Auto Terminal Japan Limited v Nzai & another (Judicial Review E204 of 2025) [2025] KEHC 11917 (KLR) (Judicial Review) (11 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11917 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW E204 OF 2025

JM CHIGITI, J

AUGUST 11, 2025

BETWEEN

AUTO TERMINAL JAPAN LIMITED ..... EX PARTE APPLICANT

AND

CHARLES NZAI ..... 1ST RESPONDENT

PUBLIC PROCUREMENT REGULATORYBOARD ..... 2ND RESPONDENT

JUDGMENT

1. The application that informs this judgment is the Notice of Motion Application dated 8thJuly 2025 where in the Applicant seeks the following orders THAT:

    1. An order of Certiorari to remove into this Honourable Court and quash the entire decision of the 2nd Respondent herein in Debarment Application Number 6 of 2025, dated and delivered on 20th June 2025.

    2. An order of Prohibition to prohibit and/or restrain the Respondents and/or their agents and any other persons from implementing the decision delivered in Debarment Application Number 6 of 2025, dated and delivered on 20th June 2025.

    3. Such other, further order and/or incidental orders or directions as this Honorable Court shall deem just and expedient;

    4. Costs of this Application be borne by the Respondents.

The Applicant's Case;

2. Through a decision dated and delivered on 20th June 2025 the 2nd Respondent made a decision to debar the Exparte Applicant. The Applicant aggrieved that the 2nd Respondent did not fully consider the Applicant's argument and submissions filed during the Debarment proceedings.

3. The Applicant strongly believes that the 1st Respondent's Request for Debarment dated 10th April 2025 was based on facts and evidence similar to those raised in Debarment Application Number and 5 of 2021.

4. It concludes that in the circumstances, the 2nd Respondent's decision that there was a prima facie case was made unlawfully, irrationally and unfairly and the same was contrary to Articles 10, 47 and Article 50 of *the Constitution* wherein the Exparte Applicant was denied the right to a fair hearing. It is the applicants case that this is contrary to The Public Procurement and Asset Disposal Debarment Proceedings Manual 2022

5. The Applicant is concerned that The 2nd Respondent's decision sought to hear and determine issues and evidence that had already been relied on in Debarment Applications No.4 and 5 of 2021, in which a decision was issued on 25th March 2022 debarring the Exparte Applicant and the Exparte Applicant has already suffered the ramifications of its actions. According to it, Debarment Application No.6 of 2025 is therefore barred by Res Judicata.

6. It identifies the following res judicata in Debarment Application No.6 of 2025:

    a. Under paragraphs 236 of the decision dated 2nd June 2021 (delivered on 25th March 2022) — refer pages 1435 and 1436 of the Annexures, the Debarment Committee was invited to make a determination on the existence of JLS Investments Group Limited and it did so in the said paragraph. The same invitation was also extended to the Debarment Committee as in decision dated on 20th June 2025 wherein it made the same finding at paragraph 88(refer page 22 of the Annexures), wherein the company was deemed to be non-existent.

    b. Additional y, at paragraphs 236 and 237 of the decision dated 2nd June 2021 (delivered on 25th March 2022)— refer pages 1435 and 1436 of the Annexures, the Debarment Committee was invited to lease agreement executed in 2019, wherein the Committee made its decision in the aforesaid paragraphs. The same invitation was also extended to the Debarment Committee as in its Decision dated 20th June 2025 wherein it made at paragraph 90 (refer page 22 of the Annexures), wherein the lease was deemed to be falsified.

    c. Under paragraphs 238, 239 and 240 of the decision dated 2nd June 2021 (delivered on 25th March 2022) — refer pages 1436 and 1437 of the Annexures, the Debarment Committee made a determination as to the notarisation of the Lease Agreement between Itech Auto Finance and Auto Terminal UK Limited by Drake and Scott. The same was also determined at paragraphs 83, 84, 85 and 86 of the decision dated 20th June 2025 (refer pages 20 and 21 of the Annexures), wherein the documents were deemed to have been falsified.

    d. Under paragraph 235 of the decision dated 2nd June 2021(delivered on 25th March 2022) — refer pages 1435 of the Annexures, the Debarment Committee was invited to make a determination considering the affairs of Pal Auto Garage, which it did. The same invitation was extended to the Debarment Committee, and a decision was made under paragraph 92 of the decision dated 20th June 2025(refer page 23 of the Annexures) wherein was dismissed due to insufficient evidence.

7. The Applicant further argues that it served the debarment period to its conclusion and should not be subjected to the debarment as ordered in decision dated 20th June 2025.

8. It buttresses its case through the argument that the Court previously in Nairobi High Court in HCJR/E054/2025 highlighted the fact that the 2ndRespondent had acted ultra vires, irrationally and unfairly when making its decision outside timelines and regrettably, this time, the 2nd Respondent has proceeded to make a determination contrary to Articles 10, 47 and 50 of *the Constitution* wherein the Exparte Applicant was denied the right to a fair hearing.

9. In Nairobi High Court in HCJR/E054/2025 Auto Terminal Japan Limited vs State Law the court found the Judicial Review Application meritorious on grounds of lack of jurisdiction on the part of the Public Procurement Regulatory Board and quashed the Public Procurement Regulatory Board's debarment decision.

10. In the instant suit, the Applicant advances the a rationale and argues that comparatively, in criminal proceedings that principle of 'double jeopardy' is the basis that underlies the pleas of autrefois convict and acquit, which assert that once a person has been convicted or acquitted, they cannot be charged against on the same offence.

11. The Debarment proceedings in Debarment Application No.6 of 2025 therefore serve no purpose according to the Exparte Applicant since it did not benefit in any conceivable manner from the International Tenders No. KEBS 019/2017-2020 and KEBS/RT/011/2021-2024, and the initial debarment was more than sufficient sanctions to the Exparte Applicant.

12. The Exparte Applicant had already been subjected to disciplinary proceedings on merit and received penalties for their actions, vide a decision to debar it on 25th March 2022.

13. The Applicant relies on Article 50 (1) and (2) of *the Constitution* of Kenya which states that:

> " 50. Fair hearing.
>
> 1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
>
> 2. Every accused person has the right to a fair trial, which includes the right—
>
> (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted."

14. It argues that the Debarment proceedings filed at the 2nd Respondent are contrary to Section 7 of the *Civil Procedure Act* states as follows;

> " 7. Res judicata
>
> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
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> Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

15. In criminal law the doctrine of res judicata is captured under the doctrine of "double jeopardy" and to compare the two doctrines, we associate ourselves with the decision in the Supreme Court of Kenya Case Petition No. E015 of 2024 Nyagol v Judicial Service Commission & another [2024] KESC 69 (KLR), the Honourable Court stated that this doctrine of double jeopardy is based on the Latin maxim nemo debet bis vexari pro una et eadem causa which means that no man shall be put in jeopardy twice for the same offence. It is also founded on public policy that there ought to be an end to the same litigation described it not only as a procedural defence but a constitutional protection against subsequent trial based on a prior acquittal or conviction.

16. Stones Justices' Manual, Part I Magistrates' Court Procedure in Criminal Proceedings where in discussing Double Jeopardy states as follows:

> "Double jeopardy is, in effect, a discretionary extension of the rules of law defining the defences of autrefois convict and acquit. A second trial involving the same or similar facts may in the discretion of the court be stayed if to proceed would be oppressive or prejudicial and therefore an abuse of the process of the court."

17. In Supreme Court decision in Petition No.17 of 2015 John Florence Maritime Services Limited and another v Cabinet Secretary Transport and Infrastructure & 3 others [2021] the following elements must be demonstrated:

    a. There is a former judgment or order which was final;

    b. The judgment or order was on merit;

    c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

    d. There must be between the first and the second action identical parties, subject matter and cause of action.

18. It is the Exparte Applicant's case, that there was a former decision by the 2nd Respondent in Debarment Application Number 4 and 5 of 2021 which was delivered to parties on 25th March 2022, and consequently, both issue and cause of action estoppel arise preventing the same matter from been brought against the Exparte Applicant again.

19. It submits that Regulation 19 of the Debarment Manual addresses the issue of finality and states that: "The decisions of the Committee shall be final and binding on the parties to the proceedings and shall take effect immediately."

20. It argues that once the decision was issued on 25th March 2022, the issues were determined to finality, and the same issues could not be raised subsequently.

21. It is the Exparte Applicant's case that all the issues and documents referred to by the Exparte Applicant on Debarment Application Number 6 of 2025 were analysed by the 2nd Respondent and a finding on the same was made in Debarment Application Number 4 and 5 of 2021 on 25th March 2022.

22. It is the Exparte Applicant's submission that the Respondents were estopped by the doctrine of res judicata from prosecuting Debarment Application Number 6 of 2025.

23. It argues that the 2nd Respondent violated Article 10(1)(a) (b)(c), Article 47(1) and Article 50 of *the Constitution* by failing to give the Exparte Applicant a fair hearing and by making a determination that a prima facie case existed against the Exparte Applicant despite the same facts and issues being finally determined vide a decision that was delivered on 25th March 2022 in Debarment Application Number 4 and 5 of 2021.

