Republic v Public Procurement Administrative Review Board; Sicpa SA (Exparte); Accounting Officer, Kenya Bureau of Standards & another (Interested Parties) (Application E101 of 2024) [2024] KEHC 7157 (KLR) (Judicial Review) (14 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7157 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E101 OF 2024

J NGAAH, J

JUNE 14, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... RESPONDENT

AND

SICPA SA ..... EXPARTE

AND

ACCOUNTING OFFICER, KENYA BUREAU OF STANDARDS ... INTERESTED PARTY

KENYA BUREAU OF STANDARDS ..... INTERESTED PARTY

JUDGMENT

1. The applicant's application is the motion dated 12 May 2024 expressed to be brought under sections 8 and 9 of the *Law Reform Act*, cap. 26 and Order 53 Rule 3(1) of the Civil Procedure Rules. The applicant seeks for:

> "
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> "a) An Order of certiorari to remove into the High Court of Kenya for the purpose of being quashed the decision made by the Public Procurement Administrative Review Board (the "PPARB") on the 30th April 2024 by which

it dismissed the Ex-parte Applicant's Request for Review against the decision of the Accounting Officer, Kenya Bureau of Standards in relation to Tender No. KEBS/T029/2023/2024 for Provision of Printing KEBS Standardization Mark Stickers.

b) An Order of prohibition directed at the Accounting Officer Kenya Bureau of Standards and the Kenya Bureau of Standards restraining them from conducting any procurement process on the basis of the Tender Documents in relation to Tender No. KEBS/TOZ9/Z023/2024 for Provision of Printing KEBS Standardization Mark Stickers as published and advertised on 26th March 2024.

c) An Order of mandamus directed at the Accounting Officer Kenya Bureau of Standards and the Kenya Bureau of Standards compelling them to expunge from the Tender Documents to be used in relation to the Tender for Provision of Printing KEBS Standardization Mark Stickers the following Clauses:

i. Clause I on Eligibility Sub-Clause I (xii):

ii. Clause 2Mandatory Requirements, Sub-Clause 11 {VD/) to wit

"The tenderer or of its associates (sic) must not have been convicted or paid fines anywhere in the world, directly or indirectly for any irregularities regarding Government contracts such as bribery or organizational deficiency"

2. The application is based on a statutory statement dated 9 May 2024 and an affidavit sworn on even date by Ms. Lillian Atogo verifying the facts relied upon.Ms. Atogo has sworn that she is the general manager of the applicant.

3. According to Ms. Atogo, on 26 March 2024, the 1st and 2nd Interested Parties published an advertisement in a local daily newspaper of an open international tender, more particularly described as "Tender No: KEB/T029/2023/2024 Tender for Provision of Printing Kebs Standardization Mark Stickers." I will henceforth refer to this tender as simply "the tender". As the name of the tender suggests, it was a tender for the printing or supply of standardization mark stickers.

4. The applicant obtained a copy of the Tender Documents and was, therefore, "a candidate" as defined in section 2 of the *Public Procurement and Asset Disposal Act*, 2015 (hereinafter "the PPADA"). According to that interpretation section of the Act, a "candidate" is defined as"a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity".

5. According to the applicant, the procuring entity deliberately manipulated and edited the tender document with the sole intention of disqualifying the applicant from the tender. This, the procuring entity did by inserting in the tender document what the applicant has described as "an unfair, unlawful, and subjective requirement". The requirement has been captured in Section 111 of the Tender Document, on evaluation and qualification criteria.

6. It spells out the tenderers' eligibility and qualifications documents. The particular clauses that the applicant has found offensive are Clause 1 on Eligibility Sub-Clause 1 (xii) Clause 2 Mandatory Requirements, Sub-Clause 11 (VIII) which is to the effect that:

> "The tenderer or of its associates (sic) must not have been convicted or paid any fines anywhere in the world, directly or indirectly for any irregularities regarding Government contracts such as bribery or organizational deficiency".

7. According to the applicant, these clauses are a departure from previous tenders and from the Standard Tender Document published by the Public Procurement Regulatory Authority. When the applicant raised the issue with the procuring entity, the latter did not address it and it is for this reason that the applicant filed a request for review which was registered before the respondent as no. 29 of 2024.

