Republic v Public Procurement Administrative Review Board & 3 others; Four M Insurance Brokers Limited (Exparte Applicant) (Miscellaneous Application E121 of 2023) [2023] KEHC 26953 (KLR) (Judicial Review) (18 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26953 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION E121 OF 2023

JM CHIGITI, J

DECEMBER 18, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

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

SEDGWICK KENYA INSURANCE BROKERS LIMITED ..... 2ND RESPONDENT

THE MANAGING DIRECTOR, KENYA PIPELINE COMPANY LIMITED ..... 3RD RESPONDENT

KENYA PIPELINE COMPANY LIMITED ..... 4TH RESPONDENT

AND

FOUR M INSURANCE BROKERS LIMITED ..... EXPARTE APPLICANT

JUDGMENT

1. Kenya Pipeline Company Limited (hereinafter KPC) invited sealed tenders from qualified and interested tenderers in response to Tender number KPC/PU/OT-298/FINANCE/NBI/23-26 for provision of Insurance Brokerage Services for period between 1st July, 2023 to 30th June, 2023 (hereinafter the tender).

2. The Ex-Parte Applicant and 2nd Respondent participated in the tender and they were ranked as the 4th Lowest Bidder, and the 1st Lowest Bidder respectively - by the 3rd and 4th Respondents.

3. The 2nd Respondent was unable to place the All Industrial Risk Insurance Policy Cover as was required of it by the 3rd and 4th Respondents; and thus unable to enter into a contract. The 3rd and 4th Respondents notified the 2nd, 3rd, and 4th (the Ex-Parte Applicant) the Lowest Evaluated Tenderers asking them to confirm if they are able to place cover considering the 2nd Respondent's inability to deliver.

4. The Ex-parte Applicant's underwriter confirmed it is able to place premiums and hence the Ex-Parte Applicant was declared the successful tenderer. The Ex-Parte Applicant was notified by the 3rd and 4th Respondent of its success. Flowing from the notification to the Ex-Parte Applicant, a contract was signed between the Ex-Parte Applicant and the 3rd and 4th Respondent on 2nd October, 2023.

5. The 2nd Respondent challenged the 3rd Respondent's decision with respect to the All Risks Industrial Insurance Policy in relation to the subject tender by filing a request for review before the 1st Respondent, being PPARB Application No. 77 of 2023 (hereinafter the Application).

6. In a decision rendered on 2nd November, 2023 the 1st Respondent allowed the application.

7. The Applicant is aggrieved by the 1st Respondent's decision and seeks to invoke the supervisory jurisdiction of this honorable court through a Notice of Motion dated 6th November, 2023 wherein the Ex-parte Applicant seeks:

    1. The Honourable Court be pleased to grant the Ex-Parte Applicant:

        a. An order of Certiorari to remove into the High Court and quash the 1st Respondent's decision dated 2nd November 2023 in Public Procurement Administrative Review Board Application No. 77 of 2023 with Respect to the All Risks Industrial Insurance Policy in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for the provision of Insurance Brokerage Services for the period 1st July, 2023 to 30th June, 2025.

        b. An order of Prohibition directed at the 3rd and 4th Respondent prohibiting and restraining it from implementing the decision of the 1st Respondent handed down on 2nd November, 2023 by proceeding to conclude the procurement proceedings and executing a contract with the successful tenderer with Respect to the All Risks Industrial Insurance Policy in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for the provision of Insurance Brokerage Services for the period 1st July, 2023 to 30th June, 2025.

        c. An order of Mandamus directing the 3rd and 4th Respondents to proceed with the implementation and performance of the Contract dated 2nd October, 2023 entered into between the Ex-Parte Applicant and the 3rd and 4th Respondents with Respect to the All Risks Industrial Insurance Policy in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for the provision of Insurance Brokerage Services for the period 1st July 2023 to 30th June 2025.

    2. This Honourable Court do issue any other Orders it may deem fit to issue.

    3. The costs of this Application be provided for.

8. The Applicant also seeks for an order that pending the hearing and determination of the substantive Notice of Motion in this matter, the contract entered into between the Ex-Parte Applicant and the 3rd and 4th Respondents dated 2nd October, 2023 with Respect to the All Risks Industrial Insurance Policy

in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for the provision of Insurance Brokerage Services for the period 1st July, 2023 to 30th June, 2025 to continue to be valid and in force.

9. The Application is predicated on the Grounds as set out in the Chamber Summons, the Grounds as well set out in the Statement of Facts, and the Grounds as set out in the Supporting Affidavit of Dennis Nyongesa all dated 6th November, 2023 in urging this Honourable Court to allow the Notice of Motion dated 6th November, 2023.

The Applicant's case:

10. The Applicant's case is that in arriving at the impugned decision, the 1st Respondent acted ultra vires and failed to correctly interpret the provisions of sections 82, 87, 134, 135, 136 and 167 (4) (c) of the Act, which clearly demonstrate that the 1st Respondent lacked jurisdiction to hear and determine the review application by the 2nd Respondent, and that no contract could be entered into between the successful tenderer and the 3rd and 4th Respondents as directed by the 1st Respondent.

11. In arriving at the impugned decision, the 1st Respondent failed to correctly interpret Section 167(4) (c) of the Act which divests it of jurisdiction where a contract has been signed in line with Section 135 of the Act.

12. In arriving at the impugned decision, the 1st Respondent failed to correctly interpret sections 82, 87, 135, 136 and Regulation 23(a) of the Regulations, 2020.

13. In arriving at the impugned decision, the 1st Respondent committed an illegality and acted irrationally by misinterpreting facts and law in holding that the Ex-Parte Applicant in signing the contract on 8th September, 2023 before the lapse of 14 days' standstill period after being notified of being a successful bidder makes the contract a valid contract within the provisions of section 135 whereas the actual contract was signed on 2nd October 2023.

14. In arriving at the impugned decision, the 1st Respondent defied logic by holding that the Ex-Parte Applicant's and 3rd and 4th Respondent's preliminary objection was a proper preliminary objection since the facts pleaded are correct and unopposed by the 2nd Respondent but still went ahead to discuss the facts and dismiss the Preliminary objection.

15. In arriving at the impugned decision, the 1st Respondent incorrectly held that the 2nd Respondent had not refused to sign the contract with the 3rd and 4th respondent but instead had varied its acceptance of the award, whereas it was clear that the 2nd Respondent underwriter could not place cover at the premiums stated in the Form of tender thus implying the 2nd Respondent's refusal to sign the contract.

16. Further, that the 1st Respondent failed to exercise its discretion reasonably and in good faith in ordering the 3rd and 4th Respondent to enter into a contract with the successful tenderer for the subject tender, whereas there is a legally valid successful tenderer being the Ex-Parte Applicant.

17. That the 1st Respondent acted unreasonably and illegally in holding that the award to the 2nd Respondent was still valid and in place, the award having not been cancelled and/or revoked and tenderers not notified of the revocation whereas there is no provision in law providing for such an obligation.

18. It is contended that the 1st Respondent acted illegally and unreasonably by holding that the award to the Ex-Parte Applicant was null and void.

19. By the said impugned decision, the 1st Respondent improperly fettered its discretion by failing to pay homage to section 167(4)(c) of the Act and therefore acted ultra vires the Act.

20. To the Applicant, the 1st Respondent's conduct amounts to breach of the rule of law, the Applicant's legitimate expectation and fair administrative action under Articles 10 and 47 of *the Constitution* as read together with the provisions of the *Fair Administrative Action Act*.

21. Also, that the impugned decision is misconceived, erroneous, and an illegality having been rendered based on the erroneous interpretation of section 167 (4) (c) of the Act as read together with Article 227 (1) of *the Constitution*.

22. The Application dated 6th November, 2023 has also been supported by the 3rd and 4th Respondent through the Replying Affidavit of Joe Sang, which reliance is also place on.

23. The Application has however been opposed by the 1st Respondent through the Replying Affidavit of James Kilaka and the 2nd Respondent through the Replying Affidavit of Sammy Kiragu.

24. Having analyzed the Application vis-à-vis the Responses thereto, it is submitted that the following issues present themselves for determination:

    i. Whether the Board Acted without jurisdiction in hearing and determining Application No. 77 of 2023 by the 2nd Respondent;

    ii. Whether the Judicial Review Application is merited and ought to be allowed as prayed.

Issue No. 1: Whether the Board Acted without jurisdiction in hearing and determining Application No. 77 of 2023:

25. It is opportune at this stage to appreciate that the review envisaged by the Ex-Parte Applicant is under the special jurisdiction of judicial review with the court's mandate being exercise of supervisory jurisdiction over the Board, a quasi-judicial body within the legally established scope.

26. That scope was aptly captured by the court in Pastoli v Kabale District Local Government Council & Others (2008) 2 EA 300 where the court held;

> "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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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." (our emphasis)

27. Contrary to the allegations by the 1st and 2nd Respondents, the Ex-Parte Applicant does not seek to appeal the decision of the 1st Respondent but purely seeks that this Honourable Court do exercise its

supervisory jurisdiction over the 1st Respondent impugned decision of 2nd November, 2023 as provided for under Section 175 of the Public Procurement and assets Disposal Act.