24. It argues that specifically, the 2nd Respondent violated Article 47(1) and Article 50 of *the Constitution* by failing to give the Applicant a fair hearing as well as Section 4 of *Fair Administrative Action Act* in the following manner:

    a. Failure to make a determination that there was no prima facie case against the Exparte Applicant in Debarment Application Number 6 of 2025.

    b. Failure to make a determination at the prima facie stage that the facts, evidence and parties were the same as those in Debarment Application Number 4 and 5 of 2021.

    c. Failure to dismiss Debarment Application Number 6 of 2025 at the prima facie stage.

25. It argues that the said prima facie case was established against the Exparte Applicant on account of material non-disclosure on the part of the 1st Respondent who did not disclose to the 2nd Respondent that all the issues in questions that are being raised in its Debarment Application were already heard and determined conclusively in Debarment Application Number 4 and 5 of 2021.

26. It argues that the 1st Respondent is aware that International Tender No. KEBS/RT/011/2021-2024 for Provision of Pre-Export Verification of Conformity (PVOC) to Standard Services-Used Motor Vehicles, Mobile Equipment and Used Spare Parts lapses this year and that bidders will be subjected to a procurement process. In the circumstances, the 1st Respondent is desirous of ensuring that the Respondent does not take part in the said tender.

27. It argues that the 1st Respondent who used similar tactics when lodging Debarment Application Number 5 of 2021 just as the previous tender i.e. Tender No. KEBS/T010/2019-2021 for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standard Services- Used Motor Vehicles, Mobile Equipment and Used Spare Parts was about to be renewed.

28. It is convinced that there is an on-going and very well-calculated witch-hunt aimed at ensuring that the Applicant does not partake in any tender processes involving the Pre-Export Verification of Conformity (PVOC) to Standard Services- Used Motor Vehicles, Mobile Equipment and Used Spare Parts.

29. According to the Applicant, it is apparent that the 1st Respondent is engaged in a form of legal warfare, in some legal doctrines, termed as "lawfare" wherein the 1st Respondent is attempting to use the legal process to settle business scores, to frustrate the operations of the Exparte Applicant and to ensure that Kenya remains to have one company being a monopoly in the motor vehicle inspection sector.

30. To the Applicant, this is not only a national security risk but a national safety and health risk whereby only one company is tasked with inspection standards of all motor vehicles and mobile equipment where such a company can even set its own prices and fees unilaterally to the detriment of taxpayers in Kenya.

31. It is the Exparte Applicant's contention that there would be a scenario where a monopoly be in the market is created and any competitors would not only be swatted away but entirely crushed using all manner of ways available to the persons with the controlling interest or monopoly.

32. The Exparte Applicant contends that the Court ought to take judicial notice of the fact that any allegations of forgery and falsifying of documents must be substantiated, verified and authenticated by the government agency with the mandate and capacity to carry out such a task.

33. In fact, when the Exparte Applicant appeared before the Parliamentary Investment Committee and in its report of June, 2020, at Chapter Two on its observations and findings, page 47 of the report (page 387 of the Annexures) touching on the same documents being referred to by the 1st Respondent herein states that:

    24. The Authority has also written to the Directorate of Criminal Investigations on 25thFebruary, 2020 seeking assistance in verifying the alleged falsification and misrepresentation of documents by the two companies.

    25. At the time of compiling this report, there was no indication from PPRA that and the DCI that they had concluded investigating the matter...."

34. The Applicant has advanced the argument that over and above the foregoing, the Directorate of Criminal Investigations vide a letter dated 19th December 2024 which was written to the Exparte Applicant a copy of which was furnished to the 2nd Respondent wherein the Directorate of Criminal Investigations expressly that investigations are still on-going wherein the said investigations directly related to the documents and matter before the Debarment Committee.

35. It is the Exparte Applicant's case that the Directorate of Criminal Investigations expressly set out that it was still actively investigating the documents and we urge this Court to take the same into great consideration.

36. The Applicant believes that The 2nd Respondent in making any findings at prima facie stage was bound to ensure that the law is followed and abided by, to the latter, in a manner that demonstrates that the findings against the Applicant were made within the confines of the law.

37. It argues that if it is debarred based on the damaging unfounded allegations, its reputation will suffer irreparably hence affecting the right to property under Article 47 of *the Constitution* of Kenya 2010.

38. It argues that many countries have adapted policy requirements to ensure that respective tenders related Pre-Export Verification of Conformity (PVOC) to Standard Services-Used Motor Vehicles, Mobile Equipment and Used Spare Parts are carried out by a minimum of two to three companies so that checks and balances are always there.

The Applicant's submissions;

39. The Exparte Applicant submits that the debarment Application Number 6 of 2025 was res judicata for the reasons that the facts, evidence and grounds relied on in the said Application were similar to the grounds relied on in Debarment Application Number 10 of 2024 and more importantly in Debarment Application Number 4 and 5 of 2021.

40. It is that Applicant's case its that both decisions relied on the above states irregularities to debar the Applicant for a period of three years, and the as per the decision dated 2nd June 2021, the Applicant served the debarment period to its conclusion and should not be subjected to the debarment as ordered in decision dated 20thJune 2025.

41. It relies on Article 47 (1) and (2) of *the Constitution* provide for the right to a fair administrative action, stating that:

    1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair;

    2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

42. The Applicant also invokes Section 4 (1) of the Fair Administrative Actions Act states as follows:

    Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

43. It further submits that under Regulation 2 of the Public Procurement and Asset Disposal Debarment Proceedings Manual (Debarment Manual) which states as follows on the Objectives of debarment:

    The objectives of debarment are to;

    a. Promote good governance in public procurement and asset disposal.

    b. Promote fair competition and transparency in public procurement and asset disposal.

    c. Penalize errant suppliers, contractors and consultants.

    d. Serve as a deterrent measure for suppliers, contractors and consultants from engaging in unethical practices.

    e. Increase public confidence in procurement and asset disposal.

44. It is its submission that the above provisions highlight the importance of fair administrative practices in procurement sector and the requirement of the Public Procurement Regulatory authority, through its board, to embrace and uphold those values in Debarment proceedings.

45. It submits that the proceedings in Debarment Application No.6 of 2025 were defective ab initio and ought to be barred by Res Judicata because the Applicant seeks to re-litigate an already heard and determined issue in Debarment Application Number 4 and 5 of 2021; and Number 10 of 2024, and which decision was quashed the High Court on 9th April 2025.

46. It submits that the decision in Debarment Application No.6 of 2025 has crucified the Applicant based on the same facts issues and evidence consequently raising the issue of Double Jeopardy.

47. It submits that The 2nd Respondent/Public Procurement Regulatory Board should have struck out the debarment Application as it sought to re-litigate already concluded issues, a clear case of res judicata and abuse of the process based on Section 7 of the *Civil Procedure Act* which provides for Res Judicata:

48. It submits that The Halsbury Laws of England expound on the concept of Res Judicata as follows:

> " The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision, save on appeal. It is most closely associated with the legal principle of 'cause of action estoppel' , which operates to prevent a cause of action being raised or challenged by either party in subsequent proceedings where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties (or their privies), and having involved the same subject matter. However, res judicata also embraces 'issue estoppel', a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue. For this reason, res judicata has been described as a portmanteau term which is used to describe a number of different legal principles with different juridical origins upon which the courts have endeavoured to impose some coherent scheme only in relatively recent times."

49. Reliance is placed in the case of The United Kingdom Supreme Court in Virgin Atlantic Airways Limited (Respondent) v Zodiac Seats UK Limited (formerly known as Contour Aerospace Limited (Appellant) [2013]; Lord Sumption stated as follows on the general principles of the Res Judicata:

> " Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.
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> Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336.
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> Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, section 34.
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> Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was

decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197-198. Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.

Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

50. It submits that The Court went further to quote the celebrated case of Henderson v Henderson in its explanation of the difference and intersection between res-judicata and abuse of process as follows:

> "He expressed his own view of the relationship between the two at p 31 as follows: "Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.
>
> The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party.
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> It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

After the quotation, the Court states as follows:

> "Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in Arnold v National Westminster Bank at p 110G, "estoppel per rem judicatam, whether cause of action estoppel, or issue estoppel is essentially concerned with preventing abuse of process."

51. It submits that The House of Lords of the United Kingdom in Thrasyvoulou v Secretary of State for the Environment, Oliver v Secretary of State for the Environment [1990] 2 AC 273 further elaborated on the nature of Res Judicata follows:

> " The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims "interest reipublicae ut sit finis litium" and "nemo debet bis vexari pro una et eadem causa." These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions."