8. It has been sworn on behalf of the applicant that the clauses with which the applicant was offended were included in the tender document to target the applicant becauseit was in the public domain that in April 2023, the applicant entered a settlement with the office of the Attorney General in Switzerland on what has been described as "organizational deficiency". This fact was made known to the procuring entity when it sought clarity on the matter of the inclusion of the term "organizational deficiency" in the subject tender documents. Nevertheless, the Applicant's settlement with the Office of the Attorney General of Switzerland was not an admission of culpability and neither did it imply that the Applicant has been directly or indirectly convicted anywhere in the world for any irregularities or vices such as bribery with respect to Government contracts. As a matter of fact, the Applicant has not been convicted or paid fines anywhere in the world for corruption or bribery.

9. It is the applicant's case that the concept of organizational deficiency is a regulatory matter under the Swiss Law by which companies are expected to continually maintain vigilance. At the time of entering into the aforesaid settlement with the Office of the Attorney General, the Applicant had long addressed any concerns Swiss Law may have raised against it by way of organizational deficiency, a fact that the Attorney General acknowledged and recorded in the settlement. It follows that the term organizational deficiency is peculiar to Swiss Law and is not contemplated under any laws in Kenya including the *Companies Act*, the Penal Code, the Anti-*Bribery Act* and the Anti-Economic Crimes Act.

10. Organizational deficiency is not akin to an act of bribery or corruption. The inclusion of the aforementioned clause specifically affects the Applicant because it effectively debars the applicant from participating in the tender yet it has not been debarred from participating in procurement or asset disposal proceedings in accordance with Section 41 of the PPADA.

11. By its decision dated 30 April 2024, the respondent dismissed the applicant's request for review. The applicant was aggrieved by the respondent's decision and, therefore, filed this suit against it. Its case against the decision is that the decision is ultra-vires sections 2, 41, 55, 58, 62 and 80 (3) of the PPADA and Regulation 47 thereof. The respondent is alleged to have made a jurisdictional error in its decision and that the decision is premised on an error of law and fact. The respondent is also said to have abused its power and that its decision is irrational.

12. One thing that I can quickly note is that all these grounds are based on the fact that the respondent largely endorsed the procuring entity's decision. It has, inevitably, attacked the respondent's decision on the same grounds upon which it attacked the procuring entity's decision before the respondent. The only difference is that the grounds have now been fashioned as constituting elements of ultra vires, jurisdictional error, abuse of power, irrelevant considerations and irrationality.

13. The document purportedly filed on the case tracking system portal as a replying affidavit by the respondent could not be downloaded; at least I could not download it. I will, therefore, proceed on the assumption that the respondent did not file a replying affidavit.

14. Ms Jane Ndinya swore a replying affidavit on behalf of the respondents. She has described herself in the affidavit as the "Chief Manager, Supply Chain" at the 2nd interested party.

15. Ms Ndinya has admitted that indeed the tender was floated as deposed in the Ms. Lillian Atogo's affidavit. She has also acknowledged that the Applicant wrote to the 1st Interested Party on 2nd April 2024 seeking cancelation of the Tender because of the inclusion of mandatory requirement 11 (VIII), to which reference has been made. The 1st Interested Party responded to the Applicant vide a letter dated 8 April 2024, clarifying that the mandatory requirement was in line with Section 41 (1) (a & b) and Section 66 (2) (a & b)of the PPADA in addition to the 2nd Interested Party's ISO 37001 Anti Bribery Management System which includes compliance with *Anti-Corruption and Economic Crimes Act* 2003, *Bribery Act* 2016, *Leadership and Integrity Act* 2012 as well as the *Public Officer Ethics Act* 2003.

16. The tender was, however, suspended following the Request for review by the Applicant but it was reopened when the applicant's application was dismissed. Ms. Ndinya has sworn further, that the tender is a non-consulting tender and, therefore, the Interested Parties used Standard Tender Document available on the Public Procurement Regulatory Authority website .The 2nd Interested Party has in all its procurement transactions been using the standard tender documents approved by the Public Procurement Regulatory Authority in accordance with Section 58(1) of the Act, and Regulation 68(1 & 2) of the Public Procurement and Asset Disposal Regulations , 2020.

17. The procuring entity advertised the tender without any prior knowledge of the Applicant's challenges arising from its organizational deficiencies. The advertisement of the tender was not intended to discriminate against the Applicant in any way. It has also been sworn on behalf of the interested parties that by incorporating what the applicant regards as "offending clauses" in the tender document, the 2nd Interested Party was only keen on attracting eligible bidders with demonstrated integrity, as is articulated in the PPADA which, no doubt, was enacted in furtherance of Article 227 of *the Constitution*.

