

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 70/2024 OF 24<sup>TH</sup> JULY 2024**

**BETWEEN**

**PARAMAX CLEANING SERVICES LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYATTA INTERNATIONAL**

**CONVENTION CENTRE.....1<sup>ST</sup> RESPONDENT**

**KENYATTA INTERNATIONAL**

**CONVENTION CENTRE.....2<sup>ND</sup> RESPONDENT**

**AND**

**KENMA HOMECARE SERVICES.....1<sup>ST</sup> INTERESTED PARTY**

**SERVICEHUB LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**NODEN INVESTMENTS LIMITED.....3<sup>RD</sup> INTERESTED PARTY**

**STEPOVER SERVICES.....4<sup>TH</sup> INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenyatta International Conference Centre in respect of Tender No. KICC/66/2023-2024 to 2024-2025 Provision of Cleaning and Garbage Collection Services.

**BOARD MEMBERS PRESENT**

1. Mr. George Murugu, FCIArb, I.P. - Chairperson
2. Ms. Jessica M'mbetsa - Member
3. Mr. Stanslaus Kimani - Member



4. CPA Alexander Musau - Member

**IN ATTENDANCE**

Mr. James Kilaka - Ag. Board Secretary  
Mr. Philemon Kiprop - Secretariat  
Mr. Anthony Simiyu - Secretariat

**PRESENT BY INVITATION**

**APPLICANT PARAMAX CLEANING SERVICES LIMITED**

Mr. Ondieki Advocate, Gicheru & Company Advocates  
Ms. Murage Advocate, MGM Advocates LLP

**RESPONDENTS THE ACCOUNTING OFFICER, KENYATTA INTERNATIONAL CONVENTION CENTRE KENYATTA INTERNATIONAL CONVENTION CENTRE**

Ms. Wanjiku Advocate, Kihara & Wyne Advocates  
Mr. Kihara Advocate, Kihara & Wyne Advocates

**INTERESTED PARTIES KENMA HOMECARE SERVICES , SERVICEHUB LIMITED, NODEN INVESTMENTS LIMITED, STEPOVER SERVICES**

N/A N/A

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenyatta International Convention Centre, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, vide an advert in the PPIP Portal ([www.tenders.go.ke](http://www.tenders.go.ke)) and the Procuring Entity's website ([www.kicc.co.ke](http://www.kicc.co.ke)), invited interested suppliers to submit their tenders in response to Tender No. KICC/66/2023-2024 for Provision of Cleaning and Garbage Collection Services (herein "the subject tender"). The tender was reserved for Youth category under the AGPO Categories and had a tender closing date of Monday, 25<sup>th</sup> March 2024 at 10:30 a.m.

### **Submission of Tenders and Tender Opening**

2. According to the signed Tender Opening Minutes dated 16<sup>th</sup> February 2024, submitted under the Confidential File submitted by the Procuring Entity, the following Five (5) tenderers were recorded as having been submitted in response to the subject tender by the tender submission deadline:

<b>#</b>	<b>Name of Tenderer</b>
1.	Kenma Homecare
2.	Paramax Cleaning Services
3.	Noden Investment Limited
4.	Service Hub Limited
5.	Stepover Services

## **Evaluation of Tenders**

3. The 1<sup>st</sup> Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders in the following 4 stages as captured in the Evaluation Report
  - i. Preliminary Evaluation
  - ii. Technical Evaluation
  - iii. Detailed Technical Evaluation
  - iv. Financial Evaluation
  
4. The documents in the Confidential File bear out that the subject tender was terminated when the evaluation process was still underway.

## **Notification to Tenderers**

5. Accordingly, the tenderers were notified of the termination of the subject tender vide letters dated 10<sup>th</sup> July 2024.

## **REQUEST FOR REVIEW**

6. On 24<sup>th</sup> July 2024, the Applicant filed a Request for Review dated 23<sup>rd</sup> July 2024 supported by an affidavit sworn on 23<sup>rd</sup> July 2024 by Duke Machongo Omori, the Managing Director of the Applicant, seeking the following orders from the Board in verbatim:

***a) The Board suspends, quashes and declares null and void the decision of the Procuring Entity contained in the letter dated 10<sup>th</sup> July 2024 terminating/cancelling the entire***