52. The Court in determining the Appeal before it stated as follows:

> " The inspector who determined the appeal against this notice in favour of the local planning authority found that there had been a material change in the character of the site as a whole since 1963 to the use as described in the notice. It is submitted for the local planning authority that no relevant issue estoppel arises from the first inspector's decision because it concerned a part only of the site and concerned only a use for storage purposes. It seems to me, however, that the first inspector's decision involved by necessary implication the finding that the use in fact being made of the site at the date of service of the first enforcement notice was an established use, however described. It is expressly conceded in these proceedings that there had been no material change in the character of the use between the dates of the two enforcement notices. Accordingly it follows, in my opinion, that the local planning authority are now estopped from asserting that there was a material change of use between 1963 and 1982 which expressly contradicts a finding made by the first inspector, which was not merely incidental or ancillary to his decision but was the essential foundation for his conclusion that no breach of planning control was involved in the use being made of the structure which was the subject of the first notice. As Mr. Malcolm Spence Q.C. said in his judgment:
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> "It does not make the slightest difference to the question of the application or otherwise of issue estoppel to a particular case that on the first occasion the local planning authority described the use in one manner and on the second occasion they described it in another manner, when it is conceded that the actual use is the same use on each occasion. This is merely a matter of language. On each occasion the use was the same, and on each occasion the issue was the same."

53. Reliance is also placed in The Supreme Court of India in Daryao and Others vs. The State of U.P. and Others 1961 AIR 1457 in dismissing petitions filed under different statutory provisions but relying on the same facts that had already been decided under another statutory provision stated as follows:

> " We hold that if a writ petition filed by a party under Art. 226 is considered on the merits as &-contested matter, and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate

proceedings permissible under *the Constitution*. It would not be open to a party to ignore the said judgment and move this Court under Art. 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs."

54. The United Kingdom Supreme Court in R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales [2011] UKSC 1 in dismissing an Appeal stated as follows:

> " Notwithstanding its reference to findings of fact in their written decision, the tribunal understood the position as being that the Institute was relying on the conviction because, having set out their conclusion that the Jersey conviction was not for an offence which corresponded to an indictable offence in England and, it expressly stated that the complaint was dismissed. If it had reached the opposite conclusion and held that the Jersey conviction was based on an offence which corresponded to an indictable offence in England and Wales, it would have found the complaint proved because the conviction would have been conclusive evidence of a breach of bye-law 4(1)(a). There could have been no doubt that such a decision would have been final and on the merits. In my judgment, the same is true of the decision to dismiss the complaint."

55. It also relies in the United Kingdom First-Tier Tribunal (Tax) Waterloo Car Hire (a partnership) v Revenue and Customs Commissioners [2023] UKFTT 549 (TC) also dismissed an Appeal, after a lengthy discussion on Res Judicata as follows:

> " We find that the decision of the FtT in 2016 was a judicial decision and that decision was pronounced on 5 September 2016. We are further satisfied that the FtT had jurisdiction over the parties and the subject-matter of the appeal by virtue of the right of appeal under TMA. The decision was final in the sense that it was un-appealed or, rather, challenges to the decision were unsuccessful on 23 January 2017, 4 April 2017 and 13 July 2017. That the Appellant is now appealing on different evidence does not detract from the fact that the Appellant did not seek to challenge the evidence produced by HMRC in raising the Assessments. We find that during the 2016 appeal, the Appellant was primarily focusing its arguments on the status of the cars, to the detriment of the amount of the Assessments. That, we find, does not give the Appellant the right to a "second-bite at the cherry".

56. In The United Kingdom High Court, Queen's Bench Division; in Sayed S. Sangamneheri and Chartered Institute of Arbitrators and Five Others [2022] EWHC 886 (Comm) stated as follows in dismissing claims on basis of Res Judicata and Abuse of process:

> " To sum up: there is therefore no real prospect of showing that there was "conscious and deliberate" concealment of evidence, in the shape of the Acceptance of Nomination form and nor is that evidence at all "material". It would not have "changed the way in which the first court approached and came to its decision" assessed by reference to its impact on the evidence supporting the original decision. None of the relevant criteria identified in Takhar are satisfied. By the same token, this is not a case where it can be said that new facts have come to light that fundamentally change the complexion of the case: Phosphate Sewage Company Ltd v Molleson (1879) 4 App Cas. 801 at 814. The Claimant has no basis for setting aside any of the previous Judgments, which remain fully binding on the Claimant.
>
> I therefore move on to consider whether the effect of those Judgments is to bar the present claims. 49. Parts of the present claims are on any view the subject of a clear res judicata: for

example, as between the Claimant and the First, Second, and Fifth and Sixth Defendants, the issues of the arbitrator's immunity from suit, and the absence of any basis in the law of bailment or the tort of wrongful interference for holding any of them liable for the value of the gold has already been determined by the Judgments of Master Kay QC and/or Males J. I do not propose to try to pick out every individual allegation that is the subject of a res judicata, because in my view it is absolutely clear that this is a clear, and indeed egregious, example of litigation which is an abuse of process.

It then concluded:

I conclude that the Part 7 and Part 8 Claims are not only, in large measure, res judicata, but so far as that is not the case, they are an abuse of process, based on a broad, merits-based judgment and taking account of the public and private interests involved. In any event, the new elements of the claims (which relate to the False Date point and the Fraudulent Concealment point, and the purported claims against those two Defendants who were not previously sued) have no real prospects, for the reasons I have given above.

On that basis, the Part 7 and Part 8 claims are liable to be struck out as an abuse of process and it also follows that they have no real prospect of success, such that the Defendants are (so far as may be necessary) entitled to summary judgment. I find both claims to have been totally without merit."

57. The English and Wales High Court, Chancery Division in Ackerman v Thornhill and others [2017] dismissed a subsequent claim that had been served, stated as follows:

> " Accordingly, and for similar reasons to those that were advanced by Mann J in holding that a second claim was barred by the Henderson v Henderson doctrine in Gaydamak v Leviev [2014] EWHC 1167 (Ch) and by Vos LJ in refusing permission to appeal in the same case, [2015] EWCA Civ 256, I consider that unless Joseph can show that he has a realistic prospect of showing that the 2011 judgment should be set aside on the grounds that it was obtained by fraud, I see no answer to the argument that the 2015 claim is barred by the doctrines of issue estoppel and Henderson v Henderson abuse of process."

58. The Constitutional Court of South Africa in Case CCT 214/14 Eke v Parsons [2015] ZACC 30 in rejecting an Appeal seeking to challenge the settlement order stated as follows:

> " Turning to the present matter, the appellant's attempt to undo the settlement agreement, in the main, on the authority of Thutha53 and Tasima54 cannot succeed. The terms of the settlement order 55 created clear obligations with which Mr Eke had to comply. The terms also unambiguously spelt out consequences for non-compliance with these obligations: Mr Parsons would be entitled to claim the full outstanding amount by re-enrolling the summary judgment application. This step was necessitated by the nature of what the parties had agreed upon. Had the settlement simply provided for the payment of a lump sum, Mr Parsons would have been entitled immediately to execute upon Mr Eke's failure to satisfy the judgment debt. The underlying basis for Mr Eke's liability under these obligations is res judicata; Mr Eke cannot seek to re-open it."
>
> "Accordingly, I can find no basis to disagree with the High Court's finding that the settlement agreement is final in its terms and that Mr Parsons is entitled to approach a court for enforcement of that order in accordance with the procedure set out in it."

59. The Applicant submits that it was debarred on grounds and documentary evidence that had been relied on in Debarment Application 10 of 2024, which were determined by the Board, and which decision was later quashed by the High Court.

60. It submits that The 1st Respondent is abusing the legal process and is on a serious witch-hunt against the Respondent, thereby frustrating it from being able to conduct its business activities in peace. The 1st Respondent is a malicious, vexatious litigant and the 2nd Respondent failed to take cognizance of this at both the Prima Facie stage and in issuance of its decision dated 20th June 2025, rather it seems to be supporting the lawfare waged against the Applicant. This Court is the Applicant's bastion of hope in order to protect it from the witch hunt.

61. It submits that this is similar to a person, having been convicted of an offence and served their sentence, being subsequently locked up again for the same facts, circumstances and offence he had been convicted with before: Double Jeopardy. Stones Justices' Manual, Part I Magistrates' Court Procedure in Criminal Proceedings states as follows:

> " Double jeopardy is, in effect, a discretionary extension of the rules of law defining the defences of autrefois convict and acquit. A second trial involving the same or similar facts may in the discretion of the court be stayed if to proceed would be oppressive or prejudicial and therefore an abuse of the process of the court. Accordingly, whether a person accused of a minor offence is acquitted or convicted, he shall not be charged on the same facts in a more aggravated form, although this principle does not apply where the consequences have changed, i.e. where a person assaulted has died after a conviction for assault or wounding."
>
> "Where excess alcohol was the only foundation for a charge of causing death by reckless driving, and there was no dispute about the cause of death, it was held that the accused would be put in double jeopardy and that it would be oppressive and prejudicial if he were to be tried on indictment for causing death by reckless driving following a summary conviction for driving with excess alcohol. A stay restraining the justices from proceeding with the summary trial was accordingly granted"

62. In the end the Applicant is asking the court should make a finding that the proceedings in Debarment No.6 of 2025 were barred due to res judicata.

63. It is the Exparte Applicant's submission that it is prejudicial and a Constitutional infringement of the Applicant's right to a fair hearing in the context of civil proceedings.

64. Article 50 (1) and (2) of *the Constitution* of Kenya states that:

> " 50. Fair hearing.
>
> 1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
>
> 2. Every accused person has the right to a fair trial, which includes the right—
>
> o. not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted."