18. As far as the concept of "organizational deficiency" is concerned, Ms. Ndinya has sworn that the term "organizational deficiency" is coined to "mean structural and management weakness within organizations that compromise organizational inability to operate optimally and within the law. Organizational deficiencies may lead to organizational or staff misconduct, including fraud and bribery, leading to non-compliance with government regulations." The phrase is said to be commonly used in various jurisdictions to describe potential threats in the organizational structure or processes that may lead to catastrophic failure or process violation.

19. Since the tender is an international tender, it is bound to attract bidders across various jurisdictions, the reason why it was necessary to incorporate "organizational deficiencies" as one of the conditions that may disqualify a tenderer. The requirement was also necessary so as to mitigate against risks that may arise in the project considering its sensitivity and to attract a winning bidder with good Organizational structure and systems that guarantee the credibility of the Procuring Entity's Standardization Mark project. With this requirement the potential bidders were also reminded of the high ethical standards demanded by laws internationally including *the Constitution* and PPADA.

20. All the parties filed written submissions and had opportunity to highlight them before the court retreated to write this judgment.

21. To begin with, the facts are not in dispute. It is not in contention that the procuring entity floated a tender for supply of standardization mark stickers. Having obtained the tender document for the tender, the applicant qualified as a "candidate", a status that, in turn, qualified it to question the procurement process before the respondent by way of a request for review. No doubt, the applicant invoked its right under section 167 of the PPADA under which the applicant is entitled to initiate those proceedings. This section reads as follows:

> 167. Request for a review
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> 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.

22. When I consider the applicant's pleadings, affidavits and submissions, its main theme all along has been the inclusion of what it regards as an "offensive clause" that constitute one of the mandatory requirements to which the tenderers are subjected. The applicant's case is that the clause is offensive because it is discriminatory in its character in the sense that it is fashioned to lock the applicant out of the procurement process.

23. A related question and which, by this very character, would be answered if the first question is resolved is whether, by including the alleged offensive clauses in the tender document, this document would be considered a departure from the standard tender document provided by the Public Procurements Regulatory Authority. It will become clearer, in due course, that these questions would be more relevant to the respondent than they are to this court whose jurisdiction as a judicial review court is restrictive.

24. The clause in issue is found in the tender document under the main heading "Section III-Evaluation and Qualification Criteria". Under the sub-heading "eligibility" the clause is captured as no. xxi; it reads as follows:

> " xii. The tenderer or of its associate must not have been convicted or paid any fines anywhere in the world, directly or indirectly for any irregularities regarding government contracts such as bribery or organizational deficiency."

The same clause is captured as a mandatory requirement for all tenderers in clause no. 11(VIII) of the tender document.

25. As far as I understand the applicant's submissions, this requirement is tantamount to a debarment and it is for this reason that it has invoked section 41 of the PPADA to urge that debarment is a culmination of a process which the applicant has never been taken through. To this end, the applicant has cited J.R 106 of 2014 R Vs Public Procurement Administrative Review Board Vs Ministry of Science and Technology Ex. P Olive Telecommunication PVT Limited in which the process of debarment was laid out.

According to the applicant, the phrase "organizational deficiency" cannot form the basis of mandatory eligibility criteria.

26. Secondly, the applicant has submitted that the tender document is not consistent with the standard form tender document by the Public Procurement Regulatory Authority, since the precedent by the Authority does not contain the words "organizational deficiency".

27. I note that the applicant has not shied away from submitting that these issues were not only brought to the attention of the procuring entity but that they were also before the respondent for determination. For instance, on the question of organizational deficiency, it is submitted as follows:

> "17. The Applicant was able to establish from a perusal of previous tender documents that the term "organizational deficiency" did not feature at all and its inclusion in the current tender document was a new development.
>
> 18. Applicant therefore being reasonably apprehensive that the inclusion of this term as mandatory eligibility criteria was aimed at preventing it from bidding in a tender for it is eminently qualified raised the matter with the procuring entity which outrightly rejected its contention that the inclusion of the term was against the law.
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> 19. Indeed in its response to the Applicant's plea the procuring entity did not address any of the concerns about the term "organizational deficiency" but only pontificated about corruption and the imperative to address the vice."

28. On whether the tender document was consistent with the precedent provided by the Public Procurement Regulatory Authority, the learned counsel for the applicant submitted as follows:

> "22. In its supplementary statement to the PPARB the Applicant was able to demonstrate that in fact the said Standard Tender Document as published on the PPRA's website did not include the term "organizational deficiency", raising the question on what basis did the interested parties amend the tender document to include the term?
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> 23. In answer to this pertinent question, the interested parties argued that the law permitted the accounting officer of a procuring entity to "customize" a tender document.
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> 24. The interested parties were however unable to explain to the Review Board, what organizational deficiency means or on what law it is anchored."