***Tender No. KICC/66/2023-2024 TO 2024-2025 for provision of Cleaning and garbage collection services.***

- b) Upon order (a) above, the tender validity period of Tender No. KICC/66/2023-2024 TO 2024-2025 for provision of Cleaning and garbage collection services be extended for a further thirty (30) days from 25<sup>th</sup> July 2024 when it expires***
- c) The Procuring Entity be compelled and directed to complete the procurement process of Tender No. KICC/66/2023-2024 TO 2024-2025 for provision of Cleaning and garbage collection services to its logical conclusion.***
- d) The Procuring entity do pay the costs of the Review.***

7. In a Notification of Appeal and a letter dated 24<sup>th</sup> July 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 24<sup>th</sup> July 2024.
8. On 29<sup>th</sup> July 2024, the Respondents through the firm of Kihara & Wyne Advocates filed a Preliminary Objection dated 26<sup>th</sup> July 2024 and a Memorandum of Response sworn on 29<sup>th</sup> July 2024 by James Mbugua



Mwaura, the 1<sup>st</sup> Respondent herein. The Respondents equally forwarded the Confidential Documents under Section 67(3) of the Act.

9. Vide letters dated 30<sup>th</sup> July 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 30<sup>th</sup> July 2024. None of the tenderers filed a response.
10. On 1<sup>st</sup> August 2024, the Applicant filed Written Submissions dated 31<sup>st</sup> July 2024 and a Further Statement in the form of an affidavit sworn on 31<sup>st</sup> July 2024 by Duke Machongo Omori.
11. On 2<sup>nd</sup> August 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 8<sup>th</sup> August 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
12. On 6<sup>th</sup> August 2024, the Respondents filed Written Submissions dated 5<sup>th</sup> August 2024.
13. On 7<sup>th</sup> August 2024, the Respondents filed a Further Memorandum of Response in the form of an affidavit sworn on 7<sup>th</sup> August 2024 by James Mbugua Mwaura.



14. On 8<sup>th</sup> August 2024 at 11:00 a.m., when the Board convened for the online hearing, all the parties were represented by their various Advocates.
15. The Board read through the documents filed in the matter and asked parties to confirm service of the said documents upon them to which all Counsel responded in the affirmative.
16. The Board also noted that there was a Preliminary Objection that had been filed in the matter and that the same would be heard as part of the Request for Review in line with Regulation 209(4) of the Regulations 2020.
17. The Board gave the hearing address as follows:
  - i. The Respondents would argue their Preliminary Objection in 3 minutes
  - ii. The Applicant would respond to the Preliminary Objection and prosecute the Request for Review in 13 minutes.
  - iii. The Respondent would then to respond to the Request for Review within 10 minutes.
  - iv. The Applicant would thereafter close with a rejoinder in 2 minutes.
18. However, before the Respondent's Advocates could commence their address, Counsel for the Applicant, Mr. Ondieki, indicated to the Board that the Applicant had registered their Protest to the Respondents' filing of a Further Memorandum of Response and Written Submissions while quoting Regulation 205 of the Regulations 2020. According to Counsel, the law did not countenance a situation where the Respondents would be



allowed to file pleadings late in the day such that the Applicant would be denied an opportunity to offer a rejoinder. He therefore urged that the lately filed documents be struck out from the record.

19. Counsel for the Respondents, Ms. Wanjiku while relying on the case of ***Raila Odinga v IEBC; Presidential Petition No. 1 of 2017*** argued that the Board had jurisdiction to admit documents filed after the close of pleadings. She urged that the filed documents did not constitute new evidence but were in fact a response elicited by the Applicant's Further Statement on the capacity of the firm of Gicheru & Company Advocates to file the instant Request for Review.
20. Mr. Kihara, equally appearing for the Respondents chimed in citing that the Respondent's Further Memorandum of Response only introduced a letter from the Law Society of Kenya in response to the Respondents' inquiry on the capacity of the firm of Gicheru & Company Advocates to bring the Request for Review. He submitted that the letter was timeously filed being that it was filed on the same day it was made available by the Law Society of Kenya. Counsel therefore urged the Board to allow the hearing to proceed as earlier scheduled with leave to the Applicant to submit on the admissibility or otherwise of the said letter.
21. Counsel for the Applicant, Mr. Ondieki, submitted that there was no room in law for the filing of a Further Memorandum of Response and that in adducing evidence in the form of the letter from the Law Society of Kenya, the Respondents' Preliminary Objection was doomed to fail being that its grounds would have departed from the conventional points of law characteristic of Preliminary Objections. Further that the Applicant craved



for leave to file a rejoinder on the Respondents' Further Memorandum of Response.

