Republic v Public Procurement Administrative Review Board; Iansoft Technologies Limited (Exparte Applicant); Accounting Officer National Cereals & Produce Board & another (Interested Parties) (Judicial Review Miscellaneous Application E073 of 2023) [2023] KEHC 21894 (KLR) (Judicial Review) (15 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21894 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E073 OF 2023

JM CHIGITI, J

AUGUST 15, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... RESPONDENT

AND

IANSOFT TECHNOLOGIES LIMITED ..... EXPARTE APPLICANT

AND

THE ACCOUNTING OFFICER NATIONAL CEREALS & PRODUCE BOARD ..... INTERESTED PARTY

DYNASOFT BUSINESS SOLUTIONS LIMITED ..... INTERESTED PARTY

JUDGMENT

1. On 6th April, 2023 the 2nd Interested Party herein advertised Tender No. NCPB/UPGRADE/DYNAMIC 365/21/2022-2023 for supply, installation, customization, and commission of MS Dynamics 365 Business Central on the Star, and Daily Nation Newspapers; as well as in the NCPB, and PPIP website/portal.

2. The Ex parte Applicant herein (Iansoft Technologies Limited) and the 3rd Interested Party herein (Dynasoft Business Solution) attained the required minimum score of 80% and were considered for

the next stage of Financial Evaluation. Upon conclusion of the procurement process in its entirety, the 3rd Interested Party herein was awarded the tender.

3. On 24th May, 2023 the 2nd Interested Party informed the Ex parte Applicant herein that their bid for the tender was unsuccessful--in accordance with Section 87 (3) of the *Public Procurement and Asset Disposal Act* 2015 (PPAD Act). Being dissatisfied, the Ex parte Applicant herein wrote a complaint letter dated 25th May, 2023 to the 2nd Interested party which was duly responded to vide letter dated 2nd June, 2023 and followed up with a meeting on 5th June, 2023 to address the complaints raised.

4. On 8th June, 2023 the Ex parte Applicant instituted a Request for Review at the Public Procurement Administrative Review Board vide Application No. 40 of 2023. On the 29th June, 2023 the Respondents made a decision in Public Procurement Administrative Review Board Application No. 40 of 2023 striking out the Applicant's Request for Review--dated 7th June, 2023 and filed on 8th June, 2023--for want of jurisdiction on account of being filed out of time.

5. That has precipitated the filing of the Notice of Motion Application dated 7th July, 2023 that is before this court. The Application is opposed by the Respondent and the Interested Parties.

The Application

6. The Ex parte Applicant, Notice of Motion Application dated 7th July, 2023 seeks the following orders: -

    1. An order of certiorari be issued to remove into this Honorable Court for the purposes of being quashed the determination and orders of the Respondent in Public Procurement Administrative Review Application No. 40 of 2023 delivered on 29th June, 2023.

    2. An order of declaration be issued that the Applicant's Request for Review dated 7th June, 2023 and filed on 8th June, 2023 was properly before the Respondent within the meaning of Section 167 (1) of the *Public Procurement and Asset Disposal Act* of 2015.

    3. An order of mandamus be issued compelling the Respondent to hear and determine on merits the Applicant's Request for Review dated 7th June, 2023 and filed with the Respondent on 8th June, 2023.

    4. The Applicant be awarded the costs of this application.

The Applicant's Case

7. The Ex parte Applicants case is that on 24th May, 2023 the Applicant herein received a letter from the 2nd Interested Party, informing it that its bid was unsuccessful on grounds that its price was not the most competitive. Pursuant to the aforesaid letter; the Applicant herein lodged a complaint at the 2nd Interested Party, vide a letter dated 25th May, 2023. The letter read in part as follows,

    > "...I therefore request you to conduct a thorough investigation into the process, procedures, and final decision. It is my wish that a corrective action be taken to restore the integrity and transparency of the procurement process. I appreciate your prompt attention to this matter, and I look forward to hearing from you soon about the investigation findings and proposed corrective actions."

8. That the 1st Interested Party responded to the aforesaid letter on 2nd June, 2023 in the following terms inter alia,

> "...After reviewing the entire process, I hereby confirm that it was done in accordance with the rules and regulations stipulated in the *Public Procurement and Asset Disposal Act* of 2015, Public Procurement & Asset Disposal Regulations of 2020 and the 2010 Constitution of Kenya. We hereby invite your firm for further review of the process on Monday 5th June 2023 at NCPB Head Office (Board room) starting 9.00 AM."

9. According to the Applicant, the response dated 2nd June, 2023 indicating that the process was above board, but they additionally invited the Applicant "...for further review of the process on Monday 5th June, 2023 at NCPB Head Office (Board room) starting 9.00am." That the response generated in the Applicant a legitimate expectation that the complaint raised by the Applicant will be fully clarified to enable it decide on whether to pursue a further review with the Respondent, or be satisfied with whatever clarifications will be provided by the 2nd Interested Party.