65. It submits that the criminal law the doctrine of res judicata is captured under the doctrine of "double jeopardy" and to compare the two doctrines, we associate ourselves with the decision in the Supreme

Court of Kenya Case Petition No. E015 of 2024 Nyagol v Judicial Service Commission & another [2024] KESC 69 (KLR), the Honourable Court stated that this doctrine of double jeopardy is based on the Latin maxim nemo debet bis vexari pro una et eadem causa which means that no man shall be put in jeopardy twice for the same offence. It is also founded on public policy that there ought to be an end to the same litigation described it not only as a procedural defence but a constitutional protection against subsequent trial based on a prior acquittal or conviction.

66. The Applicant further relies on Stones Justices' Manual, Part I Magistrates' Court Procedure in Criminal Proceedings where in discussing Double Jeopardy states as follows:

> "Double jeopardy is, in effect, a discretionary extension of the rules of law defining the defences of autrefois convict and acquit. A second trial involving the same or similar facts may in the discretion of the court be stayed if to proceed would be oppressive or prejudicial and therefore an abuse of the process of the court."

67. The Exparte Applicant's submits that for res judicata to be invoked in a civil matter as stated in Supreme Court decision in Petition No.17 of 2015 John Florence Maritime Services Limited and another v Cabinet Secretary Transport and Infrastructure & 3 others [2021] the following elements must be demonstrated:

a. There is a former judgment or order which was final;

b. The judgment or order was on merit;

c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d. There must be between the first and the second action identical parties, subject matter and cause of action.

68. It submits that Regulation 19 of the Debarment Manual addresses the issue of finality and states that: "The decisions of the Committee shall be final and binding on the parties to the proceedings and shall take effect immediately."

69. It submits that the decision was issued on 25th March 2022, the issues were determined to finality, and the same issues could not be raised subsequently. The Debarment Applications No.10 of 2024 and No.6 of 2025 that sought to do so, were acting in an arbitrary, capricious, unfair and unreasonable manner and this court should exercise its judicious powers to protect the Exparte Applicant.

70. It is the Exparte Applicant's case that all the issues and documents referred to by the Exparte Applicant on Debarment Application Number 6 of 2025 were analysed by the 2nd Respondent and a finding on the same was made in Debarment Application Number 4 and 5 of 2021 on 25th March 2022.

71. The Applicant submits that The 2nd Respondent violated Article 10(1)(a) (b)(c), Article 47(1) and Article 50 of *the Constitution* by failing to give the Exparte Applicant a fair hearing and by making a determination that a prima facie case existed against the Exparte Applicant despite the same facts and issues being finally determined vide a decision that was delivered on 25th March 2022 in Debarment Application Number 4 and 5 of 2021.

72. It is submitted that the 2nd Respondent violated Article 47(1) and Article 50 of *the Constitution* by failing to give the Applicants fair hearing as well as Section 4 of *Fair Administrative Action Act* in the following manner:

a. Failure to make a determination that there was no prima facie case against the Exparte Applicant in Debarment Application Number 6 of 2025.

b. Failure to make a determination at the prima facie stage that the facts, evidence and parties were the same as those in Debarment Application Number 4and 5 of 2021.

c. Failure to dismiss Debarment Application Number 6 of 2025 at the prima facie stage.

73. It submits that the prima facie case was established against the Exparte Applicant on account of material non-disclosure on the part of the 1st Respondent who did not disclose to the 2nd Respondent that all the issues in questions that are being raised in its Debarment Application were already heard and determined conclusively in Debarment Application Number 4 and 5 of 2021.

74. The Applicant submits that the 1st Respondent is aware that International Tender No. KEBS/RT/011/2021-2024 for Provision of Pre-Export Verification of Conformity (PVOC) to Standard Services-Used Motor Vehicles, Mobile Equipment and Used Spare Parts lapses this year and that bidders will be subjected to a procurement process. In the circumstances, the 1st Respondent is desirous of ensuring that the Respondent does not take part in the said tender.

75. The Applicant submits that these actions are not new to the 1st Respondent who used similar tactics when lodging Debarment Application Number 5 of 2021 just as the previous tender i.e. Tender No. KEBS/T010/2019-2021 for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standard Services- Used Motor Vehicles, Mobile Equipment and Used Spare Parts was about to be renewed.

76. The Applicant submits that there is an on-going and very well-calculated witch-hunt aimed at ensuring that the Applicant does not partake in any tender processes involving the Pre-Export Verification of Conformity (PVOC) to Standard Services- Used Motor Vehicles, Mobile Equipment and Used Spare Parts.

77. It submits that the 1st Respondent is engaged in a form of legal warfare, in some legal doctrines, termed as "lawfare." It is submitted that this is not only a national security risk but a national safety and health risk.

78. It submits that in order to avoid this national security risks from emerging in this sector, many countries have adapted policy requirements to ensure that respective tenders related Pre-Export Verification of Conformity (PVOC) to Standard Services-Used Motor Vehicles, Mobile Equipment and Used Spare Parts are carried out by a minimum of two to three companies so that checks and balances are always there.

79. The Exparte Applicant contends that the Court ought to take judicial notice of the fact that any allegations of forgery and falsifying of documents must be substantiated, verified and authenticated by the government agency with the mandate and capacity to carry out such a task.

80. It submits that when the Exparte Applicant appeared before the Parliamentary Investment Committee and in its report of June, 2020, at Chapter Two on its observations and findings, page 47 of the report touching on the same documents being referred to by the 1st Respondent herein states that:

24. The Authority has also written to the Directorate of Criminal Investigations on 25thFebruary, 2020 seeking assistance in verifying the alleged falsification and misrepresentation of documents by the two companies.

25. At the time of compiling this report, there was no indication from PPRA that and the DCI that they had concluded investigating the matter...."

81. It also submits that, the Directorate of Criminal Investigations vide a letter dated 19th December 2024 which was written to the Exparte Applicant a copy of which was furnished to the 2ndRespondent wherein the Directorate of Criminal Investigations expressly that investigations are still on-going wherein the said investigations directly related to the documents and matter before the Debarment Committee.

82. The Exparte Applicant's submit that the very pertinent point that the Directorate of Criminal Investigations expressly set out that there were no findings whatsoever express or implied in relation to proof of fraudulent documents purportedly relied on by the Applicant in any tenders it participated in.

83. The Applicant submits that the Directorate of Criminal Investigations expressly set out that it was still actively investigating the documents and no findings have been reported, therefore we urge this Court to take the same into great consideration.

84. It is its submission that the 2nd Respondent violated Article 10(1)(a) (b)(c), Article 47(1) and Article 50 of *the Constitution* by failing to give the Exparte Applicant a fair hearing and by making a determination that a prima facie case existed against the Exparte Applicant despite the same facts and issues being finally determined vide a decision that was delivered on 25th March 2022 in Debarment Application Number 4 and 5 of 2021.

85. The Exparte Applicant submits that the Court ought to take judicial notice of the fact that any allegations of forgery and falsifying of documents must be substantiated, verified and authenticated by the government agency with the mandate and capacity to carry out such a task.

86. It submits that when the Exparte Applicant appeared before the Parliamentary Investment Committee and in its report of June, 2020, at Chapter Two on its observations and findings, page 47 of the report touching on the same documents being referred to by the 1st Respondent herein states that:

24. The Authority has also written to the Directorate of Criminal Investigations on 25th February, 2020 seeking assistance in verifying the alleged falsification and misrepresentation of documents by the two companies.

25. At the time of compiling this report, there was no indication from PPRA that and the DCI that they had concluded investigating the matter...."

87. Reliance is placed in the High Court in Republic v Public Procurement Administrative Review Board and 2 Others [2015] eKLR stated as follows are regards the Judicial Review:

> " The purpose of the remedy of judicial review is now well established. In the House of Lords decision of R v Chief Constable of North Wales, ex p. Evans [1982] UKHL 10 (22 July 1982) it was stated that judicial review is available to prevent excessive exercise of power by administrative bodies or officials; to ensure that an individual is given fair treatment by administrative authorities; to keep administrative excesses in check; and to provide remedy to those aggrieved as a result of excessive exercise of power by administrative bodies.
>
> However, the reach of judicial review is limited to illegality, irrationality/unreasonableness and breach of the rules of natural justice. The purpose of judicial review was aptly captured by Justice Kasule in the Ugandan case of Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300 when he stated 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: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)."

88. Section 7 (2) (a) to (o) of the Fair Administrative Actions Act, 2015;

2. The Court considered the laws and facts as presented A court or tribunal under subsection (1) may review an administrative action or decision, if–

a. the person who made the decision–

i. was not authorized to do so by the empowering provision;

ii. acted in excess of jurisdiction or power conferred under any written law;

iii. acted pursuant to delegated power in contravention of any law prohibiting such delegation;

iv. was biased or may reasonably be suspected of bias; or

v. denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

b. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

c. the action or decision was procedurally unfair;

d. the action or decision was materially influenced by an error of law;

e. the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the Applicant;

f. the administrator failed to take into account relevant considerations;

g. the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

h. the administrative action or decision was made in bad faith;

i. the administrative action or decision is not rationally connected to–

i. the purpose for which it was taken;

ii. the purpose of the empowering provision;

iii. the information before the administrator; or

iv. the reasons given for it by the administrator;

j. there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

k. the administrative action or decision is unreasonable;

l. the administrative action or decision is not proportionate to the interests or rights affected;

m. the administrative action or decision violates the legitimate expectations of the person to whom it relates;

n. the administrative action or decision is unfair; or

o. the administrative action or decision is taken or made in abuse of power.

