Power Parts (Kenya) Limited v Procurement Administrative Review Board & 2 others (Judicial Review Miscellaneous Application E006 of 2025) [2025] KEHC 6921 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6921 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E006 OF 2025

J NGAAH, J

MAY 16, 2025

BETWEEN

POWER PARTS (KENYA) LIMITED ..... APPLICANT

AND

PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... 1ST RESPONDENT

THE ACCOUNTING OFFICER, KENYA PORTS AUTHORITY .... 2ND RESPONDENT

KENYA PORTS AUTHORITY ..... 3RD RESPONDENT

JUDGMENT

1. Before court is an originating motion dated 1 April 2025 expressed to be brought under articles 10, 22, 23(3)(f) 47, 48, 50 (1) and 227 of *the Constitution*; section 175 (1) of the *Public Procurement and Asset Disposal Act* cap. 412C; sections 7, 9 and 11 of the Fair Administrative Actions Act cap. 7L; and, rule 11(2) of the Fair Administrative Action Rules, 2024. The applicant seeks the following orders:

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> " 1. That this application be certified urgent and An Interim Order Of Prohibition in terms of prayer 2 be issued ex parte in the first instance.
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> 2. That pending inter partes hearing and determination of the Originating Motion, AN Interim Order Of Prohibition be and is hereby issued to prohibit the 2nd and 3rd Respondents from further evaluating bids, awarding, executing and performing a procurement contract in implementation of the part of the decision of the Public Procurement Administrative Review Board which directed the said 2nd and 3rd Respondents to proceed with

the procurement proceedings in the tender number Kpa/115/2024- 25/ te Rewinding, Servicing, Repair, And Condition Monitoring Of Rotating Electromechanical Machines.

3. An Order of Certiorari removing to this Honourable Court for purposes of being quashed the part of the decision, findings and holding of the Public Procurement Administrative Review Board dated 11th March 2025 in Request for Review Application No. 16 Of 2025: Between Power Parts (kenya) Limited - Versus- Accounting Officer, Kenya Ports Authority And Kenya Ports Authority in the matter of tender number Kpa/115/2024-25/ te Rewinding, Servicing, Repair, And Condition Monitoring Of Rotating Electromechanical Machines wherein the 1st Respondent found and held that the commencement of the procurement proceedings in the subject tender was not in violation of the orders by the High Court in Hccommie070/2024; the procuring entity did not act contrary to the law in commencing and continuing the procurement process in the subject tender; dismissed the Applicant's request for review and directed the procuring entity to proceed with the procurement process in the subject tender.

4. An Order of Certiorari removing to this Honourable Court for purposes of being quashed the entire procurement proceedings in the tender number Kpa/115/2024-25/te Rewinding, Servicing, Repair, And Condition Monitoring Of Rotating Electromechanical Machines.

5. Any other appropriate relief which the Honourable Court deems fit and just in the circumstances.

6. The costs of this application be in favour of the Applicant."

The motion is based on the grounds on its face and the affidavit of Vishal Soni sworn on 1 April 2025.

2. Soni has sworn that he is a director of the applicant company which he has described as a "leading supplier of equipment and services in container, trailer and heavy industrial handling with multiple years of experience in the East African region." According to him, the suit seeks, first, judicial review of the 2nd and 3rd respondents' administrative action in tender number Kpa/115/2024-25/te Rewinding, Servicing, Repair, And Condition Monitoring Of Rotating Electromechanical Machines (hereinafter "the subject tender") which was published on the Public Procurement Information Portal on the URL https://tenders.go.ke/tenders/225471 on 10 February 2025; and, second, judicial review of the decision of the 1st respondent in review application no. 16 of 2025 dated and delivered on 17 March 2025. In particular, the applicant seeks judicial review of the administrative action of the 2nd and 3rd respondents' in commencing and continuing the subject tender and the decision of the 1st respondent's decision on the review no. 16 of 2025, that sought to review the 2nd and 3rd respondent's decision, pursuant to section 175(1) of the *Public Procurement and Asset Disposal Act* (also referred to hereinafter as "the Act") as read with article 47 of *the Constitution* and sections 7 and 11 of the *Fair Administrative Action Act* and the Fair Administrative Action Rules, 2024.

3. The 2nd and 3rd respondents are said to have published on the Public Procurement Information Portal on the URL https://tenders.go.ke/tenders/225471 the tender document for the subject tender on 10 February 2025. On even date, the procuring entity published on the URL https://tenders.go.ke/tenders/225471 a professional opinion of the head of procurement function which, in Soni's words, purported to be an opinion rendered under section 84(1) of the Act.

4. As a “candidate” within the meaning of section 2 of the Public Procurement and Asset Disposal Act, the applicant obtained the tender document from the at https://tenders.go.ke/tenders/225471.

5. Nonetheless, the applicant was aggrieved by the commencement and conduct of the procurement proceedings in the subject tender and, therefore, it requested for review of the procuring entity's decision in review application no. 16 of 2025 which was lodged before the 1st respondent. The request for review was opposed and after hearing parties to the application, the 1st respondent rendered its decision, dismissing the applicant's application, on 17 March 2025.

6. The applicant is aggrieved by the 1st respondent's decision, to the extent that, first, the 1st respondent held that the commencement of the procurement proceedings in the subject tender was not in violation of the orders by this Honourable Court in Hccomm/e070/2024 (hereinafter also referred to as "suit no. 70 of 2024"); second, the procuring entity did not act contrary to the law in commencing and continuing the procurement process in the subject tender; and, third, it dismissed the applicant's request for review and directed the procuring entity to proceed with the procurement process in the subject tender.

7. According to the applicant, the decision "...manifestly suffers the infirmities of illegality, gross errors of law, irrationality and violation of the applicant's legitimate expectations. "

8. As far the ground of illegality is concerned, the 2nd and 3rd respondents are alleged to have failed to take account of legally relevant considerations, namely that the subject procurement proceedings could only be lawfully commenced based on what the applicant says is an "approved procurement plan". In its view, there was no such "approved procurement plan" upon which the subject tender was commenced by the 2nd and 3rd respondents.