28. Through the Application and the supporting documents, it is the Applicants case that the 1st Respondent acted illegally, by incorrectly interpreting the provisions of section 87, 134, 135, 136 and 167(4) (c) of the Act and Regulation 23(a) of the Regulations to the Act, 2020.

29. In seeking to demonstrate that the 1st Respondent acted without jurisdiction in rendering itself in the decision of 2nd November, 2023 the subject of this proceedings the Applicant relies on the case of Republic v Public Procurement Administrative Review Board & another Ex parte Intertek Testing Services(EA) Pty Limited & Authentix Inc; Accounting Officer, Energy and Petroleum Regulatory Authority & another [2022] eKLR, where the Court quoted with approval the case of In Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR, where the Court of Appeal stated that:

> " The distinction between judicial review and an appeal is not a novel issue in our jurisdiction. It is a well-trodden path. In Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR, the Court of Appeal stated;
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> > "Judicial review is concerned with the decision making process, not with the merit 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 the 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".

30. It is the Ex-Parte Applicant's case that the Board lacked jurisdiction to hear and determine the Application by the 2nd Respondent before it. That under the provisions of Section 167(4) of the Act on the basis that there is an already signed Contract that was indeed signed on the 2nd October, 2023 between the Ex-Parte Applicant, and the 3rd and 4th Respondent.

31. The contract in place was executed between the Respondents and the Interested Party on the 2nd October, 2023 as submitted by the 2nd Respondent. This is a fact that was not contested by the 2nd Respondent.

32. The board did not have to go into the facts in deciding the Preliminary Objection as it did in its ruling of 2nd November, 2023. This was an illegality by the 1st Respondent after holding that the Preliminary Objection was proper, but still went to investigate the fact. It was held in the case of Zipporah Njoki Kangara v Rock and Pure Limited & 3 others [2021] eKLR, where it was held that:

> " A preliminary objection can only be raised on a pure point of law and must not be blurred with factual details that can be subjected to contest in any way that can be proved by way or evidence. Reference is made to Mukisa Biscuit Manufacturing Co. Ltd – Versus - West End Distributors Ltd. (1969) EA 696. A preliminary may only be raised on a pure point of law, the Supreme Court in Aviation & Allied Workers Union Kenya - Versus - Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, [2015] eKLR, held that "Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the

Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."

33. In the case of Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR: -as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia: -

    i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

    ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

    iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

34. The 1st Respondent having held that the Preliminary Objection by the 3rd and 4th Respondent is proper, ought not to have gone to the facts as it did. It ought to have decided the preliminary objection on a crisp point of law, whether it had jurisdiction to hear and determine the Request for Review in light of an existing contract executed on the 2nd October, 2023. The 1st Respondent therefore acted illegally as submitted by the Ex-Parte Applicant.

35. The Applicant argues on a without prejudice basis that the 1st Respondent misapprehended the facts and law in holding that the Contract of 2nd October, 2023 was executed by the Ex-Parte Applicant on 8th September, 2023 which is denied, the Contract cannot have deemed to have been executed without the 3rd and 4th Respondent's execution which happened on the 2nd October, 2023.

36. In the case of Republic v Public Procurement Administrative Review Board; Ex parte: Madison General Insurance Kenya Limited; Vice Chancellor, Kenyatta University & another (Interested Parties) [2022] eKLR, it was held that:

> " The question as to when a procurement contract is executed does matter and it is material because it is a question that goes to the jurisdiction of the respondent to determine the application or the request for review of a procurement process. The law on this question is section 167(4) of the Act which states as follows: 167. (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 62 of this Act; and (c) where a contract is signed in accordance with section 135 of this Act. (Emphasis added).
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> Section 167 (4) (c) is more or less self-explanatory and for our purposes it is fairly clear that the respondent is deprived of jurisdiction to determine a request for review if a procurement contract has been signed in accordance with section 135 of the Act.
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> Section 135 to which reference has been made states as follows: 135. Creation of procurement contracts (1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer. (2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings. (3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the

giving of that notification provided that a contract shall be signed within the tender validity period. (4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties. (5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid. (6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum — (a) Contract Agreement Form; (b) Tender Form; (c) price schedule or bills of quantities submitted by the tenderer; (d) Schedule of Requirements; (e) Technical Specifications; (f) General Conditions of Contract; (g) Special Conditions of Contract; (h) Notification of Award. (7) A person who contravenes the provisions of this section commits an offence. Section 135 (1) is more or less an embodiment of the general principle of contract that a contract is formed the moment the offer is accepted and signing of a contract document is, no doubt, one of the means of expressing such acceptance. As far as the procurement process is concerned, the signing of the contract document would signify the end of the procurement process. (our emphasis)

37. The Applicants case is that the 1st Respondent acted illegally in deciding that the it had jurisdiction to hear and determine the Application despite the preliminary objection on record being on a pure point of law with uncontested fact and the 1st Respondent went ahead to interrogate questions of facts.

38. This Court ought to be guided by the decision in Republic v Public Procurement Administrative Review Board; Ex parte: Madison General Insurance Kenya Limited; Vice Chancellor, Kenyatta University & another (Interested Parties) [2022] eKLR where it was held that:

> "It could be that indeed the contract was invalid but, in my humble view, considering the provisions of section 167 (4) (c), once a contract has been signed, the appropriate forum before which the question of validity of a signed contract can be determined is this Honourable Court."
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> "It does not necessarily follow that an aggrieved party is left without a remedy merely because a contract is signed. Grievances arising out of a signed contract will certainly be addressed but not before the Public Procurement Administrative Review Board. They will be addressed before the court which only has the jurisdiction to determine such disputes related to the alleged grievances. (our emphasis)

39. To further demonstrate that the Board acted without jurisdiction as able stated above, the Applicant referred this court to Section 167(1) as reads together with Regulation 203(2)(c), which provides that a Request for Review ought to be filed within 14 days of the occurrence of the breach complained of, where the notice of the award to the successful bidder is made.

40. The 2nd Respondent was issued with a notification letter under section 87 of the Act on 7th June, 2023 it filed its request for review on 12th October 2023, four months later. In its request for review the 2nd Respondent majorly complained of breach on the part of the 3rd and 4th Respondent after the issuance of the notification of award in failing to enter into a contract with it.

41. The 1st Respondent contravened Section 167(1) of the Act in proceeding to hearing and determining the Application the subject of these proceedings, considering the allegations of breaches against the 3rd and 4th Respondent being raised outside 14 days after the notice of award to the successful bidder.

42. The 1st Respondent therefore acted illegally and ultra vires in proceeding to issue its determination of 2nd November 2023, whereas clearly it lacked the jurisdiction to hear and determine the Application before it. Submitted that the ground of illegality as pleaded in the Application has been ably proven by the Ex-Parte Applicant.

Issue No. 2: Whether the Judicial Review Application is merited and ought to be allowed as prayed.

43. He Applicant argues that the Judicial Review Application as filed is merited and ought to be allowed as prayed because the 1st Respondent acted illegally and committed an error of the law in deciding that it has jurisdiction to hear the Application which it then ruled upon on the 2nd November, 2023.

44. The 2nd Respondent refused to sign the procurement contract with the 3rd and 4th Respondent through their email dated 30th June, 2023 by making it clear that they were unable to place cover. Despite this evidence being laid bare before the 1st Respondent, the 1st Respondent defied logic in its decision of 2nd November, 2023 by holding that the refusal was not one contemplated under section 136 of the Act.

45. Section 136 provides that:

> " If the person submitting the successful tender refuses to enter into a written contract in writing as required under section 135 and section 61 of this Act, he or she shall forfeit his or her tender security and the procurement process shall proceed with the next lowest evaluated tenderer." (our emphasis)

46. It is maintained that the 2nd Respondent's email of 30th June, 2023 is a refusal to enter into a contract. Refusal has been defined in the Online Black's Law Dictionary as:

> " The act of one who has, by law, a right and power of having or doing something of advantage, and declines it.

47. Going by the above definition, the 2nd Respondent acted, by writing an email of 30th June, 2023 to the 3rd and 4th Respondent and made it clear they could not place cover. Which amounted to a decline by the 2nd Respondent within the meaning of refusal as defined above.

48. The 1st Respondent ought not to have delved into issues of cancellation/revocation of the notification of award, as that is no contemplated within the provisions of the Act. Section 136 of the Act quoted above is self-sufficient and does not require any action from the 3rd and 4th Respondent, apart from the procurement process proceeding to the next lowest evaluated tenderer which is exactly what the 3rd and 4th Respondent's did. Forfeiture of the tender security is an automatic occurrence after the action of refusal.

49. It is submitted that the Ex-Parte Applicant has ably demonstrated irrationality on the part of the 1st Respondent in its holding and interpretation of Section 136 of the Act as set out above. That as quoted in the case of Pastoli v Kabale District Local Government Council & Others (2008) 2 EA 300 (supra):

> Irrationality is defined as 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. (our emphasis)

50. Taking into consideration the facts around the email of 30th June, 2023 and the provisions of Section 136 of the Act, it submits that the 1st Respondent acted irrationally in failing to dismiss the 2nd Respondent Request for Review filed on 12th October, 2023.