89. Reliance is further made in Migai Aketch in his book 'Administrative Law' published in 2016 by Strathmore University Press at page 31 elaborates as follow on illegality:

> " A mechanism to control the exercise of discretionary powers is therefore required. English courts have provided such a mechanism in the form of the doctrine of ultra vires, which they have deployed in two senses. In its narrow sense, the doctrine has meant that 'a person or body acting under statutory power can only do those things the statute authorizes him or it to do; an act will be ultra vires if the person or body doing it did not have the statutory power to do it. Courts have therefore allowed an individual to challenge the legality of an act on the grounds that there was no power to do it."

90. It is submitted that where the 2nd Respondent acts beyond its powers, the said decision would be illegal. In this case, the illegality stems from the fact that the debarment decision dated 20th June 2025 was res judicata as the same facts, issues and evidence had been raised, heard and determined in Debarment Application Nos. 4 and 5 of 2021. The Supreme Court of Nigeria in Appeal No. SC/24/2002 Bosinde Ayuyaand 4 Others (for themselves and on behalf of OjoboCommunity) and Chife Naghan Yonrin and 3 Others (for themselves and on behalf of Torugbene Community)[2011] stated as follows as regards the relation of res judicata and jurisdiction:

> " When the plea is res judicata on the other hand, the party is saying that although he has already gotten judgment on the piece or parcel of land, he wants the court to adjudicate on the matter that had already been adjudicated upon in his favour which would be contradictory in terms since he would be asking the court to judge what had already been judged, that is why res judicata is a shield, not a sword particularly as the effect of its being sustained is that the court has no jurisdiction to entertain the present action over the same subject matter between the same parties or their privies etc, etc"

91. The High Court at Mombasa in Judicial Review Application 69 of 2018 V. Chokaa & Co. Advocates v Francis Thoya, County Secretary, Mombasa County Government & 4 Others [2021] also noted as follows:

> " Res Judicata is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again."

92. Also, a judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. Res judicata halts the jurisdiction of the court and that is why it is one of the factors affecting jurisdiction of the court. The effect of this is that the court is prevented from trying the case in limine. The rule of res judicata presumes conclusively the truth of the decision in the former suit.

93. It also relies on the High Court at Milimani in Judicial Review Miscellaneous Application 142 of 2019 Republic v Betting Control and Licensing Board & another; Outdoor Advertising Association of Kenya (Exparte Applicant) stated as follows:

> " In the application of that test, the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at.
>
> Reasonableness, as a ground for the review of an administrative action is dealt with in section 7(2)(k) of the *Fair Administrative Action Act*.[33] A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function."

94. Migai Aketch further elaborates at pg. 35 of his book (Supra) as follows:

> " This reformulated test has allowed them to review decisions where there has been a material defect in the decision-making process, where the decisions taken violate common law or constitutional principles governing the exercise of power such as the rule of law and equality, and oppressive decisions such as those which have an unnecessarily onerous impact on the rights or interests of the persons they affect.
>
> Examples of decisions deemed unreasonable by this test include: where manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration; where a decision is unreasoned, that is, lacks 'ostensible logic or comprehensive justification'; where there is no logical connection between the evidence and the ostensible reasons for the decision; and, where the decision-maker has taken into account as a fact something which is wrong or where he has misunderstood the facts upon which the decision depends."

95. It submits that in applying reasonableness, the High Court at Nairobi in Judicial Review No. 436 of 2016 Republic v Commission on Administrative Justice Ex parte Nyoike Isaac [2017] eKLR stated as follows:

> " In this case the Respondent's decision against the ex parte Applicant seems to have been informed by the fact that though the Applicant contended that he was not the one who registered the third parties as the proprietors of the suit land, there was no evidence to that effect. With due respect this was not the proper approach. It was incumbent upon the Respondent to satisfy itself as to the role played by the ex parte Applicant in the transaction. It was not for the ex parte Applicant to prove that he played no role therein. By arriving at its decision, the Respondent improperly shifted the burden of proof onto the ex parte Applicant.
>
> Apart from that the failure to consider the ex parte Applicant's role as a valuer before arriving at its decision in my view amounted to taking into account irrelevant factors and failing to consider relevant ones."

96. It submits that the decision is unreasonable if it does not take into account all relevant considerations.

97. The debarment decision dated 20th June 2025 is also disproportionate as the same seeks to punish the Applicant twice for the same subject matter.

98. The Court in Republic v Chairman, Rent Restriction Tribunal; Nzaro (Interested Party); Wambua(Exparte)(Judicial Review Application 1 of 2021) [2023] KEELC 17988 (KLR) (23 May 2023) (Judgment) stated as follows as to when it can issue Orders of Certiorari and Prohibition:

> The prerogative writs of "Certiorari" derives from the Latin word "Certiorari" which means to be certified, informed, appraised or shown. Both in its embryonic days and today, the order, initially and prerogative writ was inferior courts and required the proceedings of that to be transferred to the High Court and examined for validity. It meant the decision would be quashed. From the Provisions of Order 53 of the Civil Procedure Rules the Applicant ought to move court within a period of six (6) months from the time the order, decree, judgment, conviction or other proceeding was made.

99. The Order of "Prohibition" issues where there are assumption of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi's Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction.

100. The Court went on to grant Certiorari and Prohibition Orders stating as follows:

> From the foregoing, the Court finds and hold that the Respondent had no jurisdictions to hear and determine the matter before it involving the suit property. Having found that the Respondent acted in excess of its jurisdiction, then any orders that was made ought to be quashed and the proceedings struck out. Further the Respondent is hereby prohibited from proceeding with the matter.

101. Reliance is also placed in Republic v Public Procurement Administrative Review Board & 2 others [2019] KEHC 9688 (KLR) in quashing the decision of the PPARB stated as follows:

> The power of the court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved. A proper construction of the impugned decision and the relevant provisions of the law cited herein above leave me with no doubt that the impugned action tainted with an error of the law. Put differently, the ex parte Applicant has demonstrated that the Respondent acted ultra vires its statutory mandate and that the decision is tainted with unreasonableness.

The 1st Respondent' Case;

102. It is his case that he commenced debarment proceedings number 10 of 2024 against the Applicant was based on the participation of the Applicant herein in Tender No: KEBS/RT/011/2021/2024 while using documents that had already been found to have been falsified in debarment proceedings number 4 and 5 of 2021.

103. It is his case that a decision was rendered in the debarment proceedings precipitating the Applicant herein to file Judicial Review application number E054 OF 2025.

104. He argues that vide a judgment delivered on 9th April 2025, the Honourable Lady Justice Aburili found that the 2nd Respondent herein acted outside of time and devoid of jurisdiction in entertaining debarment proceedings number 10 of 2024.

105. It is further his case that having found that the 2nd Respondent acted without jurisdiction the Honourable Court did not delve into the merits of the debarment proceedings as the same were held to

be a nullity abinio. Accordingly, the issue of using falsified documents in tendering processes remained unlitigated upon.

106. Vide a notice for debarment dated 10th April 2025, he filed a Request for Debarment against the Applicant herein which application was assigned Debarment Application no 6 of 2025.

107. The said request for debarment was pegged the following:

a. The Applicant herein in participating in procurement proceedings gave false information about his qualifications.

b. The Applicant herein had committed an offence under the A *Public Procurement and Asset Disposal Act*.

c. The Applicant herein had committed an offence relating to procurement under any other Act or Law of Kenya.

d. The Applicant herein had committed an offence relating to procurement under any other jurisdiction.

108. Some of the documents which the Applicant herein used in Tender No: KEBS/RT/011/2021/2024 were the same documents that the Debarment Committee had previously found to have been falsified in previous Tenders and the Applicant herein accordingly debarred vide the decision of the Debarment Committee in Debarment Application No 4 and 5 of 2021.

109. The 2nd Respondent having been satisfied on prima facie issued a Notice of Intended Debarment and Directions dated 7th May 2025.

110. It is his case that the Applicant herein indeed confirmed that some of the documents used in the impugned Tender were the same as those used in previous Tenders leading to its debarment vide Debarment Applications 4 and 5 of 2021.

111. He argues that his Application for debarment was on the premise that the Applicant herein is a repeat offender who uses falsified documents in different tenders.

112. The matter was accordingly heard where the Applicant herein was ably represented and the Board, 2nd Respondent herein accordingly debarred the Applicant herein.

113. Debarment proceedings number 6 of 2025 were conducted in a lawful, procedural and effective manner and the court ought not to disturb the debarment decision thereof.

114. Debarment proceedings are tender specific. Accordingly, the documents and grounds relied upon in each Debarment proceedings relate to a specific tender.

