ultra vires, bad faith, unfairness, made or arrived at out of excess powers (ultra vires) biasness, capriciousness or un Judicially.

.....In an application for Judicial review the Applicant must be a person with a sufficient interest – (Locus Standi) and who commences proceedings promptly. To support this legal concept on judicial review, I have made in depth references to several literature review and court decisions – “Pharmaceutical manufacturers Association of South Africa in re-ex-parte president of Republic of South Africa - 2000 S.A. 674 CC at 33 Republic – Versus - Speaker of the Senate and Another Ex-parte Afrison Export Import Limited 2018 eKLR Republic – Versus- Stanley Mambo Amuti (2018) eKLR.”; the *Kenya National Examination Council – Versus - Republic (Ex - Parte - Geoffrey Gathenji & Another Nairobi Civil Appeal No. 266 of 1996.*”

14. It submits that the 1<sup>st</sup> Respondent in its decision dated 13/12/2024 acted per in curium by erroneously finding that the Procuring Entity failed to evaluate the 2<sup>nd</sup> respondent's bid at the Financial Evaluation stage in accordance with the procedures and criteria set out in the Tender Document as read with section 86(1)(a) of the Act and Regulation 77(3) of Regulations 2020 thereby illegally purporting to prescribe a new Evaluation Criteria and places reliance on the finding in Milimani Const Petition No.86/2017 - Kenya Human Rights Commission-V-Communication Authority of Kenya & 4 Others.
15. The Applicant argues that 1<sup>st</sup> respondent is not statutorily mandated to prescribe an Evaluation Criteria for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties and neither can it purport to standardize the latter's pricing and urges this court to adopt Justice Mativo's arguments thus:

“The mandate of promoting standardization is vested to the KBS. A statutory body can only perform functions vested to it by the law.



In Daniel Ingida Aluvaala and another vs Council of Legal Education & Another, [38]I observed that: -

"Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decisions to be allowed to stand, it must be demonstrated that the decision is grounded on law.

As such, the Respondents actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the rule of law. Guidance can be obtained from the South African case of AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another where the court held as follows:- "(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law"[39]

Courts are similarly constrained by the doctrine of legality, i.e to exercise only those powers bestowed upon them by the law.[40] The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the Respondent is constrained by that doctrine... by ensuring that its decisions conform to the relevant provisions of the law...

The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with the law and Regulations."

16. It further submits that the Evaluation Criteria developed by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party met the standards of International good practice as captured in the guidebook RFP Writing: Evaluation and Selection Criteria by Havard Kennedy School of Government Performance Lab which states the following key conceptions as the characteristics of a Good Evaluation Criteria: -
  - i. It must connect to the Procurement Entity's specific outcome goals, metrics and scope of work
  - ii. It must give the right balance between multiple priorities
  - iii. It must provide sufficient information to let proposer know what a successful response looks like
  - iv. It must clearly align to proposal responses and submittals requested
  - v. It must be fair to all proposers, free of bias, consistent and not overly restrictive.
17. The Applicant further submits that the 1<sup>st</sup> Respondent has compromised the ex-parte applicant's legitimate expectation.
18. The Applicant places reliance on the case Nairobi JR-Misc Application E073/2023-R-V-Public Procurement Administrative Review Board, Iansoft Technologies Ltd, The Accounting Officer-National Cereals And Produce Board & Dynasoft Business Solutions Ltd borrowing from Elias JA of the English Court of Appeal in SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services Authority (2010) 2 CMLR 47 extensively discussed when time starts to run with respect to a breach in procurement proceedings.



19. In *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others* SC Petition Nos. 14, 14A, 14B & 14C of 2014 the court held as follows:

“Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation.”

20. Also in *Republic vs. Kenya Revenue Authority Ex parte Shake Distributors Limited HCMISC. Civil Application No. 359 of 2012* it was held that:

“On the issue of legitimate expectation, the Applicant submitted that it met all the prerequisite conditions and obtained all the documents necessary for the importation of sugar. The Applicant argued that it had received an assurance that after meeting the necessary conditions its legitimate expectation would be protected and not breached. In reply the Respondent submitted that it did not make any representation to the Applicant that it would clear its imports without imposing conditions permitted in law or release them on terms which contravene customs law or practice. According to Harry Woolf, Jeffrey Jowell and Andrew Le Sueur at page 609 of the 6th Edition of De Smith’s *Judicial Review*, ‘Such an expectation arises where a decision maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken)’. It follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner. For the promise to hold, the same must be made within the confines of law. A public body cannot make a promise which goes against the express letter of the law.”

