



**SGS Kenya Limited v Energy Regulatory Commission & 2 others (Petition 2 of 2019) [2020] KESC 64 (KLR) (10 January 2020) (Judgment)**

*SGS Kenya Limited v Energy Regulatory Commission & 2 others [2020] eKLR*

Neutral citation: [2020] KESC 64 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**PETITION 2 OF 2019**

**MK IBRAHIM, JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

**JANUARY 10, 2020**

**BETWEEN**

**SGS KENYA LIMITED ..... PETITIONER**

**AND**

**ENERGY REGULATORY COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD .... 2<sup>ND</sup>  
RESPONDENT**

**INTERTREK TESTING SERVICES (EA) LTD ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Court of Appeal sitting at Nairobi (Nambuye, Ouko & Kiage JJ.A) dated 11 May 2018, in Nairobi Civil Appeal No. 341 of 2017)*

**Applicability of the doctrine of stare decisis to tribunals**

Reported by Moses Rotich

***Precedent** - doctrine of stare decisis – applicability of the doctrine of stare decisis in tribunals - doctrine of stare decisis in quasi-judicial decisions - Public Procurement Administrative Review Board (PPARB) - whether quasi-judicial tribunals, such as the PPARB, were bound by the doctrine of stare decisis - whether a tribunal was bound by its previous decision*

**Brief facts**

The 1<sup>st</sup> respondent, Energy Regulatory Commission, floated a tender for the marking and monitoring of petroleum products, a service meant to curb adulteration of fuel. The tender attracted 3 bids. After evaluation of the bids, the tender was awarded to the petitioner but was subsequently terminated upon the realization that some technological elements had not been incorporated in the tender process. The petitioner was aggrieved by the decision to terminate the tender and filed a request for review before the Public Procurement Administrative Review Board (2<sup>nd</sup> respondent) seeking orders that the said tender-termination be annulled.



The Board disallowed the request for review. The High Court quashed the decision of the 1<sup>st</sup> respondent and ordered it to proceed with the tender as was awarded to the petitioner.

Aggrieved by the High Court decision, the 1<sup>st</sup> respondent appealed. The Court of Appeal subsequently set aside the High Court judgement sustaining the termination of the tender-award, on the ground that the applicable term of reference did not include the possibility of emergent technical conditions. The Court of Appeal faulted the High Court for determining a judicial review matter as if it was an appeal, and for going into the merits of a decision already taken.

Aggrieved by the judgment of the Court of Appeal, the petitioner sought to have the matter certified as one of general public importance, an application which was allowed by the Court of Appeal on December 19, 2019, upon a single issue; whether tribunals were bound by the doctrine of *stare decisis*.

The petitioner contended that the failure by the Public Procurement Administrative Review Board to abide by its precedent in *Avante International Technology Inc. v. IEBC PPARB, Review No.19 of 2017*, or give reasons for digressing from it, was an untransparent, inequitable and irrational exercise of its decision-making power in the public procurement process

### **Issues**

Whether a tribunal was bound by its previous decision.

### **Held**

1. Tribunals, in their primary category, were specialized bodies charged with programming and regulatory tasks of the socio-economic, administrative and operational domains. Membership in such tribunals generally reflected the essential skills required for the specific tasks in view. The Public Procurement Administrative Review Board fell within that category. It was endowed with requisite experience from its membership, and had access to relevant information and expertise, to enable it to dispose of matters related to procurement.
2. The question whether a tribunal was bound by its previous decisions, as it took on different matters, called for flexibility in the regulatory scheme. In principle, matters on the agenda of an administrative tribunal would merit determination on the basis of the claims of each case, and would depend on the special factual dynamics. The relevant factors of materiality, and of urgency, would require individualised response in many cases: and in those circumstances, a strict application of standard rules of procedure or evidence could negate the fundamental policy-object.
3. On that account, the specialized tribunal should have the capacity to identify relevant factors of merit; be able to apply pertinent skills; and have the liberty to prescribe solutions, depending on the facts of each case. Such a tribunal should fully take into account any factors of change, in relation to different cases occurring at different times; without being bound by some particular determination of the past. Administrative decision-makers should have significant flexibility in responding to changes that affect the subject-matter before them. Matters before an administrative tribunal should be determined on a case-to-case basis, depending on the facts in place.
4. By asking the court to consider if it was entitled to orders of judicial review had exceeded the leave and certification granted by the Court of Appeal, within the terms of article 163(4)(b) of the Constitution; the petitioner had engaged the court in an essentially academic exercise. However, the Court of Appeal was right in its finding that the High Court should not have gone to the merits of the Public Procurement Administrative Review Board decision as if it was an appeal, nor granted the order of *mandamus*, since the 1<sup>st</sup> respondent did not owe any delimited statutory duty to the petitioner.