10. Further, that the said invitation for a further review by the 2nd Interested Party was a clear and unambiguous representation upon which it was reasonable for Applicant to rely on it legitimately, expecting that its complaint will be fully clarified in the meeting to enable it decide on its next course of action and that the 2nd Interested Party to fulfil that expectation as the procuring entity which is constitutionally bound under Article 227 of *the Constitution* 2010--to ensure that procurement process is carried out in a system that is fair, equitable, transparent, competitive, and cost-effective.

11. That during the meeting on 5th June ,2023 the Applicant's representatives attended the meeting at the 2nd Respondent's board room, the evaluation committee responded that as far as they were concerned the process was above board. The Applicant submits that it learnt that its score was 97 which was a higher mark as compared to 81 points which was awarded to the 3rd Interested party based on the flawed evaluation process.

12. It is the Applicant's position that by failing to conduct due diligence and verify the mandatory requirements, as provided for in the tender documents, and awarding the tender to the 3rd Interested Party--without verifying the validity or authenticity of the mandatory technical documents provided by the bidder--the Respondent not only violated the provisions of Article 227 of *the Constitution* on the principles of public procurement, but also the Public Procurement Act and the Regulation therein and the mandatory requirement in the tender document.

13. The Applicant believed that in so far as this matter is concerned, the time to lodge a review with the Respondent started running on 5th June, 2023 after the meeting. The Applicant relies on the case of Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR wherein the High Court cited with approval the case of SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 and held that, "As regards how the date of occurrence of a breach is to be determined, I am persuaded by the decision by Elias JA of the English Court of Appeal in SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services Authority (2010) 2 CMLR 47 extensively discussed when time starts to run with respect to a breach in procurement proceedings as follows:

> " .... In Uniplex, the Court of Justice decided to adopt a test of discoverability, not a test which would result in time running from the happening of an event of which the victim might not

know. The paragraphs of the judgment in Uniplex which I wish to emphasize are paragraphs 30 and 31:

> "30. However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.
>
> 31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings."

I accept that the question under reply by the Court of Justice only required the Court to decide whether the three-month period began with the date of the date of the infringement or on the date when the claimant knew or ought to have known of the infringement, but it is clear that in paragraphs 30 and 31 the Court of Justice moved to consider the degree of knowledge necessary to constitute knowledge for the purpose of starting the three-month period.

The conclusion in paragraph 31 that time only starts to run once the unsuccessful tenderer can "come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings" reflects a number of decisions that the Court of Justice must have taken with respect to the test of discoverability. The most obvious question that arises for consideration, given that the unsuccessful tenderer has such a small window of time in which to start proceedings and given that the factual basis of a claim may be complex, is what happens if the information which the unsuccessful tenderer has is incomplete" It seems to me that in effect the Court of Justice resolves the problem of gaps in knowledge by treating the existence of an informed view as sufficient to bridge this gap. Once that is reached, there is no further threshold test in terms of prospects of success or indeed any other reason to escape the consequence of knowledge, such as lack of resources or failure to realize the true position in law, that can be taken into account. From this analysis it must follow that it is irrelevant that the unsuccessful tenderer's evidence is incomplete. The unsuccessful tenderer has the requisite knowledge once he has sufficient information to enable him to reach an informed view as to the matters stated in paragraph 31 of the judgment of the Court of Justice. Finally, the formulation provided by the Court of Justice, involving an informed view as to the appropriateness of bringing proceedings, may well mean that knowledge of some trivial breach not justifying the start of proceedings would not be enough..."

14. It is the Applicant submissions that adopting the 'test of discoverability' in the strictest sense--in this matter, the information supplied by the 2nd Interested Party in its letters dated 24th May, 2023 and 2nd June, 2023 as to the fairness, equitability, competitiveness, transparency and cost effectiveness of the procurement process was insufficient to enable the Applicant to establish whether there was any illegality which might form the subject-matter of proceedings.

15. Additionally, that it is in the aforesaid meeting of 5th June, 2023 that the Applicant learnt on express admission of the 2nd Interested Party, that they had failed to verify mandatory technical ISO Certifications and also that the Applicant had actually scored higher than the 3rd Interested Party, in

the evaluation stage. Therefore, that the time for lodging a request for review started running on 5th June, 2023.

16. According to the Applicant, it is on the above basis that a Request for Review was lodged with the Respondent on 8th June, 2023. However, as far as the Respondent's impugned decision to dismiss the same, on want of jurisdiction, is concerned, that on page 39 to 40 of the decision the Respondent stated as follows,

> "We note that the Applicant does not dispute receipt of the notification letter dated 24th May, 2023 wherein it was notified of its unsuccessfulness in the subject tender and award of the subject tender to the Interested Party. What the Applicant contends is that since it responded to the notification letter dated 24th May 2023 vide a complaint letter dated 25th May, 2023 and subsequent correspondence led to a meeting with the Respondents held on 5th June, 2023, correspondence lines were still open and time could only start running on 5th June, 2023 when material breach complained of was discovered."

