



**Republic v Public Procurement Administrative Review Board & 2 others;
Spic & Span Cleaning Service Limited (Interested Party); Paramax Cleaning
Services Limited (Exparte Applicant) (Judicial Review Application E008 of 2025)
[2025] KEHC 1096 (KLR) (Judicial Review) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E008 OF 2025
RE ABURILI, J
FEBRUARY 27, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

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

**THE ACCOUNTING OFFICER, KENYATTA INTERNATIONAL
CONVENTION CENTRE 2ND RESPONDENT**

KENYATTA INTERNATIONAL CONVENTION CENTRE .. 3RD RESPONDENT

AND

SPIC & SPAN CLEANING SERVICE LIMITED INTERESTED PARTY

AND

PARAMAX CLEANING SERVICES LIMITED EXPARTE APPLICANT

JUDGMENT

1. Pursuant to the leave to apply granted on 21/1/2025 vide JR MISC No. E009 of 2025, The ex parte applicant before this court filed a notice of motion application dated 21st January 2025 in this matter seeking judicial review orders of certiorari, mandamus and Declaration. The Notice of motion was brought under Order 53 Rule 3(1) of the Civil Procedure Rules and Sections 8 and 9 of the [Law Reform Act](#).



2. In the motion, the ex parte applicant sought the following orders:
 - a. An order of certiorari to remove the whole of the decision of the Public Procurement Administrative Review Board in the Request for Review Application No. 128 of 2024 contained in the decision delivered and dated 14th January 2024, (sic) into the High Court for the purpose of its being quashed.
 - b. An order of mandamus directed to the Accounting Officer Kenyatta International Convention Centre, to complete the procurement process of Tender No. KICC/05/2024-2026, for the Provision of Cleaning and Garbage Collection Services and award the Ex Parte.
 - c. In the Alternative, an order of mandamus directed to the Public Procurement Administrative Review Board to hear afresh and determine, on Merit according to law, the Application for Review No. 128 of 2024 dated and filed on 24th December 2024, as required by the *Public Procurement and Asset Disposal Act*, 2015.
 - d. A declaration that the decision of the Public Procurement Administrative Review Board in Review Application No. 128 of 2024 contained in the decision delivered and dated 14th January 2025 was invalid, void, and of no effect.
 - e. An order of payment of damages to the Ex parte (sic) arising from the matters herein and interest thereon.
 - f. An order for costs.
 - g. Such further and other relief be granted to the applicant as this court deems fit.
3. The application is supported by a statutory statement dated 20th January 2025 and an affidavit verifying the facts sworn on the even date by Duke Machongo Omori who introduces himself as one of the directors and chief executive officer of the ex parte applicant.
4. A brief factual background of the matter is that the third respondent, Kenyatta International Convention Centre hereinafter called the Procuring Entity advertised a tender for the provision of Cleaning and Garbage Collection Services vide Tender No. KICC05/2024-2026, and closed on the 14th November 2024.
5. Paramax Cleaning Services Limited, the Exparte applicant participated in the tendering process and on 11th December, 2024, the 3rd respondent procuring entity wrote to the exparte applicant notifying it that its tender or bid was unsuccessful for reasons that the exparte applicant was not the lowest bidder/ tenderer
6. Aggrieved by that decision as contained in the notification, the exparte applicant lodged its request for review No.128 of 2024 dated 24th December, 2024 on the same date before the 1st Respondent Public Procurement Administrative Review Board.
7. The 2nd and 3rd respondents herein opposed the request for review by filing a reply signed by Mr James Mbugua Mwaura dated 2nd January 2025 and filed on 3rd January 2025. This was followed by the exparte applicant filing a further reply dated 6th January 2025 on the same date.
8. On 3rd January 2025, the respondents also filed a preliminary objection to the request for review, contending that the supporting affidavit to the request for review is fatally defective and seeking the striking out of the said request for review in limine. I note that there were two preliminary objections



