



**Republic v Public Procurement Administrative Review Board & 2
others; Niavana Agencies Limited (Exparte) (Application E001 of 2024)
[2024] KEHC 1595 (KLR) (Judicial Review) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E001 OF 2024
J NGAAH, J
FEBRUARY 23, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

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

KENYA POWER & LIGHTING COMPANY PLC 2ND RESPONDENT

**ACCOUNTING OFFICER KENYA POWER & LIGHTING COMPANY
PLC 3RD RESPONDENT**

AND

NIAVANA AGENCIES LIMITED EXPARTE

JUDGMENT

1. The motion before court is dated 9 January 2024; it is brought under section 175 (1) of the *Public Procurement and Asset Disposal Act*, 2015 (also referred hereinafter as “the Act”); section 7 and 11 of the Fair Administration Action Act, 2015 and Order 53 Rule 1 of the Civil Procedure Rules. The applicant seeks the following orders:

1. An order of certiorari removing to this Honourable Court for purposes of being quashed the Public Procurement and Administrative Review Board’s determination on breach by the 2nd and 3rd respondent (sic) of the provisions of section 75(5) of the PPAD Act; section 86(1)(a) of the PPAD Act and section 155 and 157 of the PPAD as read with Article 227(1) of *the Constitution* as contained in the decision of the Public Procurement Administrative Review



Board dated 22nd December 2023 in 109 of 2023: Niavana Agencies Limited versus Accounting officer, Kenya Power & Lighting Company Limited Plc.

2. A declaration that the 2nd and 3rd respondents breached their obligations under section 75 (3) of the Public Procurement and Asset Disposal Act by failing to promptly issue Addendum no. 1 of 27th November 2023 and addendum no. 2 of 28th November 2023.
 3. A declaration that the 2nd and 3rd respondents breached the obligations under section 75 (3) of the Public Procurement and Asset Disposal Act by failing to extend bid submission deadline as stipulated thereunder following issuance of addendum no. 1 on 27th November 2023 whereas the time remaining before the deadline for submitting tenders on 1st December 2023 was less than one third of the time allowed for the preparation of the tenders.
 4. A declaration that the provisions of the tender document for the determination of the successful tender under ITT 33 and ITT 38 as read with section 3: evaluation and qualification criteria in the subject tender number KPI/9A.3/OT/07/23-24 supply of single phase and 3 phase smart meters (Local manufacturers and assemblers) contravene section 86 (1) (a) of the Public Procurement and Asset Disposal Act.
 5. A declaration that the 2nd and 3rd respondents have breached their obligations under section 155 and 157 of the Public Procurement and Asset Disposal Act as read with section 86 (2) by failing to provide for preference scheme for citizen contractors in the subject tender number KPI/9A.3/OT/07/23-24 supply of single phase and 3 phase smart meters (Local manufacturers and assemblers).
 6. An order of certiorari removing to this Honourable court for purposes of being quashed the entire procurement proceedings in the tender number KPI/9A.3/OT/07/23-24 supply of single phase and 3 phase smart meters (Local manufacturers and assemblers).
 7. An order of mandamus compelling the 2nd and 3rd respondents to commence fresh the procurement proceedings in the subject tender number KPI/9A.3/OT/07/23-24 supply of single phase and 3 phase smart meters (Local manufacturers and assemblers).
 8. Any other appropriate relief which the Honourable Court deems fit and just in the circumstances.”
2. The applicant also asked for costs of the application.
 3. The application is based on an affidavit sworn on 5 December 2023 by Benedict Kabugi Ndungu in verification of the facts relied upon and a statutory statement dated 11 December 2023.
 4. Mr. Ndungu has sworn that he is the managing director of the applicant company and that sometimes in November 2023, Kenya Power and Lighting Company Plc floated a tender, more particularly described as “tender no. KPI/9A.3/OT/07/23-24 supply of single phase and 3 phase smart meters (Local Manufacturers and Assemblers).”
 5. The tender document was subsequently amended through addendum no. 1 dated 27 November 2023 and addendum no. 2 of 28 November 2023. According to the applicant, the entire procurement process was unlawful, irregular null and void because the 2nd and 3rd respondents breached the obligations under the Constitution, the Public Procurement and Asset Disposal Act and the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as “the regulations”).
 6. Accordingly, the applicant requested for review by the 1st respondent in review application no. 109 of 2023. In the application, the applicant urged that:



- (a) The 2nd and 3rd respondents contravened section 75 (5) of the [Public Procurement and Asset Disposal Act](#) by issuing addendum no. 2 of 28 November 2023 in which the respondents failed to extend the tender submission deadline to allow the amendment in addendum no. 1 and addendum no. 2 to be taken into account by candidates and bidders in the preparation or amendment of their respective tenders.
- (b) The 2nd and 3rd respondents contravened section 80 (3) as read with section 80 (2) of the [Public Procurement and Asset Disposal Act](#) by providing evaluation criteria which are neither objective nor quantifiable, in particular, the criteria for determining whether a bidder is a local manufacturer or a local assembler.
- (c) The 2nd and 3rd respondents stipulated an award criterion in the tender document which violated the provisions of section 86 (1) (a) of the Act.
- (d) The 2nd and 3rd respondents contravened the obligation under section 96 (1) and (3) of the Act as read with regulation 85 (2) of the regulations and the Public Procurement Regulatory Authority circular no. 4 of 2022 dated 1 July 2022 by failing to publish the tender notice and the tender document in the public procurement information portal.
- (e) The 2nd and 3rd respondents contravened section 58 (1) and section 70 (2) of the Act by failing to use the appropriate standard tender document prescribed by the Public Procurement Regulatory Authority for the procurement of single phase and three phase smart meters and deviated from the contents of the standard bidding document issued by the Public Procurement Regulatory Authority.
- (f) The 2nd and 3rd respondents contravened section 3 (b) of the Act by restricting the participation of bidders to local manufacturers or assemblers only; this, according to the applicant, is a non-existent preference and reservation scheme under the Article 227(2) of [the Constitution](#), the Act and the regulations made thereunder.
- (g) The 2nd and 3rd respondents failed to comply with the obligations to give effect to the provisions of section 155 and 157 of the Act by implementing a non-existent preference and reservation scheme which is unknown in law.
- (h) The 2nd and 3rd respondents curtailed competition and fairness in the subject tender through the prescribing non-existent preference and reservation scheme and thereby contravened their obligations under Article 227 (1) of [the Constitution](#).
- (i) The 2nd and 3rd respondents contravened section (b) of the Act by discriminating against citizen contractors by failing to give effect to the provisions of section 155 of the Act and instead introduced a non-existent preference a reservation scheme and law.
- (j) The 2nd and 3rd respondents contravened section 3 (i) and (j) of the Act by failing to promote local industry in failing to promote citizen contractors which would be attained by giving effect to section 155 of the Act.
- (k) The 2nd and 3rd respondents contravened section 60 (1) of the Act by failing to provide specific requirements regarding participation of citizen contractors which would allow open and fair competition among the citizen contractors that wish to participate in the subject procurement proceedings.
- (l) The 2nd and 3rd respondents contravened section 70(6) (e) (vi) of the Act by failing to clearly spell out in the tender document the instructions on preparation and submission which



ensures that preference and reservation that ordinarily apply in accordance with section 155 of the Act, applied to the citizen contractors.

- (m) The 2nd and 3rd respondents contravened rule 143 of the regulations by discriminating against citizen contractors and prescribing non-existent preference reservation scheme termed “local manufacturers and assemblers” which is unknown in law.
 - (n) The 2nd and 3rd respondents contravened rule 144(1) of the Public Procurement and Asset Disposal Regulations 2020 by failing to ensure that the mandatory provisions contained thereunder are provided in the tender document.
7. The 2nd and 3rd respondents opposed the request for review and, therefore, the application was heard on 21 December 2023 after which the 1st respondent delivered its decision dismissing the applicant’s application.
 8. The applicant was aggrieved by the decision of the 1st respondent and, for this reason, lodged the instant proceedings. According to the applicant, the impugned decision is tainted with illegality, error of law, irrationality and violation of the applicant’s legitimate expectations.
 9. James Kilaka, the 1st respondent’s acting secretary, swore and filed a replying affidavit opposing the application. He admits that indeed the applicant filed a request for review in application no. 109 of 2023. The 1st respondent dismissed the application in its decision of 22 December 2023. Mr. Kilaka has, in general terms, defended the impugned decision. More importantly, he has reiterated that, contrary to the applicant’s allegations, the 1st respondent’s decision was fair, reasonable, rational and lawful.
 10. Also opposing the motion are the 2nd and 3rd respondents. A replying affidavit in this regard was sworn by Peter Kinaro Muchori who swore that he is an employee of the 2nd respondent and its acting chief supply chain officer.
 11. Like the 1st respondent, Muchori has also defended the 1st respondent’s decision.
 12. He has sworn that the 2nd respondent advertised the subject tender on my-Gov Publication on 7 November 2023 and that it was set to close on 1st of December 2023. The tender was open to all local manufacturers or assemblers based in Kenya.
 13. Ten bidders expressed their interest to participate in the tender but only eight firms submitted their bid documents by the tender closing date of 1 December 2023. However, the applicant was not one of the tenderers.
 14. Pursuant to section 75 of the Act, the 2nd respondent made clarifications and corrected clerical errors in respect of the principal tender document through two addenda, each of which was justified and made in response to clarification sought by the bidders or observations made by what has been described as the respondent’s “user divisions”. The clarifications included, clarifications on summary of electrical parameters maximum current and in default factory settings maximum current; clarifications on financial situation and historical financial performance; clarifications on varying dates for tender validity and tender security validity; and, clarifications on requirement for performance security and on the number of samples needed.
 15. It has been sworn on behalf of the 2nd and 3rd respondents that there was no material alteration to the substance of the tender through the addenda except that the 2nd respondent only made general clarifications and corrected clerical errors on issues raised by the bidders and answered by the respondents in accordance with section 75 of the Act.