17. In addition to the foregoing, that on page 41 of the decision, the Respondent held as follows,

> "From the contents of the above complaint letter dated 25th May 2023, it is clear to the Board that upon receiving the notification letter dated 24th May, 2023 the Applicant was aggrieved by the decision of the Respondent to award subject tender to the Interested Party since it believed that the procurement process was unfair...."

As such, it is our considered view that at the time of receipt of the notification letter dated 24th May, 2023 the Applicant was aware of the alleged breach of duty by the Respondents complained of in its letter dated 25th May, 2023 considering that parties were holding that meeting to address complaints raised by the Applicant on the alleged breach of duty by the Respondents following notification of the outcome of the evaluation of the subject tender on 24th May, 2023.

18. The Ex parte Applicant submits that the impugned decision is irrational, unreasonable, illegal, and against the Applicant's legitimate expectation on the following grounds: -

a. The Respondent did not take into account or consider relevant facts and legal arguments put forth by the Applicant and especially the fact that the 1st and 2nd Interested Parties notification letter dated 24th May, 2023 and the subsequent response to the Applicant's letter on 2nd June, 2023 did not provide sufficient information to establish whether there was any illegality which might form the subject-matter of proceedings.

b. The Respondent ignored and/or failed to appreciate the fact that the 1st and 2nd Interested Parties invited the Applicant for further review of the process on Monday 5th June, 2023 at NCPB Head Office (Board room) starting 9.00am which invitation generated in the Applicant a legitimate expectation that the complaint raised by the Applicant will be fully addressed to enable it decide on whether to pursue further review with the Respondent or be satisfied with whatever clarifications will be provided and as such the Respondent acted irrationally and unreasonably.

c. The Respondent in arriving at its decision to strike out the Applicant's Request for Review, disregarded express provisions of the law and/or failed to direct itself properly in law and especially Article 47 (1) and Article 50

(1) of *the Constitution* and Section 167 (1) of the *Public Procurement and Asset Disposal Act*, and as such it acted irrationally and unreasonably and the resultant decision is devoid of legality and therefore void.

d. The Respondent failed to call to its attention matters that it was bound to consider in arriving at its determination, it misinterpreted a statutory provision and in particular Section 167 (1) of the Public Procurement & Disposal Act 2015 specifically on the issue of when material breach complained of was discovered and as such it acted unreasonably.

e. The Respondent rendered a decision that defeated constitutional provisions under Article 47 (1) on the Applicant's right to fair administrative action, Article 50 (1) on right to fair hearing and Article 227 on the requirement to ensure that procurement process is carried out in a system that is fair, equitable, transparent, competitive and cost-effective and Section 167 (1) of the *Public Procurement and Asset Disposal Act* 2015 which allows the Applicant lodge a request for review on discovery of material breach hence the decision is so unreasonable and irrational therefore done in bad faith.

f. The Respondent's decision defeated Article 47(1), 50 (1) and 227 of *the Constitution* and Section 167 (1) of the *Public Procurement and Asset Disposal Act* 2015 and was a departure from the purpose of the aforementioned empowering provisions of law therefore unreasonable.

g. The determination of the respondent is therefore an illegality as it lacks basis in the relevant law. The decision exhibits manifest errors of law which ought not to be left to capsize justice.

h. There are serious violations of the fundamental rights of the Applicant in view of the applicant's legitimate expectation and rights as enshrined in the Bill of rights and in particular Article 47 (1), 50 (1) and 227 of *the Constitution* and Section 167 (1) of the *Public Procurement and Asset Disposal Act* 2015.

19. The Applicant relies on the case of Republic v Public Procurement Administrative Review Board; Ex Parte Madison General Insurance Kenya Ltd; Accounting Officer (KEBS) & another (Interested Parties) wherein the High Court cited with approval the case of Council of Civil Service Unions v Minister for the Civil Service (1985) A.C. 374,410 and held as follows at paragraph 43,"43. A person aggrieved by the decision of the Board has recourse before this court by dint of section 175 of the Act. The emphasis I would wish to lay here is that the recourse is one under the judicial review jurisdiction of this court and not an appellate one. The court, thus, would be exercising its supervisory powers over the board through sniffing for any whiff of illegality, irrationality or procedural impropriety. In Council of Civil Service Unions v Minister for the Civil Service (1985) A.C. 374,410 Lord Diplock stated as follows:

> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further

development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice."

The Respondent's Case

20. The Respondent opposed the Application. Towards that, the Respondents filed a Replying Affidavit sworn by James Kilaka on 20th July 2023. It is the Respondents case that it discharged/determined the issues in Request for Review No. 40 of 2023 within the provisions of the *Public Procurement and Asset Disposal Act*, 2015 and the principles enshrined under Articles 10 and 227 of *the Constitution* of Kenya.

21. The Respondent submits that the Applicant has not demonstrated to the Court that its finding/determination was materially influenced by an error of law, irrational, illegal, unreasonable, or marred by any procedural impropriety. It submits that the Ex-parte Applicant's motion is essentially a review of the merits of the decision of the Respondent and that the Applicant has not established that the Respondent acted unreasonably, irrationally or with misapprehension of the law.

