



Republic v Kenya Ports Authority; Newnham Services International Limited (Exparte Applicant); Catch Security Links Limited & 9 others (Interested Parties) (Judicial Review Application 1 of 2022) [2024] KEHC 2144 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION 1 OF 2022
OA SEWE, J
FEBRUARY 29, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

KENYA PORTS AUTHORITY RESPONDENT

AND

NEWNHAM SERVICES INTERNATIONAL LIMITED .. EXPARTE APPLICANT

AND

CATCH SECURITY LINKS LIMITED INTERESTED PARTY

HATARI SECURITY GUARDS LTD INTERESTED PARTY

NORTHWOOD SERVICES LTD INTERESTED PARTY

TOTAL SECURITY SURVEILLANCE LTD INTERESTED PARTY

BEDROCK SECURITY SERVICES LTD INTERESTED PARTY

SOLVIT SECURITY SOLUTIONS LTD INTERESTED PARTY

SECURITY LINKS LTD INTERESTED PARTY

ACCESS SECURITY LINKS LTD INTERESTED PARTY

RADAR LTD INTERESTED PARTY

VICKERS SECURITY SERVICES LTD INTERESTED PARTY



JUDGMENT

1. Upon being granted leave on the 25th February 2022, the ex parte applicant, Newnham Services International Limited, filed the Notice of Motion dated 9th March 2022 pursuant to Section 8 of the [Law Reform Act](#), Chapter 26 of the Laws of Kenya, Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya, and Order 53 Rule 1 of the Civil Procedure Rules, 2010. The applicant thereby asked for the following orders:
 - (a) That an order of Certiorari be issued to remove to the High Court for purpose of quashing:-
 - (i) The contracts for provision of security services entered into between the respondent and the interested parties herein;
 - (ii) The instructions or authority or approval granted by the respondent to the interested parties to deploy guards and or take over the provision of security services at any of the respondent's premises;
 - (b) An order of Prohibition be issued to prohibit the respondent from evicting the ex parte applicant from any of its premises or handing over any such premises to any of the interested parties or entering into any written contracts for provision of security services or honouring any of the terms and obligations thereof;
 - (c) An order of Mandamus be issued to direct the respondent to comply with Section 93(1) of the Public Procurement and Disposal Act as read with Regulation No. 73 of the Public Procurement and Disposal Regulations as amended;
 - (d) An order of Mandamus be issued to direct the respondent to comply with Regulation 74(2) of the Public Procurement and Asset Disposal Regulations;
 - (e) That the Orders of Certiorari, Prohibition and Mandamus so granted to the ex parte applicant be allowed to operate as stay of:
 - (i) The intended removal or eviction of the ex parte applicant from the respondent's premises where it currently provides security services under the contract for provision of security services dated 1st March 2018 pending the hearing of the Notice of Motion.
 - (ii) The intended conclusion, execution and or implementation of any written or unwritten contracts for provision of security services or parts thereof between the respondent and the interested parties herein pending the hearing and determination of the Notice of Motion.
 - (f) The costs of the application be provided for.
2. The application was premised on the grounds that the applicant currently provides and has been providing security services to the respondent under a contract for provision of security services since March 2018; and that the applicant has deployed 18 guards to the respondent's premises pursuant to that contract. The applicant was therefore aggrieved that the respondent had awarded Tender No. KPA/2020-21/SS to the interested parties vide their letter dated 28th January 2022, notwithstanding the applicant's application for review to the Public Procurement Administrative Review Board; thereby exposing it to financial loss, loss of contract and grave prejudice.