21. The Applicant prays that this court allows its application with costs.

The 1<sup>st</sup> Respondent’s case;

22. The application is vehemently opposed through the Replying Affidavit sworn by James Kilaka on 15<sup>th</sup> January, 2025 and written submissions dated 20<sup>th</sup> January, 2025.
23. According to the 1<sup>st</sup> Respondent, on 22<sup>nd</sup> November 2024, the 2<sup>nd</sup> Respondent filed a Request for Review Application No. 116 of 2024 dated 21<sup>st</sup> November 2024 before the 1<sup>st</sup> Respondent - Request for Review No. 116 of 2024 seeking the following orders:
- a. A declaration that the Procurement Entity breached the requirements under the Tender Document.
  - b. A declaration that the Procurement Entity breached the provisions of the *Public Procurement and Asset Disposal Act*, 2015:
  - c. A declaration that the Procurement Entity breached Article 227(1) of *the Constitution*, 2010.
  - d. The decision of the Procuring entity dated 13th November 2024 to award the tender to the Interested Party be annulled and set aside forthwith.
  - e. The Applicant be declared the Lowest Evaluated Bidder in clusters 1,3, 4, 5 and 6, and the Tender for provision of cleaning, garbage management and gardening services for KENGEN premises for the year 2024-2026 (RE-TENDER) NO. KGN-ADM-007-2024 be awarded to the Applicant.



- f. An order do issue terminating any contract entered into by the Procuring Entity until the logical conclusion of this matter
  - g. The costs of this application be awarded to the Applicant in any event.
24. On 13<sup>th</sup> December, 2024, the 1<sup>st</sup> Respondent made the following orders:
- a. The letters of Notification of Intent to Award dated 13<sup>th</sup> November 2024 issued by the 1<sup>st</sup> Respondent to successful bidders with respect to Tender No. KGN- ADM-007-2024 for Provision of Cleaning, Garbage Management and Gardening Services for KenGen Premises for the Year 2024-2026 (Re-tender) be and are hereby cancelled and set aside.
  - b. The letters of Notification of Intent to Award dated 13<sup>th</sup> November 2024 issued by the 1<sup>st</sup> Respondent to the Applicant and to all other unsuccessful tenderers with respect to Tender No. KGN-ADM-007-2024 for Provision of Cleaning, Garbage Management and Gardening Services for KenGen Premises for the Year 2024-2026 (Re-tender) be and are hereby cancelled and set aside.
  - c. The 1<sup>st</sup> Respondent is hereby ordered to direct the Evaluation Committee of the Procuring Entity to admit the Applicant and all other bidders who progressed to the Financial Evaluation stage back into the procurement process and re-evaluate their tenders at the Financial Evaluation stage and proceed with the procurement process to its logical conclusion in accordance with the law while taking into account the findings of the Board in this decision.
  - d. For certainty, the re-evaluation ordered at C above shall be carried out and completed within 30 days from the date of this decision while taking note of the provisions of Section 175 of the Act.
  - e. Considering that the procurement process is not complete, each party shall bear its own costs in the Request for Review.
25. The Respondent's case is that in its decision it considered the parties' pleadings, documents, written and oral submissions, the list and bundle of authorities together with the confidential documents submitted to the Board pursuant to Section 67(3) (e) of the Act and it found without a doubt that any reference by the 2<sup>nd</sup> Respondent regarding the findings by the Procuring Entity in the 1<sup>st</sup> tender was time barred having been raised outside the statutory period of 14 days stipulated under Section 167(1) of the Act.
26. In Response to the issue on whether the Procuring Entity evaluated the 2<sup>nd</sup> Respondent's tender at the Financial Evaluation stage in strict compliance with the provisions of the Tender Document, the Act and *the Constitution*, the 1<sup>st</sup> Respondent took cognizance of:
- a. the relevant provisions of *the Constitution* (i.e. Article 227 of *the Constitution*), the Act (i.e. Sections 58, 60, 70, 80 & 86), Regulations 2020 (i.e. Regulation 77);
  - b. the Tender Document (i.e. Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 35 to 36 of the Tender Document; Stage 3. Financial Evaluation at page 39 of the Tender Document; Appendix 4 User Requirements – No. of Staff Required per Cluster, Station and Category was provided at page 202 to 203 of the Tender Document; Section VIII – General Conditions of Contract at page 174 of the Tender Document);