22. The Board inquired from the Applicant if they were agreeable to being granted leave to respond to the Respondents' Further Memorandum of Response to which Counsel for the Applicant, Mr. Ondieki responded in the affirmative.
23. The Board briefly retreated before returning the following directions:
  - i. The Applicant was granted leave to file a rejoinder to the Respondents' Further Memorandum of Response and any other documents they deem fit including further submissions by 11:00 a.m. on 9<sup>th</sup> August 2024.
  - ii. The day's hearing was adjourned to 2:30 p.m. on 9<sup>th</sup> August 2024.
24. On 9<sup>th</sup> August 2024, the Applicant through the firm of MGM Advocates LLP filed a Notice of Change of Advocates dated 9<sup>th</sup> August 2024 and undated Further Supplementary Written Submissions. The Applicant equally filed a Supplementary Statement in the form of an affidavit sworn on 9<sup>th</sup> August 2024 by Duke Machongo Omori.
25. Later on the same day, 9<sup>th</sup> August 2024 when the Board convened at 2:30 p.m., parties herein were represented by their various Advocates and there were some changes in the Board's panel as well as Advocates present. On the part of the Board, CPA Alexander Musau stepped in place of Mr. Stanslaus Kimani. On the part of the Advocates present, Ms. Murage had come in as Counsel for the Applicant in place of Mr. Ondieki.



26. The Board started the session by reading through the new filings that had been made subsequent to the adjourned hearing session of 8<sup>th</sup> August 2024 and sought for parties' confirmation that the said documents had been served upon them to which the parties' Advocates responded in the affirmative. Accordingly, the Board directed that the hearing would proceed as per the order of address and time allocation directed on 8<sup>th</sup> August 2024; which it did.

## **PARTIES SUBMISSIONS**

### **Respondents' Submissions on the Preliminary Objection**

27. Counsel for the Applicant, Ms. Wanjiku, contended that the Board lacked jurisdiction to hear the instant Request for Review under Section 167(4)(b) of the Act as the termination of the subject tender was done in compliance with Section 63 of the Act upon the detection of material governance issues. Relying on ***Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (Interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018]eKLR*** she argued that the termination was regular as the notices for termination were sent to the bidders and a written report made to the Public Procurement Regulatory Authority.
28. Further, relying on ***Loise Njambi & 3 Ors v Samuel Muiro Magu [2007]eKLR*** Counsel submitted that when a sole proprietor dies, their operating entity equally dies and thus the law firm of a deceased sole practitioner could not properly file a Request for Review before the Board.



29. She argued that Regulation 14 of the Law Society of Kenya (General) Regulations requires that an Advocate should nominate an administrator who would manage their firm for purposes of winding it up in the event of their death and not for filing fresh matters. She therefore contended that Mr. Paul Gicheru having died on 26<sup>th</sup> September 2022, Mr. Ondieki was only appointed to wind up the law firm of Gicheru & Company Advocates. It was her submission that it would be inconceivable that the law firm of Gicheru & Company Advocates would appear to be filing the instant Request for Review about 2 years after the demise of Mr. Gicheru. Accordingly, Counsel urged the Board to strike out the Request for Review filed under the name of the law firm of Gicheru & Company Advocates.

### **Applicant's Submissions**

30. Counsel for the Applicant Ms. Murage begun her address by citing that at the time of instructing Mr. Ondieki, the Applicant believed that Mr. Ondieki was a qualified Advocate in active practice.
31. Shortly thereafter, Counsel for the Applicant, Ms. Murage experienced a technical glitch on her end as the Board and the Respondents' Advocates were unable to hear her submissions. The Board adjourned for 5 minutes to allow Ms. Murage to reconfigure her connection to the hearing session but this did not improve her audibility. The Board further adjourned the hearing session for about 15 minutes to allow Ms. Murage to adjust her connection but her connection did not stabilize. It was at this stage that the Board asked the parties to confirm if they were amenable to the Board dispensing with the plenary hearing and in place proceeding by way of considering the documents parties had filed in the matter and both Counsel for the Applicant and Respondents, Ms. Wanjiku and Ms. Murage

confirmed that they were indeed amenable to the Board rendering its decision on the basis of the filed documents.