3. The detailed grounds in support of the application were set out in the Statement dated 22nd February 2022 as well as the Supporting Affidavit sworn by Mr. Saul Munoko on 9th March 2022. In essence, the applicant averred that it duly applied for Tender No. KPA/004/2020-21/SS and enclosed all the mandatory requirements; but that on the 28th January 2022, the respondent wrote to it notifying it of its intention to award the subject tender to the 10 interested parties. In the same vein the respondent notified it that its bid in respect of the tender was unsuccessful.
4. The applicant further deposed that it responded to that notification vide a letter dated 8th February 2022 and clarified the issues in controversy; in addition to filing an application for review to the Public Procurement Administrative Review Board (PPARB) in compliance with Section 93(1) of the Public Procurement and Asset Disposal Act as read with Regulation 73 of the Public Procurement and Asset Disposal Act. Thus, at paragraph 6 of the Supporting Affidavit, the applicant averred that its review application was pending hearing and determination before the PPARB as at 9th March 2022 when the deposition was made.
5. Hence, the applicant was apprehensive that the respondent would proceed and award the tender to the interested parties in breach of the law before the hearing and determination of its review application. It added that it has been providing security services to the respondent prior to the subject tender; and contended that the respondent's decision to award the contracts to the interested parties notwithstanding a pending review is in breach of the rules of natural justice and therefore amenable to judicial review.
6. The application was opposed by the respondent vide the Replying Affidavit sworn on 15th March 2022 by its Head of Procurement & Supplies, Mr. Cosmas Makori. The respondent thereby conceded that it successfully floated a tender for the provision of security services under Tender No. KPA/04/2017-18 and thereafter contracted 8 security service providers, including the applicant, to provide security services for a period of three years with effect from 16th January 2018. It further averred that, prior to the lapse of the contract, it floated Tender No. KPA/080/2020-21 for Provision of External Security Services; but that the tender was non-responsive. It was consequently terminated pursuant to Section 63(1)(f) of the PPADA. Accordingly, the respondent extended the applicant's contract period in line with Section 139(2)(a) of the PPADA pending the initiation and conclusion of a successful tender process.
7. The respondent further deposed that, in the meantime, it floated the tender afresh in September 2021 vide Tender No. KPA/004/2021-22; which tender attracted 44 bids, including the bid of the applicant. The bids were evaluated in accordance with the relevant provisions of the PPADA and the bids of 10 service providers, who are the interested parties herein, were found successful. The respondent explained that the applicant's bid was found unresponsive at the preliminary stage and therefore did not proceed to financial evaluation. It further deposed that all the bidders were notified of the outcome as required by Section 87(3) of the PPADA.
8. The respondent further stated that, in the said notification of award, it explained to the unsuccessful bidders the reasons why their bids were unsuccessful and referred them to the avenues for redress, including the standstill period within which the unsuccessful bidders could apply for debriefing. In particular, the respondent deposed that, although it informed the applicant of its right to apply for review before the PPARB, no request, either for debriefing or review, was made by the applicant or any of the other unsuccessful tenderers. It added that it was on that account that it proceeded to prepare the contracts and had them signed by the interested parties. The contracts were to take effect from the 1st March 2022.