29. These submissions show that the questions on what "organizational deficiency" entails and whether the tender document conformed to the precedent document provided by the Public Procurement Regulatory Authority were not only addressed to the procuring entity and the respondent but also that the two questions are tied together.

30. The applicant is also clear in the submissions filed on its behalf that these are the same questions that have now been brought before this Honourable Court as a judicial review application. In paragraph 20 of the submissions, it has been submitted as follows:

> "20. The Applicant therefore moved the Review Board by way of a Request for Review in which it contended that the Tender Documents as drawn departed from the Constitutional and Statutory imperatives as pleaded in the Request for Review the contents of which we reiterate here." ((Emphasis added).

31. There should, therefore, be no doubt that the applicant's complaint against the procuring entity's tender document and its case before the respondent is what the applicant has now escalated to this Honourable Court as the application for judicial review.

32. It is also apparent from the applicant's submissions that they are on the same issues that were raised before the respondent and, for that reason, they are more or less the same submissions that were made before the respondent.

33. In the request for review, the applicant urged that the procuring entity failed to comply with section 58 and 70 of the PPADA and Regulation 68 of the Regulations on the standard form tender documents and urged that:

> " 17. We submit that a careful and objective examination of the Standard Tender Document provided and as published by the PPRA does not make any mention of the term "organizational deficiency" and the term is evidently introduced for the first time in the lexicon of public procurement by the Respondents.
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> 20. The procuring entity's unilateral inclusion of a term not contemplated in the Standard Tender Document departs from the obligation to utilize the Standard Tender Document published by the PPRA which is further contrary to Regulations 68 (1) and (2).
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> 30. The explanation given by the Respondents as to inclusion of the term "organizational deficiency" in the eligibility criteria exposes that the decision to include the same is wholly subjective and lacking in objectivity".

34. It is also worth noting that in the application before the respondent the applicant sought for an order, similar in effect, to the order of mandamus prayed for in the instant application. The prayer in the request for review read as follows:

> "
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> " a) The Procuring Entity expunges from the Tender Document for KEBS/ T029/2023/ 2024 being a Tender for Provision of Printing KESS Standardization Stickers, at Section III Evaluation and Qualification Criteria- Tenderers Eligibility and Qualification Documents the following Clauses of therein:
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> i. Clause 1on Eligibility Sub-Clause t(xii):
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> ii. Clause 2 Mandatory Requirements, Sub-Clause. 11(VIII) to wit
>
> "The tenderer or of its associates (sic) must not have been convicted or paid any fines anywhere in the world, directly or indirectly for any irregularities regarding Government Contracts such as bribery or organizational deficiency".

35. This order, if granted, would have achieved the same purpose for which the applicant now seeks in the prayer for the order of mandamus. The prayer for this order as, noted, is couched as follows:

> " An Order of mandamus directed at the Accounting Officer Kenya Bureau of Standards and the Kenya Bureau of Standards compelling them to expunge from the Tender Documents to be used in relation to the Tender for Provision of Printing KEBS Standardization Mark Stickers the following Clauses:
>
> i. Clause I on Eligibility Sub-Clause I (xii):

ii. Clause 2Mandatory Requirements, Sub-Clause 11 {VD/) to wit

"The tenderer or of its associates (sic) must not have been convicted or paid fines anywhere in the world, directly or indirectly for any irregularities regarding Government contracts such as bribery or organizational deficiency".

36. The two prayers are almost in the same terms; they both seek the expunging of "offensive clauses" from the tender document.

37. The applicant has urged that, by endorsing the decision of the procuring entity, the respondent has flouted, just as the procuring entity did, sections 2,41,55,58, 62 and 80(3) of the PPADA except that, in this application, the respondent's endorsement has been charactersised as ultra vires, jurisdictional error, error of fact and law and abuse of power. It is in the same breath that the respondent's decision is impeached as having disregarded pertinent and relevant facts and being unreasonable.

38. The applicant's submission on the ground of ultra vires, for instance, is that, since it was not open to the procuring entity to use procurement and asset disposal documents different from those published by the Public Procurement Regulatory Authority, the respondent acted ultra-vires section 58 of the PPADA by holding the procuring entity could use such documents. For the same reason, the decision is impugned as having been tainted by a jurisdictional error. The respondent is said to have expanded the scope of its jurisdiction by endorsing errors committed by the procuring entity of adopting a tender document that is at variance with the precedent published by Public Procurement Regulatory Authority.