51. On Procedural Impropriety, that in the case of Pastoli v Kabale District Local Government Council & Others (2008) 2 EA 300 (supra), Procedural Impropriety has been defined as:

> " 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."

52. The 1st Respondent in its decision did not address in any way, representations made by the Ex-parte Applicant and evidence produced by the Ex-Parte Applicant, in respect to it having signed a contract with the 3rd and 4th Respondent out of which, subsequent contracts were entered into with third parties thus exposing the Ex-Parte Applicant to subsequent significant and enormous loss and damage, whereas the 2nd Respondent had not demonstrated any loss they would suffer if the Court were to dismiss the Request for Review.

53. As it was held in the case of Republic v Public Procurement Administrative Review Board; Ex parte: Madison General Insurance Kenya Limited; Vice Chancellor, Kenyatta University & another (Interested Parties) [2022] eKLR, by this Honourable Court:

> " It is also worth noting that the terms of the contract, among other things, not only regulate the manner the parties to the contract relate with each other but are also meant to ensure performance of the contract. Flowing from these terms will be obligations whose discharge may very well involve commitments to other third parties who may not necessarily be privy to the procurement contract but whose services are necessary for the performance of the contract. In the process, new obligations and rights are respectively assumed and vested. The discharge of the obligations and enforcement of the vested rights will have very little to do, if at all, with the procurement process and, for this very reason, will be outside the jurisdiction of the Public Procurement Review Board." (Our Emphasis)

54. The Ex-Parte ably demonstrated that the contract signed by it and the 3rd and 4th Respondent involved third parties to ensure that there was performance of the contract. The Ex-parte Applicant entered into binding contracts with NCBA Bank and APA Insurance Company to ensure it is able to perform the contract of 2nd October, 2023. The discharge of the Ex-Parte Applicant's obligations in the said contract had little to do with the procurement process which in submissions had been concluded upon execution of the contract of 2nd October 2023.

55. The 1st Respondent did not in any way address the said obligations and the risk the Ex-Parte Applicant is exposed to despite it being very clear that the 1st Respondent lacked the jurisdiction to hear and determine the Request for Review by the 1st Respondent.

56. It is the Applicants case that the impugned decision of the1 st Respondent defies the rules of natural justice, wherein the decision of the 1st Respondent clearly shows that the Ex-Parte Applicant's case was not heard and considered prior to the decision of 2nd November, 2023. This was considered in the case of Republic v Public Procurement Administrative Review Board; Ex parte: Madison General

Insurance Kenya Limited; Vice Chancellor, Kenyatta University & another (Interested Parties) [2022] eKLR (supra), which the Ex-Parte Applicant placed reliance upon but the 1st Respondent opted to unfairly not consider it, where it was held that:

> " The point is this: fundamental questions beyond the procurement process will arise once a procurement contract is signed; while reference may be made to the *Public Procurement and Asset Disposal Act* in determination of such questions, more often than not, the court will look beyond the Public Procurement and Asset Act for the appropriate answers. This is an exercise that the Public Procurement Review Board will be ill-equipped to undertake. Of the many reasons that Parliament may have thought it fit to remove from the purview of the Public Procurement Review Board disputes arising after the procurement contract has been signed, it is my humble view that the inability of the Board to determine such questions is one of those reasons. (Our Emphasis)

57. In the 1st Respondent failing to address issues that arose post the signing of the procurement process, it is submitted that it acted unfairly towards the Ex-Parte Applicant and hence demonstrating the procedural impropriety on its part.

58. The 1st Respondent also acted contrary to the provisions of Article 47 of *the Constitution* in failing to take into considerations relevant facts as raised by the Ex-Parte Applicant and failing to address the said issues. In the case of Sunchan Investment Limited v Ministry of National Heritage & Culture & 3 Others [2016] eKLR where the Court held that;

> " Analysis of Article 47 of *the Constitution* as read with the *Fair Administrative Action Act* reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review." (Our Emphasis)

59. It is further submitted that in the 1st Respondent directing the 3rd and 4th Respondent to enter into a contract with the successful bidder offended Section 82 of the Act.

60. The 2nd Respondent seeks to sign a contract with the 3rd and 4th Respondent using a different financial proposal to that it had submitted in the form of tender which was the reasons of the notification of award issued to them which was refused by the 2nd Respondent contrary to Section 82 which provides that, "The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity."

61. The 1st Respondent is therefore directing the 3rd and 4th Respondent to engage in an illegality in asking them to execute a contract with the successful bidder whereas the successful bidder wants to enter into a contract with a different figure from that it had filled in the financial proposal.

62. The Ex-Parte Applicant's contract price with the 4th Respondent is of USD 1,819,653.91which is lower by more than 400 Million USD than the premiums quoted by the 2nd Respondent's re-insurers as has been ably demonstrated by the 3rd and 4th Respondents.

63. The 1st Respondent therefore acted unfairly in nullifying the valid and enforceable contract entered into between the Ex-Parte Applicant and the 3rd and 4th Respondent and is promoting further procedural impropriety by directing the 3rd and 4th Respondent to enter into a contract with the 2nd Respondent despite all the above set out breaches of the Act and *the Constitution*.

64. That the 1st Respondent's decision is tainted with all the above three grounds of judicial review as explained by Lord Diplock in the case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410 grounds 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 recognised 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.
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
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> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all." (our emphasis)

65. The Applicant is praying that the Notice of Motion Application dated 6th November, 2023 together with prayer 5 in the Chamber Summons Application should be allowed.

1st Respondent's Written Submissions

66. In opposing The Applicants case, the 1st Respondent submitted that Section 173 of the *Public Procurement and Asset Disposal Act*, 2015 provides as follows:

> " 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.

67. It is the 1stRespondent case that it remained faithful to its powers and mandate and that this this court is not empowered to venture into correcting the decision of the Review Board on the merits (whether wrong or correct).

68. In Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43. Additionally, the ground upon which the Court grants judicial review were stated in the case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 where it was held:

> " 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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."

69. Reliance is also placed in Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR where it was observed that,

> " judicial review is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power"

70. In Republic v Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited where Majanja J. quoting with approval the decision of Githua J in Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012[2012] eKLR observed that in order for an applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the applicant must demonstrate that there is indeed a mistake that goes to the jurisdiction of the tribunal. Misinterpretation of the law is not sufficient to move a judicial review application.

71. According to the Applicant this Application is an appeal disguised as a Judicial Review Application. The Court of Appeal in Municipal Council of Mombasa V Republic & another (2002) e KLR held that in judicial review:

> " The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters of did he take into account irrelevant matters? These are the kind of the questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was ore there was not sufficient evidence to support the decision –and that, as we have, is not the province of judicial review".

72. It also places reliance in Republic Vs Kenya Power & Lighting Company Limited & Another [2013] eKLR.

73. In addressing the prayer for Prohibition, relied on the case of Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 and the case of Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572, as a matter of common-sense the judicial order of prohibition must be pre-emptive in nature, that is, it must be directed at preventing what has not been done.

74. According to the 1st Respondent, the applicant has not demonstrated any breaches of the Law or procedure which would entitle this court to intervene in this matter and grant the orders sought.

2nd Respondent's case:

75. The 2nd Respondent's relies on the Replying Affidavit dated 14thNovember, 2023.

76. The 2nd Respondents case is that, the1st Respondent being a creature of the Statute, established under Section 27 of the Act, had the jurisdiction to hear the Request for Review pursuant to Section 167(1) and (4) of the Act for the sheer fact that a valid contract pursuant to the provisions of Section 135, did not exist.

77. It places reliance on the locus classicus case of The Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd where Nyarangi J.A held that

> " ...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 a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
>
> "By jurisdiction is meant 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 its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given..."

78. The 1st Respondent had the jurisdiction to entertain the Request for Review by the 2nd Respondent owing to the provisions of Section 167(1) of the *Public Procurement and Asset Disposal Act* [2015] (hereafter 'the Act'), which provides that,

> "(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)— (c) where a contract is signed in accordance with section 135 of this Act."

79. While Section 135(1) of the Act reads as follows,

> "(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer."

80. The 2nd Respondent argues that it was not aware of any contract signed between the 3rd and 4th Respondents and the Applicant on 2nd October, 2023 as at the time of filing the Request for Review and that it only came to be aware that a contract had allegedly been signed, after receiving market information on the said contract.

81. It further argues that it would not have been possible for the Applicant to enter into a valid contract with the 3rdand 4th Respondents with regards to the All Risks Insurance Policy in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for the purposes of Insurance Brokerage Services for the period 1st July, 2023 to 30th June, 2025(hereafter 'the subject tender') for the reason that the Applicant by a letter dated 12th July, 2023 to the 3rdand 4th Respondents, cancelled the cover over the All Risks Industrial Insurance Policy (hereafter 'letter of cancellation') in the letter marked as annexure SK-25, informing the 3rd and 4th Respondents that their re-insurer APA insurance Limited could not offer cover with regards to the All Risks Industrial Insurance Policy and that the reinsurer was going off cover from 12th July 2023 midnight as per APA Insurance's letter dated 12th July 2023 and annexed to the Relying Affidavit as annexure SK-26.