9. The 2nd and 3rd respondents are also alleged to have failed to take account of legally relevant considerations under rule 89(5) of the Public Procurement and Asset Disposal Regulations, to the effect that the purported 10 bidders to whom the subject tender was restricted have not performed similar works sought to be procured in the subject tender. According to the applicant, the bidders have only been prequalified to "supply stationery, prequalified for construction of roads, prequalified for drilling of boreholes".

10. It is further alleged that the 2nd and 3rd respondents failed to take account of legally relevant considerations, namely, that there were subsisting court orders issued by this Court at Mombasa in Hccomm/e070/2024; Power Parts (Kenya) Limited v Kenya Ports Authority, inter alia, restraining the 2nd and 3rd respondents from advertising fresh tenders for the contract items in the procurement contracts in Tender No. KPA/l.07/2023- 24/TE dated 2 February, 2024 and Contract Tender No. KPA/205/2023- 24/TE dated 19 April, 2024 and all other matters ancillary or incidental thereto including supply of spare parts for Kalmar Terminal Tractors and supply of spare parts for Kalmar Reach stackers, whether internally or on local newspapers, websites and other forms of media; or interfering with the existing contracts.

11. The 2nd and 3rd respondents are also alleged to have floated the subject tender to prejudice the applicant's legal rights in existing procurement contracts won by the applicant in Tender No. Kpa/107/2023-24/te dated 2 February 2024 and procurement contract in Tender No. Kpa/205/2023- 24/TE dated 19 April 2024 since the same items in the applicant's existing procurement contracts were manifestly part of the items being procured by the 2nd and 3rd respondents through the subject tender.

12. As far as the 1st respondent's decision is concerned, the applicant has pleaded that the 1st respondent committed errors of law to the extent that it found that the subject tender was planned or budgeted for

and that it was initiated based on an existing procurement plan when there was no evidence in proof of this fact.

13. The decision is also impugned on this ground because of the 1st respondent's findings that the firms identified for invitation were listed from persons who had previously performed similar works and demonstrated satisfactory services to the procuring entity and thereby implying that the firms were from the list of registered suppliers maintained by the Head of Procurement. The listing was based on the professional opinion dated 22 January 2025 which, according to the applicant, is ultra vires section 84 of the Act as read with rule 78 and the 9th Schedule to the Regulations and rule 79 of the Regulations.

14. On irrationality, as a ground for judicial review, the applicant has averred that the 1st respondent's decision was irrational to the extent that the 1st respondent held that the commencement of the procurement proceedings in the above subject tender by the respondents was not in violation of the orders by this Honourable Court in Hccomm/e070/20204 yet the goods tendered in the subject tender were similar items to the items already subject of the applicant's existing procurement contract in TENDER NO. KPA/107/2023-24/TE dated 2 February 2024 and procurement contract in TEnder No. Kpa/205/2023-24/te Dated 19 April 2024.

15. The decision is also said to have been irrational because the 1st respondent held that the subject procurement was planned and budgeted for and initiated based on an existing procurement plan yet there was no proof of the existence of a procurement plan. The decision is also said to have been irrational because the firms listed for invitation were not qualified to perform the tender.

16. The ground for legitimate expectations is more or less based on the same facts. In particular, it is urged that it was expected that the 2nd and 3rd respondents would refrain from commencing parallel procurement proceedings such as through the subject tender to procure the same items which are alleged to make the procurement contracts already executed between the applicant and the 2nd respondent.

17. It is also alleged that it was expected of the 2nd and 3rd respondents to comply with the valid court orders issued by the Court at Mombasa in Hccomm/e070/2024; Power Parts (Kenya) Limited v Kenya Ports Authority, inter alia, restraining the 2nd and 3rd respondents from advertising fresh tenders for the contract items in the procurement contracts in Tender No. KPA/107/2023-24/TE dated 2 February, 2024 and Contract Tender No. KPA/205/2023- 24/TE dated 19 April, 2024 and all other matters ancillary or incidental thereto including supply of spare parts for Kalmar Terminal Tractors and supply of spare parts for Kalmar Reach stackers, whether internally or on local newspapers, websites and other forms of media; or interfering with the existing contracts of the applicant.

18. James Kilaka swore a replying affidavit on behalf of the 1st respondent opposing the motion. He has introduced himself in the motion as "a procurement professional and the acting Board Secretary of the Public Procurement Administrative Review Board" and that he "heads the 1st respondent's secretariat that provides secretariat and administrative services to the 1st Respondent, the 1st respondent's committees and 1st respondent's hearing panels. "

19. Kilaka does not dispute the initiation by the applicant, the request for review no. 16 of 2024 and affirms that indeed it was heard and duly determined by the 1st respondent. But in opposing the applicant's application, he has, by and large, defended the 1st respondent's decision as being sound, logical, unbiased, and not contrary to the law as alleged by the applicant. •

20. Further, contrary to the applicant's allegations, the 1st respondent is said to have considered all the parties' pleadings, submissions, oral arguments, confidential documents in coming to its determination and, more importantly, acted within the confines of *the Constitution*, the Act, the Regulations, the *Fair Administrative Action Act* and, generally, the rule of law.

21. The decision, according to Kilaka, was well reasoned and cannot be said to have been unreasonable, ultra vires, unlawful, misconceived, erroneous, irrational, or in violation of the applicant's legitimate expectations.

22. Finally, the application is opposed because though fashioned as an application for judicial review, it is effectively an appeal against the decision of the 1st respondent and, on that score alone, the court should decline to hear the application for want of jurisdiction.

23. Like the 1st respondent, the 2nd and 3rd respondents also opposed the applicant's motion and filed a replying affidavit to that effect. The affidavit has been sworn by Mathews O. Amuti who has introduced himself as the 3rd respondent's general manager and has sworn the affidavit on behalf of both the 2nd and 3rd respondents.