32. It was at that stage that the Board directed that the instant Request for Review having been filed on 24<sup>th</sup> July 2024 the same had to be determined by 14<sup>th</sup> August 2024. Therefore, the Board would communicate its decision on or before 14<sup>th</sup> August 2024 to all parties via email.
33. Based on the documents filed in the Request for Review, below is a summary of the parties' respective positions:

### **Applicant's Submissions**

34. The Applicant filed 2 sets of Submissions, the Written Submissions dated 31<sup>st</sup> July 2024 and undated Further Supplementary Submissions.
35. According to the Written Submissions dated 31<sup>st</sup> July 2024, it was the Applicant's position that Ground 2 of the Respondents' Preliminary Objection on the capacity of the law firm of Gicheru & Company Advocates to bring the instant Request for Review was mistaken since despite it being hinged on Section 167(4)(b), the said Section had no relationship with the ground as raised. It was also argued that the ground did not constitute a pure point of law and thus was unmerited as it raised an issue of fact.
36. Further, that though the Applicant presented a letter showing that Robert Birundu Ondieki was appointed to manage the law firm of Gicheru & Company Advocates, the Respondents had not led any evidence showing



that the law firm had ceased operation or that Mr Ondieki was not running the operations of the law firm.

37. The Applicant relying on ***Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (Interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018]eKLR*** urged that the Board has to satisfy itself on the legality of termination of a procurement process before it can make a finding that it has no jurisdiction over a Request for Review challenging the termination of the procurement process.
38. Further, that the Procuring Entity is under an obligation to place sufficient reasons and evidence to justify and support the grounds for termination of the procurement process and that it must comply with both the procedural and substantive requirements under Section 63 of the Act. According to the Applicant, the Respondents had not led any evidence of compliance with the substantive and procedural requirements under Section 63 of the Act.
39. The Applicant contended that mere citing of material governance issues as a ground for terminating the procurement process in the subject tender did not of itself establish the legal basis for termination. According to the Applicant, the use of material governance issue as a ground for termination was an afterthought since:
- i. The notice of cancellation of the subject tender referred to a complaint by Spic N Span, a supplier who did not submit a bid in the subject tender.



- ii. The allegations by Spic N Span could only be determined by the Board and not the Respondents.
- iii. One of the allegations by Spic N Span related to an already concluded tender.
- iv. The allegations by the said Spic N Span were made late in the day after the tender had closed.
- v. The complaint by Spic N Span was made on 25<sup>th</sup> April 2024 yet the Respondents were relying on it as at 10<sup>th</sup> July 2024.
- vi. The letter by Servicehub Limited was an inquiry on the status of the evaluation and not a complaint.

40. While relying on ***PPARB Application No. 144 of 2020; County Builders Limited v Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, State Department of Housing and Urban Development and PPARB Application No. 50 of 2020; Danka Africa (K) Limited v The Accounting Officer, Kenya Ports Authority & another*** the Applicant maintained that the Respondents had not shown any material governance issues that arose in the procurement process in the subject tender.

41. The Applicant's undated Further Supplementary Submissions citing the case of ***DJC v BKL (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR), Henry Wanyama Khaemba v Standard Chartered Bank Ltd & anor and Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Ors [2025]eKLR*** contended that a preliminary objection should constitute a pure point of law and thus the Respondents were barred from pleading a preliminary objection as to the lawfulness of operation of the firm of Gicheru & Company Advocates.



42. Further that the Applicant had produced search results from the Law Society of Kenya search engine that it relied on when instructing Mr. Robert Birundu Ondieki to bring the Request for Review. That the search results showed Robert Birundu Ondieki is licensed to practice, his status is active and that his place of work is stated as Gicheru & Company Advocates.
43. Further, if there was an issue on the operation of the firm of Gicheru & Company Advocates, this lapse should not be visited upon the Applicant as a client.
44. Additionally, that the Fourteenth Schedule provides for a Request for Review to be signed by the Applicant and not necessarily their Advocate. It was argued that in the instant case both the Request for Review and Statement in support thereof were signed by a Director of the Applicant.

### **Respondents' Submissions**

45. The Respondents filed Written Submissions dated 5<sup>th</sup> August 2024 relying on ***Samuel Kamau Macharia & anor v Kenya Commercial Bank Limited & 2 Ors [2012]eKLR*** and ***Owners of Motor Vessel Lilian S v Caltex Oil (Kenya) Limited [1989]eKLR*** for the proposition that once a court established it lacked jurisdiction, it ought to down its tools.
46. Further that Section 167(4)(b) of the Act excluded termination of procurement processes from the jurisdiction of the Board and that Section 63(1)(e) of the Act contemplated detection of material governance issues as a ground for terminating a tender.



