



**Chief Executive Officer, the Public Service Superannuation Fund Board
of Trustees v CPF Financial Services Limited & 2 others (Civil Appeal
E510 of 2022) [2022] KECA 982 (KLR) (9 September 2022) (Judgment)**

Neutral citation: [2022] KECA 982 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E510 OF 2022
DK MUSINGA, LK KIMARU & GWN MACHARIA, JJA
SEPTEMBER 9, 2022**

BETWEEN

**CHIEF EXECUTIVE OFFICER, THE PUBLIC SERVICE SUPERANNUATION
FUND BOARD OF TRUSTEES APPELLANT**

AND

CPF FINANCIAL SERVICES LIMITED 1ST RESPONDENT

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 2ND
RESPONDENT**

**BOARD OF TRUSTEES, THE PUBLIC SERVICE SUPERANNUATION
FUND 3RD RESPONDENT**

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi
(Ndung'u, J.) delivered on 29th July 2022 in Judicial Review Misc. Application No. E086 of 2022)*

JUDGMENT

1. The subject matter of this appeal is Tender No. PSSS/003- 2020-2021- Procurement of a Fund Administrator for the Public Service Superannuation Scheme Fund (hereinafter referred to as 'the tender'). The tender was advertised by the appellant on 1st June 2021.
2. The 1st respondent, a duly registered and licensed provider of administration services to retirement benefits schemes in the country, was amongst the various bidders who had submitted their bids at the close of the Tender application period on 23rd June 2021. On 19th July 2021, the appellant sent a letter to the 1st respondent informing the latter that its bid had passed the Technical Evaluation and subsequently invited the 1st respondent to attend the opening of Financial Proposals.



3. The 1st respondent sent a representative at the opening of the Financial Proposals which is said to have taken place on 21st July 2021. The 1st respondent was the only bidder who managed to get to the financial proposals opening stage of the tender evaluation process after attaining a technical score of 95.2%.
4. The tender documents contained a clause on due diligence of a successful bidder. On 22nd July 2021, officers of the appellant in compliance with Clause 39 on due diligence visited the offices of the 1st respondent and conducted the necessary due diligence. It is the inaction by the appellant which followed thereafter that set into motion the events culminating into this appeal.
5. The position of the 1st respondent was that the due diligence conducted by the appellant created a legitimate expectation that it was the successful bidder and that it would receive the notification letter from the appellant as well as the eventual award of the tender. This did not happen as anticipated and no reasons for the delay were proffered by the appellant, necessitating the 1st respondent to file Request for Review No. 148 of 2021 with the 2nd respondent on 7th December 2021. Prior to the filing of the Request for Review the 1st respondent had written to the appellant enquiring about the results of the tender and the appellant's response was that it was doing further consultations with some unspecified persons.
6. On 28th December 2021 the 2nd respondent delivered its decision, directing the appellant to, inter alia, ensure that the procurement proceedings of the Tender proceeded to its logical conclusion within 14 days of the decision. The appellant was also directed to extend the validity period of the Tender for a further period of 30 days with effect from 11th January 2022.
7. On 7th January 2022 the 1st respondent sent the appellant a letter extending the Tender validity period for a period of 30 days with effect from 11th January 2022 in accordance with the 2nd respondent's decision. The 1st respondent also extended its bid security for a similar period. However, on 10th January 2022 the appellant requested the 1st respondent to extend its tender validity period for a period of 30 days with effect from 20th January, which the 1st respondent did. The appellant did not proffer any reason for that request, which was beyond the effective date set by the 2nd respondent. Before the expiry of the extended period, on 15th February 2022 the appellant wrote to the 1st respondent requesting for yet a further extension of the tender validity for a period of 30 days with effect from 19th February 2022 to 20th March 2022, which the 1st respondent promptly did. That notwithstanding, the appellant failed to conclude the tender procurement for no stated reason.
8. The appellant's conduct caused the 1st respondent to file a second Request for Review, to wit, Request for Review No. 16 of 2022, citing the appellant's dilatory tactics and unending extensions which frustrated the conclusion of the tender process. The 2nd respondent in its decision dated 17th March 2022 held, inter alia, that the tender validity period had lapsed on 11th January 2022. This set the stage for the filing of Judicial Review Application No. E037 of 2022 by the 1st respondent.
9. In its application, the 1st respondent sought a multiplicity of orders which included: an order of Mandamus compelling the appellant and the 3rd respondent to comply with the Ruling and Orders issued by the 2nd respondent on 28th December 2021 in Application No. 148 of 2021; an order of Mandamus compelling the appellant to award it the tender; and an order of certiorari to bring into the High Court, to be quashed, the 2nd respondent's decision delivered on 17th March 2022 in Public Procurement Administrative Review Board Application No. 16 of 2022.
10. Upon hearing the parties, the High Court (Ndung'u, J.) delivered its judgment on 6th May 2022. The orders issued by the court were, inter alia, an order of certiorari for purposes of quashing, the 2nd