- filed on the same day but one was withdrawn giving way for the other as the first one had named different parties who were not parties to the proceedings before the PPARB).
9. The preliminary objection was opposed by the ex parte applicants herein who filed a response on 6th January 2025 and seeking for the dismissal of the preliminary objection.
 10. The Request for Review was heard simultaneous with the preliminary objection and determined and on 14th January 2025 by the 1st respondent which made the following impugned orders:
 - a. The 2nd Respondents Preliminary Objection dated 2nd January 2025 be and is hereby upheld;
 - b. The Request for Review dated 24th December 2024 be and is hereby stuck out;
 - c. The 1st Respondent be and is hereby directed to oversee the proceeding in Tender No. KICC/05/2024-2026 for Provision of Cleaning and Garbage Collection Services to their logical and lawful conclusion.
 - d. Each party shall bear its own costs.
 11. I reiterate that the respondents' preliminary objection sought for the dismissal of the Request for Review on grounds that the evidence in support of the Review was based on an affidavit that was fatally defective.
 12. In its determination, the 1st respondent from paragraphs 80 correctly analysed what the law and judicial pronouncements provide in instances where the affidavit before the court only had a stamp by a commissioner for oaths, but the commissioner had not commissioned or signed the same. The 1st respondent also relied on several decisions by the Court of Appeal and the High Court to support its position of allowing the preliminary objection on grounds that the ex parte applicant's affidavit was fatally defective.
 13. In the instant Judicial Review proceedings, the ex parte applicant argues that the 1st respondent erred in dismissing its request for review without hearing the merits. According to the applicant, the 1st respondent abdicated its responsibility by denying the applicant access to justice by raising jurisdiction issues without delving into the merits of the application for review, contrary to Article 48 of *the Constitution*.

Analysis and Determination

14. I have considered the ex parte applicant's Notice of motion and the opposition by the respondents. The main issue for determination is whether the orders sought in the notice of motion application ought to be granted.
15. I observe that there was no response from the Interested Party despite service having been affected as evidenced by the affidavit of service dated 27th January 2025.
16. I further observe that the applicant refers to the decision of 14th December 2024 but all documents filed show that the decision which is impugned was made on 14th January 2025. I am aware that 14th January was at the commencement of the new year and more often than not, most people write the previous year at the beginning of the new year before they get used to the new year. I therefore shall treat the December 2024 to be a typo which is curable by an amendment on the court's own motion as the amendment shall not occasion any prejudice to the respondents or interested party. This amendment



is allowed under section 100 of the Civil Procedure Act on the General power to amend. The section provides:

“ 100. The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

17. I will then proceed to first determine the question of whether the 1st respondent should have determined the request for review on merit as opposed to determining it on the basis of a preliminary objection and therefore whether the ex parte applicant’s right to access justice under Article 48 of the Constitution was denied.

18. To answer the above question, I must ask, what is a preliminary objection and in what circumstances should it be taken up. The case of Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696 is the locus classicus one on the issue of what constitutes a preliminary objection where their Lordships observed thus:

“ ---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

19. In the same case Sir Charles Newbold, P. stated:

“ a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

20. The question is whether the Preliminary Objection as raised was properly raised. Although the objection was not a jurisdictional one, but in my humble view, the preliminary objection raised on account that the pleadings or affidavit in support of the request for review was fatally defective and as argued, was a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and was capable of disposing of the entire request for review without delving into the merits thereof. If the issues raised in the preliminary objection would require merit review of the dispute to determine whether the preliminary objection meets the threshold on the Mukisa Biscuit Manufacturing case, then it ceases to be a preliminary objection.

21. I am therefore satisfied that the preliminary objection was well taken and a determination made on the same instead of a merit determination. This because the Review Board was merely adhering to the law by not accepting an affidavit that is not commissioned though signed by the ex parte applicant’s deponent. Arguably, the requirement for depositions and commissioning of affidavits is aimed at maintaining the integrity of legal proceedings and preventing fraudulent manipulation of evidence.

22. The only issue is whether that preliminary objection was merited in the circumstances of this case. I shall therefore set out the legal foundation for filing of request for review and the manner of filing of such request, to establish whether there is a requirement for filing of an affidavit and if not, whether



the document which the Review Board correctly found to be a defective affidavit was validly on record to sustain the request for review.

23. The legal foundation for filing of a request for review is Section 167 of the *Public Procurement and Asset Disposal Act*, which provides as follows:

“167. Request for a review

1. Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.
- (2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract:
Provided that this shall not apply to tenders reserved for women, youth, persons with disabilities and other disadvantaged groups.
- (3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.
- (4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—
 - (a) the choice of a procurement method;
 - (b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and
 - (c) where a contract is signed in accordance with section 135 of this Act.”

24. The manner prescribed for the lodging of the request for review is provided for in the Public Procurement and Asset Disposal Regulations. Regulation 203 of the Public Procurement and Asset Disposal Regulations, 2020 provides, or sets out the manner in which an aggrieved bidder or tenderer, may seek administrative review before the 1st respondent Board.