47. It was contended that while the evaluation process was underway, material governance issues were detected, which informed the termination of the subject tender. Further, that subsequent to the termination, the Respondents sent notifications to the tenderers in the subject tender and also notified the Public Procurement Regulatory Authority through the Public Procurement Information Portal (PPIP). Accordingly, the Respondents maintained that the procurement process in the subject tender was terminated in accordance with Section 63 of the Act.
48. The Respondents equally took the view that the late Paul Gicheru was a sole practitioner and that Mr. Robert Birundu Ondieki was appointed to wind up the firm of Gicheru & Company Advocates and that it was inconceivable for the said firm to purport to file a request for Review 2 years after the death of Mr. Paul Gicheru when it ought to have been dissolved.

### **BOARD'S DECISION**

49. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

I. ***Whether the Board is clothed with the requisite jurisdiction to hear and determine the instant Request for Review?***

In determining this issue the Board will address itself on the following:

- a) Whether there is in fact a competent Request for Review before the Board?



Depending on the Boards finding on issue (a) above:

- b) Whether the subject tender was terminated in accordance with the provisions of Section 63 of the Act?

II. ***What orders should the Board issue in the circumstance?***

**Whether the Board is clothed with the requisite jurisdiction to hear and determine the instant Request for Review?**

50. Subsequent to the filing of the Request for Review, the Respondents filed a Preliminary Objection dated 26<sup>th</sup> July 2024 raising 2 Grounds i.e. (i) the Board lacked jurisdiction as termination of procurement is not subject to review and (ii) the pleadings are in the name of a law firm whose sole proprietor is deceased. From the tenor of the Respondents' Preliminary Objection, this Board's jurisdiction was called to question.
51. This Board acknowledges the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.
52. Black's Law Dictionary, 8th Edition, defines jurisdiction as:
- "... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make***



***decisions and declare judgment; The legal rights by which judges exercise their authority."***

53. On its part, Halsbury's Laws of England (4<sup>th</sup> Ed.) Vol. 9 defines jurisdiction as:

***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***

54. The locus classicus case on the question of jurisdiction is the celebrated case of ***The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1*** where Nyarangi J.A. made the oft-cited dictum:

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."***

55. In the case of ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR***, the Court of Appeal emphasized the centrality of the issue of jurisdiction and held that:

***"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any***



***judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."***

56. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

***"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."***

57. Further, Section 28 of the Act provides for the functions of the Board as:

***The functions of the Review Board shall be—  
reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

58. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review as follows:



**PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS**

**167. Request for a review**

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

***(2) .....***

***(3) .....***

***(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***

***(a) the choice of a procurement method;***

***(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and***

***(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]***

**168. ....**

**169. ....**

**170. ....**

**171. ....**

**172. ....**

**172. Dismissal of frivolous appeals**

***Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.***

***173. Powers of Review Board***

***Upon completing a review, the Review Board may do any one or more of the following—***

***(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***

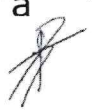
***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***

***(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***

***(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***

***(e) order termination of the procurement process and commencement of a new procurement process.***

59. Section 167 of the Act above, extends an opportunity to candidates and tenderers disgruntled with a public tender process to approach the Board for redress. However, subsection (4) of the Section divests the Board jurisdiction on a myriad of subject matters including the termination of a



procurement process. Termination of public procurement proceedings is governed by Section 63 of the Act.

60. Superior Courts of this country have on numerous occasions offered guidance on the interpretation of Section 167(4) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders. The High Court in ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority*** and ***Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board & Ors v Aprim Consultants*** held that the Board has jurisdiction to first establish whether the preconditions for termination under section 63 of the Act have been met before downing its tools. This position mirrors this Board's Decisions in ***PPARB Application No. 14 of 2024; Emkay Construction Limited v Managing Director, Kenya reinsurance Corporation Limited; PPARB Application No. 29 of 2023; Craft Silicon Limited v Accounting Officer Kilifi County Government & anor;*** and ***PPARB Application No. 9 of 2022; and PPARB Application No. 5 of 2021; Daniel Outlet Limited v Accounting Officer Numeric Machines Complex Limited; PPARB Application No. 18 of 2024; Infinity Pool Limited v The Accounting Officer, Kenya Wildlife Services; PPARB Application No. 40 of 2024 Marl Mart Enterprises Limited v The Accounting Officer Independent and Electoral Boundaries Commission & Ors; PPARB Application No. 68 of 2024; Colnet Limited v Accounting Officer Kenya Revenue Authority & Ors.***