*Appeal dismissed; costs to be borne by the respondent in the Supreme Court, Court of Appeal, High Court and the Public Procurement Administrative Review Board.*

### **Citations**

#### **Cases**

#### **Kenya**



1. *Avante International INC v Independent Electrol and Boundaries Commission* Review No 19 of 2017 - (Followed)
2. *Fabim Yasin Twaha v Timamy Issa Abdalla & 2 Others* Civil Application 35 of 2014; [2015] KESC 20 (KLR) - (Followed)
3. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Mentioned)
4. *Martin Nyaga Wambora & another v Speaker of the Senate & another* Petition 51 of 2014; [2014] KEHC 7080 (KLR) - (Followed)
5. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Mentioned)
6. *Republic v Commissioner of Customs Services Ex parte Imperial Bank Limited* Miscellaneous Application 123 of 2014; [2015] KEHC 6939 (KLR) - (Followed)
7. *SGS Kenya Limited v Energy Regulatory Commission* Application No. 64 of 2017 - (Mentioned)
8. *SGS Kenya Limited v Energy Regulatory Commission & 2 others* Civil Application 39 of 2018; [2019] KESC 45 (KLR) - (Mentioned)
9. *Yusuf Gitau Abdalla v Building Centre (K) Ltd & 4 Others* Petition 27 of 2014; [2014] KESC 50 (KLR) - (Mentioned)

### **South Africa**

*Pharmaceutical Manufacturers Association of South Africa, ex parte President of the Republic of South Africa & Others* [2000] (2) SA 674 - (Followed)

### **Canada**

1. *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professional* [2011] 3 SCR 616 - (Followed)
2. *Sweney v Department of Highways* (Canada, 1933) Ontario Court of Appeal - (Applied)
3. *Weber v Ontario Hydro* [1995] 2 SCR 929 - (Followed)

### **Texts**

Williams, G., (Ed) (1973), *Learning the Law* London: Stevens & Sons 9th Revised Edition

### **Statutes**

#### **Kenya**

1. Constitution of Kenya articles 10(1); 47; 163(4) (a) (b) (7); 164 (a) ; 201; 227(1); Chapter 12- (Interpreted)
2. Energy Act (Repealed) (Act No 12 of 2006) - (Cited) In general
3. Public Procurement and Asset Disposal Act (cap 412C) sections 27, 63(1)(a)(4) -(Interpreted)
4. Public Procurement and Disposal Regulations (cap 412C Sub Leg) In general-(Cited)
5. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 33 - (Interpreted)

#### **South Africa**

Constitution of the Republic of South Africa, 1996 In general -(Cited)

### **Advocates**

*Mr. Muite* Senior Counsel and *Mr. Musyoka* for the petitioner

*Mr. Otachi* for the 1st respondent

*Ms. Mwasao* h/b for *Mr. Bitu* for the Attorney General



## JUDGMENT

### A. Introduction

1. This is an appeal from a Judgment of the Court of Appeal, dated May 11, 2018, in Civil Appeal No 341 of 2017, which set aside the Judgement and decree of the High Court at Nairobi by (Mativo, J), dated September 22, 2017. The High Court (in JR Misc. Application No 496 of 2017) had quashed the decision of the Public Procurement Administrative Review Board (PPARB), which upheld the decision of the Energy Regulatory Commission to terminate the award of Tender Number ERC/PROC/4/2/16-17/119, won by the petitioner herein. The Judgment of the Court of Appeal had the effect of sustaining the termination of the tender-award, on the ground that the applicable terms of reference did not include the possibility of emergent technical conditions.