- c. Addenda to the Tender Document (i.e. Revised Appendix 8 Summary of Estimate Quantities of Detergents, Chemicals and Consumables Required per month was provided under Addendum No. 3 dated 2<sup>nd</sup> August 2024);
  - d. The Evaluation Report submitted as part of the confidential documents pursuant to Section 67(3)(e) of the Act; and the Tabulations used by the Evaluation Committee under Appendix 8 Summary of Estimate Quantities of Detergents, Chemicals and Consumables of the Tender Document; and
  - e. PPRRA Circular No. 07/2023 dated 27<sup>th</sup> October 2023.
27. It is its case that it established that the Evaluation Committee is under a duty to confine itself to the procedures and criteria set out in the Tender Document when evaluating bids and was thus left with the inevitable conclusion that the Evaluation Committee introduced extraneous criteria at the Financial Evaluation stage and therefore the Procuring Entity failed to evaluate the Applicant's bid at the Financial Evaluation stage in accordance with the procedures and criteria set out in the Tender Document as read with Section 86(1)(a) of the Act and Regulation 77(3) of Regulations 2020.
  28. The 1<sup>st</sup> Respondent avers that by dint of the of the discretionary power under Section 173(b) of the Act, it deemed it just and fair to order itself to direct the Evaluation Committee to re-admit the 2<sup>nd</sup> Respondent's tender and all other bidders' tenders which progressed to the Financial Evaluation stage back into the procurement process for re-evaluation at the Financial Evaluation stage and to proceed with the procurement process to its logical conclusion while taking into consideration its findings in it Decision, the provisions of the Tender Document, *the Constitution*, the Act and Regulations 2020.
  29. It further argues that it took into account provisions of Article 227 of *the Constitution*, the Act and Regulation 2020 and as such was well reasoned and was neither unreasonable, ultra vires, unlawful, misconceived, erroneous, irrational, nor in violation of the Ex parte Applicant's Legitimate Expectations.
  30. It is submitted that Review Board acted within powers under section 173 of the Public Procurement and Disposal Act, 2015 and mandate and did not divert from the same contrary to what is alleged in the instant suit.
  31. Reliance is placed on the case of Republic V Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR wherein the court held that;

“The reach of judicial review is now well established. In the case of Council Of Civil Service Unions V Minister For The Civil Service [1984] 3 ALL ER 935 Lord Diplock summarized the scope of judicial review thus:-

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action are subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.



By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"

(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means least he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals. The Court of Appeal in Grain Bulk Handlers Limited V J. B. Maina & Co. Ltd & 2 Others [2006] eKLR summarized the purpose of judicial review by stating that:-

"Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions."

From the foregoing it is clear that in judicial review, the court does not exercise its appellate powers. It mainly looks at the decision-making process to ensure that the citizen who has come into contact with an administrative body or tribunal has been treated fairly. But as observed by Lord Diplock in the already cited Civil Service Unions V Minister For The Civil Service case, the court can quash the decision if the same is so unreasonable to the extent that a reasonable tribunal addressing its mind to the facts of the case would not have arrived at such a decision. In doing so, I submit, the court will have descended into the arena of decision-making. For a court to justify such action it must be clearly obvious that the decision is truly and obviously unreasonable.

32. It further submits that it is incumbent upon a party in a judicial review application who seeks the issuance of any of the orders to prove breach or show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety as was held in the case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, it was held while citing Council of



Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479.

33. The 1<sup>st</sup> Respondent further submits that for an applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the applicant must demonstrate that there is indeed a mistake that goes to the jurisdiction of the tribunal. Misinterpretation of the law is not sufficient to move a judicial review application.
34. It also relies in the case of Kenya Pipeline Company Limited V Hyosung Ebara Company Limited & 2 Others (2012) e KLR and Republic Vs Kenya Power & Lighting Company Limited & Another [2013] eKLR where the learned Judge quoting a decision of the Court of Appeal stated:

“The Board considering all the arguments of the Applicant and made findings on each of these issues. The Board may have been wrong in its decision but this Court would be usurping the statutory function of the Board were it to substitute its own views for those of the Board”

### **The 2<sup>nd</sup> Respondent’s case;**

35. The 2<sup>nd</sup> Respondent relies in the Replying Affidavit sworn by Samuel Mburu Nganga on 15<sup>th</sup> January, 2025 and written submissions dated 21<sup>st</sup> January, 2025.
36. It is its case that the 2<sup>nd</sup> Interested Party by way of advertisement invited interested bidders to participate in Tender for Provision of Cleaning, Garbage Management and Gardening Services for KenGen Premises for The Year 2024-2026 Tender No. KGN-ADM-014-2023 which it participated in and they proceeded to fill in documents to participate in the said tender.
37. On the 25<sup>th</sup> of April 2024, the 2<sup>nd</sup> Respondent received a letter of regret from the Procuring entity indicating that all the lots reserved for People with Disabilities were awarded to the Ex Parte Applicant herein while those reserved for Youth were terminated and retendered and was now open for all AGPO groups.
38. Thereafter they submitted their bid for the re-tender in all the clusters for a total price of Kenya Shillings One Hundred and Twenty-Four Million, Five Hundred and Eighty-Four Thousand (Kshs. 124,584,000.00) under Tender For Provision Of Cleaning, Garbage Management And Gardening Services For KenGen Premises For The Year 2024-2026 (Re-Tender) No. Kgn-Adm-007-2024.
39. Subsequently they received a letter on 13<sup>th</sup> of November 2024 from the 2<sup>nd</sup> Interested Party on the outcome of the evaluation process that its bid had not been successful for the reason that it’s bid in cluster 1,2,3, and 5 was not the lowest evaluated and that its total bid price for cluster 6 was below the statutory minimum wage as per the *Labour Institutions Act* No.12 of 2007, Regulation of wages (Agricultural Industry (Amendment) Order2022 and minimum consumable items cost.
40. Aggrieved by this decision the 2<sup>nd</sup> Respondent filed with the 1<sup>st</sup> Respondent a Request for Review Application No.116 of 2024 which culminated in the ruling of 13<sup>th</sup> December 2024 where it held that the evaluation by the evaluation committee at the financial stage was derived from extraneous criteria that did not form part of the procedures and criteria in the tender document.
41. It is its case that in so doing, the 1<sup>st</sup> Respondent failed to evaluate the 2<sup>nd</sup> Respondent’s bid at the Financial evaluation stage in accordance with the procedures and criteria set out in the tender document as read with Section 86(1) (a) of the Act and Regulation 77(3) of the Public Procurement and Asset Disposal Regulations.