39. The ground of "error of fact and law" is by and large based on the same facts of the form that the tender document took. The respondent is faulted for having found that there was no evidence that the tender document adopted by the procuring entity was different from the standard one provided by the Authority. Similarly, the ground of abuse of power revolves around the tender document and the argument here is that the respondent allowed the procuring entity to legislate and introduce an alien criteria on the pretext of customizing the tender document.

40. What the applicant regards as the offensive tender document or clause therein is also the same foundation upon which it has faulted the respondent's decision for being unreasonable and irrational. According to the applicant it was unreasonable and irrational for the respondent to hold that the applicant could still submit its tender without due regard to the blemishes in the tender document, in particular, the clauses that the applicant regards offensive. The applicant also urges that the decision was irrational for suggesting that organizational deficiency is equivalent to an international norm as described in section 3(g) of the PPADA.

41. Perhaps, acknowledging that the applicant's arguments go into the merits of the respondent's decision and not just the process by which it was arrived at, the applicant has cited the Supreme Court judgment in *Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019* (Consolidated)) [2023] KESC 6 (KLR) for the argument that it is now settled that "Judicial Review has developed and the scope of the matters the Court looks at in arriving at its decision has expanded". For the same arguments the applicant has cited the Court of Appeal authorities in Civil Appeal No. E 174 of 2023 Hon Jared Odhiambo Opiyo and 5 Others Vs Migori County Assembly and 6 Others. This Honourable Court's decision in Republic v Kenya Revenue Authority Ex Parte Cooper K-Brands Limited [2016] eKLR (Odunga, J, as he then was) has been cited for the argument that statutory powers and duty must be exercised and performed reasonably. The respondent, it is alleged, did not exercise its power in a manner that was proper.

42. I have had the opportunity to read the respondent's impugned decision with a view to ascertaining whether it is tainted as suggested by the applicant and, in particular, whether it is impeachable on any of the grounds of judicial review, for which the applicant seeks the reliefs of certiorari, prohibition and mandamus.

43. From the very outset, it is apparent from the respondent's decision that it captured the applicant's case against the procuring entity. As noted, the applicant's concern has been the introduction in the tender document of "organizational deficiency" as a limiting factor to potential tenderers and, therefore, the variation of the tender document in that respect. The arguments by the learned counsel for the applicant on these issues which, as earlier noted, have been raised in this application, albeit under the grounds for judicial review, are captured in paragraphs 14 to 22 of the respondent's decision.

44. After considering these arguments and, of course, the respondent's counter-arguments, the respondent identified one main issue for determination which it couched in the following terms:

> " Whether a procuring entity has discretion to customize the standard procurement and asset disposal tender document supplied by the Public Procurement Regulatory Authority."

45. At the conclusion of its representations of the parties' respective arguments the respondent noted at paragraph 39 of its decision as follows:

> " Drawing from the above, the board is at this stage invited to interrogate the latitude of a procuring entity customising tender documents and whether the procuring entity in the subject tender fell afoul the provisions of the Act, in including the impugned clauses in the tender document"

46. The respondent then considered the provisions of sections 9,58 and 70 of the PPADA on the use of a standard procurement and asset disposal document in public procurement processes. According to paragraph 41 of its decision, it understood these provisions to mean that the Public Procurement Regulatory Authority is tasked with the responsibilities of, among others, preparation and publication of various public procurement and disposal documents; that the accounting officer of a procuring entity is responsible for the preparation of the tender document and that this is to be done in consultation with the relevant user department within the procuring entity; that the tender document should allow for fair competition among the tenderers; and, the tender document should spell out various matters including the procedures and criteria to be used to evaluate and compare tenders as well as anything else required in the Act or the regulations made thereunder. It also considered regulation 68 of the regulations and noted that it restates the responsibility of the accounting officer of a procuring entity in preparing a tender document.

47. The respondent concluded at paragraph 46 of its decision as follows:

> " 46. From the above, an accounting officer of a procuring entity bears the responsibility of preparing tender documents to be used in a tender process while consulting the relevant user department. Consequently, it would follow that different user departments will come up with different requirements unique to their functions with the result that the standard procurement and asset disposal tender documents for different departments will bear some variations.
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> 47. From page 33 of the standard tender document for non-consulting services above it is also apparent that the authority does not in its standards tender

document stipulate any of the evaluation criteria to be used at the preliminary evaluation stage. Accordingly, it is the responsibility of the accounting officer of a procuring entity and the relevant user department in the procuring entity to populate the evaluation criteria.