### B. Background

2. The 1<sup>st</sup> respondent, Energy Regulatory Commission, is a public body established under the [Energy Act, 2006](#). Its mandate includes the regulation of electrical energy, petroleum and related products, renewable energy, and other forms of energy. On or about May 12, 2017, the 1<sup>st</sup> respondent floated tender number ERC/PROC/4/3/16-17/119, for the marking and monitoring of petroleum products, a service meant to curb adulteration of fuel. The tender attracted 3 bids. These were opened on May 31, 2017, with the responding firms being SILPA SA, Intertek Testing Services (EA) Ltd, and SGS Kenya Ltd (SGS).
3. The 1<sup>st</sup> respondent appointed an evaluation committee which duly evaluated the bids, on the basis of technical and financial criteria. The evaluation committee recommended, on June 30, 2017, that the contract for the provision of petroleum-marking and monitoring services be awarded to SGS (the petitioner), at an annual cost of US\$ 2,760,844.72. This was on the basis that SGS had attained the highest score, and had been the lowest bidder. The Commission, in the course of its recommendation upon the bids received, thus remarked in its evaluation report:

#### General Observation

- (a) The increasing need of detection of adulteration by use of Jet 1 ought to have been captured in the terms of reference for this tender. This is so because Jet A1 is never marked unlike illuminating kerosene and there is reliable information that the perpetrators of adulteration have now shifted to the use of jet A1 as an adulterant for diesel. Further, the Commission is now aware of an existing technology that can easily detect Jet A1 in motor fuel.
  - (b) The team also noted the need for a detailed explanation of how the test-results from the monitoring teams are to be transmitted to the client. To this end . . . the advantage of use of a real-time and tamper-proof mechanism that would provide more authentic results”.
4. Taking into account the existence of the technology referred to in the general observations, the 1<sup>st</sup> respondent’s Acting Director for Petroleum, gave an opinion on July 7, 2017, recommending to the Acting Director-General, that the procurement process be terminated, and then re-commenced, with the requirement that the said technological elements be incorporated in the tender, and with reference to the monitoring of the petroleum service. The Acting Director-General considered this opinion, as well as that of the Head of Procurement, and on that basis, approved the recommendation



- for termination, by virtue of section 63(1)(a) of the Act. The decision to terminate the tender was communicated to all bidders, as required by section 63(4) of the Act.
5. SGS was aggrieved by the decision to terminate the tender, and filed a request for review, before the Public Procurement Administrative Review Board (2<sup>nd</sup> respondent), seeking Orders that the said tender-termination be annulled. SGS asked that it be awarded the tender; and in the alternative, SGS sought that the 1<sup>st</sup> respondent be directed to proceed with the tender and complete the process. The Board, by its decision of 1<sup>st</sup> August 2017, disallowed the request for review. It also gave the liberty to re-advertise the tender, for the provision of the petroleum marking services.
  6. SGS thereafter moved to the High Court, seeking leave to file a judicial review application. In its motion filed on August 16, 2017, SGS sought Orders of:
    - (a) *Certiorari*, to remove in to the High Court and quash the Board's decision;
    - (b) Prohibition, to countermand the decision of the 1<sup>st</sup> respondent to proceed with a new tender process;
    - (c) Prohibition, to prohibit the 1<sup>st</sup> respondent from entering into or signing any contract with any third party on the basis of a new tender; and
    - (d) *Mandamus*, directing 1<sup>st</sup> respondent to proceed with the old tender, including award of the contract to SGS.
  7. Mativo J heard the judicial review proceedings, culminating in a Judgment dated September 25, 2017, bearing the following Orders:
    - (a) an order of *certiorari* to remove into the High Court to quash the decision and Ruling delivered by the Public Procurement Administrative Review Board on August 1, 2017, in Application No 64 of 2017 (*SGS Kenya Limited v. Energy Regulatory Commission*);
    - (b) an Order of Prohibition to remove into the High Court and quash the decision of the Energy Regulatory Commission, to proceed with the tender process in Tender Number ERC/PROC/4/3/17-18/016 for the provision of Marking and Monitoring Petroleum Products;
    - (c) an order of prohibition directed to the Energy Regulatory Commission, prohibiting it, directly and /or through its servant and/or agents, from entering and /or signing any contract with any third party, concerning tender number ERC/PROC/4/3/17-18/016, for the provision of Marking and Monitoring of Petroleum Products;
    - (d) an order *mandamus* directing the Energy Regulatory Commission to proceed with the tender process in tender number ERC/PROC/4/3/16-17/119, for the provision of Marking and Monitoring of Petroleum Products in conformity with the recommendation of its evaluation committee, for the award of the tender/contract to SGS Kenya Limited;
    - (e) each party to bear its own costs.
  8. Aggrieved by the Judgment of the High Court, 1<sup>st</sup> respondent lodged an appeal in the Court of Appeal. The appellate court, in a Judgment dated May 11, 2018, allowed the appeal, setting aside the Orders of the High Court, and substituting them with an Order dismissing the substantive motion with costs.
  9. The Court of Appeal 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.