42. The 2<sup>nd</sup> Respondent contends that The 1<sup>st</sup> Respondent's order inter alia that the 2<sup>nd</sup> Interested Party do direct the Evaluation Committee to admit the Applicant and all other bidders who progressed to the Financial evaluation stage back into the procurement process and re-evaluate their tenders at the Financial evaluation stage and proceed with the procurement process to its logical conclusion in accordance with law.
43. It is its case that the Applicant has failed to illustrate how the Respondent's decision is illegal, irrational and marred with procedural impropriety or how the decision is illegal or ultra vires and outside the functions of the 1<sup>st</sup> Respondent.
44. Section 80 (2) & (3) (b) provides that the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and that each criterion shall be expressed so that it is applied, in accordance with the procedures.
45. The 2<sup>nd</sup> Respondent avers that 1<sup>st</sup> Respondent in arriving at its decision took cognizant of the above Sections of the law and found that the evaluation committee of the 2<sup>nd</sup> Interested Party fell short of the same, therefore the decision cannot be said to be irrational or erroneous as the same is well founded within the law.
46. The 2<sup>nd</sup> Respondent further argues that it had a legitimate expectation that the 2<sup>nd</sup> Interested Party would adhere to the criteria that was set out in the tender documents in the evaluation of the tenders, the failure to adhere to set criterion can only be established after the evaluation of tenders is done and not before.
47. It is its case that the only logical award made was for cluster 2 where the balance after labor costs of 27% and can cater for materials and leave a reasonable margin for the contractor and that going by the 2<sup>nd</sup> Interested Party's calculations as submitted at the Board level Cluster 6 has more than 50% of the price left after labor charges, however, as per the calculations of the 2<sup>nd</sup> Respondent 45.1% is left after the labor charges. It is therefore clear that the same is extremely overpriced and this being a service contract, the cost of consumables cannot exceed the labor charges.
48. It is further its case that the Applicant's tender documents had numerous errors and ought not to have passed the preliminary and technical evaluation to reach the financial stage. In a fair and transparent process, the Ex-Parte Applicant would have been kicked out at the preliminary stage.
49. It lists the inter alia the following errors/breach of mandatory requirements:
  - a. Mandatory requirement MR21 - the self-declaration form as submitted by the Ex-Parte Applicant was not duly filled as required as the same is not dated
  - b. Technical requirement TR2 - The ex-Parte Applicant provided a Nairobi County Government license for garbage transportation, licensing it in sub-counties of Dandora and Mavoko dumpsites which do not exist in Nairobi
  - c. Technical requirement TR3 - The Ex-Parte provided a copy of a vehicle lease dated 22<sup>nd</sup> December 2022 and is valid for one year and thus expired on 23<sup>rd</sup> January 2023.
  - d. technical requirement TR9 - the Ex-parte Applicant lacked training in first aid and/or fire marshals.
  - e. The Ex-Parte Applicant's cluster 6 prices had a number of errors which the evaluation committee ignored. The subtotal for Gogo station is not a sum of all the prices from part A to E, the monthly subtotal is less by Kenya Shillings Fifty Five Thousand (Ksh.55,000).



- f. the subtotal per month was wrongly computed resulting to Kenya Shillings Two Hundred and Fifty Thousand (Ksh. 250,000) before VAT instead of Kenya Shillings Three Hundred and Thirty Thousand (Ksh.330,000). Therefore factoring the wrong calculations the total cost for cluster 6 on page 113 gives a sum of Kenya shillings Fifty one Million, Three Hundred and Thirty Six Thousand, Nine Hundred and Sixty Shillings (Ksh. 51,336,960.00) and not the awarded total price of Kenya Shillings Forty Seven Million, Five Hundred and Seventy Eight Thousand Five Hundred and Sixty Shillings (Ksh.47,578,560.00).
50. It strongly believes that the 1<sup>st</sup> Respondent's decision is illegal, irrational, and unreasonable.
51. In its submissions it refers to Sections 28 and Section 173 of the *Public Procurement and Asset Disposal Act* to the effect that the 1<sup>st</sup> Respondent cannot to be said to have acted ultra vires.
52. Reliance is placed on the case of Republic v Public Procurement Administrative Review Board & 3 others, Ex Parte Applicant Korea Expressway Corporation (KEC) Judicial review Misc. Application E012 & E016 of 2022.
53. It is argued that Ex-Parte Applicant has failed to demonstrate how the 1<sup>st</sup> acted Respondent unreasonably, unlawfully or irrationally.
54. The 2<sup>nd</sup> Respondent argues that in determining the matter, the 1<sup>st</sup> Respondent was guided by Article 227 (1) of *the Constitution* and Section 80(2) of the Act which provides that the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents.
55. In the case of OJSC Power Machines Limited, Transcentury Limited, and Civicon Limited v Public Procurement administrative review Board Kenya, Electricity generating Company Limited (KENGEN) Civil Appeal 28 of 2016, the Court held that;