9. The respondent acknowledged that it did receive a letter dated 8th February 2022 from the applicant in which the applicant set out its concerns; but pointed out that the letter came after the debrief period had expired. It pointed out that, in the absence of a request for review, which would in effect stay the tendering process, the contracting phase was underway and was proceeded with to conclusion. Thus, the respondent maintained the stance that the transition process was completed on 28th February 2022 whereupon the handing over modalities were communicated and the incoming service providers deployed on 28th February 2022.
10. At paragraph 14 of its Replying Affidavit, the respondent explained that, by the time it was served with handwritten Court Orders on the 28th February 2022 at 1534 hours, the transition and handing over process had been finalized and the outgoing service providers had vacated the zones previously manned under the expired contracts. Hence, the respondent asserted that it lacked the contractual mandate to reinstate the outgoing service providers to their previously manned security zones. It further stated that, notwithstanding the foregoing, the applicant turned up on 4th March 2022 and proceeded to man its previously contracted zone till 5th March 2022 when its security officers left on their own volition for alleged lack of supervision from their supervisors.
11. Thus, at paragraph 17 of its Replying Affidavit, the respondent denied any knowledge of a pending application for review before the PPARB by the applicant as no notification thereof was given to it by the Board as required by Section 168 of the PPADA. The respondent annexed several documents to its Replying Affidavit to buttress its averments.
12. There is on record another Replying Affidavit sworn on behalf of the respondent by Daniel Amuyunzu, the Manager of Procurement & Contract Management. The affidavit reiterates, in the main, the averments earlier made by Cosmas Makori; particularly that the impugned contracts were duly signed with the interested parties and are in force to date. Hence, Mr. Amuyunzu averred that the orders sought by the applicant are not available; and therefore that it is in the interest of justice and fairness that the applicant's Notice of Motion dated 9th March 2022 be dismissed with costs to the respondent.
13. On behalf of the 2nd, 3rd, 5th, 7th and 8th interested parties (hereinafter, "the interested parties"), a Replying Affidavit was filed herein, sworn on their behalf on 8th November 2023 by Edward Madagwa. Their contention was that the application is incurably defective and therefore an abuse of the process of the court. The interested parties were of the posturing that the Court lacks the jurisdiction to hear and determine the application in view of the alternative dispute resolution mechanism provided for under Part XV of the PPADA. Thus, they submitted that the first port of call for resolution of any grievance by an unsuccessful bidder in a procurement process is through an administrative review application to the **PPARB**; which application should be made within 14 days of the notification of award or date of occurrence of the alleged breach at any stage of the procurement process.
14. The interested parties further averred that, although the applicant mentioned that it has filed an application for review with the PPARB, it failed to disclose the case or review application citation. The respondent having denied the existence of such a review application through the Replying Affidavit of Cosmas Makori dated 15th March 2022, the interested parties urged the Court to find that no such review has been filed.
15. Further to the foregoing, the interested parties averred that the application has been overtaken by events in that the respective contracts have been signed and are undergoing execution. They also pointed out that since 45 days have elapsed since the institution of the suit, any decision by the Court in this matter,



by way of judgment or otherwise, would be a nullity. They accordingly prayed for the dismissal of this suit.

16. The application was canvassed by way of written submissions pursuant to the directions given herein on 8th May 2023. The applicant's written submissions dated 4th July 2023 reiterated the evidence as set out in the Supporting Affidavit sworn by Mr. Saul Munoko. In particular, the applicant submitted that the respondent acted in breach of Sections 93(1), 94 and 173(b) of the PPADA as read with Regulations 73 and 74(1) and (2) of the PPADR by making the awards to the interested parties while its review application was pending hearing and determination.
17. In the respondent's written submissions dated 8th January 2024, reference was made to the factual basis of the application, with an emphasis on the fact that the applicant's bid was found to be unresponsive at the preliminary stage; and therefore did not proceed to the financial evaluation for failure to meet some of the mandatory requirements. Accordingly, the respondent was of the firm view that the applicant ought to have filed an application for review to the PPARB as provided for in the PPADA. It relied on *Mutanga Tea & Coffee Company Limited v Shikara Limited & Another* [2015] eKLR for the proposition that where a specific dispute resolution mechanism is prescribed by *the Constitution* or a statute, aggrieved parties ought to resort to that mechanism first before purporting to invoke the jurisdiction of the High Court.
18. In connection with Section 93(1) of the PPADA which was one of the provisions relied on by the applicant, the respondent urged the Court to note that this suit was not filed in connection with a prequalification process, but was in respect of an open tender process where bidders competed openly, transparently and freely within the strictures of the procurement law. In the respondent's view, Section 93(1) is entirely irrelevant to the facts hereof. In the same vein, the respondent submitted that it was misconceived for the applicant to place reliance on Regulations 20, 73 and 74(2) of the PPADR because none of them are relevant to the suit before the Court.
19. On whether breach of statutory duty on the part of the respondent has been proved, the respondent submitted that it lawfully performed all that was required of it in so far as the subject tender was concerned. It added that the applicant did not plead any failure to act. It was categorical that the whole process was conducted in accordance with the provisions of Article 227 of the Constitution, the PPADA and the attendant regulations; and therefore an order of Mandamus would be unnecessary. Reliance was placed in this regard on *Republic v National Employment Authority & 3 others Ex Parte Middle East Consultancy Services Limited* [2018] eKLR and *Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another* [2015] eKLR for the proposition that Mandamus is a judicial command requiring the performance of a specified duty which has not been performed. Hence, the Court was urged to find that none of the remedies sought by the applicant are merited in the circumstances presented by it.
20. In the same vein, the interested parties urged for the dismissal of the suit with costs. They posed a single question for determination by the Court, namely, whether the application dated 9th March 2022 is merited. They faulted the application on two fronts; firstly, on the failure by the applicant to abide by the exhaustion doctrine; and secondly, on the ground that the application is time barred. On their part, they relied on *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others* [2015] eKLR, *Republic v Nairobi City County & Another* [2019] eKLR and *Arprim Consultants v Public Service Commission*, Civil Appeal No. E039 of 2021, in support of their submissions.
21. In the premises, the issues arising for determination by the Court are;
 - (a) Whether the suit is time barred;