24. Similarly, Amuti has stated that the applicant's motion is more of an appeal and, as a matter of fact, the 2nd and 3rd respondents have been named in that capacity yet the impugned decision was by the 1st respondent.

25. It has also been sworn on behalf of the 2nd and 3rd respondents that whereas the applicant has a right to pursue judicial review under the provisions of section 175 of the *Public Procurement and Asset Disposal Act* 2015, the matters raised in the judicial review proceedings are similar to those determined by this Honourable Court in Commercial Case Number E070 of 2024; Powerparts (K) Limited versus Kenya Ports Authority between the same parties. The same matters are also directly and substantially in issue in the ongoing arbitration proceedings commenced by the applicant in respect to several contracts entered into between itself and the 3rdrespondent.

26. On the applicant's contention that the 2nd and 3rd respondents initiated and continued the public procurement process under the subject tender in order to prejudice and violate the applicant's rights and legitimate expectations that the 3rd respondent would not initiate other procurement proceedings parallel to those existing under Tender Number KPA/107/2023-2024/TE - Contract for Supply of Spare Parts for Kalmar Reachstackers dated 2 February 2024 and Tender Number KPA/205/2023-2024/TE- Contract for Supply of Spare Parts for Kalmar Terminal Tractors dated 19 April 2024, Amuti has sworn that the contracts dated 2 February 2024 and 19 April 2024 between the applicant and the procuring entity were terminated by the 2nd and 3rd respondents by way of the termination notices dated 22nd July 2024 and 30 September 2024 on account of fraudulent conduct exhibited by the applicant in the tendering process.

27. Upon termination of the contracts, the applicant commenced the proceedings before this Honourable Court at Mombasa in Commercial Case No. E070 of2024 against the 3rd respondent seeking interim measures of protection pending arbitration under the provisions of sections 6 and 7 of the *Arbitration Act* 1995. The applicant also filed several interlocutory applications including the applications dated 5 December 2024, 9 January 2025, 30 January 2025 and 27 February 2025.

28. In the application dated 5 December 2024, the applicant sought orders that:

> " a. The application be certified urgent, and be heard ex-parte in the first instance.

b. pending hearing and determination of the application inter partes, the Honourable Court be pleased to grant interim protection relief in the form of an injunction restraining the Respondent from upholding the termination of the Contract for Supply of Spare Parts for Kalmar Reachstackers dated 2nd February 2024 and Contract for Supply of Spare Parts for Kalmar Terminal Tractors dated 19th April 2024, assigning to other persons/advertising for fresh tender of the Contracts items and all matters ancillary or incidental thereto including supply of spare parts for Kalmar Terminal Tractors and Kalmar Reachstackers; whether internally or on local newspapers, websites and other forms of media; or interfering with the existing contracts;

c. pending hearing and determination of the application inter partes, the Applicant be allowed to continue its services with the Respondent as per the terms of the said Contracts and in particular, clause 10(b) of the Contracts;

d. the matter be referred to arbitration under the terms of clause 10(b) of the said Contract.

e. pending hearing and determination of the Arbitration proceedings between parties, the Honourable Court be pleased to issue an interim protection relief in the nature of injunction staying the termination of the Contracts;

I. Costs of the application to be provided.

29. Following this application, the court granted ex parte interim orders in terms of prayers (b) and (c) of the said chamber summons. Subsequently, the applicant filed three contempt of court applications respectively dated 9 and 30 January 2025 and 27 February 2025 alleging that the officers of he 3rd respondent had acted in breach of the Court orders issued on 6 December 2024.

30. The applicant, it is alleged, failed to disclose to this Honourable Court that it filed the contempt of court application dated 27 February 2025 alleging that the officers of the 3rd respondent had commenced the subject tender in alleged disobedience of the Court orders issued by the said Court on 6 December 2024.

31. By a ruling dated 6 March 2025, the Court in Commercial Case No. E070 of2024 determined the applicant's suit and applications dated 5 December 2024, 9 January 2025, 30 January 2025 and 27 February 2025. The Court allowed prayers (d) and (e) of the chamber summons dated 5 December 2024 which referred the matter to Arbitration and stayed the termination of the Contracts dated 2 February 2024 and 19 April 2024. The Court further issued directions on the appointment of the arbitrator by the parties and orders for the performance of the Contracts pending the conclusion of the arbitration proceedings. However, the Honourable Court declined to grant the prayer which sought to restrain the 3rd respondent from advertising for fresh tender and procuring spare parts for its Terminal Tractors and Reachstackers.

32. The applicant complied with the ruling by effecting service of the Arbitration Notice dated 21 March 2025 upon the 3rd respondent intimating their desire to appoint an arbitrator with the concurrence of the 3rd respondent within 30 days of the notice in line with the provisions of section 12 of the *Arbitration Act* and the terms of the Contracts dated 2nd February 2024 and 19 April 2024.

33. Nowhere in the originating motion has the applicant alleged that the 2nd and 3rd respondents have disobeyed any of the final orders issued in the above ruling of the Court in Commercial Case No E070

of 2024 which, according to the 2nd and 3rd respondents, are binding. In that ruling, in paragraph *2* in particular, the Court held and found that all the other applications filed by the applicant after the Chamber Summons dated 5 December 2024, including the contempt application dated 27 February 2025, would be resolved by the same ruling of 6 March 2025. Thus, the question whether the 2nd and 3rd respondents violated the orders issued on 6 December 2024 by the Court in Commercial Case No. E070 of 2024 is one of the questions which were deliberated upon and settled by the Honourable Court in its ruling of 6 March 2025.

34. Further, the question whether the public procurement process under the subject tender was commenced in order to prejudice and defeat the performance of the Contracts dated 2 February 2024 and 19 April 2024 is a question which was also deliberated upon and determined in the same ruling.

35. By issuing the said orders in the ruling of 6 March 2025, this Honourable Court discharged its mandate under the provisions of sections 6 and 7 of the *Arbitration Act* and all matters touching on the performance of rights, obligations and expectations of the parties under the terms of the Contracts dated 2 February 2024 and 19 April 2024 are now matters the arbitrator, and not this Honourable Court, is seized of.