82. On the other hand, on 7th June, 2023, vide a letter of "Notification of Intention of Award" (Letter of Notification) from the 3rd and 4th Respondents "all bidders" were notified of their awards under the subject tender.

83. In the Letter of Notification, adduced before this court as annexure SK-5 to the 2nd Respondent's Replying Affidavit, the 3rd and 4th Respondents informed bidders, among them, the Applicant and 2nd Respondent that they had made a decision to award them tenders whereby, the Applicant was awarded; the Marine Open Cover Policy and Terrorism and Sabotage Policy, while the 2ndRespondent was awarded three (3) policies out of the 24 policies that is; the All Risk Industrial Insurance Policy; the Aviation Refueling Liability Policy; and the Aviation Hull and Liability Policy.

84. At page 13 of the Letter of Notification, at part b), that is, paragraph 15, the Applicant was informed by the 3rd and 4th Respondents that the reason why it was not the successful tenderer was because, its quote was not the lowest evaluated bid with regards to the All Risk Industrial Insurance Policy among other policies that they were not successful in. While under part a), the 2ndRespondent was indicated as the successful tenderer for the All Risks Industrial Insurance Policy.

85. Following the notification to "all bidders" the 2ndRespondent received a second 'award notification' letter dated 21st June, 2023, on 23rd of June, 2023 from the 3rdRespondent informing them that they had been awarded the above mentioned insurance policies that is;

    i) The All Risk Industrial Policy;

    ii) The Aviation Refueling Liability Policy; and

    iii) The Aviation Hull and Liability Policy.

86. In the second 'award notification' letter, adduced as annexure SK-6, the 3rd Respondent called on the 2ndRespondent to;

    a. Provide the 3rd and 4th Respondents with a separate performance bond from the underwriters for each policy in the amount of 10% of the annual premium valid for the period of the policy and the 2ndRespondent's CR12 form from the registrar of companies within 3 days of receipt of the notification; and

b. Signify their acceptance of the award by signing the duplicate of the letter and returning the same by 26th June 2023.

87. The second award notification letter also informed the 2nd Respondent that the contract documents were under preparation and would be signed as soon as the documents sought are received, which informed the 2nd Respondent of the 3rd and 4th Respondents' 'intention to enter into a contract' with it, after the same letter also notified it of its award under the Subject tender.

88. Later on, pursuant to the provisions of Section 87(2) of the Act, the 2nd Respondent proceeded to signify its acceptance of the award vide a letter dated 26th June, 2023 and stated that it "looked forward to signing of the contract".

89. The subject letter was sent to the 3rd and 4th Respondents via email on 26th June, 2023 and the 3rd and 4th Respondents acknowledged receipt thereof on the same date. The said letters and email of acceptance of 26th June, 2023 were adduced before this Court as annexures SK-7and SK-8 to the 2nd Respondent's Replying Affidavit.

90. That Section 87(1) and (2) of the Act provides that,

> "(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.
>
> (2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award."

91. It is the 2nd Respondents case that the letters of notification of award by the 3rd and 4th Respondent, which represent the 'offer' aspect of contracting, and the letter of acceptance by the 2nd Respondent conformed to the provisions of Section 87(1) and (2) of the Act.

92. Rightfully, the next step should have followed afterwards was the signing of a contract pursuant to the provisions of Section 135 of the Act between the 2nd Respondent, as the successful tendered pursuant to Section 86(1)(a), and the 3rd and 4th Respondent.

93. Section 135 of the Act, provides that,

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2)) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid

(6) ....."

94. While Section 86(1)(a) provides that

(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price..."

95. Shortly afterwards, the 2nd Respondent informed the 3rdand 4th Respondents vide an email dated 30thJune, 2023 that its underwriter was facing challenges in placing cover due to time constraints with a cut line of 30th June, 2023 because of delay the underwriter experienced in getting a confirmation from the reinsurers.

96. The 2ndRespondent then proceeded to propose extension of the then existing cover for a minimum period of 3 months to avoid exposure and allow time to plan to enable the 2nd Respondent's underwriter to continue pursuing the reinsurers confirmation of the cover within 3 months from 30th June, 2023.

97. After working out its issue with obtaining a cover from its re-insurers, by a letter dated 7th September, 2023(Annexure SK-10), sent via email on 8thSeptember, 2023 (Annexure SK-11), the 2ndRespondent communicated and forwarded to the 3rdand 4th Respondents, Old Mutual General Insurance Kenya Limited's confirmation letter dated 7th September, 2023 (Annexure SK-12), of cover for the subject tender as the underwriter and Swiss Reinsurance Company Limited's approval (Annexure SK-13), support and confirmation of the subject tender, as the lead local reinsurer of Old Mutual General Insurance Kenya Limited.

98. In the same letter of 7th September, 2023 the 2ndRespondent intimated to the 3rd Respondent that the underwriter was ready to take up the cover from 12thNovember, 2023 upon expiry of the extension of the All Risks Industrial Insurance cover on 11th November, 2023 and trusted that the 3rd and 4th Respondents would proceed to formalize a contract of procurement in the subject tender.

99. The 3rd and 4thRespondents did not respond to the 2ndRespondent and no contract was ever forwarded to the 2nd Respondent by the 3rd and 4th Respondent in respect the subject tender for the 2nd Respondent's consideration and consequent execution, as it had assured the 2nd Respondent in its letter of dated 21stJune, 2023.

100. On 28th September, 2023 (Annexed as SK-8), the 2nd Respondent informed the 3rdRespondent that it had received market information that the 3rd and 4thRespondents intended to enter into a contract with another bidder with respect to the subject tender yet the 2ndRespondent had submitted the best and lowest evaluated bid, was awarded the subject tender and had provided a confirmation by the underwriter and approval and support of local reinsurers.

101. Further, the 2ndRespondent reminded the 3rd and 4th Respondents that the subject tender's validity period of 182 days was set to expire on 25thOctober, 2023 and was therefore looking forward to signing the contract with respect to the subject tender which caused them to seek the 1st Respondent's assistance in form of the Request for Review dated 11th October, 2023.

102. It is its case that the 2nd Respondent did not at any one point 'refuse' to contract with the 3rd and 4thRespondents while the Applicant is the one who expressly declined or as the Applicant termed it "refused" by the meaning of Section 136 of the Act, to provide cover for lack of having a reinsurer, by its letter of 12th July, 2023.

103. A fact which was taken note of by the 1st Respondent at paragraph 40 of the 1st Respondent's decision. The 2nd Respondents case is that despite the 3rd and 4th Respondent's assurance that they would prepare contracts with the 2ndRespondent, they never followed through with the same despite, the 2ndRespondent unconditionally accepting the award, via the letter and email dated 26th June, 2023 which was the reason for the 2nd Respondent's Request for Review.

104. The 3rd and 4th Respondents however, contrary to the provisions of Section 135 of the Act entered into a contract with the Applicant and an illegal contract at that, since the award of the All Risks Industrial Insurance Policy was firstly, never to the Applicant as can be seen from the letters of notification to award; and secondly, because the said Policy was rightfully and legally as per the provisions of Section 86(1), awarded to the 2ndRespondent who was the lowest evaluated bidder.

105. Contrary to the Applicant's averments as at paragraph 64, the 2nd Respondent as seen on page 3 of annexure SK-5, quoted premiums of US$ 1,602,458.98 for the All Risks Industrial Insurance Policy which is in fact lower than the contract price quoted by the 4thRespondent of USD 1,819, 653.91 pleaded by the Applicant and evidenced by annexure SK-28 and as noted by the 3rd and 4th Respondents via its letter of notification of award of 7th June, 2023 at Pg. 13.

106. Section 86(1) of the Act provides that,

> (1) The successful tender shall be the one who meets any one of the following as specified in the tender document—
>
> (a) the tender with the lowest evaluated price;
>
> (b) ....."

107. The 2nd Respondent was therefore the lowest evaluated bidder and the successful tenderer as indicated in the letter of notification of award of 7thJune, 2023 for the All Risks Industrial Insurance Policy having been the lowest evaluated bidder.

108. Further to these, the Preliminary Objection by the 3rd and 4th Respondents and the Applicant, was also dismissed by the 1st Respondent its final orders on page 98 of the Decision of the Board.

109. That the Applicant by its submissions at Paragraph 32 of its submissions misconstrued the decision of the 1st Respondent for the reason that, the 1st Respondent's reference to its Preliminary Objection as "proper" was not with reference to the "merit" of the Objection but was with reference to the "substance" of it.

110. That the 1stRespondent's obiter at paragraphs 136 and 137 at page 49 of the decision, the Preliminary Objection was 'proper' for being on jurisdiction being a 'point of law' as is well laid out in the locus classicus case of Mukisa Biscuit Manufacturing Co.Ltd vs West End Distributors Ltd[1969] EA but on merit, it failed and on this ground, the 1st Respondent dismissed the Objection.