- (b) Whether the doctrine of exhaustion is application to the facts hereof;
- (c) Whether the orders sought by the applicant are merited;

A. On the plea that the suit is time barred:

22. As has been stated herein above, the contention of the interested parties was that the suit is time-barred in that forty-five (45) days have lapsed since the institution of the suit. Reliance was placed on Civil Appeal E039 of 2021 Arprim Consultants v Parliamentary Service Commission & The Public Procurement Administrative Review Board that found that the words under Section 175 of the *Public Procurement and Asset Disposal Act* were mandatory in nature and thus a suit should be concluded within forty-five (45) days of its commencement. Accordingly, the interested parties posited that since the forty-five (45) days provided in statute lapsed, this court lacks jurisdiction to handle the application herein and it ought to be dismissed.
23. Indeed, Section 175 of the *Public Procurement and Asset Disposal Act* provides that:-
- (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.
 - (2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.
 - (3) The High Court shall determine the judicial review application within forty- five days after such application.
 - (4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.
 - (5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.
 - (6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.
 - (7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.
24. Accordingly, the question to pose is whether this suit was filed "...by a person aggrieved by a decision made by the Review Board..."? and the answer is no. Indeed, the posturing of the respondent and the interested parties, which position is apparently diametrically opposed to their argument on time-bar, is that no such review application was filed by the applicant. They explained that, had such an application been filed, the Board would have notified the respondent accordingly as this is a mandatory requirement of Section 168 of the PPADA. It States:

Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed."



25. Upon a careful perusal of the applicant's affidavit, it is manifest that other than a bare assertion by the applicant at paragraphs 4 and 5 of its Supporting Affidavit, no proof was availed to demonstrate that indeed a request for review was signed by it before the PPARB. Indeed, the only document mentioned in this regard, namely Annexure M3 is in fact a letter dated 8th February 2022 by the petitioner to the respondent, which it wrote in reaction to the notification of intention to award. Accordingly, on that account and granted the provisions of Section 168 of PPADA as read with Regulation 205 of the PPADR, I am convinced that had such an application been filed, the respondent would have been notified thereof. Indeed, Regulation 205 is explicit and peremptory in terms. It provides that:
- (1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.
 - (2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary.
 - (3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.
 - (4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.
 - (5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3).
26. That this process was not activated in the applicant's case only goes to confirm the respondent's assertion that that no such request was filed by the applicant. In the premises, I find the contention that the suit is time-barred from the standpoint of Section 175(3) of the PPADA to be untenable, granted that this suit was not filed in response to the decision of the PPARB.
27. The Respondent and the interested parties also submitted that the application has been overtaken by events, since the contracts have been executed and are undergoing performance. I did not find merit in that argument because, under Article 165(6) of the Constitution the Court is clothed with supervisory jurisdiction over subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function. Accordingly, it cannot be said that the application is beyond the reach of the Court just because the contracts have been executed and are undergoing performance. A judicial review court is entitled to intervene at any stage in the event it finds an action taken to be illegal, irrational, and ultra vires. Hence, that aspect of the respondent's and interested parties' arguments is clearly untenable.