25. The Regulation provides as follows:

1. A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.
2. The request referred to in paragraph (1) shall—
 - a. state the reasons for the complaint, including any alleged breach of *the Constitution*, the Act or these Regulations;



- b. be accompanied by such statements as the applicant considers necessary in support of its request;
 - c. be made within fourteen days of—
 - i. the occurrence of the breach complained of, where the request is made before the making of an award;
 - ii. the notification under section 87 of the Act; or
 - iii. the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.
 - d. be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.
3. Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.
 4. The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.
26. The format for the request for review is set out in the Fourteenth Schedule of the Regulations and is as follows:

Fourteenth Schedule [r. 203(1)]

Form For Review

Public Procurement Administrative Review Board
Application No. ... of .. 20
between
Applicant (Review Board)
and
Respondent (Procuring Entity)

Request for review of the decision of the (Name of the Procuring Entity) of dated the day of 20 in the matter of Tender No. of 20 for (Tender description)

Request for Review

I/We the above-named Applicant(s) of address Physical addressP O Box No. Tel No.Emailhereby request the Public Procurement Administrative Review Board to review the whole/part of the above mentioned decision on the following grounds namely:-1.2.By this memorandum the Applicant requests the Board for an order/orders that:

1.2.



Signed (Applicant) Dated on day of .. / 20

For Official Use Only

Lodged with the Secretary Public Procurement Administrative Review Board onday of 20

Signed

Board Secretary

27. Under Regulation 203 (2) (b) above, the request in the form reproduced above shall be accompanied by such statements as the applicant considers necessary in support of its request.
28. Having reproduced the sections of the law and Regulation governing the filing of requests for review and the manner in which the same ought to be filed, it is important to identify whether under any of the above provisions, there is a requirement for the request for review to be in the form of or to be accompanied by or supported by an affidavit.
29. The answer to the above question is an obvious NO. Nothing under the above provisions mandates or directs that the aggrieved party is required to file a request for review supported by an affidavit. If anything, Regulation 203 (2)(b) specifies that the request for review shall be accompanied by such statements as the applicant considers necessary in support of its request. The question is, can the statement referred to in the said Regulation be said to be an affidavit?
30. Nowhere in above provisions is there a requirement for the applicant in a request for review to support the same with a statement confirmed by oath or affirmation.
31. What then is an affidavit and what distinguishes it from a statement?
32. The Black Law's dictionary 6th Edition defines an affidavit as follows:

“A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. State v. Knight, 219 Kan. 863, 549 P.2d 1397, 1401. See also Certification; Jurat; Verification”
33. Similarly, the Britannica defines an affidavit as:

“A written statement of fact made voluntarily, confirmed by the oath or affirmation of the party making it, and signed before a notary or other officer empowered to administer such oaths.
34. From the above definitions, an affidavit is a sworn statement put in writing. When you use an affidavit, you're claiming that the information within the document is true and correct to the best of your knowledge. That affidavit must be signed by both the deponent and the person administering an oath.
35. As to what a statement is, as contradistinguished from an affidavit, the Oxford Dictionary defines a statement as: '1.a definite or clear expression of something in speech or writing.' Collins English Dictionary defines a statement as 'something that you say or write which gives information in a formal or definite way.' The Thesaurus defines statement as 'a communication or declaration in speech or writing, setting forth facts, particulars, etc.'
36. In a legal context, a statement can refer to a pleading or a written document submitted to provide information, such as a witness statement or a statement given to the Police. Statements are often used informally and may not carry the same legal weight as statutory declarations or affidavits.