respondent's decision delivered on 17th March 2022 in Public Procurement Administrative Review Board Application No. 16 of 2022; an order of mandamus compelling the 2nd respondent to re-hear/re-consider Public Procurement Administrative Review Board Application No. 16 of 2022 within 30 days, taking into account the findings contained in the judgment of the court.

11. The 2nd respondent re-admitted Public Procurement Administrative Review Board Application No. 16 of 2022 for re-hearing, culminating in a decision dated 6th June 2022. The findings by the 2nd respondent were, inter alia, that the tender validity expired on 11th January 2022; the appellant, the 2nd respondent and the 3rd respondent could not extend the tender validity period after 11th January 2022; the appropriate relief for the appellant's contempt of court, intransigence and deliberate refusal to obey the 2nd respondent's decision of 28th December 2021 lay in referring the matter to the Director General of the Public Procurement Regulatory Authority. According to the 1st respondent, the decision of the 2nd respondent was a restatement of the decision the High Court had quashed on 6th May 2022.
12. The 1st respondent in yet another judicial review application, to wit, Judicial Review Misc. Application No. E086 of 2022, argued, inter alia, that the decision of the 2nd respondent was contrary to the rule of law, the doctrine of precedent and the hierarchical structure of our country's judicial system. The orders sought in the application mirrored those sought in JR. Application No. E037 of 2022, save to note that the 1st respondent sought an order compelling the appellant to award the tender to it and an order directing the appellant and members of the 2nd respondent to show cause why they should not be punished for contempt of court for disobeying orders of the Review Board and the High Court respectively.
13. The matter was heard, and the court delivered its judgment on 29th July 2022. The orders issued by the High Court were an order of certiorari quashing the 2nd respondent's decision delivered on 3rd June, 2022 in Public Procurement Administrative Review Board Application No. 16 of 2022; an order of mandamus compelling the 2nd respondent to re-admit Public Procurement Administrative Review Board Application No. 16 of 2022 for the limited purpose of issuing appropriate and effective relief(s), taking into consideration the Judgment delivered by the court on 6th May 2022 in Judicial Review Application No. E037 of 2022 and the findings in the instant judgement within 30 days of the judgment; and an order of prohibition, prohibiting the appellant and the 3rd respondent and their officers, subordinates, servants and agents from terminating, re-advertising and/or awarding the tender to any external administrator other than the 1st respondent pending the determination of the re-hearing.
14. Aggrieved and dissatisfied by the decision of the High Court, the appellant lodged this appeal raising 8 grounds of appeal. The appellant faults the learned judge for misdirecting himself in law by failing to appreciate that the application before him was one for judicial review and not an appeal thereby applying wrong principles; failing to appreciate that the court lacked jurisdiction to compel the Public Procurement Administrative Review Board to exercise its discretion in a particular manner; holding that the Public Procurement Administrative Review Board did not consider the judgment delivered on 6th May 2022 upon remitting the matter back for reconsideration/re-hearing; and failing to appreciate that there was no statutory duty to extend tender validity period and therefore neither the procuring entity nor the Board can be compelled to extend the tender validity period; treating the application before him as enforcement proceedings in respect of his previous decision in the same subject matter rather than a judicial review application in respect of the subsequent proceedings before the Board.
15. At the hearing of this appeal before us, the appellant was represented by Mr. Munene Wanjohi, learned State Counsel. Mr. Wanjohi was also on record for the 2nd respondent, but the latter did not take