10. The appellate court held that, in a judicial review matter, the court's mandate is limited to procedural improprieties, and extends not to the merits of a decision. It held that 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 1<sup>st</sup> respondent had acted upon; and the Board's reasoning exhibited a fidelity to practicality and to good sense. Consequently, the appellate court held, 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 appellate court held that the 1<sup>st</sup> respondent 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*.
11. Aggrieved by the Judgment of the Court of Appeal, the petitioner sought to have the matter certified as one of general public importance under article 163(4)(b) of the [Constitution](#), an application which was allowed by the Appellate Court on December 19, 2019, upon a single issue: whether tribunals are bound by the doctrine of *stare decisis*. The petitioner filed a petition of appeal in this court, thereafter, on January 22, 2019.

### **C. Tribunal Mandate, Judicial Review, and the Scope for Appeal: Case Before the Supreme Court**

12. The petition is stated to fall under rule 33 of the [Supreme Court Rules, 2012](#) and it raises the following issues for determination:
  - (a) whether Tribunals, such as the Public Procurement Administrative Review Board, are bound by their prior decisions, in accordance with the doctrine of precedent (*stare decisis*);
  - (b) whether the failure by quasi-judicial bodies (such as the PPARB) to abide by, or distinguish their prior decision, without giving reasons, is an irrational, or improper exercise of their mandate;
  - (c) whether it was unfair, inequitable, untransparent, or not cost-effective, for the procuring agency to terminate the tender process, with a view to starting the same all over again, when the petitioner had offered to avail the relevant petroleum-technology information at no extra cost.
13. The petition is premised on the following grounds:
  - (a) failure by quasi-judicial tribunals to adhere to the doctrine of *stare decisis* would subject the course of administration of justice, and of the rule of law, to caprice, irrationality and unpredictability on the part of such bodies, causing extreme uncertainty in the processes of justice;
  - (b) PPARB failed to adhere to the terms of article 227(1) of the [Constitution](#), the [Public Procurement and Assets Disposal Act, 2015](#) and the [Public Procurement and Disposal Regulations](#), for ensuring that the procurement system is fair, equitable, transparent, competitive and cost-effective;
  - (c) the failure by the PPARB to abide by its precedent in *Avante International Technology Inc v IEBC* PPARB, Review No 19 of 2017, or give reasons for digressing from it, is an untransparent, inequitable and irrational exercise of its decision-making power in the public procurement process;