“the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceedings. Put in another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters.”

...“the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question.”

...

“to justify interference with the decision of a public body, the court must be satisfied that that decision is so grossly unreasonable, so outrageous in defiance of logic or acceptable moral standards that no reasonable authority or body addressing itself to the facts and the law



would have arrived at it. This is what has come to be known as the Wednesbury principle in Judicial review.”

56. It is submitted that the Ex-parte Applicant’s application is an appeal disguised as a judicial review to the extent that it seeks a different outcome on the merits of the 1st Respondent’s decision.
57. It is also submitted that the 2<sup>nd</sup> Interested Party evaluation committee did not adhere to their own evaluation criteria as the same is overpriced and the subject Tender being a service contract, the cost of consumables cannot exceed the labor charges.
58. The 2<sup>nd</sup> Respondent argues that the aspect of awarding using a conflicting criterion does not inspire confidence in tendering process and creates doubt as to whether the process carried out by the 2<sup>nd</sup> Interested Party evaluation committee was fair and transparent.
59. It is their case that 2<sup>nd</sup> Interested party’s evaluation committee on one hand were awarding tenders to bidders who had quoted extremely low prices eliminating the 2<sup>nd</sup> Respondent’s tender on grounds that the price quoted for cluster 6 was below the statutory minimum wage as per the *Labour Institutions Act* No. 12 of 2007 and the Regulation of wages (Agricultural Industry (Amendment) Order, 2022 and minimum consumable items cost.
60. It is submitted that the 2<sup>nd</sup> Respondent’s tender was well within the minimum wage as per the *Labour Institutions Act* no. 12 of 2007 and the Regulations of Wages (Agricultural Industry) (Amendment) Order, 2022 and minimum consumable items cost and by introducing a new criterion in order to favour other bidders the 2<sup>nd</sup> Interested Party evaluation committee kicked out the 2<sup>nd</sup> Respondent’s bid.
61. In the case of Republic v Public Procurement Administrative Review Board & 4 others Ex Parte BRITAM Life Assurance Company (K) Limited & another (2018) eKLR where Mativo J held that;  

“...in public procurement regulation it is a general rule that procuring entities should consider only conforming compliant or responsive tenders. Tenders should comply with all the aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents...”
62. It is their case that 2<sup>nd</sup> Respondent and all other bidders had the legitimate expectation that the 2<sup>nd</sup> interested party in evaluating the tender will use the financial criteria set out in its tender document. However, they failed to do so and therefore the decision of the 1<sup>st</sup> Respondent of 13<sup>th</sup> December 2024 is merited.

#### **1<sup>st</sup> and 2<sup>nd</sup> Interested Parties case;**

63. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party filed a Replying Affidavit and Further Affidavit by Vincent Nyamweya Mamboleo , sworn on 6<sup>th</sup> January, 2025 and 14<sup>th</sup> January, 2025 respectively and written submissions dated 20<sup>th</sup> January, 2025.
64. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties aver that they are Kenya’s leading electricity generating company and the Procuring Entity that advertised Tender No. KGN- ADM-007-2024 for Provision of Cleaning, Garbage Management and Gardening Services for KenGen Premises for the Year 2024-2026 (Re-tender) in respect of the following areas of its operations Garissa, Ngong, Kipevu I, Kipevu III and Steam Plant, Turkwel, Gitaru, Kiambere, Kindaruma, Ndula, Gogo, Sondu, Sangoro, Muhoroni and Sosiani Power Stations which services are crucial to the performance of its mandate.