- any position in the appeal. The 1st respondent was represented by Dr. Muthomi Thiankolu and Mr. Njoroge. We were informed that the 3rd respondent had since been degazetted.
16. In arguing this appeal, Mr. Wanjohi submitted that the law was well settled that a court sitting as a judicial review court was not an appellate court. He argued that the High Court erred by delving into the merits of the case as opposed to restricting itself to procedural issues. Counsel cited the decision of this Court in *Municipal Council of Mombasa v. Republic & another* [2002] eKLR as well as the English decision of *Chief Constable v. Evans* (1982) 3 ALL. ER 141 where Lord Brightman held that judicial review was concerned not with the merits of the decision but with the decision-making process.
 17. Regarding tender validity period, it was submitted that a proper reading and interpretation of section 88 of the *Public Procurement and Asset Disposal Act* (PPAD Act) is that an accounting officer cannot extend the tender validity period once it lapses. The argument by the appellant was that once the tender validity period has expired, the subject tender is dead and cannot be resuscitated. Several decisions including Judicial Review No.50 of 2017, *Higawa Enterprises Limited v Kenya Ports Authority & 6 others* [2018] eKLR and *Republic v. Public Procurement Review Board; Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S (interested party); National Irrigation Board Ex Parte* [2020] eKLR were cited in support of this argument.
 18. On his part, Dr. Thiankolu urged us to find that the 2nd respondent's decision of 3rd June 2022 offended the doctrine of judicial precedent and was thus untenable in Kenya's hierarchical common law judicial system. He cited the English common law decision in *Cassel & Co. Ltd v Broome and Another* [1972] A.C 1072 where it was held that lower courts are bound by the decisions of a higher court.
 19. On whether the High Court went beyond the scope of its powers in judicial review, counsel submitted that the traditional English common law position on the scope of judicial review was inconsistent with the transformative agenda of *the Constitution* of Kenya, 2010 as read with the relevant provisions of the *Fair Administrative Action Act*, 2015. Counsel cited several decisions such as *Communications Commission of Kenya & 5 others v Royal Media Service Limited and 5 others* [2014] eKLR, *Matagei v. Attorney General* [2021] KEHC 460 (KLR) and the decision of this Court in *Eunice Khalwali Miima v. Independent Electoral and Boundaries Commission and another* [2018] eKLR in support of his argument.
 20. Regarding tender validity, counsel stated that section 88 of the PPAD Act does not expressly address a situation where a rogue procuring entity runs down the clock by way of dilatory tactics to avoid awarding a successful tenderer. According to counsel, the 2nd respondent has extensive powers to stop such a practice and that the appropriate reliefs envisaged under *the Constitution* should be granted in such circumstances.
 21. We have considered the record of appeal, the respective submissions by learned counsel, the authorities cited by the parties and the law. The following three issues commend themselves for our determination:
 - a. Whether in arriving at the impugned judgment the High Court went beyond its scope of judicial review;
 - b. Whether the High Court erred in its findings regarding tender validity and the related powers of the 2nd respondent; and
 - c. Whether the 2nd respondent was bound by the orders and directions issued by the High Court in its decision dated 6th May 2022.
 22. Section 175 (1) of the *PPAD Act* provides that:



175.

- (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.

23. The argument by the appellant was that the High Court in arriving at its decision considered the merits of the Board's decision as opposed to the procedure it followed and thus fell into error.

24. The English common law position is that judicial review looks into the process through which a decision was made as opposed to the merits of the decision. This Court in *Municipal Council of Mombasa v. Republic & Another* (supra) expressed itself as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was sufficient evidence to support the decision –and that, as we have, is not the province of judicial review.”

25. However, the scope of judicial review proceedings has since expanded under the new constitutional order, and in appropriate cases the court will enter into the merits of a decision made by an inferior body. In *Suchan Investment Limited v. Ministry of National Heritage & Culture & 3 others* [2016] eKLR, this Court held as follows:

“Analysis of Article 47 of *the Constitution* as read with the *Fair Administrative Action Act* reveals the implicit shift of judicial review to include aspects of merit review of administrative action...the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.”

26. Further, this Court expressed itself as follows in *Kivuku Agencies v Kenya Airport Authorities Accounting Office & another* [2020] eKLR:

“We are also conscious that paradigms have shifted as stated in the case of *Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others* (2016) eKLR. That Articles 22, 23 and 47 of *the Constitution* read with the grounds for review set out under Section 7 of the *Fair Administrative Action Act*, allows a fusion of the traditional common law ground of review to include some merit review in an administrative act, although the court cannot usurp the decision-making power of the administrative body but merely quash the errors.”