- (d) the appellant suffered loss and damage, by the tender process being terminated, on the basis of criteria not recognized by the law.
14. The petitioner prays for the following reliefs:
- (a) a declaration that the 2<sup>nd</sup> respondent and all other quasi-judicial bodies under Kenyan law, are bound by their previous decisions, in accordance with the doctrine of precedent;
  - (b) a declaration that the Court of Appeal erred in holding that the 2<sup>nd</sup> respondent did not act in ignorance, nor disregard its own decision in the earlier case;
  - (c) a declaration that the Court of Appeal erred in finding that the High Court had improperly and impermissibly delved into an evaluation of the evidence, and in substituting its opinion in place of the 2<sup>nd</sup> respondent's opinion;
  - (d) a declaration that the failure to adhere to the doctrine of precedent, or even to provide reasons for departing from its earlier decision, resulted in an unfair and untransparent decision-making process, contrary to article 227(1) of the Constitution, and the Public Procurement and Asset Disposal Regulations;
  - (e) an Order setting aside the Judgment, Order and decree of the Court of Appeal in Civil Appeal No 341 of 2017;
  - (f) an Order affirming the Judgment, Order and decree of the High Court in Judicial Review Miscellaneous Application No 496 of 2017
  - (g) costs of the appeal.

#### **D. Submissions of Counsel**

15. Learned counsel for the petitioner and the 1<sup>st</sup> respondent filed their written submissions, which were highlighted on September 24, 2019: Mr Muite and Mr Musyoka for the petitioner; Mr Otachi for the 1<sup>st</sup> respondent; and Ms Mwasao (holding brief for Mr Bitu) for the Attorney-General. Ms Mwasao, however, stated her obligation as being limited to observing the proceedings, without making submissions. The 3<sup>rd</sup> respondent was not represented, even though its advocates had been duly served with the hearing notice.
16. Learned Senior Counsel, Mr Muite, submitted that the 1<sup>st</sup> respondent had violated the provisions of article 227(1) of the Constitution, by failing to follow a system that is fair, equitable, transparent, competitive and cost-effective, in the procurement of public goods and services. He called in aid, in that regard, the terms of article 10(1) of the Constitution, on “national values”, which he alleged, were violated by the 1<sup>st</sup> respondent, especially as regards good governance, integrity, transparency and accountability. He submitted that the procurement process lacked openness and accountability, contrary to the terms of Chapter 12 of the Constitution, which relates to public finance. He urged that public money, in the present circumstances, would not be used in a prudent and responsible manner. He submitted that the petitioner, having scored 84.7% in the bid-assessment, was the highest scorer, on combined technical and financial criteria, and so, should have been awarded the tender, and failure in this regard would amount to imprudent use of tax-payers' money.
17. Mr Muite submitted that the Court of Appeal was wrong in failing to appreciate that judicial review proceedings are no longer a set of proceedings *sui generis*, but are now anchored under article 47 of the Constitution, which requires fair administrative action. He submitted that judicial review now falls within the express prescriptions of the Constitution, and on this account, the appellate court was in



error, in hold that the High Court had improperly interfered with the jurisdiction of a body that was subject to articles 10, 47, 201 and 227. He invited this court to find that these articles of the Constitution had been violated; and he urged that a general message on the importance of prudent financial management, should issue forth to all public entities.

18. The petitioner's written submissions focus upon four principal questions, for determination:
  - (i) whether the Review Board failed to follow its decision in a past decision (the *Avante* case);
  - (ii) whether the doctrine of *stare decisis* applies to quasi-judicial tribunals, like the Review Board;
  - (iii) whether the petition has exceeded the terms of the leave and certification granted by the Court of Appeal on 19 December 2019;
  - (iv) should the answer to (ii) above be in the negative, would the petitioner be entitled to Orders of judicial review?
19. On the first issue, the petitioner submits that, despite the *Avante decision* being cited to the Review Board, and the Board expressly making reference to it, the Board, nonetheless, overlooked the principle of that decision.
20. On the second issue, learned counsel, Mr Musyoka urged that the doctrine of *stare decisis* is a fundamental jurisprudential yardstick, and that prior decisions must be followed, save for good cause justifying a departure. Counsel urged that the doctrine is helpful in achieving uniformity/consistency, predictability and certainty, in law. He submitted that the need for consistency in administrative decisions demands that, even though an administrative tribunal is not bound by its previous decisions, and is free to adopt any reasonable interpretation of the pertinent legislation in a matter before it, previous interpretations will have some bearing on the reasonableness of the tribunal's interpretation, in a current matter.
21. The petitioner, in extolling the object of precedent, invoked works of record: Glanville Williams, *Learning the Law* (9<sup>th</sup> ed. 1973); *Sweney v The Department of Highways* (Canada, 1933) (Ontario Court of Appeal, Middleton, JA). It was the petitioner's position that, a disregard of past cases bearing similarity to the present one, has the negative consequence of occasioning uncertainty in the law.
22. On the third and fourth issues, the petitioner submits that it is common ground, that the certification by the appellate court for this appeal, was on the question of whether quasi-judicial tribunals are bound by the doctrine of *stare decisis*. But it is also submitted that, tied to that issue, is the question whether the Review Board followed the *Avante* precedent, and whether it should have followed it. The petitioner submits that the decision of this court should bring out the consequences of its determination of the two issues, lest the decision holds its place as no more than an academic statement.
23. The petitioner invokes article 47 of the Constitution (on fair administrative action), as well as the High Court's decision in *Martin Nyaga Wambora v Speaker of the Senate* [2014]eKLR, urging that the rules of natural justice, and the duty to act fairly when making administrative, judicial or quasi-judicial decisions, coalesced into constitutional rights, capable of enforcement by an aggrieved party, in appropriate cases.
24. The petitioner draws a comparison between the concept of judicial review under the Constitution of Kenya, and under the Constitution of South Africa, and in that context, cites a South African case,