65. It is their case that the tender was opened, evaluated and awarded in accordance with: the guiding principles of public procurement enshrined in Article 227(1) of *the Constitution* of Kenya (2010) and the Laws of Kenya, namely, procurement and in line and a fair, equitable, transparent, competitive and cost- effective manner ,the requirements set out in the tender document, the provisions of the *Public Procurement and Asset Disposal Act* (2015) and the Public Procurement and Asset Disposal Regulations (2020).
66. It their case that the Ex Parte Applicant was the successful tenderer in respect to Tender No. KGN-ADM-007-2024 for the provision of Cleaning, Garbage Management, and Gardening Services for KenGen Premises for the Year 2024-2026 (Re-Tender) as per the Letter of Notification of Intention to Award dated 13/11/2024.
67. The Letters for Notification of Award and Letters of Regrets were sent to the respective tenderers on 13<sup>th</sup> November 2024.
68. Dissatisfied with the procurement process the 2<sup>nd</sup> Respondent lodged a Request for Review No. 116 of 2024 to the Public Procurement & Administrative Review Board.
69. The matter proceeded to hearing of the Review Application and the 1<sup>st</sup> Respondent delivered its ruling on 13<sup>th</sup> December 2024.
70. It is their case that the 1st Respondent reached this decision by claiming that they used extraneous factors to evaluate the subject tender by allegedly failing to provide the total sums/costs for consumables to bidders for Cluster 2 and 6 of the subject Tender.
71. Aggrieved with the Board' Ruling, the Ex-parte Applicant filed the instant suit. They contend that 1<sup>st</sup> Respondent erroneously found in Review Application No. 116 of 2024 dated 13th December 2024 that the Procuring Entity failed to evaluate the 2<sup>nd</sup> Respondent's bid and other bidders at the Financial Evaluation stage in accordance with the criteria set out in the Tender Document as read with Sections 58(1), 60(1), 70(3), 80, and 86(1)(a) of the *Public Procurement and Asset Disposal Act*, (2015) and Regulation 77(3) of Regulations 2020 of the Laws of Kenya.
72. In the erroneous decision, the 1<sup>st</sup> Respondent laid too much emphasis on the successful tenderer being the bidder with the lowest evaluated price as defined in Section 86(1)(a) of the *Public Procurement and Asset Disposal Act* (2015) and disregarded the requirements of Section 135(2) of the *Public Procurement and Asset Disposal Act* (2015) which requires the Accounting Officer of a Procuring Entity to enter into a contract with the person submitting the successful tender based on the tender document and any clarifications that emanate from the procedural proceedings.
73. Further, the 1<sup>st</sup> Respondent did not take cognizance of the Mandatory requirements in the Tender Document. They argue that 1<sup>st</sup> Respondent's finding at paragraph 9 is irrational, unfounded and a gross misrepresentation as the Evaluation Criteria as set out in the Tender Document.
74. It is their case that they adhered to the requirements of Sections 58(1), 60(1), 70(3), 80, and 86(1)(a) of the *Public Procurement and Asset Disposal Act*, (2015) and Regulation 77(3) of Regulations 2020 of the Laws of Kenya, in its Financial Evaluation by:
  - a. Providing objective and quantifiable evaluation criteria in the tender document, the addendums and the clarifications thereto, which are mentioned in paragraph 8 above;
  - b. Considering not only the bidder's price but also aspects of quality services to be provided by the successful bidders through requiring bidders in the tender document to make a provision for consumables in their bid price; and



- c. Requiring bidders, as per the requirements of the tender document, to adhere to applicable statutory minimum wages to ensure compliance with the Laws of Kenya.
75. It is also their case that the 2<sup>nd</sup> Interested Party, in its previous similar tenders observed that bidders quoted very low prices which did not adequately factor the costs of consumables which resulted in either the provision of low-quality cleaning materials and consumables such as toiletries and floor cleaning detergents, or the none provision of most consumables thus compromising the 2<sup>nd</sup> Respondent's statutory duty under the *Employment Act* (226) of the Laws of Kenya to provide a clean and safe working environment for its employees, contractors, and sub-contractors which include suitable power plant and sanitary facilities, among other facilities.
76. They also argue that the 1<sup>st</sup> Respondent, in its decision, acted ultra vires and usurped the mandate of the 2<sup>nd</sup> Interested Party by altering the requirements of the tender document and guiding on the manner of evaluating the tender which acts are solely reserved for the 2<sup>nd</sup> Interested Party through the Tender Evaluation Committee as stipulated under Section 80 of the *Public Procurement and Asset Disposal Act* (2015).
77. Reliance is placed in the case of Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR the Learned Judge JM Mativo defined the purpose of competitive bidding to be.
78. They submit that it is not contested that all bidders submitted signed the Tender document acknowledging that they understood that consumables were to be considered in the assessment of their Bids.
79. It their submission that disclosure to the bidders of the market survey prices for consumables by the Review Board in their decision dated 13.12.2024 is akin/tantamount to giving a leakage/cheat sheet that could have rendered the procurement process uncompetitive in violation of the procurement principles under Article 227 (1) of *the Constitution* and Section 80 of the PPADA 2015.
80. Reliance is placed in the case of Republic vs. Public Procurement Administrative Review Board & 2 Others ex parte Numerical Machining Complex Limited [2016] eKLR where the court stated;
- “Therefore, where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies”
81. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties refute that the Review Board made any finding that the minimum wage rate/cost per cluster applied by the evaluation committee was erroneous and/ or that market prices for the items/consumables under Appendix 8 were erroneous/ exaggerated or that they were selectively disclosed to any of the Bidders to the exclusion of the Applicant before the Review Board thus occasioning prejudice.
82. They contend that all bids were uniformly subjected to the same evaluation criteria set out in the tender documents in respect of all clusters in line with Article 227 of *the Constitution*.