27. The principles applicable in a judicial review application were considered by this Court extensively in the *Child Welfare Society of Kenya v Republic & 2 others Ex-parte Child in Family Focus Kenya* [2017] eKLR. The Court noted as follows:

- “39. For a long time in the history of the common law, JR has been tried and tested as the most efficacious remedy for control of administrative decisions.



It was not concerned with private rights, or the merits of the decision being challenged but with the decision-making process. See *Commissioner of Lands vs Kunste Hotel Limited* [1997] eKLR and *R vs Secretary of State for Education and Science ex-parte Avon County Council* [1991] 1 ALL ER. 282. It was also principally concerned with the 3 'Is' --- "Illegality, Irrationality and (procedural) Impropriety" --- and many are the decisions which followed such narrow considerations. For example: - *An Application by Bokobu Gymkhana Club* [1963] EA 478; *Council of Civil Unions vs Minister for the Civil Service* [1985] AC 2; both cited with approval in the Ugandan case of *Pastoli vs Kabale District Local Government Council and Others* [2008] 2 EA 300 which courts in this country have followed, stating:

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

40. However, the dynamism of society and the events of recent history have decidedly thrust JR into a whole new trajectory. Nyamu, J. as he then was, clearly 'smelt' the impending extension of the scope of JR in 1998 when in the case of *Republic vs. The Commissioner of Lands, ex- parte Lake Flowers Limited* Nairobi Misc. Application No. 1235 of 1998 he stated as follows:

“..Courts must resist the temptation to try and contain judicial review in a straight jacket... Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality... The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations... Judicial review is a tool of justice, which can be made to serve



the needs of a growing society on a case-to-case basis... The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”

41. In the same year, this Court expressed similar views in the case of Bahajj Holdings Ltd. vs Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998 stating that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions. The trend continued in Kuria & 3 Others vs Attorney General [2002] 2 KLR 69 where the Court expressed itself as follows:

“So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit.”

42. The bells for expansion of the scope of JR rang even louder after the promulgation of *the Constitution* 2010. Odunga, J. for example, in Republic vs Commissioner of Customs Services ex-parte Imperial Bank Limited [2015] eKLR recognized that “Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision” and the “need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on this front”. Mativo, J. similarly in the case of Ernst & Young LLP vs Capital Markets Authority & Another [2017] eKLR (decided on 7th March, 2017), extensively examined comparative jurisprudence before expressing the following view: -

“...judicial review is available as relief to a claim of violation of the rights and freedoms guaranteed in *the constitution*. *The constitution* has expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi- judicial function. The point of focus is no longer whether the function was public or private or by a statutory body, but whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50. The Kenyan judiciary must



guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution... Judicial review is now entrenched in our constitution and this ought to be reflected in the court decisions and any decision making process that does not adhere to the constitutional test on procedural fairness, then the decision in question cannot stand court scrutiny... Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by *the Constitution*."

44. Finally, as we settle the principles upon which we shall consider the matter before us, this Court, as recently as 20th July, 2017, in the case of Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR was in no doubt about the current place of JR in our system of governance. After extensively reviewing the CCK Supreme Court decision (supra) and other cases, including Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others (2016) eKLR 51, and Pharmaceutical Manufacturers Association of South Africa in re ex-parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC) at 33, the five-Judge bench held:

"In our considered view presently, judicial review in Kenya has Constitutional underpinning in Articles 22 and 23 as read with Article 47 of *the Constitution* and as operationalized through the provisions of the *Fair Administrative Action Act*. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the *Civil Procedure Act* and Rules is a procedure for applying for remedies under the common law and the *Law Reform Act*. These common law remedies are now part of the constitutional remedies that the High Court can grant under Article 23 (3) (c) and (f) of *the Constitution*. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law Order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both... We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non- exclusive judicial review approaches."