*Pharmaceutical Manufacturers Association of South Africa, ex parte President of the Republic of South Africa & Others*, 2000 (2) SA 674, where the court thus held:

“The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts”

25. The petitioner has also placed reliance on the High Court decision in *Republic v. Commissioner of Customs Services ex parte Imperial Bank Limited* [2015]eKLR where Odunga J. recognized that “judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision.”
26. The 1<sup>st</sup> respondent, in grounds of opposition and replying affidavit filed on dated April 23, 2019 and filed on April 24, 2019, states that the petition, in effect, extends in design beyond the terms of the leave and certification granted by the Court of Appeal on December 19, 2018. The replying affidavit is sworn by Mueni Mutunga, the 1<sup>st</sup> respondent’s Commission Secretary and Director of Legal Services, who depones that, in so far as the petitioner seeks to challenge the merits of the Court of Appeal’s Judgment, the true object of the appellate court’s certification has been missed. This, as maintained by learned counsel, Mr. Otachi, was not for sustaining: for, if the petitioner had perceived true constitutional issues, then a petition of appeal would have been filed under article 164(a) of the *Constitution*, within time.
27. The 1<sup>st</sup> respondent, in written submissions dated August 26, 2019, maintains that the appeal before this Court should be restricted to the single issue of whether tribunals are bound by the doctrine of *stare decisis*, as held by the Court of Appeal on December 19, 2018 <sup>3</sup>/<sub>4</sub> and not whether the petitioner was entitled to Orders of judicial review at the High Court or the Court of Appeal. Therefore, it was urged, by dint of article 163(4)(b) of the *Constitution*, the court’s jurisdiction, for purposes of this appeal, is limited to the said issue. To sustain this argument, 1<sup>st</sup> respondent cited the decision of this court in *SGS Kenya Limited v Energy Regulatory Commission & 2 others* [2019]eKLR.
28. The 1<sup>st</sup> respondent submits that the petition exceeds the jurisdiction of this court, citing the case of *Owners of the Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Ltd* (1989) KLR 1, in support. Citing the decision of this court in *Samuel Kamau Macharia & anor v KCB Ltd & 2 others*, Application 2 of 2011, this respondent urges that the court’s jurisdiction cannot be expanded through sheer judicial craft, or innovation. The 1<sup>st</sup> respondent recalls the caution that the court is not to assume jurisdiction merely on account of a litigant’s badgering (*Yusuf Gitau Abdalla v. Building Centre (K) Ltd & 4 Others* [2014]eKLR).
29. The 1<sup>st</sup> respondent submits that the instant petition goes against the declared judicial stand, by enlarging the issues for determination, and introducing matters beyond the contemplation of the leave-grant of the Court of Appeal (in Civil Appeal No 341 of 2017). The 1<sup>st</sup> respondent urges this court to decline the invitation by the petitioner to upset the merits of the appellate court’s judgment.
30. The 1<sup>st</sup> respondent, next, addresses the question whether a tribunal is bound by its prior decisions. It is submitted that the relevant case must, in the first place, address the same legal questions as are presently arising; and secondly, such earlier must have been decided by the same court, or a superior court within the judicial-administration hierarchy to which the court considering the current case belongs. The context of this principle, it was urged, is to be found in article 163 (7) of the *Constitution*.



which stipulates that: “All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court”.