111. It strongly believes that the Preliminary Objection was decided on a pure point of law and not on the facts as alleged by the 1stRespondent. The pure point of law was on the issue of its jurisdiction under Section 167(4) (c) on the allegation that a contract allegedly existed.

112. To decide on its jurisdiction, the 1st Respondent on a strict reading of the Section 167(4) (c) noted that the contracts being referred are this signed "in accordance with Section 135 of the Act".

113. The 1st Respondent guided statement of Sir Charles Newbold P, in the Mukisa Biscuit Case carefully considered the Preliminary Objection and found that a facts need not be 'ascertained' and therefore commented in Obiter, that the Applicant's Preliminary Objection was proper for its consideration, on the pure point of law of its jurisdiction under Section 167(4) of the Act as read with Section 135 of the Act.

114. The Statements of Sir Charles New Bold in the Mukisa Biscuit case with regards to Preliminary Objections were as follows;

> " a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertainedor if what is sought is the exercise of judicial discretion."

115. In the same case, Law JA pointed out that in order for a point to qualify as a Preliminary Objection it must consists of the following:

(a) It must raise a pleaded point of law or one arising from the pleadings by implication.

(b) It must be such that, if argued successfully, would dispose of the suit (and he gave examples of jurisdiction and limitation of time).

116. It submits that by their understanding, that a 'pure point of law' is one that must be answered by the application of the law or a legal principle, and the 1stRespondent established that the Applicant's Preliminary Objection was 'proper' for this reason as it raised the question of the 1stRespondent's jurisdiction, which question the 1stRespondent by bringing to light the provisions of Section 167(4) (c) as read with Section 135 of the Act.

117. The Board's inquiry into the legality of the contract signed was not a consideration of the facts but was as a matter of law and procedure as a part of its wide powers given to under Section 173(a) (b) and (c) of the Act. Relied on the case of Civil Appeal No.35 of 2018 Ederman Property Limited vs Lordship Africa Limited & 2 Ors [2019] eKLR.

118. Also, that because time is a jurisdictional issue, the Preliminary Objection was filed three (3) days after Notification of the Review by the Board Secretary and this merited the 1st Respondent's attention over it as per the provisions of Regulation 209 of the Regulations, 2020 and the 1st Respondent rightfully heard the Preliminary objection as can be seen at pages 28 to 38 it decision of 2nd November, 2023.

119. Regulation 209 provides that,

(1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within three days from the date of notification.

(2) A preliminary objection filed under paragraph (1) shall set out the grounds upon which it is based on and shall be served to the applicant at least one day before the hearing.

(3) The applicant may file a reply to the preliminary objection before the time of the hearing of the request.

(4) The Review Board may hear the preliminary objection either separately or as part of the substantive request for review and give a separate or one decision.

120. Further, Section 167 (1) of the Act reads as follows;

> "(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."

121. While Regulation 203(2) (c) provides that

> (1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations. Request for a review.
>
> (2) The request referred to in paragraph (1) shall—
>
> (a) state the reasons for the complaint, including any alleged breach of *the Constitution*, the Act or these Regulations;
>
> (b) be accompanied by such statements as the applicant considers necessary in support of its request;
>
> (c) 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..."

122. Based on the above provisions, that in contention to the Applicant's averments at paragraphs 38 to 40, that the Applicant filed the Request for Review 14 days after occurrence of breach after the award was sent to the 2nd Respondent with regards to the aforementioned policies, among them, the All Risks Industrial Insurance Policy pursuant to the provisions of Section 167(1) of the Act as read with Regulation 203(2) (c) (iii) of the Public Procurement and Asset Disposal Regulations, 2020 (hereafter 'the Regulations').

123. The Request for Review dated 11th October, 2023, was filed on the 12th October, 2023 which was well within the 14 days upon the breach occasioned by the 3rd and 4th Respondents of contracting with the Applicant who was not the successful bidder with regards to the All Risk Industrial Insurance Policy under the subject tender.

124. That, even if the 3rd and 4th Respondents entered into a contract with the Applicant regards to the All Risk Industrial Insurance Policy as the next lowest evaluated bidder, it would have still been impossible to enter into a valid contract under Section 135, for the reason that the Respondents did not send the Ex-parte Applicant a notification of intention to enter into a contract awarding the Applicant the All Risk Industrial Insurance Policy, in accordance with Section 87(1) of the Act.

125. The foregoing is also because they had not cancelled their letter of 21st June, 2023 to the 2ndRespondent, intimating their intention to contract with the 2nd Respondent with regards to the All Risk Industrial Insurance Policy, together with all the other policies awarded to the 2nd Respondent. This means that the letter of notification of award to the 2nd Respondent was still valid and consequently, the alleged contract of 2ndOctober, 2023 was unenforceable and void.

126. The 1st Respondent at paragraphs 151 to 171 of its decision, discussed this issue in detail, pointing out that the provisions of Section 167(4) (c) of the Act, are limited to contracts signed pursuant to the provisions Section 135 of the Act.

127. Section 167(4)(c) provides that,

> (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

128. It is not just the mere act of signing a procurement contract by the 3rd and 4thRespondents and the Applicant that the contract itself must have been signed in accordance with Section 135 of the Act in order for the 1stRespondent's to be deprived of jurisdiction. Relied on Judicial Review No. 589 of 2017 Lordship Africa Limited vs Public Procurement Administrative Review Board and 2 Others [2018] eKLR which upheld the decision in Civil Appeal No.35 of 2018 Ederman Property Limited vs Lordship Africa Limited & 2 Ors [2019] eKLR cited by the 1stRespondent in its decision at paragraph 157.

129. With regards to the foregoing paragraph, the 1st Respondent cited the above authority while inquiring into whether the contract dated 2nd October, 2023 was signed in accordance with Section 135 of the Act. In the above cited case, the Court of Appeal stated that,

> " In this case, the review board makes no reference to whether or not the contract allegedly signed was in accordance with Section 135 of the Act. From the above cited case law, it is clear that the review board should have first determined whether the contract in question was signed in accordance with Section 135 of the Act. This is so because the mere fact that a contract has been signed does not necessarily deprive the respondent of the jurisdiction to entertain the request for review. In other words, before the review board makes a determination that it has no jurisdiction to entertain the request by virtue of sect 167 (4) (c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with Section 135 of the Act and the failure to do so in my view would amount to improper deprivation of jurisdiction; in my further view improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction".

130. The Judge further found that,

> " the 2nd respondent at the time of declining jurisdiction to entertain the review did not make any reference to or inquiry as to whether the subject contract was entered into in accordance

with Section 135 of the Act and therefore the 2nd respondent acted in error by merely declining jurisdiction on account that the procurement contract had already been signed between the appellant and the 3rd respondent....."

131. The provisions of Section 167(4) carefully read, clearly show that the jurisdiction of the 1st Respondent will be ousted only on the condition that the contract is signed in line with Section 135 of the Act, which the Applicant's alleged contract of 2nd October, 2023 was not.

132. That evidence of the alleged void contract of 2ndOctober, 2023 was never adduced before this court for its consideration, to prove the existence of the same.

133. The conduct of the 3rdand 4thRespondents engaging the Ex-parte Applicant, without any 'refusal' by the meaning under Section 136 of the Act, from the 2ndRespondent, who was the successful bidder by the meaning of Section 86(1)(a) and as per the Letters of Notification of Award done in line Section 87(1) and the 2nd Respondent's consequent acceptance of the same under Section 87(2) of the Act, was an illegality and the contract of 2nd October, 2023 allegedly signed by the Applicant with regards to the All Risk Industrial Insurance Policy is a nullity for the reasons submitted above, and that there did not and still does not exist a valid or enforceable procurement contract between the 3rd and 4thRespondents and the Applicant pursuant to the provisions of Section 135 of the Act.

134. It is contended that the above stated facts were well taken into consideration by the 1st Respondent in its decision of 2ndNovember 2023.

135. The 1st Respondent was very clear on the facts as to when the contract was signed as is evidenced at paragraph 171 on page 69, paragraph 174 and 173 of its decision. Also, as a part of its Final Orders, the 1st Respondent as paragraph B ordered that,

> "The Contract dated 2nd October, 2023 for the All Risks Industrial Policy in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for the purposes of Insurance Brokerage Services for the period 1st July, 2023 to 30th June, 2025 signed between the Respondent and the Interested Party be and is hereby nullified and set aside"

136. The Applicant alleged that the 1st Respondent went into the facts in deciding the Preliminary Objection in its decision of 2nd November, 2023.