22. The Respondent relies on the case of Republic v Public Procurement Administrative Review Board Exparte Giant Forex Bureau De' Change Limited & 2 others [2017] eKLR where the Court opined that,

> "That misapprehension, or error of law or fact, however, is not an issue within the judicial review purview of this court. This proposition was upheld by the Court of Appeal in the cited Kenya Pipeline Company Limited (supra) case in the following words:-
>
> > "In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly. The High Court erred in essence in treating the judicial review application as an appeal and in granting judicial review orders on the grounds which were outside the scope of Judicial Review jurisdiction."

23. It also relies on the book by Peter Kaluma, Judicial Review, Law Procedure and Practice, where page 46 enumerates as follows,

> "The remedy of judicial review is radically different from those of review and appeal. Judicial Review is not an appeal from a decision but a review of the decision making process and the legality of the decision making process itself. When determining an appeal, the court is concerned with the merits of a decision. Conversely, in Judicial Review the courts exclusive concern is with the legality of the administrative action or decision in question. Thus instead of substituting its own decision for That of some other body, as happens in appeals, the court in an application for judicial review is concerned only with the question as to whether or not the action under attack is lawful or should be allowed to stand or be quashed."

24. According to the Respondent, this distinction is reiterated by the Court of Appeal in Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd [2002] eKLR as follows,

> "Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

25. The Respondent also relies on the case of Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 where the court held as follows:"From the foregoing it is clear that the 1st Respondent considered all the issues raised by the applicants before proceeding to dismiss their request for review. In my view the applicants are asking me to look at the 1st Respondents said decision and reach a conclusion that the 1st Respondent erred both in fact and in law when it reached that decision. The question would then be whether this court acting as a judicial review court has powers to interfere with the decision...This court is being asked to determine whether the 1st Respondent misapprehended the law as relates to the technical evaluation and award of scores thereunder. In my view, such an enquiry would amount to sitting on appeal over the decision of the 1st Respondent. Indeed, Parliament was alive to the distinction between judicial review and appeal in procurement proceedings when it provided in Section 100 of the Act that: -

> 1. A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision.
>
> 2. Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court, and the decision of the High Court shall be final.

26. That their (the Respondent) powers under Section 173 of the *Public Procurement and Asset Disposal Act*, the Respondent can: (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.

27. It further relies on court of Appeal finding in Pipeline Ltd vs. Hyosung Ebara Company Ltd [2012] eKLR; held that,

> "The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review

envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with."

The 1st & 2nd Interested Party's Case

28. The 1st and 2nd Interested Party, in further opposing the Application, filed their Replying Affidavit dated 12th July, 2023 wherein they averred that at the time of receipt of the notification letter dated 24th May, 2023 the Ex parte Applicant was aware of the alleged breach of duty, by the 2nd Interested Party, as set out in the Ex Parte Applicant's letter dated 25th May, 2023.

29. That the Ex parte Applicant admits in its Affidavit, that the follow up meeting that was held on 5th June, 2023 was held to address the complaints raised by the Ex parte Applicant on the alleged breach of duty by the 2nd Interested Party following notification of the outcome of evaluation of the subject tender on 24th May, 2023.

30. They argue that if the Ex parte Applicant wished to seek orders from the Board the Ex parte Applicant ought to have approached the Board by way of a Request for Review within 14 days, and which allowed time had already lapsed by the time it filed its Request for Review on 9th June, 2023.

31. It is the 1st and 2nd Interested Party's case that the Ex Parte Applicant has no locus to commence Judicial Review proceedings before this Honorable Court because doing so, will be allowing the Ex Parte Applicant to seek administrative review through the backdoor and in any event the *Public Procurement and Asset Disposal Act* has a dispute resolution mechanism with explicit timelines under the Act; thus this suit is an abuse of the process of the Court. That the Ex parte Applicant is therefore misguiding this court with its trivial misconstruction on the manner in which the Respondent exercised its mandate; an issue that this Court and Superior Courts have consistently and severally held that the Respondent has no jurisdiction to hear review(s) filed outside 14 days.

32. The 1st and 2nd Interested Party believe that the Ex parte Applicant does not have an arguable case since their gravamen involves an interpretation of the obligations to provide ISO (ISO 9001 and ISO 27001:2013) by bidders; to which they (1st and 2nd Interested Party) now clarify as follows: (a) The bidder was only required to provide certificates, which were not to be subjected to verification. (b) Any bidder who provided a copy was supposed to be awarded full marks (15 marks) considering no specific body had been cited to standardize uniformity in evaluation. (c) Any bidder who did not provide a copy would lose out on the full marks (15 marks) and be awarded no mark (0 Marks).

33. It is their case that Ex Parte Applicant is therefore misleading this Court, as ISO Certification was not a mandatory requirement in the tender document. The ISO Certification requirement was to be evaluated under technical evaluation and a score of Fifteen (15) Marks awarded to bidders who submitted copy of ISO Certification documents from any authorized entity be it local or international.