31. Learned counsel submitted that the petitioners’ case would entail an inapposite notion of horizontal *stare decisis*, that binds tribunals or subordinate courts to their own previous decisions, on matters so much dependent on variable facts on the ground. Mr. Otachi submitted that tribunals are not courts, in a literal sense, and should not be held to be subject to the rule of *stare decisis*.
- 32.c Learned counsel urged that the Public Procurement Administrative Review Board was a specialized agency established under section 27 of the [Public Procurement and Asset Disposal Act](#), and its main tasks involved reconsideration or review of administrative decisions, on their merits. Such an agency, it was urged, stands in the shoes of the original decision-maker, and makes decisions all over again, uninfluenced by the original decision. Such an agency, it was urged, works to expectations, thanks to variety in its composition, the experience of its members, and the ready access to all such information as may be found relevant; and in that regard, settled legal positions founded upon precedent will not be the requisite consideration, in achieving right outcomes.
33. The 1<sup>st</sup> respondent’s standpoint sought support in a Canadian case ([Weber v. Ontario Hydro](#) [1995] 2 SCR 929), in the dissenting opinion of Lacobucci, J. (para 14)

“The first significant difference between courts and tribunals relates to the difference in the manner in which decisions are rendered by each type of adjudicating body. Courts must decide cases according to the law and are bound by *stare decisis*. By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate.”

34. For the 1<sup>st</sup> respondent herein, it was submitted that administrative decision-makers are permitted to draw rules from the general law, and to modify these to the needs of a particular regulatory setting. In this respect, learned counsel called in aid the decision of Fish J. in [Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals](#) [2011]3 SCR 616 (at para 45):

“[A]rbitrators may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.”

35. In such a context, the 1<sup>st</sup> respondent’s position was that, applying *stare decisis* to bind an administrative tribunal may preclude it from applying its expertise to reach a differing conclusion such as may be justified, in light of its specific policy goals, and its regulatory structure. It was urged that administrative decision-makers do have significant flexibility in responding to changes, and they may attune their directives to better suit changed circumstances.
36. Mr. Otachi supported the finding of the Court of Appeal, that the tribunal had not disregarded its own decision in *Avante*, as it did take into consideration the nature and the weight of the opinion on technological change. Learned counsel thus urged this Court to dismiss the petition.

## E. Analysis And Determination

37. Learned Senior Counsel, Mr. Muite, had urged the court to consider the instant appeal under the terms of article 163(4)(a) as well as (b). Not only, according to him, has this case been certified by Court of Appeal as involving “matter of general public importance”, (ie Clause (b)), it also involves issues of interpretation and application of the Constitution (in accord with clause (a)). In [Fabim Yasin Twaha](#)



v. Timamy Issa Abdalla & 2 Others [2015]eKLR, this court in resolving a similar issue, held as follows (paras 39 and 41):

- (i) “The two avenues of the appellate jurisdiction of this court are distinct. Firstly, an appraisal of the nature of an appeal as involving matter of constitutional interpretation and/or application, signals access to the Supreme Court ‘as of right’; and no form of authorization or leave from the Court of Appeal, or the Supreme Court is required at the beginning....”
- (ii) “Suffice it to say that the path that a litigant takes is determined on the basis of the subject-matter, as has been held by the superior courts. Once the Court of Appeal renders its decision, the litigant is able to elect which course to follow. This decision is taken in advance, as it is the basis of determination on whether to seek certification first, or proceed straight to the Supreme Court. Thus, the decision on how to proceed, rests on the character of the issues involved in the subject matter, rather than on such procedural shortfalls as may have afflicted a litigant’s progress. It follows that where a party has elected the path to the Supreme Court ‘as of right’, that matter cannot be ‘converted’ to one where certification is required, just because time for filing ‘an appeal as of right’ has lapsed...”

