

LEGAL ALERT

Court of Appeal Clarifies the Scope of Judicial Review in Public Procurement Under the PPADA

The Court of Appeal has delivered a significant judgment in Civil Appeal No. 401 of 2026; Okoth & Kiplagat Advocates v Public Procurement Administrative Review Board & 3 Others, providing much-needed clarity on the scope of judicial review under section 175 of the Public Procurement and Asset Disposal Act, 2015 (PPADA).

The decision settles key questions in procurement litigation, particularly the distinction between legality and merits review, the interpretation of tender criteria, and the operation of the statutory standstill and timelines under sections 168 and 175 of the PPADA. In doing so, the Court reaffirmed that procurement disputes are firmly anchored in the constitutional principles of fair administrative action (Article 47) and fair, equitable, transparent, competitive and cost-effective public procurement (Article 227).

Judicial review in public procurement deals with legality and not merits of the matter

The Court affirmed that judicial review under section 175 of the PPADA is a sui generis constitutional jurisdiction extending beyond procedural fairness to encompass legality, rationality, reasonableness and constitutional compliance.

Importantly, the Court held that examining tender documents, evaluation reports and scoring sheets does not, by itself, amount to an impermissible merits review. Such scrutiny is permissible where it is necessary to determine whether the Procuring Entity (PE) or the Public Procurement Administrative Review Board (PPARB) acted within the Constitution, the PPADA and the disclosed tender criteria. The Court captured the distinction as follows:

“Examining the substance of a procurement decision to determine whether the decision-maker remained within lawful bounds is a legality review; examining the same material to determine whether the court would have reached a different procurement outcome is an impermissible merits review.”

The decision therefore confirms that while courts may interrogate procurement decisions to ensure they are lawful, they will not substitute their own evaluation or determine who should have been awarded the tender.

The Court further reaffirmed that tender documents constitute the binding framework of the procurement process and that section 80 of the PPADA requires tenders to be evaluated strictly in accordance with the disclosed procedures and criteria.

Neither the PE nor the PPARB may introduce new evaluation standards or materially alter the published requirements after bids have been submitted, as doing so would offend Article 227 of the Constitution. However, where tender criteria are ambiguous, the Review Board may adopt a reasonable interpretation that remains faithful to the language and purpose of the tender documents.

Accordingly, judicial intervention is warranted where evaluators depart from the published criteria or rely on undisclosed considerations, not merely because another interpretation or scoring outcome may have been possible.

On the standstill period and timelines under Sections 168 and 175 of the Act, the Court clarified the distinction between administrative review before the PPARB and judicial review before the High Court.

A Request for Review filed before the PPARB automatically suspends the procurement process under section 168, preserving the effectiveness of the statutory review mechanism. By contrast, filing judicial review proceedings under section 175 does not automatically halt procurement implementation. Unless the High Court grants interim relief, such as a stay or conservatory orders, the procurement process may lawfully proceed.

The Court further reaffirmed that the seven-day period for filing appeals under section 175(4) is strict and jurisdictional. Nevertheless, limited flexibility may be warranted where delay is attributable to Judiciary e-filing system failures rather than a party's indolence, consistent with the constitutional principles of access to justice.

Conclusion

This decision provides important guidance on the constitutional role of the courts in procurement disputes. It confirms that judicial review is a mechanism for ensuring that procurement decisions remain lawful, rational, reasonable and compliant with the Constitution, the PPADA and the published tender criteria, without converting the courts into procurement evaluators.

By drawing a clear distinction between legality review and merits review, while clarifying the operation of the statutory standstill and appellate timelines, the Court has strengthened both accountability in public procurement and certainty in the implementation of public projects. It is likely to become a leading authority in procurement litigation under the PPADA.

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