16. As far as the award of the tender is concerned, Mr. Muchori has sworn that the award criteria fully complied with section 86 (1) of the Act, considering that the tender was divided into lots for manufacturers with more than two years' experience and those with less than two years' experience. The award criterion was explained in the tender document.
17. As for the preference and reservation schemes, it has been sworn that they are catered for in the procurement entity's annual procurement plan and budget and also that the procurement of meters and other critical items is a continuous annual process contained in the annual procurement plan.
18. It has also been sworn that the 2nd and 3rd respondents have to ensure that there are no gaps in the supply chain due to delays that are bound to occur in the procurement of items such as meters. The average delivery time for the delivery of meters, it is sworn, is nine months from invitation to tender.
19. Again, procurement of meters is funded by customers who pay up for connection and that currently, the 2nd respondent has a back-log of approximately 150,000 meters required for new connections and replacements. This backlog translates to daily revenue losses for the respondent due to lack of meters.
20. Mr. Muchori has also sworn that the tender was restricted to local manufacturers and assemblers in order to promote local industries. The definition of a local contractor under section 2 of the Act requires that the person or firm to be registered in Kenya and that its operations must be based in Kenya. A citizen contractor, on the other hand, is a person or firm owned and controlled by persons who are citizens of Kenya.
21. In promoting local industries, the procuring entity complied with Article 10 (2) and 227(2) of *the Constitution* and section 155(3) (a) and 157(1), (3), (4), (6) and (8) of the Act which provide for preference to be given to manufactured articles, materials and supplies partially mined or produced in Kenya.
22. Upon granting leave to file the substantive motion and, owing to the strict timeline within which applications under section 175 of the Act ought to be determined, this Honourable Court issued directions on, among other things, when the substantive motion would be filed and the mode of its disposal. To be precise, the court directed as follows:

I have read the applicant's chamber summons dated 5 January 2024 seeking yet another application of even date be admitted for hearing and disposal during this Honourable Court's current Christmas recess. In view of the provisions of section 175(3) of the *Public Procurement and Asset Disposal Act*, No. 33 of 2015, the application is certified urgent and leave is granted in terms of prayers 2(a) to (g) of the chamber summons. I direct that the main motion be filed and served within 3 days of the date of this ruling. The respondents are directed to file and serve their response to the motion within 3 days of the date of service of the applicant's substantive motion. The substantive motion shall be disposed of by way of written submissions and to that extent, directions are as follows:

- (a). The applicant's submissions shall be filed and served within 3 days of the date of service of the respondent's response to the motion
- (b) The respondents' submissions shall be filed and served within 3 days of the date of service of the applicant's submissions.
- (c) highlighting of submissions shall be on 31 January 2024. It is so ordered."