61. Therefore, based on the foregoing, it is the finding of this Board that the Board has jurisdiction to first establish whether the preconditions for termination under section 63 of the Act have been met before downing its tools.
62. However the instant case presents a peculiar situation where the Respondents filed a Preliminary Objection based on the subject matter of termination as well as the competency of the filed Request for Review. In the Board's considered view it will be prudent to first address the competency of the Request for Review as drawn and filed before addressing the subject matter of termination, which forms the gist of the Request for Review. It is only upon establishing that there is in fact a competent Request for Review that the Board will address itself on whether the termination of the subject tender was in line with the provisions of Section 63 of the Act, which ideally forms the first limb of the Preliminary Objection.
63. The Respondents took issue with the competency of the Request for Review having been drawn by the firm of Gicheru & Company Advocates, whose sole proprietor died on 26<sup>th</sup> September 2022. The Respondents argued that Regulation 14 of the Law Society of Kenya (General) Regulations requires that an Advocate should nominate an administrator who would manage their firm for purposes of winding it up in the event of their death and not for filing fresh matters. Therefore, since Mr. Paul Gicheru died on 26<sup>th</sup> September 2022, it was inconceivable that the law firm of Gicheru & Company Advocates would appear to be filing the instant Request for Review about 2 years after the demise of Mr. Gicheru.



64. On the other hand, the Applicant's case was that at the time of instructing Mr. Robert Birundu Ondieki, it was under the impression that he was licensed to practice as an Advocate and that the Law Society of Kenya Advocates search engine did in fact indicate that he was practicing under the law firm of Gicheru & Company Advocates. Further that as a client, it should not be drawn into the operational exigencies at the law firm of Gicheru & Company Advocates.
65. In its earlier submissions, the Applicant had equally argued that it was not in dispute that Mr. Robert Birundu Ondieki-Advocate was appointed as the administrator of the law firm of Gicheru & Company Advocates.
66. The Board is therefore invited at this stage to pronounce itself on the competency of the Request for Review which from its face was drawn and filed by the law firm of Gicheru & Company Advocates.
67. For starters, it is not in dispute that the law firm of Gicheru & Company Advocates was registered as a sole proprietorship under the name of Mr. Paul Gicheru. It is not disputed that Mr. Paul Gicheru passed away on 26<sup>th</sup> September 2022 and that Mr. Robert Birundu Ondieki- Advocate was appointed to wind up the law firm of Gicheru & Company Advocates. It is equally not in dispute that the instant Request for Review bears out on its face that it was drawn and filed by the firm of Gicheru & Company Advocates on 24<sup>th</sup> July 2024.



68. Regulation 14 of The Law Society of Kenya (General) Regulations provides for the administration of law firms in the following terms:

**"14. Firm administrator**

**(1) A sole practitioner shall, within 60 days of establishing a law firm, nominate a member or members in Form LSK-06 in the First Schedule to be administrator of the member's legal practice in the event that that sole practitioner—**

**(a) dies;**

**(b) is suspended from practicing under the Advocates Act;**

**(c) is struck off the Roll of Advocates;**

**(d) is adjudged bankrupt by a court of competent jurisdiction;**

**or**

**(e) otherwise becomes legally incapacitated.**

**(2) Nomination under this regulation shall be made once but a member so nominating shall notify the secretary on any change in the name or particulars of the nominee.**

**(3) The secretary shall not accept nomination unless the nominee has consented to act as administrator, in Form LSK-07 in the First Schedule.**

**(4) This regulation does not override the right of a member to appoint by Will a qualified executor to act as administrator of the law firm or practice in any of the circumstances contemplated under sub-regulation (1).**

**(5) For the purposes of sub-regulation (4), "qualified" means qualified to practise under the Advocates Act (Cap. 16).**

69. From Regulation 14 above, an Advocate practicing as a sole practitioner is required to nominate another Advocate who would act as the



administrator of his law firm in the event of death or other incapacity the sole practitioner may experience. Such nominated Administrator occupies a fiduciary position as they handle the incapacitated Advocates' pending matters during the period of incapacitation and at times pending dissolution of the firm where the incapacitation on the part of the sole practitioner is of a permanent nature. In instances where the incapacity is of a permanent nature such as death, the Administrator manages the affairs of the firm pending dissolution of the firm. It is our considered opinion that managing of the affairs of a deceased advocate's law firm does not entail taking up new instructions on behalf of the sole practitioner's firm. This is so for at least 2 reasons:

- i. The Administrator cannot purport to be transacting on behalf of the deceased Advocate on instructions that post-date the deceased Advocates death as these new instructions were not in the deceased Advocates contemplation at the time of their death.
- ii. Additionally It would be imprudent and in fact illegal to commit the estate of the deceased advocate to rights and obligations that had not accrued to the advocate prior to his/her demise.