137. Relied on the case of Mukisa Biscuit cited by the 1st Respondent in its decision at para 133 of the decision of 2ndNovember, 2023, where the court stated as follows; Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd 1969 E.A. 696,

> ".....A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of land which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

138. The 1st Respondent clearly made an obiter at Para 136 of the decision DN-4 that;

> "we have already established that of the preconditions for a valid preliminary objection is based on the assumption that the facts pleaded are correct and unopposed by the rival party...there will be no need for the Board to inquire into evidence presented to ascertain whether the chronology of events leading to signing of the said contract are correct since the documents presented by all parties have not been contested"

139. The 1st Respondent in light of the above cited statement of the court then went on to elaborate on how facts in the Applicant's Preliminary Objection need not be ascertained.

140. The 1st Respondent had the jurisdiction to hear the case since no contract was in existence by the meaning of Section 135 of the Act, in light of all the other provisions of the Act cited above and we invite this Honorable Court to dismiss the Review Application for lacking in merit.

141. In the case of Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed HashamLalji [2014] eKLR: -

> "Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines 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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant....."

142. Reliance is also placed in the case of Republic v Public Procurement Administrative Review Board & 2 others ExparteRongo University [2018] eKLR.

143. The 1st Respondent showed an understanding of the laws regulating its jurisdiction in its decision citing Sections 27(1), 167 and 173 of the Act at pages 53 to 59 and very well explained their import, while also relying on case law to support its positions at pages 61 and 63 of the decision.

144. The jurisdiction of the 1st Respondent was not ousted for reason of the Applicant and the 3rd and 4thRespondents merely signing a contract, since the contract of 2nd October, 2023 was not signed as per the provisions of Section 135 of the Act that is, between the 3rd Respondent and the successful bidder, the 2ndRespondent.

145. The review was filed pursuant to the provisions of Section 167 of the Act as read with Regulation 203 of the Regulations that is within the statutory 14 day period from the occurrence of the breach, constituted by the 3rd and 4th Respondents lack of entering into a contract with it, as the successful tenderer by the meaning of the provisions of Section 86(1)(a) of the Act and instead entering into a contract with the Applicant which contract as elaborately submitted under the first issue was and in our Replying Affidavit as paragraph was null and void, which the 1stRespondent declared to be a nullity as well.

146. The 1st Respondent dismissed the Preliminary Objection on a pure point of law as well as in line with wide discretionary powers lent to it under Section 173 of the Act, to inquire into contracts arising from procurement proceedings with a view to ensuring compliance with the Act. We rely on the above cited case of Civil Appeal No.35 of 2018 Ederman Property Limited vs Lordship Africa Limited & 2 Ors [2019] eKLR, where the Court of Appeal upheld the decision of the Court in Judicial Review

No. 589 of 2017 Lordship Africa Limited vs Public Procurement Administrative Review Board and 2 Others [2018] eKLR and stated that,

> " In this case, the review board makes no reference to whether or not the contract allegedly signed was in accordance with Section 135 of the Act. From the above cited case law, it is clear that the review board should have first determined whether the contract in question was signed in accordance with Section 135 of the Act. This is so because the mere fact that a contract has been signed does not necessarily deprive the respondent of the jurisdiction to entertain the request for review. In other words, before the review board makes a determination that it has no jurisdiction to entertain the request by virtue of sect 167 (4) (c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with Section 135 of the Act and the failure to do so in my view would amount to improper deprivation of jurisdiction; in my further view improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction".
>
> The Judge further found that the 2nd respondent at the time of declining jurisdiction to entertain the review did not make any reference to or inquiry as to whether the subject contract was entered into in accordance with Section 135 of the Act and therefore the 2nd respondent acted in error by merely declining jurisdiction on account that the procurement contract had already been signed between the appellant and the 3rd respondent....."

147. The Procedure followed by the 1st Respondent to inquire into whether the contract was signed in line with Section 135 of the Act, in order to establish its jurisdiction over the review was a necessary procedural step for it to establish its jurisdiction under Section 167(1) and (4) of the Act.

148. On the 'wide powers" lent to the 1st Respondent by Section 173 of the Act, court have on various occasions acknowledged this fact including the Board itself. But for purposes of these submissions, we rely on the case of Republic v Public Procurement Review Board; Rhombus Construction Company Ltd (Interested Party) Ex Parte Kenya Ports Authority & Another [2021] where the court stated,

> " Under section 173(a)(b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer. Although the Act does not expressly limit the powers of the Board from extending tender validity period more than once, one can imply that the powers conferred upon the Review board includes powers to extend validity period to avert situations where the accounting officer can misuse powers under Section 88 to frustrate tenderers or bidders not considered favorable."

149. Noting that the 1st Respondent acted within its powers and the above cited case, and in Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Ex parte Kenya Power and Lighting Company Limited [2019] eKLR where Mativo J while relying on the decision in Paul Kiplagat Birgen & 25 Others v Interim Independent Electoral Commission & 2 Others (2011) eKLR held as follows;

> " A Judicial Review court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the body. Where a body is granted wide decision-making powers with a number of options or variables, a judicial review court may not interfere unless it is clear that the choice preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, a Judicial Review court may not interfere only because it favors a different option within the range..."

150. No party was ever condemned unheard by the 1st Respondent and that the 1stRespondent acted reasonably, objectively and judicially and ensured that all parties were heard by their written submissions and at the oral hearing.

151. Relied on the case of Republic v wide Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR where the court (Odunga J), cited the case of Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553 and the 2nd Respondent argues that the 1st Respondent having therefore adhered to the provisions of the law giving effect to its jurisdiction to adjudicate the Request for Review and the principles of natural justice, it is The 2nd Respondents submission that no illegality was furthered in arriving at its decision.

152. "Irrationality" by succinctly referring it to "unreasonableness" in Wednesbury Case-as defined by Lord Diplock in the Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374.

153. In the above referred to Associated Provincial Pictures Ltd v Wednesbury Corporation [1948] 1 KB 223 irrationality was defined thus:

> " In the present case we have heard a great deal about the meaning of the word 'unreasonable'. It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It is frequently used as a general description of the things that must be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may be said, and often is said, to be acting 'unreasonably'. Similarly, you may leave something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ, I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all those things largely fall under one head."

154. Further, in the case of Council of Civil Service Unions v Minister for Civil Service [1984] 3AII ER 935.

155. That the 1st Respondent did not act irrationally in reaching its decision of 2nd November, 2023 since the decision was made in line with Section 167(1) and (4) of the Act.

156. In response to the Applicant's submissions that the 2nd Respondent had "refused" to sign the procurement contract with the and 4thRespondents the 2nd Respondent refers this Honorable Court to the 2ndRespondents letters of 8th and 26th June, 2023, signifying its acceptance to the award and to contract with the 3rd and 4thRespondents.

157. At no point did the 2ndRespondent "refuse" to contract with the Applicant and the letter referenced of 30th June, 2023 by the 2nd Respondent was merely to inform the Applicant of the challenges it was experiencing with its re-insurer in placing cover.

158. The Applicant's allegation of "refusal" by the 2ndRespondent by the meaning of Section 136 of the Act, if anything, can be best signified by its own 'letter of cancellation" dated 12th July, 2023 to the 3rd and 4thRespondent intimating to them how they could not place cover with regards to the All Risks Industrial Insurance Policy.

159. The decision and procedure followed by the 1st Respondent was done subject to the law and cannot be faulted for being "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."- Lord Diplock.

160. Also referred to the remit of the Court on the rationality question was addressed by Majanja, J in Community Advocacy and Awareness Trust & 8 others v Attorney General [2012] eKLR where he quoted with approval the South African case of Pharmaceutical Manufacturers of SA: In re Ex Parte President of the Republic of South Africa 2000(2) SA 674 (CC) and stated that:

> " I also adopt the words in the case of Pharmaceutical Manufacturers of SA: In re Ex Parte President of the Republic of South Africa 2000(2) SA 674 (CC) where the following was said in regard to the rationality requirement, "Rationality in this sense is a minimum threshold requirement applicable to the exercise of all power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of *the Constitution* and therefore unlawful. The setting of this standard does not mean the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with a decision simply because it disagrees with it or considers that the power was exercised inappropriately."

161. The 2nd Respondent argues that the 1stRespondent's decision on the Preliminary Objection and the final decision as discussed in the foregoing paragraphs and the pleaded facts in 2nd Respondent's Replying Affidavit, acted well within its mandate and powers under the provisions of Section 173 of the Act in arriving at its decision of 2ndNovember, 2023 and was therefore "rational".

162. The 2nd Respondent reiterates that it was for the reason that no valid procurement contract existed as alleged by the Applicant that could oust its jurisdiction, the 1st Respondent ensured that all the parties' cases including the Applicant and 2ndRespondent were heard and that it considered all the evidence adduced by the parties in the case by their oral submissions and written submissions.

163. In the case of Pastoli vs Kabale District Local Government Council & Others (2008) 2 EA 300 (supra) the Court defined 'procedural impropriety' as follows;

> " 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."

164. The 2nd Respondent argues that the 1st Respondent followed the rules of procedure under the *Public Procurement and Asset Disposal Act*, 2015 and well as the Regulations, 2020 in making its decision of 2ndNovember, 2023 and in the hearing of the Preliminary Objection without any procedural impropriety, illegality or irrationality.