48. The board therefore finds that the accounting officer has latitude to customize the standard procurement and asset disposal tender document to suit the needs of the relevant department of a procuring entity. However, this is not to state that the accounting officer's discretion to customize the standard procurement and asset disposal tender document is unchecked, as the width and the breadth of any such latitude must be subject to the law."

48. After concluding that the standard tender document could be customized, the respondent went further to examine whether the procuring entity went outside the law by including the impugned clause 1(X11) under the Eligibility Criteria under section III and clause 11(VIII) of the mandatory requirements in the tender document.

49. In interrogating the answer to this question, the respondent was cautious that it should not substitute itself for the procuring entity which is best suited to determine the evaluation criteria for determining the suitability of suppliers of goods and services intended to be procured. It noted, however, that the accounting officer should in preparation of the evaluation criteria in any tender find guidance in, among other things, the Act and the peculiarity of the goods and services to be procured.

50. The respondent then considered section 55 of the PPADA on the eligibility of bidders to bid and came to the conclusion that there are seven eligibility requirements for a tenderer in a public tender and noted that, contrary to the applicant's suggestion, section 55 of the Act does not say that a candidate who thinks they have failed to meet any of the eligibility requirements shall not submit their tender.

51. The respondent understood section 55 of the Act as read with regulation 74 of the regulations to mean that a candidate could submit their tender but the question whether they meet the requirements under the tender document and under the Act can only be answered at the evaluation stage subsequent to the opening of the tenders. Accordingly, the procuring entity cannot decline receiving any tender submitted to it by a candidate, whether or not the candidate thinks that they fall short of any of the eligibility requirements.

52. What I understand the respondent to be saying is that the applicant was always at liberty to present its tender which would then be evaluated on the basis of the requirements in the tender document and, until then, it cannot be said whether the applicant, or any other tenderer for that matter, will surmount the evaluation stage.

53. The respondent also addressed the question of debarment and agreed with the applicant that section 41 of the PPADA spells out the debarment process and, therefore, a procuring entity cannot debar any tenderer through a tender document. Nonetheless, it held that the procuring entity could not be said to have gone outside the Act and the regulations in a manner that is suggestive that the applicant was under a debarment. The respondent noted at paragraph 60 of its judgment that:

> "The applicant has not led any evidence to demonstrate that the respondents prepared a tender document that was at variance with the standard document for procurement of non-consulting services-document no. 7. The applicant has equally not demonstrated the provisions of law violated by the respondents in including the impugned clauses as part of the tender document."

54. From the foregoing analysis, it is quite clear that, in its decision, the respondent addressed each and every question that the applicant raised.

But it is apparent from the applicant's own pleadings that the applicant is aggrieved more by the procuring entity's and subsequently the respondent's decisions rather than the process by which these decisions were reached. Material to this application is, of course, the respondent's decision and not that of the procuring entity. The latter's decision is only relevant to the extent that it is necessary to show, not just the genesis of the applicant's concerns but also to demonstrate that these concerns have been raised and addressed at different levels before the applicant ultimately filed the instant application.

55. In these circumstances, I am bound to agree with the respondent's submissions that the applicant's application is more of an appeal than an application for judicial review. Though packaged as a judicial review application, the applicant is seeking this court to evaluate the evidence afresh and make its own factual findings. The applicant also seeks to have this court interpret the law differently from the interpretation given to it by the respondent and, ultimately, substitute its own decision for that of the respondent.

56. This, the court cannot do because judicial review is more about the interrogation of the process of reaching a decision rather the merits of the decision. If this was not the case, there would be no need for distinguishing appellate jurisdiction from judicial review jurisdiction.

57. One of the cases the applicant has cited in its proposition that the scope of judicial review has expanded and, apparently, the breadth to which a judicial review court can now go in interrogation of the merits of a decision, in the wake of the legislation of the *Fair Administrative Action Act*, is *Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019* (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment).

The learned counsel for the applicant has, in his written submissions, quoted paragraph 75 of the judgment in which the Supreme Court held as follows;

> "(75) In order for the court to get through this extensive examination of Section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must 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 is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in *Judicial Service Commission & another v. Lucy Muthoni Njora, Civil Appeal 486 Of 2019*; [2021] eKLR there is 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 is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against Article 259 of *the Constitution* which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.