83. In the case of Republic v Public Procurement Administrative Review Board & 2 others Ex parte Coast Water Services Board & another [2016] eKLR the Court stated at para 124 that:

“In my view, the consideration of the lowest tender as a form of cost effectiveness does not infer that the Procuring Entity must go for the lowest tender no matter the results of the evaluation of the bid. Therefore, apart from the lowest tender, the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest. It ought to be emphasized that section 66(4) of the repealed Act talks of the lowest evaluated price, as opposed to merely the lowest price. The issue of price must therefore follow an evaluation in accordance with the Tender document.”

84. It is their case that the 1st Respondent’s decision is unreasonable, irrational, ultra vires and contrary to constitutional and statutory provisions, therefore, its decision should be quashed, and the 2<sup>nd</sup> Interested Party’s Letter of Award dated 13<sup>th</sup> November 2024 should be upheld with costs to follow the event.

#### **Analysis and Determination;**

85. From the application, the affidavits and the parties’ rival submissions, the court finds the following to be the issues for determination;

- i. Whether the 1<sup>st</sup> Respondent’s decision is ultra vires, illegal and irrational; and unlawful per incurium.
- ii. Whether the 1<sup>st</sup> Respondent’s decision compromised the Ex – Parte Applicant’s Legitimate Expectation.
- iii. Who bears costs.

#### **Whether the 1<sup>st</sup> Respondent’s decision is ultra vires, illegal and irrational; and unlawful per incurium.**

86. In the Ugandan case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 in which the Court citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and an Application by Bukoba Gymkhana Club [1963] EA 478 at 479 held that:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe



procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

87. I have looked at the impugned decision of 13<sup>th</sup> December, 2024 and in particular from Page 47 to page 62 where the Board found that the Procuring Entity’s Evaluation Committee went outside the evaluation criteria contained in its own Tender Document in Evaluation of the Applicant’s tender at the Financial Evaluation stage holding the procuring entity in breach of the provisions of Article 227 (1) of *the Constitution*, Section 80 (2), 86 (1) (a) of the Act as read with Regulation 77(3) of the Act.
88. Section 173 of the *Public Procurement and Asset Disposal Act* stipulates that:
- “Upon completing a review, the Review Board may do any one or more of the following—
- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
  - (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
  - (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
  - (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
  - (e) order termination of the procurement process and commencement of a new procurement process.”
89. The Applicant’s main bone of contention is that the Respondent erroneously found that the procuring entity failed to evaluate the 2<sup>nd</sup> Respondent’s bid at the financial evaluations stage in accordance with the procedures and criteria set out in the Tender document as read with section 86(1)(a) of the Act and Regulation 77(3) of the *Public Procurement and Asset Disposal Act*.
90. It is the Applicant’s argument that the 1<sup>st</sup> Respondent is not statutorily mandated to prescribe an Evaluation Criteria for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties and neither can it purport to standardize the latter’s pricing
91. In response, the Respondent argues that it’s decision dated 13<sup>th</sup> December 2024 took cognizance of relevant provisions of *the Constitution* (i.e. Article 227 of *the Constitution*), the Act (i.e. Sections 58, 60, 70, 80 & 86), Regulations 2020 (i.e. Regulation 77)
92. The 1<sup>st</sup> Respondent further argues that its decisions were sound and not per incurium as alleged by the Ex parte Applicant.
93. It is the 2<sup>nd</sup> Respondents argument that the Applicant has failed to illustrate how the Respondent’s decision is illegal, irrational and marred with procedural impropriety or how the decision is illegal or ultra vires and outside the functions of the 1<sup>st</sup> Respondent.
94. The Interested Parties in response argue that the 1st Respondent reached its decision by using extraneous factors to evaluate the subject tender.
95. They further argue that the 1<sup>st</sup> Respondent erroneously found that the Procuring Entity failed to evaluate the 2nd Respondent’s bid and other bidders at the Financial Evaluation at the Financial



Evaluation stage in accordance with the criteria set out in the Tender Document as read with Sections 58(1), 60(1), 70(3), 80, and 86(1)(a) of the *Public Procurement and Asset Disposal Act*, (2015) and Regulation 77(3) of Regulations 2020 of the Laws of Kenya.

96. Section 80 (2) of the *Public Procurement and Asset Disposal Act* provides as follows:

...

2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

Section 86 (1) (a) The successful tender shall be the one who meets any one of the following as specified in the tender document— (a) the tender with the lowest evaluated price.

97. In the case of *Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Exparte Applicant; Kenya Ports Authority & Accounting Officer-Kenya Ports Authority (Judicial Review E002 of 2021)[2021] KEHC 8109 (KLR)(5 March 2021)* upheld by the Court of Appeal in *Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others [2021] eKLR* the Court observed as follows;

“Under section 173(a)(b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer.”