37. Nowhere in those definitions does the term statement refer to it being an affidavit or even being on oath.
38. In pleadings, say by way of a petition of appeal or plaint, unless a specific statute requires the filing of an affidavit to support that pleading, such as in the case of a verifying affidavit accompanying a plaint or an Originating summons under sections 17,18,37 and 38 of the *Limitation of Actions Act* and Order 36 Rule 3D of the Civil Procedure Rules requiring that such pleadings be supported by affidavits, no Court of law or tribunal should impose its own terms and conditions on parties to file such affidavits.
39. Such imposition is an unnecessary added burden to litigants and are what I would call an overreach and procedural technicalities intended to deny the parties access to justice contrary to the constitutional guarantees in Article 48 which guarantees every person the right to access to justice and Article 159 (2) (d) which mandates Courts, in exercise of judicial authority derived from the people of Kenya to ensure that justice is administered without undue regard to procedural technicalities.
40. Thus, there is a whole world difference between having a requirement to file a request for review with a statement and filing an affidavit in support of the request for review. Where there is a requirement for an affidavit to be filed, there should be no question about it. The affidavit must be an affidavit as defined, being a statement made on oath. Anything short of that would be a mere statement and unless signed, it is not authenticated. It would be no statement at all, akin to the requirement under Order 2 Rule 16 of the Civil Procedure Rules that 16 “Every pleading shall be signed by an advocate, or recognised agent (as defined by Order 9, Rule 2), or by the party if he sues or defends in person.”
41. Signing of pleadings is for ownership and authentication, to ensure that a party or their Advocate is responsible for the contents.
42. All said and done, it follows that where the statute does not provide for the filing of an “affidavit” means that a specific law or legal provision does not mandate the use of an affidavit in a particular situation, thereby allowing for information to be presented to the court through alternative methods, such as a simple written statement or oral testimony, depending on the circumstances of each case.
43. In my humble view, therefore, when a statute does not require an affidavit, it essentially means that a person is not legally obligated to swear an oath to the truth of their statements in that specific context, and whether an affidavit is needed often depends on the type of legal proceeding and the specific rules of the court involved.
44. In the instant case, I have demonstrated that there is no legal requirement for filing of an affidavit in support of the request for review to the Review Board. Accordingly, the affidavit which was filed by the exparte applicant, which was not commissioned but which was signed by the exparte applicant’s representative, became a statement for purposes of the request for review as the defect thereof did not invalidate the request for review, there being no legal requirement for an affidavit to be filed to support such request for review.
45. In the case of *Sylvanus Okiya Ongoro v Director of Criminal Investigations, Officer Commanding Station Bondo Police Station, Director of Public Prosecutions, Attorney General & Peter Owiti Okuna* [2020] KEHC 5855 (KLR), an issue arose to the effect that the supporting and supplementary affidavits in support of a constitutional petition were fatally defective. This Court sitting at Siaya High Court found that indeed, the two affidavits were fatally defective and proceeded to strike them out and observed as follows:

74. I must at this stage mention something about the Supplementary Affidavit filed in this court on 3/3/2020 and the supporting Affidavit of the petitioner



The said Supplementary affidavit is said to be commissioned by J.M Mutisya Advocate and Commissioner for oaths of Nairobi yet the affidavit is said to be sworn by the petitioner at Siaya County! The affidavit is obviously drawn at Nairobi by the petitioner's counsel, commissioned without the signature or presence of the petitioner and brought to Siaya for the petitioner to sign the same for validation. The question is what is the law relating to commissioning of affidavits and what is the significance of commissioning of affidavits"

75. Black's Law Dictionary defines an oath as:

"Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that one's statement is true or that one will be bound to a promise? The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false."

76. Bearing that definition of what an oath is, the question I must answer is whether the petitioner took an oath before a Commissioner of Oaths. Looking at his affidavit annexed to the Petition, and which affidavit annexed court proceedings and judgment in the criminal case No 966 of 2018 at Bondo Principal Magistrate's Court, and which document or court record forms the basis of this petition, the said Supporting Affidavit was sworn at Siaya County before P.S Kisaka Advocate whose address as per the commissioning stamp affixed is Nairobi and on a date that is not indicated.

77. No doubt, the petitioner signed the affidavit in Siaya after it was "commissioned" in Nairobi by a commissioner for oaths. That supporting affidavit, just like the supplementary affidavit which was nonetheless filed in court without leave of court fail to conform to the requirements of Section 5 of the *Oaths and Statutory Declarations Act* Cap 15 of Laws of Kenya. Those are no affidavits at all as they are not made under oath. In addition, any document annexed to those "Affidavits" is no annexure at all. That being so, the same are hereby struck out. Section 5 of the *Oaths and Statutory Declarations Act* provides:

"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.?" (Emphasis added)

78. In my humble view, this is a defect that cannot be remedied by order 19 Rule 7 of the Civil Procedure Rules or Article 159(2) (d) of *the Constitution*. This is because the defects affect the veracity and probative value of the averments, which goes to the substance of the affidavits.

79. However, striking out of the affidavits does not invalidate the petition as Rule 11 of the Mutunga Rules (*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013) provides for Documents to be annexed to affidavit or petition and states:

"11(1) the petition filed under these rules may be supported by an affidavit."