28. In the present case, one of the orders issued by the High Court in its judgment dated 29th July 2022 was an order of mandamus compelling the 2nd respondent to re-admit Public Procurement Administrative Review Board Application No.16 of 2022 for the limited purpose of issuing appropriate and effective relief(s), taking into consideration the judgment delivered by the court on 6th May 2022 in Judicial Review Application No. E037 of 2022.
29. We have perused the decision of the 2nd respondent dated 6th June 2022 and are of the view that the 2nd respondent failed to take into account the orders of the High Court in arriving at its decision. It can therefore be said that the 2nd respondent failed to take relevant considerations into account in the decision making and acted contrary to legitimate expectations of the 1st respondent.
30. The High Court’s jurisdiction to hear and determine judicial review cases is granted by Article 165(6) of *the Constitution*. It provides that:
- “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi- judicial function, but not over a superior court.”
31. Article 165(7) grants the High Court powers to grant appropriate orders. It reads as follows:
- “(7) For the purposes of clauses (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
32. The orders made by the High Court in its decision dated 6th May 2022 and 29th July 2022 were, in our view, necessary to give full effect to the principles and values envisaged under Articles 10 and 227 of *the Constitution* and section 3 of the PPAD Act. We are unable to agree with the appellant that the High Court compelled the 2nd respondent to exercise its jurisdiction or rule in a particular manner. The High Court did not exercise its judicial review discretion arbitrarily, neither can it be said to have usurped the decision-making power of the 2nd respondent. Accordingly, we find no merit in this ground of appeal.
33. Turning to the second ground of appeal, the appellant argues that the learned judge failed to appreciate the legal effect of tender expiry and hence the inability by either the appellant or the 2nd respondent to extend the validity of the expired tender. In addressing this issue, it is important to revisit the findings of the 2nd respondent in its decision dated 6th June 2022, which are reproduced at paragraph 72 of the impugned judgment. The findings of the 2nd respondent were, inter alia, that:
- a. the tender validity expired on 11th January 2022;
- b. the Applicant, the 1st Respondent and the 2nd respondent could not extend the tender validity period after 11th January 2022.
34. Section 88 of the *PPAD Act* provides for the extension of tender validity period. The section provides as follows:
- “88.
- (1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.



2. The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.
 3. An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.
 4. For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).”
35. A plain reading of the provisions of section 88 yields the interpretation that the accounting officer of the procuring entity has power to extend a tender validity. In this connection, it is a fact that the appellant, who was the accounting officer of the procuring entity for purposes of the tender in question, deliberately acted contrary to the decision of the 2nd respondent in its decision of 28th December 2021 by requesting the 1st respondent to extend the tender validity for a period of 30 days with effect from 20th January 2022 and not 11th January 2022.
36. The overriding argument by the appellant is that upon the lapse of the tender period on 11th January 2022, the subject tender was dead and could not be resuscitated, hence the justification for the 2nd respondent’s finding in its decision dated 6th June 2022 that ‘the Applicant, the 1st Respondent and the 2nd Respondent could not extend the tender validity period after 11th January 2022.’ On the other hand, the germane argument by the 1st respondent is that the appellant, who was acting on behalf of the procuring entity, was hellbent on frustrating the award of the tender to it. The High Court made a finding that “the procuring entity had deliberately ran (sic) down the clock with a view to achieving expiry of the tender validity period.” The learned judge held, and rightly so in our view, that “a rogue procuring entity cannot be allowed to hide behind the law to sanitize its injurious conduct, conduct that is inimical to the constitutional principles on accountable procurement processes in public procurement.” The 1st respondent’s contention was that in appropriate cases the 2nd respondent is bestowed with powers under the PPAD Act to rein in rogue procuring entities, such as the appellant, and bring finality to the procurement process.
37. This leads us to consider the powers of the 2nd respondent in such instances. Section 173 of the [PPAD Act](#) states as follows:
- “ 173. Upon completing a review, the Review Board may do any one or more of the following-
- a. annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
 - b. give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
 - c. substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;



- d. order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
- e. order termination of the procurement process and commencement of a new procurement process.”

38. Did the 2nd respondent have power to direct the appellant to extend the validity period of the tender in question? The answer to this question was, in our view, aptly provided by Onyiego, J. in *Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & another* [2021] eKLR. The learned judge found as follows:

- “39. The crux of the issue in controversy is whether the Respondent (Review Board) has powers in law to order or direct the accounting officer of the Ex-parte Applicant as a procuring entity to extend the validity period of the subject tender more than once. Section 88 of the Act (PPDA) provides for the extension of the tender validity period...
- 40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes (sic). Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.
- 41. Therefore, the foregoing provision permits extension of a tender validity period by an accounting officer only once and that extension must be made before the expiry of the already stipulated tender validity period. It is common knowledge that one cannot extend time that has already lapsed...
- 48. From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than [for] the legislators to include or provide the Review Board’s mandate under that section. To that extent, I do agree with counsel for the I/Party that Section 88(3) of the Act does not bar the Review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice...
- 49. Under section 173(a)(b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer. Although the Act does not expressly limit the powers of the Board from extending tender validity period more than once, one can imply that the powers conferred upon the Review board includes powers to extend validity period to avert situations where the accounting officer can misuse powers under Section 88 to frustrate tenderers or bidders not considered favourable.”