B. On Whether the ex parte applicant adhered to the doctrine of exhaustion:

28. The 2nd, 3rd, 5th, 7th, and 8th Interested Parties further, took issue with the fact that the applicant bypassed the PPARB, thereby disregarding the provisions Section 167(1) of the PPADA, which stipulates that: -
- (1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of



award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

29. Accordingly, it would be pertinent to ascertain whether the applicant qualified as an aggrieved person for purposes of the above provision granted the decision of the Court of Appeal of in *James Oyondi t/a Betooyo Contractors & Another v Elroba Enterprises Limited & 8 others* [2019] eKLR where it was held:

“It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;

“(1) subject to the provisions of this part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.”

It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that section 167(1) was designed of keep out. The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.”

30. There being no dispute that the applicant’s bid was eliminated at the preliminary stage, the issue of locus standi to file a review would have been germane before the PPARB. That notwithstanding, it is indeed the law that where an alternative dispute resolution mechanism is provided for, the same ought to be followed to conclusion before the intervention of the Court can be sought. In *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR, the Supreme Court underscored the principle thus: -

(116) The foregoing verdict also finds support in an adage principle in administrative law of “Exhaustion of Administrative Remedies” and from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance...”



31. The Court of Appeal was of the same mind in *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR in which it held:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

32. Accordingly, Section 9 of the *Fair Administrative Action Act*, generally provides as follows in connection with judicial review applications:

- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
- (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
- (3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under subsection (1).”

33. There is no gainsaying therefore that where applicable the exhaustion doctrine ought to be accorded its due place. In *William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others* [2020] eKLR it was held that:

The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*.”

34. Nevertheless, there are exceptions to the doctrine of exhaustion. Indeed, Section 9 (4) of the Fair Administrative Actions Act is explicit that:

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

35. Accordingly, in *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, it was held: -

46. What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an



extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.

47. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. Indeed, in the case before us, the alternative statutory forum envisaged in the PPAD Act, namely the Public Procurement Administrative Review Board, in an earlier suit involving an attempt to award the same tender, referred some of the issues raised to the High Court for hearing and disposition since the Review Board was persuaded that resolution of the issue involved serious questions of constitutional and statutory interpretation...
48. This approach taken by the Review Board, which is consonant with the one we adopt here is same one suggested by the Court of Appeal in R vs National Environmental Management Authority [2011] eKLR where the Court explained that:

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it....”

36. Accordingly, I have carefully considered the material presented before the Court by the applicant. It emerges, from paragraphs 5 and 6 of the Supporting Affidavit that the complaint is premised on Sections 93 and 94 of the PPADA, which provide for prequalification of tenderers for purposes of alternative methods of procurement as contra-distinguished from open tender. In particular, Section 93(1) provides: -

- (1) Subject to provisions of subsection (2), an accounting officer of a procuring entity where applicable, may conduct a pre-qualification procedure as a basic procedure prior to adopting an alternative procurement method other than open tender for the purpose of identifying the best few qualified firms for the subject procurement.
- (2) Pre-qualification shall be for complex and specialized goods, works and services.