115. The Applicant herein participated in Tender KEBS 019/2017-2020 whereof it submitted documents in support of its Application including documents certified by a Firm of Drake & Scott Solicitors. A lease Agreement with Itech Auto Finance Limited dated 1st June 2021 and Lease Agreement with a company called JLS Investment Group Limited. He argues that he contested the validity of the above documents through Debarment Application 4 and 5 of 2021.

116. The Debarment Committee of the 2nd Respondent on scrutiny of the documents indeed found that the Firm of Drake & Scott Solicitors did not exist in the United Kingdom. The Lease Agreements were also found to have been falsified.

117. The Applicant herein thereafter participated in International Tender No. KEBS/RT/011/2021-2024 (the impugned tender.) In the same Tender, the Applicant herein again used the documents used in Tender KEBS 019/2017-2020 which had already been found to have been falsified.

118. On the basis that the documents were already impeached the Applicant filed the Debarment Application No 6 of 2025 to seek to have the Applicant to be debarred for being a repeat offender.

119. According to him, it is factually and legally inconceivable that the Applicant herein purports that since it had been debarred for using falsified documents, it can use the same documents in subsequent tenders without any recourse.

120. The Applicant has not controverted the fact that it used falsified documents in tendering for Tender No. KEBS/RT/011/2021-2024 which was subject to the debarment proceedings impugned herein.

121. The import of allowing the Applicant's motion would be to sanitize the Applicant's use of falsified documents in tendering process which will not only be an affront to justice but tantamount to abetting illegality which is frowned upon in law.

122. The Applicant herein was afforded his rights to fair hearing in accordance with *the Constitution* and in no way were his rights to fair hearing infringed upon as purported in its application.

The 1st Respondent's Submissions;

123. The 1st Respondent is of the view that the only issue before the

a. Whether Debarment No 6 of 2025 is res judicata and

b. Whether the proceedings in Debarment No 6 of 2025 are a double jeopardy.

124. The 1st Respondent herein commenced debarment proceedings vide application number 10 of 2024 against the Applicant after which the Board made a decision and barred the Applicant for a period of three years.

125. The Applicant being aggrieved by the decision filed a Judicial Review Application No. E054 of 2025.In its Judgment, the Court was categorical that the Board conducted the hearing outside the prescribed timelines. Having been conducted outside the timelines, the Court found that the Board acted without jurisdiction.

126. All the proceedings relating to debarment application No. 10 of 2024 were held to be null abinitio for having been conducted outside the statutory timelines but the court did not bar the Board from determining the application on its merits and within the realms of the law.

127. Reliance is placed in the Court of Appeal Case of The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR where it was held interalia that:

> " The doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being hounded by issues and suits that have already been determined by a competent court."

128. In her decision, the Judge held that the Board had no jurisdiction to entertain the matter. In essence the Court held that the board acted beyond its jurisdiction by allowing documents to be filed beyond the timeframe.The Court was emphatic that any judgment returned outside time would be without jurisdiction and therefore a nullity bereft of any force or effect in law.

129. In the case of Samuel Macharia & another v Kenya Commercial Bank ltd & 2 others as was cited in Republic v Public Procurement Administrative Review Board; Kenya Ports Authority & 7 others (Interested Party); Liason Group (Insurance Brokers) Limited & 3 others (Exparte) (Judicial Review Application 3A & 30 of 2020 & Judicial Review Miscellaneous Application 2 of 2020 (Consolidated)) [2022] KEHC 285 (KLR) (16 March 2022) (Ruling) it was held that;"a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. The court summed up the law in the following words "it seems clear to us that the jurisdiction of the High Court in public procurement judicial review proceedings is expressly limited in terms of time and is not open to expansion by that court. To step out of time is to step out of jurisdiction and any act or decision outside jurisdiction is by application of first principles a nullity."

130. It submits that Res judicata to be invoked the following elements must be demonstrated:

a. There is a former Judgment or order which was final;

b. The Judgment or order was on merit;

c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d. There must be between the first and the second action identical parties, subject matter because of action.

131. It submits that the present case lacks the cardinal ingredient of the principle of res judicata as the decision rendered in debarment number 9 of 2024 was rendered devoid jurisdiction.

132. The Court in Mungai v Ngunya & 3 others (Land Case E154 of 2023) [2024] KEELC 5820 (KLR) (31 July 2024) (Ruling) held as follows;

> " Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR,....."

133. In Bernard Mugo Ndegwa v James Nderitu Githae & 2 others [2010] KEHC 3922 (KLR) The Judge held;

> " Briefly put, the Land Disputes Tribunal was not a competent court as envisaged in Section 7 of the *Civil Procedure Act*. This suit is therefore not Res Judicata and the same is properly before this court and it should proceed to hearing. The Preliminary Objection is therefore overruled. Parties to nonetheless do discovery and file their lists of documents in court before they take a hearing date".

134. According to him, when a court lacks jurisdiction, its decision is not binding. This means that the parties can bring the same case before a court that has the proper jurisdiction, and the previous, invalid decision does not bar them from doing so.

135. In this case the Board must be clothed with jurisdiction in terms of timelines as provided by the laws; PPDA and the Debarment Proceedings Manual.

136. The Court's decision that the prior decision was a nullity for want of jurisdiction means that the prior decision cannot be used to block a new case from being instituted, heard and determined by a competent Court or tribunal.

137. Therefore, the doctrine of res judicata cannot apply in this situation because the prior decision as was held is not a valid and/or final determination of the issue(s).

138. The Applicant challenges the 2nd Respondent's decision of 20th June2025 to debar the Applicant, alleging double jeopardy and unlawful reliance on documents.

139. It is not disputed that the Applicant had previously been debarred on 2nd June 2021 following the outcome of Debarment Applications 4 and 5 of 2021.

140. It is also not in dispute that the 1st Respondent's application for debarment, made on 10th April 2025 (debarment Application No. 6 of 2025) is based on the allegation that the same falsified documents that led to the earlier debarment were reused by the Applicant in the subsequent tender process for KEBS/RT/011/2021-2024.

141. It is its case that The Applicant in its submissions indicates that the decision in debarment application number 6 of 2025 has crucified them twice for having been debarred previously in debarment application number 4 and 5 of 2021.

142. This averment is based on the alleged ground that the Respondents herein used the same facts and documents used in number 4 and 5 of 2021.

143. It is his case that the averments in the said paragraphs are false and deliberately misleading for the following reasons:

a. It is indeed true that the Applicant herein was debarred for a period of three years following a decision dated 2nd June 2021 issued in debarment application number 4 and 5 f 2021.

b. The said debarment proceedings were as a result of the Applicant submitting falsified documents in Tender Nos. KEBS/T057/2014-2015, KEBS/T019/2017-2020 and KEBS/T010/2019-2021. Those documents having been found to be falsified the Applicant herein was barred from using those documents in any other Tender.

c. Having been found to be falsified and the Applicant having served its term for debarment, the Applicant used the same documents that were found to be falsified in bidding in Tender No KEBS/RT/011/2021/2024 which is the subject of this Judicial Review.

144. It is argued that The Applicant herein has confirmed that indeed it was debarred as the documents used in Tenders; KEBS/T057/2014-2015, KEBS/T019/2017-2020 and KEBS/T010/2019-2021 were falsified and accordingly served the three years debarment.

145. The use of such documents is in contravention of section 41 (d) of PPADA which provides that:

> The board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person has in procurement or asset disposal proceedings given false information about his or her qualifications.

146. Debarment proceedings are precipitated by participation in individual Tenders. If an Applicant is debarred in one Tender, it is trite that they cannot use the same documents that they were debarred based on in a subsequent Tender.

147. If they so do, the same raises fresh grounds for debarment in the subsequent Tender as is the current case.

148. The procurement processes are tender based and each is tried on its own and therefore the Applicant cannot be allowed to use falsified documents previously used and still be allowed to plead double jeopardy.

149. While reaching to its decision in Debarment No 6 of 2025, it relied on documents that were presented in the application at hand (being Debarment application No 6 of 2025) and not the documents presented in Debarment application No. 4 and 5 of 2021.

150. In Debarment Application number 6 of 2025 the 1st Respondent proved that the Applicant herein has committed an offence under the Act as required under Clause 5 (1) Table 1 (a) on Grounds for debarment of the Debarment Manual and the same cannot be construed as double jeopardy.

151. The use of documents that had previously been used should not be confused with an offender in that circumstance being crucified twice as it was being put by the Applicant.

152. The principle of double jeopardy does not apply to debarment proceedings. Moreover, the Applicant's admission in its pleadings in the debarment proceedings that it had re-used in its subject tender, KEBS/RT/011/2021-2024, documents it had previously used in its bids in tenders against which it had been previously debarred did not excuse it from being considered for debarment, and from its eventual debarment on 20th June 2025.

153. He submits that the doctrine of double jeopardy only applies in criminal proceedings to the exclusion of administrative processes as was held in the case of Republic v Public Service Commission of Kenya Ex parte James Nene Gachoka, Nairobi Misc. Application 516 of 2005 [2013] eKLR.

154. The prohibition contemplated by the provision is that of a person undergoing trial for the same offence for which he was tried, convicted or acquitted.

> " The phrase 'tried for that offence or for any other criminal offence' found in section 77(5) of the repealed Constitution necessarily mean that the proceedings must be before a court or a judicial tribunal and not mere administrative or civil proceedings....."