36. It follows that, the applicant commenced the instant proceedings in contravention of the provisions of articles 159(2)(c) and 165(6) of *the Constitution* as read with the provisions of section 22 of the *Arbitration Act*. The applicant's originating motion is, accordingly, incompetent, fatally defective and incurably bad in law.

37. As far as the procurement process is concerned, it has been sworn that the public procurement process under the subject tender was informed and initiated by the professional opinion rendered by the head of procurement function at the 3rd respondent by way of the Internal Memo dated 22 January 2025.

38. Further, the head of procurement function at the 3rd respondent issued her professional opinion that the subject tender was to be undertaken by way of Restricted Tendering in order to save on the time and cost of conducting an evaluation of many tenderers as envisaged under the provisions of section 102(1)(b) of the *Public Procurement and Asset Disposal Act*.

39. She also observed that the subject tender met the thresholds for procurement under the provisions of section 102(1)(b)of the *Public Procurement and Asset Disposal Act* and rule 89(2) and the 2nd schedule of the Regulations thereunder because a request for the subject tender emanated from the head of user department communicated through the Manager Container Terminal Engineering's Internal Memo dated 9 August 2024 and that there was no specified budget for the subject tender which was to be raised on an as and when need arises basis.

40. The head of procurement function at the 3rd respondent noted in her professional opinion that the 3rd respondent had invited tenders from at least 10 persons selected from the list of registered suppliers as maintained by the 3rd respondent under the provisions of sections 57 and 71 of the *Public Procurement and Asset Disposal Act* in compliance with the provisions of rules 89(5) of the Regulations thereunder.

41. The Tender Document availed to the tenderers under the subject tender expressly stated under clause 5.2 of the Instruction To Tenderers (ITT) that the tenderers pre-qualified by submitting the information required for the determination whether the tenderer qualifies for a margin of preference under clause 18.3 of the ITT shall not be subjected to the provisions on qualifications of section III, Evaluation and Qualification Criteria which were to be applied by the 3rd Respondent in arriving at the Lowest Evaluated Tender Price.

42. The public procurement process under the subject tender was, therefore, commenced by the respondents in accordance with the provisions of sections 73, 84 (1) and102 (l)(b) of the Public Procurement and Assets Disposal Act 2015 as read together with rules 71, 89 (2) & (5) and the 2nd schedule of the Regulations thereunder which stipulated the conditions for public procurement by way of Restricted Tendering.

43. Although the applicant has alleged that the tenderers under the subject tender are not capable of providing similar works as those sought by the 3rd respondent to be provided under the subject tender, the applicant has not provided any proof of these allegations. In any event, the applicant has failed to join the 10 candidates invited to tender under the subject tender. If this Honourable Court was to issue any order against the candidates it would be condemning them unheard.

44. The 2nd and 3rd respondents, it is urged, complied with the requirements for undertaking an alternative procurement process by way of Restricted Tendering under the subject tender as stipulated under provisions of article 227 of *the Constitution* as read with the provisions of sections 3 and 91 (2) of the Act. The 1st respondent could not be faulted for making the findings it did in determining the Applicant's Request for Review dated 21 February 2025.

45. It has been sworn on behalf of the 2nd and 3rd respondents that they complied with the requirements for undertaking an alternative procurement process by way of Restricted Tendering under the subject tender as stipulated under provisions of article 227 of *the Constitution* as read with the provisions of sections 3 and 91 (2) of the Act. Thus, the 1st respondent could not be faulted for making the findings it did in determining the Applicant's Request for Review.

46. The 3rd respondent, it is sworn, is a heavily operational organization and, for that reason, it utilises a myriad of sophisticated machinery and equipment in order to discharge its core functions. The machinery and equipment require spare parts and are to be serviced on a continuous basis.The applicant is, in essence, seeking to be the sole supplier of all spare parts and service; a position that is practically and legally untenable.

47. After considering the applicant's application, the responses thereto and the submissions filed in support of and in opposition to the application, one of the issues that presents itself as warranting determination at the very outset is whether this suit is bad for misjoinder as against the 2nd and 3rd respondents. In answering this question, one need not look any further than Part XV of the *Public Procurement and Asset Disposal Act* on Administrative Review of Procurement and Disposal proceedings.

48. Under section 167 (1) of the Act, a candidate or a tenderer may seek administrative review by the 1st respondent if he has suffered or risked suffering loss or damage as a result of some breach of a duty with which the procuring entity is tasked. This section reads as follows:

> Request for a review
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> i. 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.

49. No doubt, this is the provision of the law which the applicant invoked when it filed request for review no. 16 of 2025 against the subject tender or the procurement process. According to the applicant, it filed the request for review as a "candidate". The request for review was heard and determined by the Public Procurement Administrative Review Board which is established for that purpose, among other purposes, under section 27 of the Act.

50. Under section 175(1) of the Act, a person aggrieved by the decision of the Board may seek judicial review of the decision in this Honourable Court. This section reads as follows:

> 175. Right to judicial review to procurement
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> (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.

51. This particular provision is self-explanatory that it is the decision of the Review Board that would form the subject of proceedings for judicial review in this Honourable Court in the event an applicant is dissatisfied with or aggrieved by the decision of the Review Board. The decision of the procuring entity is not open for review in the judicial review proceedings under this provision because, first, the law expressly states that it is the decision of the Review Board that would be subject to judicial review proceedings and, second, judicial review proceedings are not an appeal against the Review Board's decision on the request for review of the procurement entity's decision such that in considering the Review Board's decision, the court would be entitled to interrogate the procuring entity's decision.