58. But in the next paragraph of that decision which, for whatever reason, the applicant has omitted, the Supreme Court noted 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 Actions 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. The Commission on Administrative Justice, the 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." (Emphasis added).

59. This position is what the Court of Appeal adopted in an earlier decision of *Energy Regulatory Commission v S G S Kenya Limited & 2 others (2018) eKLR Civil Appeal No. 341 of 2017* where it held as follows:

> "In a judicial review matter, the Court's mandate is limited to procedural improprieties, and extends not to the merits of a decision. The Board had been duly mindful of its own earlier decision in Avante International INC v. IEBC (Review No. 19 of 2017): it took into consideration the nature and weight of the opinion on technological change, which the 1st respondent had acted upon; and the Board's reasoning exhibited a fidelity to practicality and to good sense. Consequently, the Judge ought to have shown greater deference to the Board's decision, and should have been more circumspect in its view of such a decision, bearing in mind the specializations of the Board. The Appellant did not bear a statutory duty to award the tender to SGS, or to any other entity, so as to attract the compulsive force of Mandamus."

60. The court further cited its own decision 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 where it was held:

> "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. See East African Railways Corp. vs. Anthony Sefu Far-Es-Salaam (1973) EA 327."

61. But a judicial review court will not let every decision pass only because its jurisdiction is limited to interrogating the process rather than the merits of a decision. Where it is obvious and apparent on the face of the record that the decision cannot be justified on the basis of the material presented before the subordinate court or tribunal or any other public body whose decision is the subject of judicial review proceedings, the decision will be quashed. A decision that is glaringly unsupported by the evidence or blatantly contrary to law will be impeached. In such a case, the decision will not stand, not necessarily because it is unmerited but because it is impeachable on grounds of illegality or irrationality, as the case may be. It would be the kind of decision that no reasonable tribunal, given the same facts or circumstances, would reach.

62. In Biren Amritlal Shah & anor vs. Republic & 3 others (2013) eKLR the Court of Appeal did not rule out the possibility of interfering with the decision of a tribunal in judicial review proceedings albeit in very exceptional circumstances. In that case it was held:

> " The learned Judge would only have been entitled to interfere were it the case that there was absolutely no evidence before the Board that would have justified the upholding of the appellant's termination of the tender. In other words, the case should have been so plainly and self-evidently devoid of evidence or basis for termination, as to render upholding of the termination an inexplicable act of capricious irrationality defiant of all logic and reason. It should have been such a decision that no reasonable tribunal, properly directing itself on the case would have arrived at. That is the Wednesbury unreasonableness that would invalidate a tribunal's decision by way of certiorari."

63. In my humble view, any reasonable tribunal could possibly have reached the same decision that the respondent reached. As I have noted, the responded not only considered the evidence with which it was presented but it also interpreted and applied the law as it understood it. It cannot be said that the respondent's decision to uphold the procurement process was not founded on any evidence or had no legal basis. Of course, the question whether this Honourable Court could have reached the same decision as the respondent is an irrelevant question as long as the court is exercising its judicial review jurisdiction.

64. I cannot end this discussion without mentioning the Supreme Court decision in Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) in which the court held that in a case where it is alleged that fundamental rights have been violated the court has a lee-way of interrogating the merits of the decision. The Court held as follows:

> " 87. With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their

grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under *the Constitution* if it limits itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the Jirongo and Praxedes Saisi cases speaks succinctly to this issue. That is also why, the question below is pertinent to the present appeal."

65. Thus, when a party approaches a court under the provisions of *the Constitution*, no doubt, by way of a constitutional petition, the court is under an obligation to undertake a merit review of the case. On the other hand, in the case where a party brings a judicial review suit under the provisions of Order 53 of the Civil Procedure Rules, the court is restricted to the process and manner in which the decision complained of was reached and not the merits of the decision. It goes without saying that the applicant's application is a judicial review application and not a constitutional petition.