165. The 2nd Respondent invites the court to rely on the case of Republic vs National Water Conservation & Pipeline Corporation & 11 Others [2015] eKLR where it was held that, "Once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith."

The 3rd and 4th Respondents' Case

166. The 3rd and 4th Respondents is in support of the Applicants' case.

167. It is submitted that the impugned decision of the Public Procurement Administrative Review Board is tainted by illegality due to a want of jurisdiction on its part.

168. That the want of jurisdiction on the part of the Public Procurement Administrative Review Board arose from: (a) The request for review was incompetent having been filed outside the timelines stipulated under Section 167 (1) of the *Public Procurement and Asset Disposal Act* 2015 as read with Regulation 203 (2) of the Public Procurement and Asset Disposal Regulations 2020; and (b) The request for review was incompetent having been filed after a contract had been signed contrary to the provisions of Section 167 (4) (c) of the *Public Procurement and Asset Disposal Act* 2015.

169. The jurisdiction of the Board flows from the provisions of Section 167 (1) of the *Public Procurement and Asset Disposal Act* 2015 (hereinafter" the Act") which provides as follows: -

> " 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

170. The aforesaid Section 167 (1) of the Act ought to be read and considered jointly with Regulation 203 (2) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter" the Regulations") which provides that-

> " (2) The request referred to in paragraph (1) shall—
>
> (a) state the reasons for the complaint, including any alleged breach of *the Constitution*, the Act or these Regulations;
>
> (b) Be accompanied by such statements as the applicant considers necessary in support of its request;
>
> (c) 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.
>
> (d) Be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable."

171. That it is undisputed that the successful tender within the meaning of Section 86 of the Act was the 2ndRespondent, to wit, M/s Sedgwick Kenya Insurance Brokers Limited, who emerged the lowest evaluated tenderer for the All Risks Industrial Insurance Policy, in the relevant procurement process, at a premium of USD 1,601,458.98.

172. It is also common ground that the 2nd Respondent was issued with a notification letter under Section 87 of the Act on 7th June, 2023 and that all the other tenderers were equally notified on the same date of the intention to award the tender to the 2ndRespondent and of the reasons why they were unsuccessful. The requirements of Section 87 (3) of the Act were therefore fully satisfied.

173. It is also not in dispute that after the expiry of the 14 days stand still period provided for under Section 87 of the Act, which lapsed at midnight on 21st June, 2023, the 4thRespondent issued the 2nd Respondent on 23rd June, 2023with a Letter of Acceptance dated 21st June, 2023.

174. In the aforesaid Letter of Acceptance, the 4thRespondent requested the 2nd Respondent to provide it with a separate performance bond from its Underwriters for each policy in the amount of 10% of the annual premium valid for the period of the policy and its CR12 Form from the Registrar of Companies within three (3) days from the date of the said letter.

175. The aforesaid request by the 4th Respondent to the 2ndRespondent to be provided with a Performance Bond prior to the signing of a Contract has a legal basis in Section 142 (1), (2) and (3) of the Act and Regulation 135 (1) of the Regulations.

176. Section 142 (1), (2) and (3) of the Act provide as follows:

> 1) Subject to the regulations, a successful tenderer shall submit a performance security equivalent to not more than ten percent of the Contract amount before signing of the Contract.
>
> 2) In case the contract is not fully or well executed, the performance security shall unconditionally be fully seized by the procuring entity as compensation without prejudice to other penalties provided for by the Act.
>
> 3) Provisions under subsection (1) of this section shall not apply to tenders related to consultancy services, works and supplies where their estimated value does not exceed a threshold established by the procurement regulations, or works and supplies reserved for women, youth, persons with disabilities and other disadvantaged groups, and for these categories, the performance securities that may be waived or fixed at not more than one percent of the contract price"

177. Regulation 135 of the Regulations provides as follows:

> " For the purposes of Section 142 (3) of the Act, the threshold for providing performance security for goods, works and non-consultancy services shall be for contracts above five million shillings."

178. The value of the relevant tender was more than Five Million Shillings and it is therefore beyond doubt that the 2nd Respondent was required under the aforesaid provisions of law to provide performance security to the 4thRespondent.

179. It is not in dispute that the 2nd Respondent Accepted the Award on 26th June, 2023 which was three days after it was given the aforesaid Acceptance Letter dated 21st June, 2023 by the 4thRespondent. However, the 2nd Respondent's aforesaid Acceptance dated 26th June, 2023 was not accompanied by the performance Bond that it had been requested as aforesaid to provide the 4thRespondent.

180. It is also not in dispute that vide an email dated 30th June, 2023 the 2nd Respondent informed the 4thRespondent that they could not place the cover with M/s Old Mutual General Insurance Company, their Underwriter for this policy, because they were unable to get reinsurance support. The reinsurer required the policy to be placed at the full gross premium of USD 1,911,756.66.

181. It is submitted that the aforesaid communication by the 2ndRespondent amounted to a refusal to contract within the meaning of Section 136 of the Act for the following reasons;

a) The 2nd Respondent indicated therein its inability to provide cover to the 4th Respondent at the price set out in its bid document.

b) The 2nd Respondent had been evaluated as the successful tender within the meaning of Section 86 of the Act on the basis of the price and qualifications set out in its bid document.

c) The 2nd Respondent was statutorily barred from adjusting the tender sum read out during the tender opening pursuant to Section 82 of the Act.

d) Further to the foregoing, by the said date, the 2ndRespondent had failed to provide the 4thRespondent with performance security, which was as aforesaid a statutory requirement, within the period indicated in the 4th Respondent's aforesaid letter dated 21st June, 2023.

182. It is submitted that the finding of the Board that the 2ndRespondent did not refuse to sign a contract with the 4thRespondent but had only made an "Award Adjustment" in its letter dated 30th June, 2023 to the 4th Respondent is tainted with illegality as an "Award Adjustment" is term that is unknown to the Act and the Regulations.

183. It is submitted that the said finding of the Board is unreasonable and consequently amenable to judicial review.

184. In Republic v Public Procurement Administrative Review Board & 2 Others Ex parte Rongo University (2018) eKLR, Mativo, J, as he then was, held as follows:

> " 54. Legal unreasonableness compromises any or all of the following, namely; specific errors of relevancy or purpose, reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight in the sense of more than was reasonably necessary-to some factors and insufficient weight to others."

185. That an Award once issued cannot be amended or adjusted. To do so would amount to making a fresh award. Even, if they are wrong in this submission, it is logical to suppose that if such an award adjustment is legally permissible then an Award would be adjusted by the procuring entity making the Award and not by the person or entity receiving the Award as was purportedly held by the Board.

186. Evidence has been produced by the 3rd and 4thRespondents through their replying affidavits which proves that the 2ndRespondent varied its price after the aforesaid award contrary to the mandatory provisions of Section 82 of the Act which provides that the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity.

187. As averred in the 3rd and 4th Respondents' replying affidavit, the 2nd Respondent was awarded the relevant tender at a premium of at USD 1,601,458.98. On 30th June, 2023 the 2ndRespondent wrote

to the 4th Respondent indicating that they could not place the cover with M/s Old Mutual General Insurance Company, their Underwriter for this policy, because they were unable to get reinsurance support.

188. The reinsurer required the policy to be placed at the full gross premium of USD 1,911,756.66. On 11thOctober 2023, the re-insurer whose support the 2ndRespondent had finally been able to obtain, Swiss Reinsurance informed the 4th Respondent that it would place cover at USD 2,237,039-FY 2023/2024 and USD 2,535,583-FY 2024/2025. The said averments have not been controverted through affidavit evidence and are deemed to be admitted.

189. Section 135 (6) of the Act clearly provides that the tender documents listed therein shall be the basis of all procurement contracts. The language used in the said provision of law is mandatory. Section 135 (7) of the Act explicitly states that any person who contravenes the provisions of the said section commits an offence.

190. Pursuant to Section 139 (3) of the Act no variation of the Contract price can be done within twelve months from the date of the signing of the Contract. That pursuant to Section 167 (1) of the Act as read with Regulation 203 (2) (c) (iii) of the Regulations any request for review ought to have been filed before the 14 days' standstill period provided for under Section 87 of the Act lapsed at midnight on 21st June, 2023. It is undisputed that no request for review was filed by any of the bidders within the aforesaid fourteen days' standstill period.

191. It is submitted that after the lapse of the 14 days' standstill period at midnight on 21st June, 2023 the Notification of Intention to Award that was issued on 7th June, 2023 had satisfied the provisions of Section 87 (3) of the Act because none of the notified tenderers filed a Request for Review with the Board.

192. It is also submitted that the purported breach of the Act and regulations which gave rise to the relevant request for review occurred, if at all, after the making of an award to the successful tender as contemplated under Regulation 203 (2) (c) (iii) of the Regulations.

193. The relevant request for review was filed on 12thOctober 2023 which is around 112 days out of time and it was therefore clearly incompetent being outside the timelines set under the aforesaid Section 167 (1) of the Act and Regulation 203 (2) (c) (iii) of the Regulations.