70. From the foregoing it would follow that an Administrator appointed to manage the affairs of a deceased colleague's law firm would be expected to oversee a smooth transition of the deceased Advocate's pending briefs. This includes concluding pending briefs where possible and at times even handing over pending briefs to other Advocates where a deceased Advocate's client directs so. The fiduciary position is further amplified by the fact that the Administrator at all times remains accountable for his actions to the regulatory body; Law Society of Kenya, a plausible explanation as to why the Law Society of Kenya in their appointment of



Mr. Ondieki as administrator over the law firm of Gicheru & Company Advocates required him to submit a winding up report. The Law Society of Kenya's appointment letter to Mr. Ondieki was annexed to the Applicant's Further Statement as Exhibit DO-3 and is hereinafter produced for ease of reference:

***"Law Society of Kenya  
(Address details withheld)***

***Date: 17<sup>th</sup> October 2022***

***BIRUNDU ROBERT ONDIEKI ADVOCATE  
(Address details withheld)***

***Dear Sir***

***RE: GICHERU PAUL ADVOCATE (DECEASED)***

***We refer to the above and the inquiry received on 7<sup>th</sup> October, 2022, contents which we have noted.***

***We confirm that according to our records, the late Gicheru Paul advocate in his application for his practicing certificate for the year 2022, nominated you to manage the affairs of his law practice and wind up his firm in the event he was unable to practice for whatever reason.***

***Kindly note that you are required to file a winding up report with the Law Society of Kenya.***

***Yours faithfully,***

***Signed***

***FLORENCE W. MUTURI***

***SECRETARY/CEO***



71. Notwithstanding the foregoing, it would appear that subsequent to his appointment as an Administrator of the firm of Gicheru & Company Advocates Mr. Robert Birundu Ondieki knowingly took up new instructions from the Applicant in the name of the firm Gicheru & Company Advocates, went on to draw up and file the instant Request for Review under the name of Gicheru & Company Advocates.
72. With respect to Mr. Ondieki, the Board finds this conduct unbecoming of an Advocate of the High Court of Kenya. It is callous and a serious breach of professional ethics for of Counsel to knowingly take up new instructions from the Applicant under the law firm that he was entrusted by the Law Society of Kenya to wind up. It is a serious breach of his duty to his client and to this Board to put himself out to his client and the unsuspecting public to hold a position of trust which in fact he does not hold. Advocates by dint of their oath of office are and continue to be in fiduciary relationships with their clients. Such relationships are built on trust and it is quite regrettable that Mr. Ondieki's actions in this matter, which border on impersonation, have just served to erode the trust and the confidence his client had in him as a professional. The Board is therefore left with no option therefore but to find ,which it does ,that it was improper for the instant Request for Review to be brought under the name of the law firm of Gicheru & Company Advocates.
73. The Board is then left to determine the fate of the Request for Review, which is patently improperly drawn in the name of a deceased Advocate.
74. The Applicant sought to be excused from the mistake by its Counsel while relying on the Court of Appeal decision in ***Civil Appeal No. 20 of 2016***



*in the case of Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR* wherein the court decreed:

**"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."**

75. The Board appreciates that the discretion of excusing a client from a mistake committed by its Advocate is one that should be exercised judicially having regard to the unique circumstances of each case and the law. The unique circumstance of the instant Request for Review is that it was indicated as having been drawn by the firm of an Advocate about 2 years after his actual demise.
76. From our local jurisprudence, Courts in this country have variously held that suits cannot be commenced or defended in the names of persons who are deceased.
77. In *Loise Njambi Njeri & 3 Ors v Samuel Muiro Magu [2007]eKLR* the High Court addressed itself on the fate of a law firm whose sole practitioner dies in the following terms:



***10. Once a sole partner dies or as in this case becomes a judge, the firm must dissolve.***

***11. A member" described under rule 12 includes and means a partnership or the actual person who owns the business and who would be personally liable to the firm.***