66. That said, even if the question of the merits of the respondent's decision was to be out of equation, I would still be hesitant to exercise my discretion in favour of the applicant and grant the reliefs sought. The applicant's case is based on its apprehension that tender requirements are designed to bar it from participant in the procurement. This is clear from paragraph 8 of the affidavit verifying the facts relied upon in which the applicant's represented has sworn as follows:

"

"8. Upon carefully perusing the Tender Documents the Ex-Parte Applicant was shocked to realize that the Interested Parties have deliberately manipulated and edited the same in a manner that effectively disqualifies and renders the Applicant debarred and ineligible to participate in the said tender, by inserting an unfair, unlawful, and subjective requirement into the tender document at Section 111- Evaluation and Qualification Criteria- Tenderers Eligibility and Qualifications Documents in the following Clauses of the tender document:

a) Clause 1 on Eligibility Sub-Clause 1 (xii):

b) Clause 2 Mandatory Requirements, Sub-Clause 11 (VIII) to wit

"The tenderer or of its associates (sic) must not have been convicted or paid any fines anywhere in the world, directly or indirectly for any irregularities regarding Government contracts such as bribery or organizational deficiency"

67. For the avoidance of doubt, this point has been emphasised in paragraph 18 of the applicant's written submissions where it has been submitted that:

"18. Applicant therefore being reasonably apprehensive that the inclusion of this term as mandatory eligibility criteria was aimed at preventing it from bidding in a tender for it is eminently qualified raised the matter with the procuring entity which outrightly rejected its contention that the inclusion of the term was against the law."

68. The assumption that can be logically drawn from the foregoing deposition and submission is that the applicant is only apprehensive because it has hitherto been found liable for all or any of vices prescribed in the impugned clause and, therefore, it may not meet the threshold. If this is not the case, why would it be apprehensive of a requirement in the tender document that least concerns it?

69. But the applicant has gone further to disabuse any notion that it may be culpable and, in a way, demonstrated its innocence in paragraph 10 of the affidavit sworn on its behalf. In that paragraph, it has been sworn as follows:

> " 10. It was the Ex.Parte Applicant's contention before the PPARB that:
>
> a) The aforesaid offending clause which is the only material departure from previously deployed Tender Documents is patently targeted at the Ex. Parte Applicant as it is in the public domain that it in April 2023, it entered a settlement with the Office of the Attorney General in Switzerland on organizational deficiency.
>
> b) The Ex-parte Applicant had made this known to the procuring entity when it sought clarity on the matter of the inclusion of the term "organizational deficiency" in the subject tender documents.
>
> c) The Ex. Parte Applicant's settlement with the Office of the Attorney General was NOT an admission of culpability nor did it imply that the Applicant has been directly or indirectly convicted anywhere in the world for any irregularities regarding Government contracts such as bribery or other similar vice.
>
> d) Indeed the Ex. Parte Applicant has not been convicted or paid fines anywhere in the world for corruption or bribery."

70. These depositions would appear to betray the applicant's apprehension but they also go to show that the applicant would not be affected by the requirement in the impugned clause. If that be the case, the burden upon the applicant of answering the question why it would then be seeking to stop the procurement process or have the impugned clause expunged has not been discharged to my satisfaction.

71. Section 167(1) of the PPA which the applicant invoked in seeking for review of the procuring entity's decision contemplates that a candidate, like the applicant, or a tenderer has either suffered or risks suffering loss or damage due to a breach of duty on the part of the procuring entity. This section reads as follows:

> 167. Request for a review
>
> (1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

72. If the applicant is taken at its own word, and there is no reason why it should not, that it is free of the vices prescribed in the impugned clause and, therefore, logically, its bid would not be encumbered by the particular mandatory requirement in the tender document disqualifying tenderers because of these vices, where is the damage or loss the applicant has suffered or risk suffering as a result of the impugned clause? What would be the basis for such a claim of loss or damage or for the risk of such loss or damage if the applicant has a clean bill of health, so to speak?

73. The point is, the consideration of whether, in view of the applicant's own depositions and submissions with respect to the offending clause, the applicant was entitled to initiate a request for review under section 167(1) of the PPADA which, as noted, is particular as to the circumstances under which such a request for review may be made, is a relevant consideration in exercise of my discretion against granting the reliefs sought.

74. In the final analysis, I am not satisfied that the respondent's decision is tainted by any of the grounds of judicial review as explained in Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374. In that case Lord Diplock explained the grounds for judicial review as follows:

> " My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person

> who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

75. The court will intervene and, in exercise of its discretion, grant the remedy for judicial review if all or any of these grounds is proved to exist. These grounds have been codified in the *Fair Administrative Action Act*, No. 4 of 2015.

76. Viewed from this perspective, there is nothing in the respondent's decision that suggests that the respondent did not understand correctly the law that regulates its decision-making power and that it did not give effect to it. The respondent's decision cannot also be said to be so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Again, there is nothing to suggest that there was any procedural impropriety in the process of reaching the respondent's decision.

77. For the reasons I have given, I do not find any merit in the applicant's application. It is hereby dismissed with costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 14 JUNE 2024

NGAAH JAIRUS

JUDGE