39. The above findings by Onyiego, J. were upheld by this Court in *Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others* [2021] eKLR.

40. Procurement of public goods and services plays an important role in the country's economic development. Over the years the Government has taken various measures to streamline it with a view to sealing many gaps that have made it prone to corruption. We, the people of Kenya, in adopting, enacting, and giving to ourselves *the Constitution* of Kenya, 2010 stated at Article 227 that:

“(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.”

Sub-Article (2) required Parliament to enact a law that shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented. The *Public Procurement and Asset Disposal Act*, 2015 is the law that gives effect to Article 227 of *the Constitution*.

41. Section 3 of the PPAD Act sets out the guiding principles of public procurement and asset disposal.as hereunder:

“Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of *the Constitution* and relevant legislation-

- a. the national values and principles provided for under Article 10;
- b. the equality and freedom from discrimination provided for under Article 27;
- c. affirmative action programmes provided for under Articles 55 and 56;
- d. principles of integrity under the *Leadership and Integrity Act*, 2012 (No. 19 of 2012);
- e. the principles of public finance under Article 201;
- f. the values and principles of public service as provided for under Article 232;
- g. principles governing the procurement profession, international norms;
- h. maximisation of value for money;
- i. promotion of local industry, sustainable development and protection of the environment; and
- j. promotion of citizen contractors.”

42. The 2nd respondent (the Board) is an independent quasi-judicial creature of statute, and its broad powers are set out in sections 28 and 173 of the PPAD Act. It has power to give directions to accounting officers of procuring entities with respect to anything to be done or redone in procurement or disposal proceedings. In our view, its power may even include power to extend validity of a tender in situations where an accounting officer for no good reason fails to adhere to statutory timelines or disobeys the Board's directions so as to frustrate tenderers or bidders, even if the stated tender validity period has expired. This is akin to the power exercised by the High Court or this Court to extend time to appeal in appropriate circumstances, notwithstanding that the stipulated time for instituting such appeal may have already expired.



43. The appellant was in violation of *the Constitution*, the PPAD Act, public policy, and principles of public finance under Article 201 of *the Constitution*. In such a situation, the Board had power to extend the tender validity period and even direct the appellant to award the tender to the 1st respondent. The 2nd respondent in declining to order further extension of tender validity when it was clear that the appellant was acting with impunity and contemptuously did not promote the principles and values in public procurement as required under Article 227 of *the Constitution* and section 3 of the PPAD Act. Accordingly, the ground of appeal that the 2nd respondent did not have such power is without merit and subsequently fails.
44. Turning to the last issue for our determination, it is evident that the decision of the 2nd respondent rendered on 6th June 2022 was strikingly similar to its previous decision rendered on 17th March 2022. The High Court had in its decision dated 6th May 2022 issued an order of mandamus compelling the 2nd respondent to re-hear/re-consider Public Procurement Administrative Review Board Application No. 16 of 2022 within 30 days, taking into account the findings contained in its judgment. The 2nd respondent evidently did not comply with the directions given by the High Court.
45. We are in agreement with the views expressed by the learned judge that if such a trend of ignoring court orders/directions is allowed to continue it would render the court's supervisory powers enshrined in *the Constitution* impotent and render the judicial review jurisdiction useless and ineffective as a remedy.
46. In the upshot, we are not satisfied that this appeal has any merit, and it is hereby dismissed in its entirety. It is evident that the 1st respondent was the successful bidder, but the appellant employed dilatory tactics to deny it the tender. This was also confirmed by the 3rd respondent in its replying affidavit filed before the High Court. Taking into account the history of litigation before the High Court and the Board, and the provisions of Article 227 of *the Constitution* and section 3 of the PPAD Act, and to bring finality in this matter, we are of the considered view that the interests of justice would be best served if we order, as we hereby do, that the appellant do issue the 1st respondent with the appropriate notification letter within 30 days from the date hereof; and further direct the appellant to complete the tender process in favour of the 1st respondent within 30 days from the date of issuance of the notification letter. The appellant shall also bear the 1st respondent's costs of this appeal.

Dated and delivered at Nairobi this 9th day September, 2022.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