34. Further, that without prejudice to the foregoing, neither the tender document nor the Addenda indicated that the ISO Certification documents would be verified; and this assertion is misguided and only meant to mislead this Honourable Court into issuing adverse orders which the Ex-parte Applicant is underserving.

35. They submit that the 2nd Interested Party, and 3rd Interested Party have already duly signed a contract dated 6th July, 2023 hence the Ex parte Applicant Application herein has been overtaken by events and ought to be dismissed so as to prevent the time of this Honourable Court from being wasted by a busy body with misguided and/or trivial complaints.

The 3rd Interested Party's Case

36. The 3rd Interested Party averred that in the Request for Review, the Ex Parte Applicant indicated that upon receipt of a letter of notification of its unsuccessful bid dated 24th May, 2023 it lodged a complaint vide a letter dated 25th May, 2023 seeking corrective action to address the above breaches in the procurement process. That the 1st Interested Party responded to the letter indicating that "after a review of the tender process, it was convinced that the process was conducted in accordance with the Public Procurement and Asset Disposal Regulations Act and *the Constitution* of Kenya". Also, that the 2nd Interested Party proceeded to invite the Ex Parte Applicant for meeting for a further review of the process on 5th June, 2023. It was upon the dissatisfaction with the feedback given in the said meeting that the Ex Parte Applicant filed the Request for Review No.40 of 2023 on 8th June, 2023.

37. It was the 3rd Interested Party's submission that due process was followed in the administrative review by the Respondent, since parties were notified of the Request for Review, and that a hearing was conducted on 22nd June, 2023. That upon considering the request and responses, written and orally highlighted submissions, the confidential tender documents, it rendered its Decision Number 40 of 2023 dated 29th June, 2023--striking out the Application for want of jurisdiction. In the said decision, the Respondent further extensively documented its review of the tender process including the evaluation process, the evaluation report, due diligence, the relevant professional opinions, and notification to tenderers.

38. To the 3rd Interested Party, the Ex parte Applicant has filed the instant Notice of Motion urging the Honourable Court to quash the disputed decision on grounds that it was unreasonable, irrational, and illegal. They (3rd interested party) invites this court to apply the test of Wednesbury unreasonableness, which has been stated that, the impugned decision must be objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated.

39. That in the Republic v Law Society of Kenya Disciplinary Tribunal & another [2018] eKLR, the Honourable Judge cited the case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 in defining irrationality:

> "Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision".

40. Further, that the case held that:

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality".

41. The 3rd interested party further submits that the decision of the Respondent specifically found that the Ex parte Applicant did not discover the alleged breaches during the meeting with the 1st Interested Party on 5th June, 2023 as they were the same issues raised in the Complaint letter and addressed in the said meeting. That from the reasoning in the judgement, the letter dated 25th May, 2023 confirmed that the Ex parte Applicant did not discover the breaches referred to in the meeting held with the 1st Interested

Party on 5th June, 2023. From the foregoing, it is evident that the respondent expansively reviewed and considered the evidence provided by the Parties, analyzed the evidence before it, and reached a decision to strike out the Application for want of jurisdiction.

42. The 3rd interested party submits that the Respondent was not convinced that the occurrence of the breach was discovered on 5th June, 2023.The ex parte Applicant was aware of the breaches alleged as of 24th May, 2023 because they expressly wrote to the 1st Interested Party on 25th May, 2023 indicating the alleged breaches, which would later form the grounds for the Request for Review.

43. According to the 3rd Interested Party, time did not stop running when the parties were invited for a meeting on 5th June, 2023.That Section 167 (1) of the Public Procurement and Asset Disposal Regulations Act stipulates that:

> "...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...".

44. That Section 203 (c) of the Public Procurement and Asset Disposal Regulations, 2020 also provides that a Request for Review shall be made within fourteen days of—(i) the occurrence of the breach complained of, where the request is made before the making of an award; (ii) the notification under section 87 of the Act; or (iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

45. It is their (3rd Interested Party's) position that the statutory timelines relating to administrative action on Public Procurements and Assets Disposal matters are cast in stone and cannot be varied. The 3rd Interested Party invite the court to consider the case of Aprim Consultants v. Parliamentary Service Commission & Another, CA. No. E039 of 2021, where the Court stated that section 175 was couched in mandatory terms and expressed itself as follows:

> "A perusal of section 175 of the Act reveals Parliament's unmistakable intention to constrict the time taken for the filing, hearing and determination of public procurement disputes in keeping with the Act's avowed intent and object of expeditious resolution of those disputes. Parliament was thus fully engaged and intentional in setting the timelines in the Section".

46. It is further their submission that the Ex parte Applicant is misleading the Honourable Court that they did not have sufficient information on the alleged breaches to enable them to make an informed decision on whether to seek administrative review. That from the reading of the letter sent to the 1st and 2nd Interested Parties seeking corrective action to alleged breaches, it is very clear that the Ex parte Applicant had the necessary information.