***12. An employee/ a director in the firm are in effect not responsible or liable to the firm. This applies to advocates referred to as associates. They are employees not partners.***

***13. In this case I rule that the firm of H.P.G. Waweru & Co. Advocates must dissolve. It should not exist on the sole practitioner becoming a judge of the high court of Kenya (an or a magistrate in other cases).***

78. In ***Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others [2018] eKLR*** the High Court decreed that a suit could not be sustained against a deceased person:

***There is then an amended Notice of Change of Advocate dated and filed on 23<sup>rd</sup> August, 2016. This time the estate of the purported 7<sup>th</sup> defendant appointed the same advocate that is Muchangi Nduati and Company Advocates, "to act for him". The plaintiffs submit that the locus of the so called estate is questionable.***

***On the other hand, the advocates who took over the matter on behalf of the deceased 7<sup>th</sup> defendant relied heavily on the provisions of Order 25 Rule 1 of the Civil Procedure Rules and***

*the consequences thereof. It is their position that the suit having been withdrawn the costs should be payable.*

*It is common ground that the 7<sup>th</sup> defendant was not alive when the suit was filed against him. It is also inconceivable how a party who is deceased can instruct counsel and that counsel takes over instructions from a non-existent person. It follows therefore any action including the filing of the plaint, the extraction of the summons; the entering of appearance and filing of the defence were a nullity. The cases cited by counsel for the plaintiffs include, Benjamin Leonard Mc foy vs. United Africa Company Limited [1961] All ER 1169. In that case the court stated as follows,*

*If an Act is void, then it is in Law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."*

*This is exactly what the instructing party to the counsel now on record for the deceased person and or his estate is attempting to do. In the words of the cited case above this is an attempt to place something on nothing and expect it to retain ground. This cannot happen.*



*The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity.*

*In the Indian case of C. Muttu vs. Bharath Match Works AIR 1964 Kant 293 the court observed,*

*"If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person."*

*In yet another Indian Case of Pratap Chand Mehta vs Chrisna Devi Meuta AIR 1988 Delhi 267 the court citing another decision observed as follows,*



***" .....if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment."***

***Going by the material on record, submissions by counsel and cited authorities I am persuaded that the bill of costs filed by counsel for the 7<sup>th</sup> defendant and or his estate cannot be sustained. Having said so, the preliminary objection hereby succeeds and the said bill of costs declared incompetent, null and void as it is founded on proceedings that were also null and void ab initio."***

79. Flowing from the above decisions, a legal suit cannot be instituted by or against a person who is deceased. By that extension deceased Advocates cannot institute or defend any claim. It would therefore follow that Mr. Paul Gicheru having passed away on 26<sup>th</sup> September 2022, nobody, including the administrator of his law firm, could purport to file a case in



his name or in the name of his firm after that day. Indeed, this fact is confirmed by the Law Society of Kenya in its letter dated 7<sup>th</sup> of August 2024 annexed as JMM4 to the Respondents Affidavit sworn by James Mwaura Mbugua on the same date.

80. Accordingly, the instant Request for Review could not be competently filed on 24<sup>th</sup> July 2024 in his name or the name of his firm Gicheru & Company Advocates.
81. In view of the foregoing, the Board finds that the firm of Gicheru & Company Advocates could not legally draw, file or institute the instant Request for Review.
82. Having found that the instant Request for Review is incompetent in its present form, the Board proceeds to down it tools and will not delve into any analysis on the termination of the subject tender.

**What orders should the Board grant in the circumstances?**

83. The Board has found that the firm of Gicheru & Company Advocates could not legally institute the instant Request for Review.
84. The upshot of our finding is that the Request for Review dated 23rd July 2024 in respect of Tender No. KICC/66/2023-2024 for Provision of Cleaning and Garbage Collection Services fails in the following specific terms:



**FINAL ORDERS**

85. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 23<sup>rd</sup> July 2024:

- 1. Ground 2 of the Respondents’ Preliminary Objection dated 26<sup>th</sup> July 2024 be and is hereby upheld.**
  
- 2. The Request for Review dated 23<sup>rd</sup> July 2024 be and is hereby struck out.**
  
- 3. Each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI, this 14<sup>th</sup> Day of August 2024.**

  
.....  
**CHAIRPERSON**  
**PPARB**

  
.....  
**SECRETARY**  
**PPARB**