155. Reliance is placed in the case of EAA Company Limited Vs Public Procurement Regulatory Authority And Charles Nzai where the Applicant had used same falsified documents in different tenders. The Court had this to say;

> " The Court agrees with the 2nd and 3rd Respondents that debarment proceedings are administrative in nature and do not attract the constitutional protections applicable to criminal trials. Even if such protections were to be analogously applied, the record demonstrates that the present debarment relates to a distinct tender No. KEBS/RT/011/2021-2024 and is grounded on conduct that occurred after the previous debarment. The reuse of allegedly falsified documents in a separate and subsequent tender when the same documents had been impeached in the earlier tender amounts to a fresh cause of action and the 3rd Respondent was entitled to address that issue independently, without binding itself to the alleged double jeopardy principle....."

156. Double jeopardy does not bar a second debarment if it arises from a separate procurement process or new misconduct, where the alleged misconduct relates to a new incident, even if similar in nature and where the previous debarment has lapsed, and they have since participated in other subsequent tenders.

157. He submits that the Debarment which is the subject of this application followed the due process of law and natural justice and the Applicant cannot be heard to say that the same violated its constitutional rights while it has been demonstrated that it used falsified documents in the subsequent tender which documents had already been declared illegal.

The 2nd Respondents Case;

158. In opposing the application, it argues that inter alia it is the Authority's statutory mandate to ensure that procurement procedures established under the Act are complied with.

159. The 2nd Respondent is empowered under section 41 of the Act read together with Regulation 22 of the Public Procurement and Asset Disposal Regulations, 2020 (the Regulations) to debar any person (s) who commit the offences stipulated in section 41 of the Act.

160. It argues that it received a Request for Debarment of the Applicant from the 1st Respondent herein dated 10th April, 2025.

161. The Request for Debarment was premised on the ground of falsification of information about qualifications in procurement proceedings as provided for in section 41(1)(d) of the Act.

162. The offences forming the basis of the Request for Debarment are indicated to have been committed in International Tender No. KEBS/RT/011/2021-2024 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts (Re-Tender) of Kenya Bureau of Standards.

163. It is further its case that the Request for Debarment was considered by the 2nd Respondent in accordance with Regulations 22 (5) (a) and (b) which provides that (a) upon receipt of a request for debarment, the Board shall analyze the case within thirty days to determine whether there is a prima facie case for debarment; (b) if the analysis establishes a prima facie case for debarment, the Board shall issue a notice of intended debarment to the party, who shall be the subject of the debarment proceedings requiring him or her to file a written response with the Board.

164. After analysis of the Request for Debarment, the 2ndRespondent found that there was a prima facie case and issued a Notice of Intended Debarment to the both parties dated 7th May, 2025 together with directions on filing, and more specifically granting the Applicant herein fourteen (14) days to file and serve its written response fixing the matter for hearing on 5th June, 2025.

165. After the hearing The 2nd Respondent made a number of observations and concluded that indeed the Applicant had falsified a number of documents regarding its qualifications as more specifically illustrated in the debarment decision. Via its decision dated 20th June, 2025, the Applicant was debarred for the minimum period of three (3) years.

166. The 2nd Respondent, in making its decision, relied not on documents were that were presented in Application Nos. 4 and 5 of 2021 but rather on the documents presented by the 1st Respondent herein in its Debarment Application No. 6 of 2025.

167. The 1st Respondent, in its Request for Debarment, brought to the attention of the 2nd Respondent the fact that some of the documents submitted by the Applicant in the instant tender had also been submitted in previous tenders and the same were found to have been falsified in the Decision in Debarment Application Nos. 4 and 5 of 2021.

168. In response to the claim of res judicata, it was the observation of the 2nd Respondent herein that the Applicant had annexed to its bid some of the documents that were previously found to be falsified in a previous Debarment Application No. 4 and 5 of 2021.

169. It argues that this is not a matter of res judicata but a serious issue of the Applicant herein becoming a repetitive offender, defiant of the orders and findings of the 2nd Respondent herein and whom without regard to the integrity of the procurement proceedings goes ahead and use documents already found to have been falsified in subsequent tenders.

170. It invites this honourable court to interrogate the 2ndRespondents decision of 20th June, 2025 and particularly from paragraph 82 to 94 and resonate with the 2nd Respondent's finding that Applicant herein is a repetitive offender and disguising its application herein to be initiated under the doctrine of res judicata.

171. It is its case that contrary to the averment that the 2nd Respondent was barred from hearing and determining Debarment Application No. 6 of 2025 in view of the judgment in High Court HCJR/E054/2025.

172. In considering the instant Request for Debarment, the Board was alive to the fact that in High Court HCJR/E054/2025, the court did not delve into the merits of the Board's decision in Debarment Application No. 10 of 2024 but the same was dismissed on technicality for having being heard outside the statutory timelines.

173. The 2nd Respondent conducted the debarment proceedings herein with utmost fairness, transparency and with due regards to the rules of natural justice.

174. All the parties were granted a fair hearing and given equal opportunities to make their representations before the 2nd Respondent.

The 2nd Respondent's submissions;

175. It submits that The Application is an appeal against the decision of the Respondent but rather not against the conduct of the Respondents debarment committee in its proceedings.

176. It submits that the main issue herein as framed by the Applicant for determination as appears in page 5 of its Submissions is whether the suit is res judicata. This is the same issue which was litigated before the 2nd Respondent and determined via its decision of 20th June, 2025.

177. The above notwithstanding, the Applicant submits that the 2ndRespondent sought to hear and determine issues and evidence that had already been relied on in Debarment Applications No.4 and 5 of 2021, in which a decision was issued on 25thMarch 2022 debarring the Exparte Applicant.

178. The 2nd Respondent has been persistent that in making its decision, it relied not on documents that were presented in Application Nos. 4 and 5 of 2021 but rather on the documents presented by the 1st Respondent wherein it was established that some of the documents submitted by the Applicant in the instant tender had also been presented in previous tenders and the same were found to have been falsified in the Decision in Debarment Application Nos. 4 and 5 of 2021.

179. It submits that the doctrine of res judicata cannot materialise in this case. The facts presented during the debarment proceedings pointed out to an Applicant who had annexed to its bid some of the documents that were previously found to be falsified in a previous Debarment Application No. 4 and 5 of 2021.

180. This is not a matter of res judicata but a serious issue of the Applicant herein becoming a repetitive offender, defiant of the orders and findings of the 2nd Respondent herein and whom without regard

to the integrity of the procurement proceedings goes ahead and use documents already found to have been falsified in subsequent tenders.

181. It submits that contrary to the averment that the 2nd Respondent was barred from hearing and determining Debarment Application No. 6 of 2025 in view of the judgement in High Court HCJR/E054/2025, the court did not delve into the merits of the Board's decision in Debarment Application No. 10 of 2024 but the same was dismissed on technicality for having being heard outside the statutory timelines.

182. The key elements for the doctrine of Res Judicata to apply were elaborated in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) to include that there is a former judgment or order which was final; the judgment or order was on merit; the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and that there must be between the first and the second action identical parties, subject matter and cause of action.

183. It submits that in this particular case, the final decision of the Board was nullified by the High Court in HCJR/E054/2025 not on merit which is one of the requirements for the doctrine of Res Judicata to crystalise. The doctrine of Res Judicata is not at all, applicable to the facts of the matter before you for consideration.

184. The Applicant herein has vehemently submitted on breach of Constitutional Rights without being specific on how the alleged rights were breached.

185. It invites this court to refuse being called upon to wear the hat of a constitutional court but rather to restrain itself within the jurisdiction conferred upon it.

186. There is nothing wrong with the conduct of the 2nd Respondent in the impugned debarment proceedings to warrant the intervention of this Court.

187. The policy behind debarment in the public procurement process is rooted in the need to uphold integrity, fairness and accountability in the use of public funds.

188. Debarment serves both preventive and punitive purposes, ensuring that only competent, honest, and reliable suppliers participate in public procurement in the supply of goods, works, or services funded by public.

189. Reliance is placed in Judicial Review No. 55 of 2022: Republic v Public Procurement Regulatory Authority & another; Auditor General & another (Interested Party) where he held that;

> "It is trite law that the court's role in judicial review remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. The legal principle now entrenched in precedent is that in circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently. The Committee, in

my respectful view, lawfully exercised power within statutory limits. It cannot be faulted for doing what the law mandated it to do."

Analysis and determination;

I have carefully considered the Application, the statutory statement, the verifying affidavit, the replying affidavits, and respective submissions and authorities of the parties' and I find the following to be the issues for determination;

1. Whether the Application has merit.

2. Who will bear the costs.

Whether the Application has merit.

190. In determining this case, the court is guided by the case of Republic v Chairman, Rent Restriction Tribunal; Nzaro (Interested Party); Wambua(Exparte)(Judicial Review Application 1 of 2021) [2023] KEELC 17988 (KLR) (23 May 2023) (Judgment) where it was stated as follows as to when it can issue Orders of Certiorari and Prohibition:

> The prerogative writs of "Certiorari" derives from the Latin word "Certiorari" which means to be certified, informed, appraised or shown. Both in its embryonic days and today, the order, initially and prerogative writ was inferior courts and required the proceedings of that to be transferred to the High Court and examined for validity. It meant the decision would be quashed. From the Provisions of Order 53 of the Civil Procedure Rules the Applicant ought to move court within a period of six (6) months from the time the order, decree, judgment, conviction or other proceeding was made.