47. The 3rd Interested Party submits that the test of discoverability as interpreted by the Ex parte Applicant in their written submissions would lead to an abuse of the statutory timelines, hence defeating the purpose of the law, if the test is applied in the instant case.

48. That the letter of notification of unsuccessful bid to the Ex parte Applicant dated 24th May, 2023 stipulated as follows:

> "Your bid was unsuccessful as your price was not the most competitive. We also take this opportunity to notify you that the tender for supply installation, customization and

commissioning of of dynamic business 365 central was awarded to Ms. Dynasoft Business Solutions Ltd at their total price of Kshs. 24,910,678.00 inclusive of VAT."

49. The notification gave sufficient information within the ambit of the law, and was compliant with Section 87 (3) of the Act which provides that:

> "When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof".

50. The 3rd Interested Party maintains that the statutory timeline started running from 25th May, 2023 and lapsed on 7th June, 2023. That the Respondent therefore properly reached its decision after according all the parties to the Request for Review a hearing, and rightly applying the law of evidence. They relied on the case of Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR where the Honorable Judge held that Judicial review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

Analysis and determination

51. From the foregoing, the following issues crystalize for determination:

    1. Whether the Respondent breached the law.
    2. When time starts running.
    3. Whether the doctrine of discoverability and legitimate expectation applies.
    4. Whether the orders sought can be granted.

52. In the Ugandan case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 in which the Court citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and an Application by Bukoba Gymkhana Club [1963] EA 478 at 479 held that:

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

53. The order of Mandamus is an equitable remedy that serves to compel a public authority to perform its legal duty and it is a remedy that controls procedural delays. The circumstances under which an Order

of Mandamus can be issued was stated in the Court of Appeal case of Kenya National Examination Council Vs Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR as: -

> " The Order of Mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

54. It is the ex parte Applicants case that upon receipt of a letter of notification of its unsuccessful bid dated 24th May 2023, from the 1st Interested Party it lodged a complaint vide a letter dated 25th May 2023 with the 2nd Interested Party seeking corrective action to address breaches in the procurement process as follows:

> " I participated in the procurement process for The upgrade of Ms dynamics Navision 2018 to Ms Dynamics 36.
>
> Business central and submitted a competitive bid that was within the budget and met all the requirements specified in the Request for Proposal (RFP). However, I was disappointed to learn that my bid was unsuccessful.
>
> Upon reviewing the procurement process, I have noticed some discrepancies that were not in accordance with standard procurement procedures. The following are the issues that led me to believe that the procurement process was unfair:
> The evaluation criteria were unclear, and the weightage assigned to the financial evaluation criterion was not disclosed in the RFP.The evaluation committee did not verify the mandatory ISO certifications for the winning bidder.The evaluation committee failed to identify any weaknesses or deficiencies in the winning bidder's proposal.The explanation provided for the unsuccessful bid was inadequate, and the feedback given was too generic and not specific enough to allow corrective actions."

55. The 2nd Interested Party responded to the letter on 2nd June 2023 indicating that "after a review of the tender process, it was convinced that the process was conducted in accordance with the Public Procurement and Asset Disposal Regulations Act and *the Constitution* of Kenya". The 2nd Interested Party then proceeded to invite the ex parte Applicant for meeting for a further review of the process on 5th June 2023.

56. The Applicant has fronted the argument of discoverability at Paragraphs 14 to 17 of the Affidavit of Geoffery Rono dated 7th July 2023 wherein he depones as follows:

> " 14. That on 5th June 2023, the Applicant's Representatives attended the meeting at the 2 Interested Party's board room as invited whereat it raised issues as indicated in the its complaint letter dated 25" May 2023 whereat the evaluation committee responded that as far as they were concerned the process was above board. (I produce a true copy of the list of attendees to the said meeting on 5th June 2023 marked "GR 8".

15. That on the very specific and key issue of the mandatory ISO Certifications as provided under Clause 5 of the tender document, and Addendum 1 dated 131 April 2023 particularly on Technical Evaluation ISO Certifications and Qualifications of the Project Manager, the Applicant posed a question to the evaluation committee on whether they verified the mandatory ISO and the evaluation committee admitted that they failed to verify the mandatory ISO certifications.

16. That do confirm that it is the Applicant's contention that it is in the aforesaid meeting of 5th June 2023 which was on invitation of the 2nd Interested Party that the Ex-parte Applicant learnt on admission of the 2nd Interested Party's that it failed to verify during evaluation whether the 3rd interested party herein met the mandatory requirements that: -

    a. bidders must be ISO 9001 and ISO 27001:2013 certified;

    b. bidders' Project Manager must be ISO 27001 certified.

17. That I also do confirm that it is on the same meeting that the Ex-parte Applicant learnt that its score was 97 compared to 81 points awarded to the 3rd interested party which score was arrived at by the 2nd Interested Party on the basis of the aforesaid flawed evaluation of bidders contrary to the terms of the tender document, the principles of the public procurement and *the Constitution* of Kenya.