52. That being the case, the proper and the only respondent in the judicial review proceedings instituted under section 175. (1) of the Act would be the Review Board. The procuring entity and the accounting officer or any other person or persons party to the request for review proceedings and who, may ultimately be affected by the orders made in determination of the judicial review, may be included in the suit as an interested party or interested parties. Where, for instance, the Court upholds the Review Board's decision nullifying an award, the successful bidder who is the beneficiary ought to be given an opportunity to be heard. Based on the provisions of section 175(1) he will be accorded such an opportunity to be heard, not as respondent, but as an interested party.

53. For the foregoing reasons, I agree that with the 2nd and 3rd respondents that they are improperly joined to this suit as respondents.

54. Beyond the suit being bad for misjoinder, the suit would fall to the extent that the applicant is seeking to review the 2nd and 3rd respondents' decision in these proceedings. That the applicant is seeking review of the 2nd and 3rd respondents' decision is not in doubt. In paragraph 8 of the affidavit of Soni, the applicant has sworn as follows:

> " 8. The Applicant is aggrieved and therefore seeks judicial review of the 2nd and 3rd Respondents' administrative action in the subject tender number Kpa/115/2024-25/te Rewinding, Servicing, Repair, And Condition Monitoring Of Rotating Electromechanical Machines which was published on the Public Procurement Information Portal (PPIP) on the URL https:/ ltenders.go.ke/tenders/225471 on 10th{{^}} February 2025 as well as judicial review of the decision of the 1st Respondent's decision in review application no. 16 of 2025 dated and delivered via email on 17th March 2025.

55. And in paragraph 27 of the affidavit, the applicant has proceeded to lay grounds of the application mainly targeting the 2nd and 3rd respondents. In that paragraph, the applicant has sworn as follows:

> " 27. The Applicant avers that the 2nd and 3rd Respondents action of commencing and continuing the subject tender constitutes an administrative action within the meaning of section 2 of the FAAA and the same is tainted with illegality for the reasons that:
>
> a. The 2nd and 3rd Respondents failed to take account of legally relevant considerations, namely that the subject procurement proceedings could only lawfully be commenced based on an approved procurement plan; there was no approved procurement plan upon which the subject tender was commenced by the 2nd and 3rd Respondents.
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> b. The 2nd and 3rd Respondents failed to take account of legally relevant considerations under rule 89(5) of the PPAD Regulations, namely that the purported 10 bidders to whom the subject tender was restricted have not performed similar works sought to be procured in the subject tender. Information readily available in public domain indicates that some of the purported bidders have only been prequalified to supply stationery, prequalified for construction of roads, prequalified for drilling of boreholes.
>
> c. The 2nd and 3rd Respondents failed to take account of legally relevant considerations namely that there were subsisting court orders issued by the High Court at Mombasa in Hccommie070/2024; Power Parts (Kenya) Limited v Kenya Ports Authority, inter alia, restraining the 2nd and 3rd Respondents from advertising fresh tenders for the contract items in the procurement contracts in Tender No. KPA/1.07/2023-24/TE dated 2nd February, 2024 and Contract Tender No. KPA/205/2023- 24/TE dated 19th April, 2024 and all other matters ancillary or incidental thereto including supply of spare parts for Kalmar Terminal Tractors and supply of spare parts for Kalmar Reachstackers, whether internally or on local newspapers, websites and other forms of media; or interfering with the existing contracts."

56. The applicant cannot purport to be seeking judicial review of the 2nd and 3rd respondents' administrative decision when section 175 (1) is clear that only the decision of the Review Board would be subject to judicial review proceedings.

57. The other question that calls for my immediate attention and which I am inclined to dispose of at the outset is that although the applicant has sought to impeach the tender for the reason that it ought not have been floated in the first place since, among other reasons, there were existing contracts between the applicant and the procuring entity, it identified itself as a "candidate" for the same tender which it

sought to impeach. This is apparent from paragraph 14 of the affidavit of Soni where he has sworn on behalf of the applicant as follows:

> " 14. Being a candidate within the meaning of section 2 of the *Public Procurement and Asset Disposal Act*, the Applicant obtained the tender document from the PPIP at https:lltenders.go.keltenders/225471."

58. Section 2 of the Act defines a "candidate" in these terms:

> " "candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity."

59. Looking at provisions in the Act where reference to a "candidate" have been made, it is quite apparent that a candidate would only obtain a tender document for the purpose of participating in the tender for which the tender document has been made available. In section 2, for instance, a "tender" is defined as:

> " ... an offer in writing by a candidate to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity ... " (Emphasis added).

60. And in section 157 (1) of the Act, on participation of candidates in tenders, "candidates" are to be allowed to participate in tenders without discrimination. The section reads as follows:

> 157
>
> (1) Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.

61. Any other reference to a candidate in the Act is of a person who is either participating or intends to participate in a procurement or tender process. What this means is that obtaining of the tender document under section 2 of the Act is consequential in the sense that it attributes certain legal status to the person who obtains the document.

62. Obtaining the tender document as the applicant did under section 2 of the Act is not for the sake of it and neither is it for the sake of instituting a request for review application. Under section 174(1) one need not be a candidate or a tenderer to institute a suit against a procurement. This section reads as follows:

> 174. Right to review is additional right
>
> The right to request a review under this Part is in addition to any other legal remedy a person may have.

63. Two important points to note from this provision is that first, the right to question a tender is not just restricted to candidate or a tenderer but that any other aggrieved person, who does not fit that description, may seek remedy for his grievances. The second point is that besides a request for review under section 161, a person may invoke any other legal process or means by which his grievances, arising out of a tender may be addressed.

64. It cannot, therefore, be assumed that the applicant could qualify for standing to initiate the request for review under section 161 of the Act only after he obtained the tender document in respect of the subject tender. The legal presumption is that a person obtains a tender document for purposes of

participating in a tender, and for that reason, the person qualifies to be identified as a "candidate" in the technical sense.

65. The point am making is that it is untenable that the applicant would seek to impeach a tender in which, for all intends and purposes, sought to participate in. It follows that the applicant had neither legal nor factual basis to institute the request for review in the first place.