38. It is clear to us that the petition of appeal has been brought under article 163(4)(b) of the Constitution. We have also taken note that the written submissions have not incorporated arguments on article 163(4)(a). The new line of submissions only came up during the highlighting stage.
39. Such a scenario comports with our Ruling of February 12, 2019, when the petitioner herein was seeking to stay the Judgment of the Court of Appeal. We held, on that occasion, that the application was properly before us, having been certified by the appellate court as raising a single question of great public importance: whether tribunals are bound by the doctrine of stare decisis. We do not intend to belabour this issue. The petitioner herein elected to proceed under the second limb.
40. The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic “Administrative Law”, is clear enough, and it is unnecessary to belabour the point.
41. So we turn to the single issue before us: are the Tribunals bound by the doctrine of *stare decisis*? The petitioner has contended that the Review Board failed to follow its own decision in *Avante*, without any explanation. According to the petitioners, stare decisis applies to quasi-judicial tribunals, to the intent that there be uniformity/consistency, predictability, and certainty in law, in general terms. The 1<sup>st</sup> respondent, quite to the contrary, has argued that tribunals are not bound by their previous decisions such being only persuasive; and that each tribunal-task is to be determined on the basis of the facts before it.
42. From the two contending propositions, it emerges, in our view, that tribunals, in their primary category, are specialized bodies charged with programming and regulatory tasks of the socio-economic, administrative and operational domains. Membership in such tribunals generally reflects the essential skills required for the specific tasks in view. The Public Procurement Administrative Review Board falls within this category. It is endowed with requisite experience from its membership, and has access to relevant information and expertise, to enable it to dispose of matters related to procurement. The question is: whether it is bound by its previous decision, as it takes decisions on different matters lately coming up.



43. Such a variegated range of implementation scenarios, it is apparent to us, calls for flexibility in the regulatory scheme. In principle, matters on the agenda of an administrative tribunal will merit determination on the basis of the claims of each case, and will depend on the special factual dynamics. The relevant factors of materiality, and of urgency, will require individualised response in many cases: and in these circumstances, a strict application of standard rules of procedure or evidence may negate the fundamental policy-object. On this account, the specialized tribunal should have the capacity to identify relevant factors of merit; be able to apply pertinent skills; and have the liberty to prescribe solutions, depending on the facts of each case. Such a tribunal should fully take into account any factors of change, in relation to different cases occurring at different times: without being bound by some particular determination of the past.
44. We would agree with the 1<sup>st</sup> respondent, that administrative decision-makers should have significant flexibility, in responding to changes that affect the subject-matter before them. Matters before an administrative tribunal should be determined on a case-to-case basis, depending on the facts in place.
45. The petitioner has asked this court to consider if it was entitled to Orders of judicial review. It is argued that, failure to do so would render the petition a bare academic exercise. It is the case, however, that the petitioner has engaged this court in an essentially academic exercise. This prayer has exceeded the leave and certification granted by the Court of Appeal, within the terms of article 163(4)(b) of the *Constitution*. We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the Order of *mandamus*, since the 1<sup>st</sup> respondent did not owe any delimited statutory duty to the petitioner.
46. The petition of appeal lacks merit.

#### **F. Orders**

47. This Judgment has provided occasion for shedding some light on the dividing line between the remits of specialized administrative tribunals, on the one hand, and the regular judicial process in so far as it accommodates the long-standing practice of stare decisis on the other hand. Such a clarification enables this court to resolve the instant dispute by way of the following Orders:
  - (a) The petition of appeal dated January 22, 2019 is hereby disallowed.
  - (b) The petitioner shall bear the costs of the 1<sup>st</sup> respondent in this court, in the Court of Appeal and the High Court, as well as at the Tribunal.

**DATED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JANUARY, 2020.**

.....

**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**J. B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

.....

**S.C. WANJALA**



**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR,**

**SUPREME COURT OF KENYA**