57. The Applicant submits that on the said 5th June 2023, it's Representatives attended the meeting at the 2nd Respondent's board room which began at 12 pm whereat it sought clarification as indicated in the its complaint letter dated 25th May 2023 whereat the evaluation committee responded that as far as they were concerned the process was above board. As regards the key issue of the mandatory ISO Certifications as provided under Clause 5 of the tender document, and Addendum 1 dated 13th April 2023 particularly on Technical Evaluation ISO Certifications and Qualifications of the Project Manager, the Applicant posed a question to the evaluation committee on whether they verified the mandatory ISO Certifications and the evaluation committee's general response was "they lacked capacity" to verify the mandatory ISO certifications.

58. It is in the aforesaid meeting that the Applicant further learnt that its score was 97 which was a higher mark as compared to 81 points which was awarded to the 3rd interested party based on the flawed evaluation process.

59. The English Court of Appeal in SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services Authority (2010) 2 CMLR 47 extensively discussed when time starts to run with respect to a breach in procurement proceedings as follows:

> " .....In Uniplex, the Court of Justice decided to adopt a test of discoverability, not a test which would result in time running from the happening of an event of which the victim might not

know. The paragraphs of the judgment in Uniplex which I wish to emphasize are paragraphs 30 and 31:

> 30 However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.
>
> 31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings. " I accept that the question under reply by the Court of Justice only required the Court to decide whether the three-month period began with the date of the date of the infringement or on the date when the claimant knew or ought to have known of the infringement, but it is clear that in paragraphs 30 and 31 the Court of Justice moved to consider the degree of knowledge necessary to constitute knowledge for the purpose of starting the three-month period.

The conclusion in paragraph 31 that time only starts to run once the unsuccessful tenderer can "come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings" reflects a number of decisions that the Court of Justice must have taken with respect to the test of discoverability. The most obvious question that arises for consideration, given that the unsuccessful tenderer has such a small window of time in which to start proceedings and given that the factual basis of a claim may be complex, is what happens if the information which the unsuccessful tenderer has is incomplete" It seems to me that in effect the Court of Justice resolves the problem of gaps in knowledge by treating the existence of an informed view as sufficient to bridge this gap. Once that is reached, there is no further threshold test in terms of prospects of success or indeed any other reason to escape the consequence of knowledge, such as lack of resources or failure to realize the true position in law, that can be taken into account. From this analysis it must follow that it is irrelevant that the unsuccessful tenderer's evidence is incomplete. The unsuccessful tenderer has the requisite knowledge once he has sufficient information to enable him to reach an informed view as to the matters stated in paragraph 31 of the judgment of the Court of Justice. Finally, the formulation provided by the Court of Justice, involving an informed view as to the appropriateness of bringing proceedings, may well mean that knowledge of some trivial breach not justifying the start of proceedings would not be enough..."

60. The Applicant has not furnished this court with any evidence of what transpired in the critical meeting that was held on 5th June 2023. No minutes or resolutions or a follow up mail was furnished to the court to demonstrate that it is at this meeting that the Applicant came to learn of weighty issues that it is raising. All the Applicant has given the court as evidence is the letter dated 2nd June 2023 and the list of the officials who attended the meeting as annexures GR 7 and 8.

61. The Applicant has not proved the fact that it is at this meeting that it came to learn of the critical information that would have helped it to take the appropriate action in time.

62. The Applicants argument that the time to lodge a review with the Respondent started running on 5th June 2023 after it discovered critical information at the meeting at the 2nd Interested Party's board room cannot avail in the circumstances. Had the Applicant tendered cogent evidence to prove that it discovered the critical information on 5th June 2023, then this court would have returned a finding that time indeed started running then. The Applicant did not fulfil the principles as set out in the case of SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156.This argument must fail and I so find.

63. The parties herein were notified of the Request for Review as a result of which Parties attended the session on 22nd June 2023 with their respective advocates. Upon hearing the Parties and upon considering the written and oral highlighting of the submissions, the confidential tender documents, the Respondent rendered its decision striking out the Application for want of jurisdiction through a ruling dated 29th June 2023.

64. Section 167 (1) of the *Public Procurement and Asset Disposal Act* is clear that:

> " ...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...".

65. Section 203 of the Public Procurement and Asset Disposal Regulations, 2020 also provides that a Request for Review shall:

> (c)(i) be made within fourteen days of the occurrence of the breach complained of, where the request is made before the making of an award; (ii) the notification under section 87 of the Act; or (iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

66. It is this court's finding and I so hold that the statutory 14 days started running from the 25th May 2023 and lapsed on 7th June 2023 for the ex parte Applicant to seek administrative review before the Board or to challenge the decision to award the 3rd Interested Party the subject tender.

67. The 14 days' window to lodge a Request for Review had already lapsed by the time the Applicant filed its Request for Review. This court cannot issue an order that a declaration that the Applicant's Request for Review dated 7th June 2023 and filed on 8th June 2023 was properly before the Respondent within the meaning of Section 167 (1) of the *Public Procurement and Asset Disposal Act* of 2015 in the circumstances.