66. The next issue for consideration is High Court Commercial Case No. E070 of 2024. This suit was instituted by the applicant against the Kenya Ports Authority and it arose out of what I gather to have been the procuring entity's decision to terminate certain contracts between the applicant and the procuring entity. Excerpts from the plaint, a copy of which has been exhibited to the 2nd and 3rd respondents' affidavit illustrate this point. At Paragraph 3 of the plaint, the plaintiff pleaded as follows:

> " 3. The plaintiff avers that at all material times herein, it had several contracts with the defendant among them contract Tender No. KPAll 07/2023-24/TE for supply of spare parts for Kalmar Reachstackers dated 2nd February, 2024 and Contract Tender No. KPA/205?2023-24/TE for supply of spare parts for Kalmar Terminal Tractors dated 19th April, 2024 (hereinafter "the subject contracts'').
>
> 4. The plaintiff states that the subject contracts were to run for a period of three (3) years each and specifically:-
>
> a. 2nd February, 2024 to 2nd February, 2027 for Contract Tender No.KPA/107/2023-TE;and
>
> b. 19th April, 2024 to 19th April 2027 for contract Tender No.KPA/205/2023-24/TE

67. The applicant proceeded:

> " 6. In a sudden turn of events, the Defendant unilaterally proceeded to terminate the subject tender contracts on 22nd July, 2024 for Contract Tender No. KPA/107/2023-24/TE and 30th September, 2024 for Contract Tender No. KPA/205/2023-24/TE respectively.REASONS WHEREFORE, the Plaintiff pray for judgment against the Defendant jointly and severally for:
>
> a. A declaration that there exists a dispute between the Plaintiff and the Defendant herein and that the dispute between the Plaintiff and the Defendant herein is subject of Arbitration as per the contracts dated 12th February, 2024 and 19th April, 2024 and in particular, clause 10 thereat
>
> b. An Order of Permanent Injunction do issue restraining the Defendant by itself, its officials, servants, agents, employees, proxies and/or anyone else claiming through it from in any manner upholding termination of the contracts dated 12th February, 2024 and 19th April, 2024, assigning the said contract items to any other person, advertising fresh tenders for the said contract items and all other matters ancillary or incidental thereto including supply of spare parts for Kalmar Terminal Tractors and supply of spare parts for Kalmar Reachstackers,

whether internally or on local newspapers, websites and other forms of media or interfering with the existing contracts;

c. In the alternative to (b) above, general damages for breach of contract and special damages amounting to Kenya Shillings Eight Hundred and Forty Million, Six Hundred and Six Thousand, Three Hundred and Eighteen (Kshs. 840,606,318)

d. Refund of the Kenya Shillings Fifty-Three Million, Thirty-Four Thousand and Twenty- Six (Kshs. 53, 034,026.40)

e. Loss of income;

j) Interests on (c), (d) and (e) above form the date of filing suit till payment in full;

g. Costs of the suit; and

g. Any other relief the Honourable Court deems fit to grant."

68. lt is not in dispute that, as sworn by Amuti in his affidavit, that by a ruling dated 6 March 2025, the Court in Commercial Case No. E070 of 2024 determined the applicant's suit and its applications. In particular, the court referred the matter to Arbitration and stayed the termination of the Contracts dated 2 February 2024 and 19 April 2024. This Honourable Court also issued directions on the appointment of the arbitrator by the parties and orders for the performance of the Contracts pending the conclusion of the arbitration proceedings. It, however, declined the prayer which sought to restrain the 3rd respondent from advertising for fresh tender and procuring spare parts for its Terminal Tractors and Reachstackers.

69. Even after the applicant sought to have his grievances addressed in suit no. 70 of 2024, and later by an arbitrator, the applicant founded his request for review on the same set of facts upon which he instituted suit no. 70 of 2024. As a matter of fact, what he alleged to be disobedience of the court orders in suit no. 70 of 2024 is what provoked the instant request for review and which it has now escalated in this Honourable Court. This is apparent from the following paragraphs in Soni's affidavit:

> " 30. Whereas the High Court at Mombasa issued orders in HCCOMM/ E070/2024; Power Parts (Kenya) Limited v Kenya Ports Authority, inter alia, restraining the 2nd and 3rd Respondents from advertising fresh tenders for the contract items in the procurement contracts in Tender No. KPA/107/2023-24/TE dated 2nd February, 2024 and Contract Tender No. KPA/205/2023- 24/TE dated 19th April, 2024 and all other matters ancillary or incidental thereto including supply of spare parts for Kalmar Terminal Tractors and supply of spare parts for Kalmar Reachstackers, whether internally or on local newspapers, websites and other forms of media; or interfering with the existing contracts the 2nd and 3rd Respondents floated and conducted the subject tender to prejudice the Applicant's rights and with the ulterior motive of circumventing the existing procurement contracts executed with the Applicant.
>
> 33. The Applicant avers that the impugned decision of PPARB in review no. 16 of 2025 is tainted with irrationality as demonstrated below:

a. The decision of the 1st Respondent at paragraph 122 that"..... we have hereinabove established that commencement of the procurement proceedings in the above subject tender by the Respondents was not in violation of the orders by the High Court in HCCOMMIE070/20204 (sic)" is not rationally connected to the information which was before PPARB since the Applicant aptly demonstrated that the items in the subject tender at pages 90 to 94 of the annexures to the Applicant's Supporting Affidavit to the request for review demonstrated that these were similar items to the items already subject of the Applicant's existing procurement contract in TENDER NO. KPA/107/2023-24/TE dated 2nd February 2024 and procurement contract in TENDER NO. KPA/205/2023-24/TE dated 19th April 2024.

35.

c. The 2nd and 3rd Respondents violated the Applicant's legitimate expectations that they would comply with the valid court orders issued by the High Court at Mombasa m HCCOMMIE070/2024; Power Parts (Kenya) limited v Kenya Ports Authority, inter alia, restraining the 2nd and 3rd Respondents from advertising fresh tenders for the contract items in the procurement contracts in Tender No. KPA/107/2023-24/TE dated 2tul February, 2024 and Contract Tender No. KPA/205/2023- 24/TE dated 19th April, 2024 and all other matters ancillary or incidental thereto including supply of spare parts for Kalmar Terminal Tractors and supply of spare parts for Kalmar Reachstackers, whether internally or on local newspapers, websites and other forms of media; or interfering with the existing contracts of the Applicant."