The Order of "Prohibition" issues where there are assumption of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi's Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction.

191. 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.

192. In the case of Pastoli v Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304 where it was 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 the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or acts 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 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 to act 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 legislature instrument by which such authority exercises jurisdiction to make a decision."

193. Illegality crystalises when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint.

194. The Applicant's case is partly pegged on the doctrine of Res judicata. Section 7 of the *Civil Procedure Act* states as follows;

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
>
> Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
>
> Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
>
> Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
>
> Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
>
> Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
>
> Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

195. The Supreme Court in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) held that:

> " We reaffirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively. To further bolster our position, we borrow from the decision from India in Karam Chanel another v Union Of India and others on 24 April, 2014 where it was restated the principles upon which the doctrine of res judicata is founded as follows;
>
> .....it is clear that the rule of res judicata is mandatory in its application and should be invoked in the interest of public policy and finality. The matter which have actually been decided would also apply to the matters which have been impliedly and constructively decided by the court. These principles are to be applied to preserve the doctrine of finality

rather than frustrate the same. The doctrine of res judicata is the combined result of public policy so as to prevent repeated taxing of a person to litigation. It is primarily founded on the following three maxims:

1. nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause.
2. interest republicae ut sit finis litium: it is in the interest of the State that there should be an end to a litigation; and
3. res judicata pro veritate occipitur: a judicial decision must be accepted as correct

.....The doctrine of res judicata is conceived not only in the larger public interest which requires that all litigation must sooner than later come to an end but is also founded on equity, justice and good conscience."

196. According to the Applicant's the following items were res judicata in Debarment Application No.6 of 2025:

a. Under paragraphs 236 of the decision dated 2nd June 2021 (delivered on 25th March 2022)— refer pages 1435 and 1436 of the Annexures, the Debarment Committee was invited to make a determination on the existence of JLS Investments Group Limited and it did so in the said paragraph. The same invitation was also extended to the Debarment Committee as in decision dated on 20th June 2025 wherein it made the same finding at paragraph 88(refer page 22 of the Annexures), wherein the company was deemed to be non-existent.

b. Additionally, at paragraphs 236 and 237 of the decision dated 2nd June 2021 (delivered on 25thMarch 2022)— refer pages 1435 and 1436 of the Annexures, the Debarment Committee was invited to lease agreement executed in 2019, wherein the Committee made its decision in the aforesaid paragraphs. The same invitation was also extended to the Debarment Committee as in its Decision dated 20th June 2025 wherein it made at paragraph 90 (refer page 22 of the Annexures), wherein the lease was deemed to be falsified.

c. Under paragraphs 238, 239 and 240 of the decision dated 2nd June 2021 (delivered on 25th March 2022)— refer pages 1436 and 1437 of the Annexures, the Debarment Committee made a determination as to the notarisation of the Lease Agreement between Itech Auto Finance and Auto Terminal UK Limited by Drake and Scott. The same was also determined at paragraphs 83, 84, 85 and 86 of the decision dated 20th June 2025 (refer pages 20 and 21 of the Annexures), wherein the documents were deemed to have been falsified.

d. Under paragraph 235 of the decision dated 2nd June 2021(delivered on 25th March 2022) — refer pages 1435 of the Annexures, the Debarment Committee was invited to make a determination considering the affairs of Pal Auto Garage, which it did. The same invitation was extended to the Debarment Committee, and a decision was made under paragraph 92 of the decision dated 20th June 2025(refer page 23 of the Annexures) wherein it was dismissed due to insufficient evidence.

197. It argues that it served the debarment period to its conclusion as a result of which it should not be subjected to the debarment as ordered in decision dated 20th June 2025.

198. It refers the court to Nairobi High Court in HCJR/E054/2025 Auto Terminal Japan Limited vs State Law wherein the court found the Judicial Review Application meritorious on grounds of lack of jurisdiction on the part of the Public Procurement Regulatory Board and quashed the Public Procurement Regulatory Board's debarment decision.

199. In The Supreme Court decision in Petition No.17 of 2015 John Florence Maritime Services Limited and another v Cabinet Secretary Transport and Infrastructure & 3 others [2021] it was held that the following elements must be demonstrated:

a. There is a former judgment or order which was final;

b. The judgment or order was on merit;

c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d. There must be between the first and the second action identical parties, subject matter and cause of action.

200. It is this court's finding that in the instant suit the doctrine of res judicata cannot come to the aid of the Applicant since the Nairobi High Court in HCJR /E054/2025 found that the Public Procurement Regulatory Board acted without jurisdiction.

201. The Applicant has repeatedly advanced the argument that the board lacked jurisdiction as a result of the above judgment. This in essence is an own goal or a self-defeatist argument given that it is one of the fundamental ingredients of Res Judicata under Section 7 of The *Civil Procedure Act*.

202. This court buttresses the fact that public procurement related contracts should not be entered into on the basis of falsified documents or non-existing companies. To allow that would amount to an affront to the rule of law. This would water down our national values and principles of governance.

203. The Applicant's argument that since it served the debarment period to its conclusion as a result of which it should not be subjected to the debarment as ordered in decision dated 20th June 2025 is misplaced.

204. The Applicant's argument that Debarment proceedings in Debarment Application No.6 of 2025 serve no purpose as the Exparte Applicant did not benefit in any conceivable manner from the International Tenders No. KEBS 019/2017-2020 and KEBS/RT/011/2021-2024 cannot hold. A debarment sanction cannot amount to a correction of falsification as contained in tender documents.

205. Any procurement matter and any attendant transaction that is advanced on the basis of falsified documents has no economic value. A bidder who uses a falsified document exposes themselves to debarment proceedings. Once a document is declared to be falsified, the tenderer cannot in the future tender the same document.

206. It is this court's finding that the fact that a tenderer has served the debarment period that was informed by an attempt to use falsified documents does not amount to a sanitization or a legalization of the falsified documents. Forgery leaves an indelible economic mark on the concerned documents.

207. To allow the use of falsified documents for purposes of the competition for tenders will water down the quality of the goods and services that flow through the procurement process which would offend Wanjiku's legitimate expectation that her taxes shall be utilized for legitimate purposes.

208. New tenders by nature present a totally new process that cannot adopt documents that had been declared illegal in a past procurement exercise.

209. Falsified documents remain incurable and no amount of litigation can bring a none existing company to life so as to allow the use of its existence during any tendering process.

210. Having observed as I have above this court has considered the fact that the Directorate of Criminal Investigations vide a letter dated 19th December 2024 which was written to the Exparte Applicant a copy of which was furnished to the 2nd Respondent, the Directorate of Criminal Investigations expressed and or pointed out that investigations are still on-going wherein the said investigations directly related to the documents and matter that was before the Debarment Committee.

211. The Respondents in this suit did not controvert the fact that that the Directorate of Criminal Investigations is still actively investigating the alleged fraudulent documents.

212. The court is of the view that the results of the investigations by the Directorate of Criminal Investigations will conclusively guide the exercise of discretion on the prima facie question during the debarment proceedings.

213. It is this court's finding that without a conclusive investigation report to the effect that the documents in the impugned debarment proceedings are fraudulent then the resultant debarment decision will be ill informed and irregular.

214. Any action or decision whether arrived at during a prima facie or at a full trial that is pegged on an issue that is still being investigated by the directorate of criminal investigations cannot be said to be legal.

215. A decision that is based on inconclusive a presumption that documents in issue are falsified is premature and the same stands on quicksand since it offends Article 50 of *the constitution* which guarantees the right to fair hearing.

216. To allow a debarment decisions to be made on the basis of documents or issues that are pending investigations amounts placing the cart before the horse, which amounts to an infraction of the fair administrative action right as guaranteed under the article 47 of *the constitution*.

217. The impugned decision that the Applicant has challenged amounts to a non-consequential debarment decision that must be quashed by this court through an order of certiorari and I hold.

218. The order of prohibition flows from the foregoing finding.

Costs;

219. In determining the issue of costs, this court is guided by the case of Jasbir Singh Rai &3 others v Tarlochan Singh Rai & 4 others [2014] eKLR [13] it was held, to the same intent Mr. Justice (Rtd.) Kuloba thus writes in his work, Judicial Hints on Civil Procedure, 2nd ed. (Nairobi: Law Africa, 2011), p. 94:

> "Costs are [awarded at] the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise: Chamilabs v. LaljiBhimjiand Shamji Jinabhai Patel, High Court of Kenya, Civil Case No. 1062 of 1973."

220. The Applicant has made out a case for the grant of order of for costs.

Disposition;

221. The Supreme Court in Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) KLR held as follows:

> "(49)[49] Section 108 of the Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

222. In conclusion the analysis herein above this court concludes that the Applicant has proven its case.

Order;

The application is allowed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF AUGUST, 2025.

.....

J. CHIGITI (SC)

JUDGE