68. The Exparte Applicant's decision to raise its concerns through the letter dated 25th May 2023 and to attend meetings as invited by the 2nd Interested Parties is not in any way illegal. From the reading of the letter sent to the 1st and 2nd Interested Parties seeking corrective action of the alleged breaches alongside the submissions that it fronted before the board, it is very clear to me that the ex parte Applicant was seized of the necessary information which it would have used had it elected to in good time to pursue what it wanted under Section 167 (1) the *Public Procurement and Asset Disposal Act*. It opted not to.

69. It is my finding that the ex parte Applicant is misleading the Honourable Court that they did not have sufficient information on the alleged breaches to enable them to make an informed decision on whether to seek administrative review in time.

70. What the Applicant ought to have done which it failed to do as they engaged in meetings was to set a Section 167 (1) the *Public Procurement and Asset Disposal Act* alarm or a reminder" behind the scene that would have reminded it that:

> " ...it had to 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".

71. According to the Applicant, the invitation for a further review by the 2nd Interested Party was a clear and unambiguous representation upon which it was reasonable for Applicant to rely on it legitimately expecting that its complaint will be fully clarified in the meeting to enable it decide on its next course of action and that the 2nd Interested Party to fulfil that expectation. The Expartes' reasoning or argument on the right to legitimate expectation is misplaced.

72. The Supreme Court of Kenya in Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others SC Petition Nos. 14, 14A, 14B & 14C of 2014 held as follows: -

> " Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation."

73. In Republic vs. Kenya Revenue Authority Ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012 it was held that:

> " On the issue of legitimate expectation, the Applicant submitted that it met all the pre-requisite conditions and obtained all the documents necessary for the importation of sugar. The Applicant argued that it had received an assurance that after meeting the necessary conditions its legitimate expectation would be protected and not breached. In reply the Respondent submitted that it did not make any representation to the Applicant that it would clear its imports without imposing conditions permitted in law or release them on terms which contravene customs law or practice.
>
> According to Harry Woolf, Jeffrey Jowell and Andrew Le Sueur at page 609 of the 6th Edition of De Smith's Judicial Review, 'Such an expectation arises where a decision maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken)'. It follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner. For the promise to hold, the same must be made within the confines of law. A public body cannot make a promise which goes against the express letter of the law."

74. The Ex Applicant cannot argue that it had a legitimate expectation in the circumstances. Indolence are the biggest enemy of the doctrine of legitimate expectation. The fourteen days' window is cast on stone and no amount of deliberations or discussions in can generate reasons for the enlargement of time or create a legitimate expectation for an aggrieved party. The Exparte Applicants' issues were raised before a public body which had no mandate to make a promise which goes against the express letter of the law. To allow the Applicants argument would water down the doctrine of legitimate expectation and render Section 167 (1) the Public Procurement and Asset Disposal Regulations Act otiose. This court will not countenance that.

75. This court finds no procedural impropriety in the manner in which the Respondent conducted the administrative review. The Exparte Applicant cannot turn around and blame the Respondent for their indolence at this point in time or at all.

76. This is a judicial review and the court has no jurisdiction to delve into the merits of the decision of the Respondent as invited by the Exparte Applicant. To do so would mean that this court would be sitting on appeal which it declines to do.

77. This court is guided by the recent Supreme Court in Petition No. 6(E007) of 2022 Edwin Dande & Others v The Inspector General, National Police Service & Others where the court addressed the issue of 'Whether the scope of judicial review has evolved to include determination of merit review of an administrative decision' [page 29]. The summary is as follows:

    (a) Prior to the promulgation of *the Constitution* in 2010, judicial review was found in Sections 8 & 9 of the *Law Reform Act* and Order 53 of the CPR that addressed the procedural basis [see paragraph 77-page 30].

    (b) Judicial review was entrenched in *the Constitution* of 2010 to a substantive and justiciable right under Article 47 [see paragraph 78-page 301. The court concluded at paragraph 85 [see page 33]and held as follows:

> "It is clear from the above decisions that when party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the Court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se."

78. In any event, I am satisfied the 1st and 2nd interested parties evidence that they have already duly signed a contract dated 6th July 2023 hence the Ex parte Application herein has been overtaken events.

79. Having satisfied myself that the 1st and 2nd interested parties have already entered into a contract, the prayer for an order of mandamus to issue compelling the Respondent to hear and determine on merits the Applicant's Request for Review dated 7th June 2023 and filed with the Respondent on 8th June 2023 will amount to an exercise in futility. This court has a duty to prevent the unnecessary usage of the scarce resources of the Government. I decline to grant the order.

Disposition

80. The Applicant has not demonstrated how the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. The Application lacks merit.

Order

81. The Notice of Motion Application dated 7th July 2023 is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF AUGUST 2023

.....

J. CHIGITI (SC)

JUDGE