70. Thus, applicant's application is based mainly on the ground that the tender in question and generally the procurement process of the subject tender violates the orders given by this Honourable Court in High Court Commercial Civil Case No. 70 of 2024. As a result of this violation, the 1st respondent's decision is said to suffer from what the applicant has described as "infirmities of illegality, gross errors of law, irrationality and violation of the applicant's legitimate expectation" to the extent that the 1st respondent came to the conclusion that the subject tender was not contrary to the orders in suit no. 70 of 2024.

71. However, it was not open to the applicant to seek to enforce the orders granted in suit no. 70 of 2024 in a request for review and subsequently, in the instant suit. The question of termination of its contracts with the procuring entity was not only directly in issue in suit no. 70 of 2024 but also it managed to obtain orders to stop the termination of the contracts. The applicant has contended that the procuring entity breached the orders as a result of which it instituted contempt of court proceedings against the procuring entity's officers. Further, it is apparent from the prayers sought in suit no. 70 of 2024, that the applicant sought damages for breach of contract.

72. It follows that the applicant need not have filed the request for review and eventually the instant suit for remedy against the termination of the contracts between it and the procuring entity. In any event, upon

considering the evidence before it, the 1st respondent concluded that the subject tender was for items that were different from those that the applicant had been contracted to supply under the contracts in question.

73. The contention by the applicant that it can pursue suit no. 70 of 2024 as additional right for request for review under section 174(1) is not tenable. This section has been reproduced before in this judgment but I reproduce it here to emphasise the point I am making here; it reads:

> 174. Right to review is additional right
>
> The right to request a review under this Part is in addition to any other legal remedy a person may have.

74. My reading of this provision is that a request of review under section 161 of the Act is one of the means by which a person can challenge a public tender or procurement process. But as much as there may be several means for seeking a remedy against a public procurement or tender, those means cannot be instituted either simultaneously or severally in diverse fora eligible to hear and determine a procurement dispute.

75. Section 174 (1) should not be interpreted to mean that the applicant is entitled to file multiple suits to achieve a particular result. Such an interpretation of the law would lead to absurdity for the obvious reason that the fora before which the dispute is presented for determination would literally be set up on a collision course. They are in effect exposed to the danger of arriving at conflicting results over the same issues arising from a similar set of facts.

76. A very live example of the possibility of conflict of decisions in these circumstances is if the Court in suit no. 70 of 2024 or the arbitrator was to find that the subject contract related to the same goods and services for which the applicant was contracted yet the Review Board has held that they were not. Needless to say, such a multiplicity of suits would contravene the doctrine of sub Judice according to which a court cannot proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim. (See section 6 of the *Civil Procedure Act*).

77. Further, of itself, the ground of the violation of the orders in suit no. E070 of 2020 is a clear demonstration that the issue whether the 1st respondent's decision violated the orders granted in suit no. 70 of 2024, is a question that was urged and determined by the 1st respondent. This is apparent from ground 2 of the request for review no. 16 of 2025 where it is pleaded as follows:

> " The respondents have commenced the procurement process in the subject tender in utter disobedience of the order of the High Court in HCCOM/E070/2024 ..."

78. And in submissions, made before the 1st respondent, on behalf of the applicant, the applicant's counsel is recorded to have submitted thus:

> " 20. Mr Omollo stated that the respondents have disobeyed the orders issued by the High Court in commercial case no. 70 of 2024 between Powerparts (Kenya) Limited versus Kenya Ports Authority whereby the High Court had issued an order stopping the respondents from procuring anything that falls under the existing procurement contracts between the applicant and the respondents.

21. He indicated that the applicant had recourse in filing for contempt proceedings which he has pursued and it ought to be noted that section 174 of the Act gives the right to any other right that the applicant may have."

79. On its part, the 1st respondent addressed this question at paragraph 115 of its decision and noted that the issue in contest in HCCOMM/70 of 2024 related to termination of contracts in two tenders for supply of spare parts for Kalmar Terminal Tractors and supply of spare parts for Kalmar Reach Stackers but that the issue in contest before it in review no. 16 of 2025 related to a tender for servicing, repair and condition monitoring of rotating electromechanical machines.

80. The 1st respondent also held that no specific order had been issued by this Honourable Court in suit no. 70 of 2024 restraining the respondents from pursuing fresh tendering. According to the 1st respondent, what the procuring entity and its accounting officer were restrained from doing was terminating the two contracts between the applicant and the procuring entity.

81. It follows that what the applicant is effectively seeking in the instant motion is for this Honourable Court to come to a contrary opinion with respect to the question whether the subject tender and the appurtenant procurement process are in breach of the order given in suit no. 70 of 2024. The applicant is effectively appealing against the decision of the 1st respondent rather than seeking for the review of the process by which the decision was reached.

82. If, in the applicant's view, an appeal against the decision of the 1st respondent's decision is one of the means by which its grievances could be addressed, it ought to have filed an appeal. It cannot file such an appeal as an application for judicial review.

83. There should be little debate that an appeal is not synonymous with judicial review and that the court cannot assume appellate jurisdiction in exercise of its judicial review jurisdiction.

84. One of the hallmarks of appellate jurisdiction is that the appellate court is entitled to substitute its own decision for that of the subordinate court or tribunal. Not so for judicial review where the court would be concerned more about the process rather than the merits of the decision.

85. It is not part of the purpose for judicial review to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question (see Lord Hailsham in Chief Constable of the North Wales Police versus Evans (1982) 1 WLR 1155 at 1160F).

86. It has also been held in R versus Entry Clearance Officer, Bombay exp Amin (1983) 818 at 829 (B-C) (per Lord Fraser) that judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision,and it is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.