37. It is plain therefore that the above section is applicable only in situations where an alternative method of procurement is employed by a procuring entity, as opposed to open tendering. To that extent, the doctrine of exhaustion is not applicable to the facts hereof, in which the method of procurement chosen by the respondent was the open tender system. Moreover, Section 167(4) is explicit that:

The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

- (a) the choice of a procurement method;



- (b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and
 - (c) where a contract is signed in accordance with section 135 of this Act.
38. It is my finding therefore that, in so far as Section 93 (1) of the Act does not fall in the categories set out under Section 167(4)(a) of the Act, an application to the PPARB would have been misconceived. Besides, the applicant also prayed that the contracts between the respondent and interested parties be quashed, thereby placing the dispute within the ambit of Section 167(4)(c) of the Act. In the circumstances, the inescapable conclusion is that the facts would not have lent themselves to a review by the PPARB; and therefore the applicant correctly approached the Court pursuant to its judicial review jurisdiction as conferred by Articles 23, 47 and 165(6) of the Constitution as well as Section 9 of the *Fair Administrative Action Act*. As pointed out herein above, the applicant also relied on Section 8 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya, and Order 53 Rule 1 of the Civil Procedure Rules, 2010. This, to my mind, is the sort of situation envisaged by Section 174 of the PPADA, which states:

The right to request a review under this Part is in addition to any other legal remedy a person may have.”

C. On the merits of the application:

39. As is often stated, judicial review is largely concerned with the decision-making process as opposed to the merits of the decision; granted that the role of the Court in judicial review is supervisory. It is not an appeal; and therefore remains a process review mechanism in spite of its anchoring in *the Constitution*. This aspect was reiterated by the Supreme Court in *Saisi & 7 others v Director of Public Prosecutions & 2 Others* (supra) as follows:
76. Be that as it may, it is the court’s firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the *Fair Administrative Action Act*. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1) (e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah*, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.
40. In the premises, the applicant needed to demonstrate that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety, or is otherwise deficient in terms of



proportionality. Hence, in the case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300 it was held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

41. Likewise, in *Kenya National Examination Council v Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR, the Court of Appeal held:

...Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons...”

42. It is also pertinent that, although in the course of a process review, the Court is at liberty to engage in some measure of an analysis of the merits of the impugned decision to enable it ascertain whether or not the decision was procedurally fair for purposes of Article 47 of the Constitution and its derivative legislation, that process is limited. Accordingly, in the *Saisi Case*, the Supreme Court pointed out that:

“For the court to get through an extensive examination of section 7 of the, there had to be some measure of merit analysis. That was not to say that the court had to embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly in the circumstances of the case without examining those circumstances and measuring them against what was reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. It was to be limited to the examination of uncontroverted evidence. The controverted evidence was best addressed by the person, body or authority in charge. There was nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review was limited to a dry or formalistic examination of the process only led to intolerable superficiality. That would be against article 259 of *the Constitution* which required the courts to interpret it in a manner that inter alia advanced the rule of law, permits the development of the law and contributes to good governance.”



43. The applicant conceded that its contract with the respondent under Tender No. KPA/04/2017-18 had come to an end by effluxion of time; and that the respondent was within its mandate to float a tender for those services. Indeed, the applicant averred that it participated in the subsequent tender, being Tender No. KPA/2020-21/SS. Its complaint was however that it was unsuccessful; and that it had filed an application for review which was yet to be determined. As has been pointed out herein above, I have looked at the applicant's Supporting Affidavit and the documents annexed thereto and saw no proof that such an application had been filed or that it is pending hearing and determination before the PPARB. Moreover, the applicant conceded that, indeed it had not submitted some of the mandatory documents requisite to the subject tender.
44. In the circumstances, there is no basis for faulting the decision taken by the respondent in awarding the subject tender to the interested parties. In sum, the applicant failed to demonstrate that the respondent's decision was illegal, irrational or procedurally improper. Hence, it has not established any basis for the issuance of the orders sought in the Notice of Motion dated 9th March 2022. The same is hereby dismissed with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF
FEBRUARY 2024**

**OLGA SEWE
JUDGE**