23. Only the respondents filed submissions in support of the positions they adopted in opposing the applicant's application. Apart from filing the substantive motion, the applicant did not comply with the rest of the directions.
24. The directions were mandatory and as is apparent from these directions, the applicant's application was to be prosecuted by way of written submissions. It follows that since the applicant failed to file the submissions within the prescribed timeline or at all, the application would fail for want of prosecution.
25. I take this position because according to Order 53 Rule 5, a judicial review application such as the instant one must not only be heard but also that the applicant has a right to begin at the hearing of his or her motion before a determination is made. It is the applicant who has to move the court before the respondent is called upon to respond. The rule reads as follows:
 5. On the hearing of any such motion as aforesaid, the applicant shall have the right to begin.
26. If the applicant cannot be heard, for one reason or another, the application cannot be said to have been prosecuted or heard, in the strict sense of the word.
27. Nowhere in Order 53 of the Civil Procedure Rules or in any of the provisions invoked by the applicant in this application, has it been suggested that a court may proceed to determine an application for judicial review only on the basis of the pleadings and affidavit on record without the application having been prosecuted or, as it were, heard.
28. If I have to go any further, all that can be said of the applicant's application is that, in the absence of a hearing or a prosecution of the application, the grounds of judicial review of illegality, irrationality and legitimate expectations have not been proved.
29. That said, a summary of the applicant's case before the 1st respondent in review application no. 109 of 2023 has been brought out in the affidavit in support of the instant motion. I have read the impugned decision from which it is apparent that the 1st respondent disposed of all the questions raised in the applicant's request of review and which, apparently, the applicant has escalated to this Honourable Court purportedly as an application for judicial review.
30. For instance, the 1st respondent held that the tender document issued in the subject tender complied with the standard tender document issued by the Public Procurement Regulatory Authority, of course, with the necessary modifications to align with the works or services procured in the subject tender.
31. It also considered the procurement process and came to the conclusion that the provisions of section 96 (1) and (3) of the Act had been complied with since the subject tender had been advertised in the publication that is recognised for advertisement of such tenders and was also advertised in the public procurement information portal.
32. As far as the extension of the tender submission deadline is concerned, the 1st respondent held that the procuring entity had the discretion to extend the deadline where necessary to allow amendment of the tender document communicated in addendum no. 1 and addendum no. 2.
33. On the award criteria, it held that the criteria provided in the tender document was not in breach of section 86 (1) of the Act and that the applicant failed to substantiate its allegations that the 2nd and 3rd respondents stipulated a criterion that violated that particular provision of the law.
34. As far as the question of preference and reservation scheme is concerned, the 1st respondent held that the invitation bids in the subject tender was reserved for local meter manufacturers and assemblers and



- that the preference and reservations of the subject tender was clearly spelt out in the tender document. The margin of preference or reservation was applicable in the subject tender and that an eligible tenderer was one who or which was able to confirm that it fell within the reserved group of local meter manufacturers and local assemblers.
35. Citizen contractors were found not to have been precluded or restricted from participating in the tender since a citizen contractor could be a local manufacturer or assembler as long as, if it is a company, it was registered in Kenya, it was undertaking its business in Kenya and that its goods and services are manufactured in Kenya.
 36. The criteria used to identify whether a bidder was a local one was the requirement of a valid tax compliance certificate from Kenya Revenue Authority, a pin certificate and a copy of a certificate of registration accompanied with form CR 12 to confirm directorship and shareholding.
 37. The 1st respondent also held that according to section 155 and once 57 of the Act, preference ought to be given to manufactured articles, materials and supplies specially mined or produced in Kenya and, where applicable, assembled in Kenya. The requirements of the tender document reserving the subject tender to local manufactures and assemblers was a preserve of the 2nd respondent and it was meant for competition among tenderers who were qualified and eligible in the tendering process. The 2nd respondent could not, therefore, be faulted for restricting the tender document to local manufacturers and assemblers without limiting the participation of citizen contractors as long as they were eligible tenderers.
 38. Having so held, it is not open to this court to inquire into the evidence presented before the 1st respondent and evaluate it afresh with the aim of coming to its own conclusion as if the instant application is an appeal. Neither is it open to this court, in the same breath, to fault the 1st respondent on its interpretation of the law.
 39. A judicial review court has no jurisdiction to substitute its own opinion for that of a tribunal or other subordinate body whose decision is the subject before court. It is not part of the purpose for judicial review to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question (see Lord Hailsham in Chief Constable of the North Wales Police versus Evans (1982) 1 WLR 1155 at 1160F).
 40. It has also been held in R versus Entry Clearance Officer, Bombay ex p Amin (1983) 818 at 829 (B-C) per ord Fraser that judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and it is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.
 41. The same point was emphasised in Chief Constable of North Wales Police versus Evans (supra) where Lord Brightman said at page 1173F and 1174G that:

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



42. Lord Hailsham stated in the same case that:

The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court.” At page 1161A.

43. On his part Lord Roskil said in R versus Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd 1982(AC) 617 at 633C that:

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

45. As far as interrogation of facts is concerned, I need not belabor the point that for the same reason that a judicial review court cannot substitute its decision for that of a tribunal on matters of law, it cannot do so also on matters of fact. On this point I would adopt the reasoning of the Court of Appeal in OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others [2017] eKLR Civil Appeal No. 28 of 2016:

Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body’s decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review.

46. These authorities point to the conclusion that it is not enough that this court could possibly arrive at conclusions both of law and fact that may differ from those reached by the 1st respondent.

47. Assuming the motion could possibly be determined on the basis of the applicant’s pleadings and affidavit, I am not satisfied that a case has been made out, on the face of these documents, to persuade me to exercise my discretion in favour of the applicant and grant any of the orders of judicial review sought. Its application is hereby dismissed with costs.

SIGNED, DATED AND UPLOADED ON THE CTS PORTAL ON 23 FEBRUARY 2024

NGAAH JAIRUS

JUDGE