87. The same point was emphasised in Chief Constable of North Wales Police versus Evans (supra) where Lord Brightman said at page 1173F and 1174G that:

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

88. Lord Hailsham stated in the same case that:

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

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

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

90. Back home in Energy Regulatory Commission v S G S Kenya Limited & 2 others (2018) eKLR Civil Appeal No. 341 of 2017 the substratum of appeal was a tender award by the Energy Regulatory Commission (appellant). It was alleged that on the 18 April 2017, the appellant advertised an open tender inviting bid for the "provision of marking and monitoring of petroleum products" under tender No. ERC/PROC/4/3/16- 17/119 in which the respondent and two other bidders (including the 3rd respondent) participated. On 30 June 2017, after evaluating both the technical and financial bids placed by the bidder, the respondent's bid was assessed as the lowest bid and the technical committee of the appellant recommended that the tender be awarded to the respondent. However, the committee, in its recommendation, made a general observation that there is in existence a new technology that can detect jet fuel in motor fuel which was of relevance to the award.

91. Acting on this general observation of the tender committee, the tender awarded to the respondent was terminated by the appellant and the tender process re-started with a requirement that the new technology changes be incorporated in the bid documents. The decision to terminate the tender was communicated to all bidders including the respondent and the Public Procurement Regulatory Authority.

92. Aggrieved by the termination, the respondent filed an application challenging the decision aforesaid for review of the tender award aforesaid, at the Public Procurement Administrative Review Board and in an award delivered on 1 August, 2017, the Review Board dismissed the application for review stating that the appellant was at liberty to re-advertise the tender without notice to any bidder, including the Respondent.

93. Dissatisfied with the Review Board's decision therefore, the respondent filed a judicial review application - Nairobi Miscellaneous Application No. 496 of 2017 - at the Judicial Review Division and, in his judgement delivered on the 25 September 2017, Mativo J. (as he then was), granted the prayers sought and quashed the decision of the Review Board and ordered the appellant to proceed with the implementation of tender No. ERC/PROC/4/3/16-17/119 dated 12 May 2017.

94. Being aggrieved by the High Court's findings, the appellant lodged the appeal to the Court of Appeal. The issue for determination in the appeal was whether the learned superior judge erred in forming a view of the evidence and improperly substituting the decision of the Board with his own. In allowing the appeal, the Court of Appeal answered this question in the affirmative and faulted the High Court Judge for determining a judicial review matter as if it was an appeal, and for going into the merits of a decision already taken. The Appellate Court held it to be improper for the High Court to make value judgment regarding the evidence; to weigh the same, and to minutely examine it, to determine whether it reached a certain standard of acceptance. The Court found that the High Court had occasioned

room for abuse of its power, by usurping the competences of the Public Procurement Administrative Review Board. The court noted:

> " 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."

95. In holding as it did, the court relied on 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/or 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 o/2006. Ln 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/act 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."

96. The Court of Appeal did not rule out the window to interfere with the decision of a tribunal albeit in very exceptional circumstances. In this regard it relied on Biren Amritlal Shah & anor vs. Republic & 3 others [2013] eKLR where 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 Wednesburv unreasonableness that would invalidate a tribunal's decision by way of certiorari."

97. I cannot say that the 1st respondent's decision upholding the procuring entity's decision was improper or was not founded on any evidence or had no legal basis. The decision is not of a kind that no reasonable tribunal, properly directing its mind to the case could have reached.

98. Proponents of merit review cite the Court of Appeal case of Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR. While addressing the provisions of section 7(2)(1) of the *Fair Administrative Action Act*, the court held as follows;

> " An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (1) of the *Fair Administrative Action Act* provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly /2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of *the Constitution* to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

99. The court, however, was cautious to note that while article 47 of *the Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act* reveals an 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.

100. But in another Court of Appeal Judgment, in the case of Kenya Revenue Authority & 2 Others v. Darasa Investments Limited [2018] eKLR the Court of Appeal was emphatic that judicial review is about the process rather the merits of the decision. It observed as follows;

> " The next issue for consideration is whether the appellants' decision amenable to judicial review. As we have set out above, judicial review is concerned with the decision-making process and not the merits of the decision in respect of which the application for judicial review is made. This was aptly stated by this Court in Commissioner of Lands vs Kunste Hotel Ltd [1997] eKLR. As such, what the learned Judge was called upon to do was to examine the process adopted by the appellants in declining to exempt the respondent's consignment."

101. The Supreme Court in the case of 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) 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 ado1st ing 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 misconce1st ion 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. (76/ Be that as it may, it is the Court's firm view that the intention was never to transform iudicial review into to full-fledged inquiry into the merits ofa matter. Neither was the intention to convert a iudicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in iudicial 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 ofa 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 of2019; [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).

102. Subsequently, the Court in the case of Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E0l0) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) while disagreeing with the reasoning of the Court of Appeal 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."

103. Thus, when a party approaches a court under the provisions of *the Constitution*, the court is under an obligation to undertake a merit review of the case. However, the party must not only claim but provide evidence of the constitutional violations. 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 and not claiming violations of rights the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision.

104. Taking cue from these decisions, I am persuaded that there is no basis to engage in merit review of the 1st respondent's decision. The court would restrict itself to the process by which the decision was arrived at.

105. As far as the question of the procurement plan is concerned, it is also a question that was argued before the 1st respondent. And in its decision the Review Board considered the facts and the law and came to the conclusion that the tender and the procurement of the goods in the subject tender were within the procuring entity's budget plan and more importantly within the law. As to whether the decision of the Board on this question is merited or not, is not a question for this Honourable Court to determine in the context of a judicial review application. This Court, I reiterate, is concerned about the process by which the decision was reached and not about its merits.

106. In the ultimate, I am not satisfied that the applicant has established any of the grounds for judicial review. I find the originating motion to be without merit and it is hereby dismissed with costs. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 16 MAY 2025

NGAAH JAIRUS

JUDGE