98. In the instant case the 1<sup>st</sup> Respondent was ordered to direct the Evaluation Committee of the Procuring Entity to consider the 2<sup>nd</sup> Respondent and all other bidders who progressed to the Financial stage into the procurement process and to re-evaluate their tenders.

99. In my opinion in doing so the Respondent was acting within its powers as envisaged under Section 173 of the Act.

100. In *Chief Constable of North Wales Police versus Evans (supra)* where Lord Brightman said at page 1173F and 1174G where the court held thus:

“Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.”

Lord Hailsham stated in the same case that:

“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court.”



101. Further in the case of *Republic v Public Procurement Administrative Review Board & 2 others; Niavana Agencies Limited (Exparte) (Application E001 of 2024)* [2024] KEHC 1595 (KLR) Ngaah, J held thus:

“The court must not cross that boundary between administration whether good or bad which is lawful and what is unlawful performance of a statutory duty.

As far as interrogation of facts is concerned, I need not belabor the point that for the same reason that a judicial review court cannot substitute its decision for that of a tribunal on matters of law, it cannot do so also on matters of fact. On this point I would adopt the reasoning of the Court of Appeal in *OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others* [2017] eKLR Civil Appeal No. 28 of 2016: Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See *Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited* (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body’s decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision”

102. I am not satisfied that the Applicant herein has made out a case that is strong enough as to persuade the court to exercise my discretion and grant any of the orders certiorari as sought and I so hold.
103. The Applicant also argues that there was a breach of legitimate expectation by the 1<sup>st</sup> Respondent.
104. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken.
105. Procedural fairness as contemplated by the *Fair Administrative Action Act* and Article 47 of *the Constitution* demands a right to be heard before a decision affecting one’s right is made.
106. The Court of Appeal in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR held that the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50(1) (2) of *the Constitution*. It held: - first, fair administrative action broadly refers to administrative justice in public administration. Second, it is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. Third, the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law. Fourth, fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies.
107. The Ex-parte Applicant was part of the proceedings in Public Procurement Administrative Review Board Application Review Application no. 116/2024.



108. In Republic v *Kenya Revenue Authority; Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021)* [2022] KEHC 5 (KLR) (24 January 2022) (Judgment) Mativo, J held thus:

“The first step in the analysis has both an objective and a subjective dimension. First, it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not.<sup>50</sup> Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual’s expectation.

The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.<sup>51</sup> Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.<sup>52</sup> Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows: -

Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public’s fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices.”

109. According to De Smith, Woolf & Jowell, “Judicial Review of Administrative Action” 6<sup>th</sup> Edn. Sweet & Maxwell page 609:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

110. In Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR paragraph 55, it is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate “in the sense of an expectation which will be protected by law”. This was the view adopted in *Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others* [2014] eKLR where it was held that:

“...legitimate expectation, however strong it may be, cannot prevail against express provisions of *the Constitution*. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends *the Constitution*, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise.”

111. The Applicant has not established nor demonstrated how that its right to legitimate expectation was been violated.

112. The Applicant also sought an order that this Honorable Court be pleased to grant the ex-parte applicant an order of prohibition to stop the 1<sup>st</sup> Interested Party from directing the Evaluation



Committee of the Procuring Entity from admitting the 2<sup>nd</sup> respondent and all other bidders who progressed to the Financial Evaluation stage back into the procurement process and re-evaluating their tenders at the Financial Evaluation stage and proceed with the procurement process while taking into account the findings of the Board in this decision.

113. In order to determine this issue of Prohibition, I am guided by the case of Kenya National Examination Council versus Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the Court stated the grounds upon which such an order of prohibition may issue as follows;

“What does an order of prohibition do and when will it issue” It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY & S LAW OF ENGLAND, 4th Edition, and Vol.1 at pg. 37 paragraphs 128”.

114. Based on the finding that the Applicant is not entitled to the orders of certiorari, granting the order of prohibition will achieve no useful purpose and I proceed to hold as such.

#### **Who will bear the Costs of this Application?**

115. In the case of Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR, we stated as follows:

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior to, during, and subsequent-to the actual process of litigation.” Petition of Appeal No.18 of 2019 -3- [4] We further stated as follows: “... in the classic common law style, the Courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs ...” [5] On discretion, we stated thus: “Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”

116. . In the instant suit, this court has noted that the procurement process is yet to be completed. In exercise of my discretion I hereby hold that each party shall bear its costs.



**Disposition;**

117. The Applicant has not demonstrated how the decision complained of is tainted with illegality, irrationality and procedural impropriety.

Order;

- i. The application dated 24<sup>th</sup> December, 2024 is hereby dismissed.
- ii. Each party shall bear its costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY, 2025.**

.....

**J.M. CHIGITI (SC)**

**JUDGE**