46. The Court went on to find that:

80. What the Rules mean is that it is not mandatory for the petitioner to file any affidavit in support of the petition and that if the petitioner wishes to rely on any documents or evidence to support his petition, then it is expected that he annexes those documents either to the petition itself directly in which case the petition will refer directly to those documents, or to annex the documents to an affidavit duly sworn. This is the reason why Rule 10 (2) provides for the form of the petition and states that among others, the petition shall disclose (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition.

81. Therefore, without commissioning of the affidavits supporting or supplementing the petition, the averments in those affidavits are akin to unsworn evidence. That defect cannot be cured by Order 19 Rule 7 of the Civil Procedure Rules or Article 159(2) (d) of *the Constitution* as it goes to the core of the affidavits in question.

45. In similar instances, such affidavits have been struck off. For instance, in *Regina Munyiiva Nthenge v Kenya Commercial Bank Ltd (2005) e KLR*.

47. In the above latter case, Wendo PV. J held that an affidavit which was not sworn in the presence of a Commissioner for Oaths is irregular and unacceptable and fatally defective, noting that it was likely that a stamp was just affixed. I agree, as I have previously made such determinations in the case of *Jamleck Kamau v Royal Media Services Ltd t/a Citizen TV [2016] eKLR* as follows:

“Consequently, I find that there was indeed no affidavit supporting the Originating Summons and therefore the question that follow is whether that situation is curable by Order 19 Rule 7 of the Civil Procedure Rules which provides that the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof, or any technicality and or invoke Article 159(2) (d) of *the Constitution* which calls on the courts to ensure that justice shall be administered without undue regard to procedural technicalities. I am persuaded beyond peradventure that a non-commissioned affidavit is not an affidavit. Commissioning of an affidavit is what clothes a statement to be an affidavit and therefore failure to commission an affidavit is not a mere technicality and neither is it a defect of misdescription or other technicality in form that a serious court of law can ignore. It goes to the root of the matter. Accordingly, I find that the Originating Summons dated 29th October 2015 was and is without a supporting affidavit.

The other question is, can that Originating Summons survive on its own without a supporting affidavit” The answer is found in the same procedural provisions that permit the filing of an Originating Summons for extension of the limitation period under Sections 27 of the *Limitation of Actions Act* Cap 22 Laws of Kenya. The relevant provision as correctly cited by the applicant is Order 37 Rule 6 of the Civil Procedure Rules which expressly provides that:

“6(1) an application under Section 27 of the *Limitation of Actions Act* made before filing a suit shall be made *ex parte* by Originating Summons supported by affidavit.”

The above provision of Order 37 Rule 6(1) of the Civil Procedure Rule is clear that an Originating Summons such as the present one must be supported by an



affidavit. It is therefore trite that the Originating Summons is unsupported by any evidence by way of an affidavit.

Noting that the summons is to be heard *ex parte*, affidavit evidence, and therefore evidence on oath would be absolutely necessary at this stage to satisfy the court as to the reasons for the delay in filing suit within the statutory period and which reasons are amenable to being challenged at the trial of the main suit where such leave is granted.”

48. However, in the instant case, as there is no requirement for a request for review to be made in the form of an affidavit or to be supported by an affidavit, the document which was filed in the form of an affidavit and which was obviously not commissioned but was signed by the *ex parte* applicant’s representative was, in my view, not fatally defective and neither did it render the request for review fatally defective or incompetent. I say so because that non-commissioned ‘affidavit’ is merely a statement setting out the request for review, and that statement in itself meets the requirements under section 167 of the *Public Procurement and Asset Disposal Act* and Regulation 203 of the 2020 Regulations made under the same Act.
49. Furthermore, if a law explicitly states that a “statement” should be filed, and someone files a statement instead of an affidavit, even though an affidavit might usually be required in similar situations, there is no legal error or defect; and the court will accept the statement as compliant with the statute because the statute specifically asked for a statement.
50. Here, I emphasize that the statute specifically and clearly specifies “statement” and not “affidavit.” That being the case, there is no technicality because if the statute only requires a statement, then filing an affidavit instead would be considered a technicality that shouldn’t affect the validity of the document.
51. And where the so called “affidavit” is not even commissioned but is signed, it becomes a statement validly on record for purposes of the request for review proceedings before the Review Board. Thus, if a rule says “to file a statement of facts regarding the dispute,” and someone submits a sworn affidavit detailing the facts, the court can still accept the document as the statute only asks for a “statement” and not an “affidavit.”
52. See the cases of Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 Others [2018] eKLR wherein the court citing with approval the case of Omusotsi -V- The Returning Officer Mumias East Constituency, Independent Electoral and Boundaries Commission and Benjamin Washiali Jomo, Election Petition No 9 of 2017, the High Court Kakamega held that;

“....22. The Court was stating that the affidavits which were not commissioned by a Commissioner for Oaths were not affidavits. I agree with the holding as affidavits which are not commissioned by a commissioner of Oaths appointed as provided by the *Oaths and Statutory Declarations Act* are not affidavits but mere statements.”

53. Again, in the above cited case of Jamleck Kamau v Royal Media Services Ltd t/a Citizen TV [2016] eKLR, this Court in determining the effect of an affidavit which was not commissioned stated:

“I must however mention that the so called “affidavit” of Beatrice Nduata in support of the Originating Summons was not commissioned and therefore it remained a mere statement of fact not testable on oath.

The requirement of the law, and hence the term affidavit, and that an affidavit can only be an affidavit if it is commissioned by either a commissioner for Oaths, a Magistrate or a Notary



Public is an elementary requirement. An affidavit by its every character contains matters of evidence on oath and has attendant consequences including if one is found to have lied on oath, they may be culpable of perjury. It therefore follows that for a statement to be called an affidavit, it must be signed on an oath being administered on the deponent otherwise a non commissioned affidavit does not elevate such signed statement to status of an affidavit but places it at best as a mere signed statement of facts.

54. For all the above reasons, I find that the ex parte applicant has demonstrated before this court that it is deserving of judicial review remedies of certiorari and mandamus against the respondents as prayed.
55. Before I make the final orders, I observe that the exparte applicant raised the issue of whether the decision as impugned was valid on account of only the Chairman and the Secretary to the Review Board having signed the decision, which rendered the decision incompetent for lack of quorum. In response, the respondents contended that the rules provide for quorum and a simple majority hence a single member of the Board could competently sign the decision.
56. In my determination of this question, I find both parties' arguments to be incorrect. Simple majority (SM) is a voting system whereby the highest number of votes for one alternative within those under decision designates the winner. It may refer to a voting requirement of half of either all ballots cast or those voting on the given alternative plus one, and also to the highest number of votes cast for any one alternative, while not constituting a majority.¹
57. The position in law is that A "simple majority" in decision making means that a proposal is considered approved when more than half of the votes cast are in favor of it, essentially just needing one more vote than the opposing side to win; it's the most basic form of majority voting where only a majority of votes are required to pass a decision, not a supermajority like two-thirds or three-quarters. To achieve a simple majority, you need to have more votes "yes" than "no" votes. For example, if 10 people vote, a simple majority would be reached if 6 people vote in favor of a proposal. Simple majority is often used in democratic voting systems to determine the winner of an election or to pass legislation. In this case, therefore, as the quorum was three members as espouse din Regulation 207 of the Public Procurement and Asset Disposal Regulations, the signature by 2 members was the simple majority, being more than one. Accordingly, that objection taken by the exparte applicant on quorum of the members of the Review Board fails.
58. In the end, I allow the ex parte applicants' Notice of Motion dated 21st January, 2025 and make the following orders:
 - a. An order of certiorari is hereby issued bringing into this court for purposes of quashing the decision rendered by the Public Procurement Administrative Review Board (PPARB) on 14/1/2025 (erroneously cited as 2024 which this court finds to be a typo), in the Request for Review Application No. 128 of 2024, which decision upheld the preliminary objection dated 2/1/2025 and filed on 3/1/2025 raised by the Interested Party, which whole decision is hereby quashed.
 - b. An order of mandamus is hereby issued directing the Public Procurement Administrative Review Board and compelling it to hear afresh and determine, on merit according to law, the request for Review No. 128 of 2024 dated and filed on 24th December 2024, as required by the [*Public Procurement and Asset Disposal Act*, 2015](#).
 - c. In accordance with section 175 of the PPADA, I make no orders as to costs.

¹ https://link.springer.com/referenceworkentry/10.1007/978-1-4614-7883-6_441-2



d. This judgment be uploaded in the CTS and published.

e. It is so ordered, and this file is hereby closed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2025

R.E. ABURILI

JUDGE