194. In Republic v Public Procurement Administrative Review Board and 2 Others (2015) eKLR JR Case No.21 of 2015, Korir J held as follows:

> " 31. The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. The Board has no jurisdiction to hear anything filed outside fourteen days. In fact, the time for filing an application for review was reduced to seven days by an amendment introduced by Regulation 20 of the Public Procurement & Disposal (Amendment) Regulations, 2013 (Legal Notice No.106 of 2013) ....."

195. The aforesaid decision was cited with approval in Republic v Public Procurement Administrative Review Board Ex parte Intertek International Limited; Accounting Officer, Kenya Bureau of Standards & 6 Others (Interested Parties) (2022) eKLR which we also relied on.

196. In the aforesaid case of Republic v Public Procurement Administrative Review Board and 2 Others (2015) eKLR, the Court delved into the rationale for the timelines and stated as follows:

> " 32. The timelines in the PP&DA were set for a purpose. Proceedings touching on procurement matters ought to e heard and determined without delay. Once a party fails to move the board within the time set by the Regulations, the jurisdiction of the Board is extinguished in so far as the particular procurement is concerned."

197. It is further submitted that after the aforesaid lapse of the 14 days' standstill period at midnight on 21stJune 2023, the transaction had entered the contract phase according to Section 135 (6) (h) of the Act which lists Notification of Award as a Contract document.

198. Consequently, any matters arising after midnight on 21stJune 2023 were outside the jurisdiction of the Board as they are contractual matters and not procurement proceedings.

199. Even if the 2nd Respondent wants to believe that the breach of law occurred when the Award was made to the ex parte Applicant, M/s Four M Insurance Brokers Limited, then the purported breach of the law would be deemed to have occurred on 7thSeptember, 2023 when M/s Four M Insurance Brokers Limited was awarded the relevant policy. Refer to the Annexure to the 3rd and 4thRespondent's replying affidavit marked KPC 13.

200. If that is the case, then pursuant to the aforesaid provisions of Section 167(1) of the Act and Regulation 203(2) (c) of the Regulations, any request for review ought to have been filed within fourteen days of the Award issued to the Applicant on 7thSeptember, 2023 to wit, by 21stSeptember, 2023.

201. The relevant request for review was as aforesaid filed on 2nd October 2023 which is around twenty-One (21) days out of time, to wit, after the aforesaid 7th September, 2023 which was a clear violation of Section 167(1) of the Act and Regulation 203 (2) (c) of the Regulations.

202. Further to the foregoing, it is not in dispute that a contract was executed, pursuant to the relevant tender, by the 4thRespondent and the Applicant on 2nd October, 2023.

203. Pursuant to the provisions of Section 167 (4) (c) of the Act, the Board lacked jurisdiction to adjudicate over any request for review filed after the execution of a contract.

204. The aforesaid provision of law was affirmed by this Court in the case of Republic v Public Procurement Administrative Review Board; Ex parte : Madison General Insurance Kenya Limited; Vice Chancellor, Kenyatta University & Another (Interested Parties) (2022) eKLR, where Justice Ngaah held as follows:

> "It could be that indeed the contract was invalid, but in my humble view, considering the provisions of Section 167 (4) (c), once a contract has been signed, the appropriate forum before which the question of validity of a signed contract can be determined is this Honourable Court.
>
> It does not necessarily follow that an aggrieved party is left without a remedy merely because a contract is signed. Grievances arising out of a signed contract will certainly be addressed but not before the Public Procurement Administrative Review Board. They will be addressed before the court which only has the jurisdiction to determine such disputes related to the alleged grievances."

205. It is also submitted that the holding by the Public Procurement Administrative Review Board in paragraph 171 of its aforesaid impugned decision that when the 3rdand 4th Respondents invoked Section 136 to award the tender to the Applicant herein, M/s Four M Insurance Brokers Limited, then new Notifications of Intention to Award were supposed to have been issued, is tainted with illegality as the Board cannot impose on the said respondents a purported legal requirement which is not prescribed under Section 136 of the Act or anywhere else in the said Act or by the Regulations.

206. Even if it was held, as aforesaid, that the procuring entity was legally bound to issue a fresh notification to all the bidders of its intention to Award the next lowest bidder under Section 136 of the Act, it is important to note that the Applicant was not the next lowest bidder. It only came on board, as per the averments contained in the 3rd and 4th Respondent's replying affidavit, which have not been controverted in any of the replying affidavits filed by the 1stand 2nd Respondents, after the next lowest bidders Zamara and Macly Insurance Brokers, also indicated their inability to place cover, after the 3rdand 4th Respondents invoked the said Section 136 of the Act.

207. The relevant communications between the 4thRespondent and Zamara and Macly were made on 30th June, 2023 as highlighted at the averments set out in paragraphs 22 and 23 of the 3rd and 4th Respondents' replying affidavit and the annexures thereto.

208. If the impugned decision of the Board was to be applied to its logical conclusion, the re-issuing of new Notifications of Intention to Award a Contract as contemplated by the Board in its aforesaid impugned decision would be a repetition of the requirements of Section 87 of the Act which is not provided for in the Act and a repetition of Section of Section 167(1) of the Act and Regulation 203 (2) of the Regulations which would then recreate multiple 14 days standstill periods which is not prescribed anywhere in the Act nor Regulations.

209. It is submitted that the holding by the Board that the 3rd and 4th Respondents ought to have cancelled in writing the award made to the 2nd Respondent prior to awarding the relevant tender to the next successful bidder, to wit, the Applicant under Section 136 of the Act lacks a basis in law as the said provision of law is self-executing. It provides for the immediate forfeiture of the tender security of the relevant successful bidder and award to the next lowest evaluated tenderer.

Issues for Determination:

1. Does this court have jurisdiction?
2. Is the Applicant entitled to the orders sought?

Analysis and Determination:

210. In order for the Applicant to succeed in the application for judicial review, the applicant has to prove that the 1st Respondents' decision of 2nd November, 2023 meets the standards as set out in the case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300. In that case the Court cited with approval 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 and held; "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..."

211. The jurisdiction of the Board flows from the provisions of Section 167 (1) of the *Public Procurement and Asset Disposal Act*, 2015 (hereinafter 'the Act") which provides as follows: -

> " 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 Regulation 203 (2) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter" the Regulations ") which provides that-
>
> "(2) (c) The request referred to in paragraph (1) 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.

212. The successful tenderer within the meaning of Section 86 of the Act was the 2nd Respondent who was issued with a notification letter under Section 87 of the Act on 7th June 2023. This meant that if there was any request for review then the same ought to have been filed before the 14 days' standstill period provided for under Section 87 of the Act lapsed at on 21st June 2023.

213. On 21st June 2023, the 4th Respondent issued the 2nd Respondent on 23rd June 2023 with a Letter of Acceptance after the expiry of the 14 days' standstill period provided for under Section 87 of the Act. After the aforesaid lapse of the 14 days' standstill period at midnight on 21st June 2023, the procurement process entered the contract phase within Section 135 (6) (h) of the PPAD Act which lists Notification of Award as a Contract document.

214. Even if the 2nd Respondent wants the court to believe that the breach of law actually occurred when the Award was made to the ex parte Applicant, M/s Four M Insurance Brokers Limited, then the purported breach of the law would be deemed to have occurred on 7th September, 2023 when M/s Four M Insurance Brokers Limited was awarded the relevant policy.

215. Even if the offending event took place was 7th September, 2023 then any request for review by any aggrieved party ought to have been filed within fourteen days of the award, that is on 21st September 2023.

216. It is my finding and I so hold that the request for review that was filed on 12th October 2023 offended Section 167 (1) of the Act and Regulation 203(2)(c)(iii) of the Regulations as a result of which it is this courts finding that it has jurisdiction. I am in agreement with Korir J in Republic v Public Procurement Administrative Review Board and 2 Others (2015) eKLR JR Case No.21 of 2015, that:

> " 31. The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. The Board has no jurisdiction to hear anything filed outside fourteen days. In fact, the time for filing an application for review was reduced to seven days by an amendment introduced

by Regulation 20 of the Public Procurement & Disposal (Amendment) Regulations, 2013 (Legal Notice No.106 of 2013) ....."

217. In Republic v Public Procurement Administrative Review Board; Ex parte: Madison General Insurance Kenya Limited; Vice Chancellor, Kenyatta University & Another (Interested Parties) (2022) eKLR, where Justice Ngaah held as follows:

> "It could be that indeed the contract was invalid, but in my humble view, considering the provisions of Section 167 (4) (c), once a contract has been signed, the appropriate forum before which the question of validity of a signed contract can be determined is this Honourable Court.
>
> It does not necessarily follow that an aggrieved party is left without a remedy merely because a contract is signed. Grievances arising out of a signed contract will certainly be addressed but not before the Public Procurement Administrative Review Board. They will be addressed before the court which only has the jurisdiction to determine such disputes related to the alleged grievances."

218. The Board lacked jurisdiction to hear and determine the Application by the 2nd Respondent under Section 167(4) of the Act, to entertain the Application given that there was an already signed Contract - signed on the 2nd October, 2023 between the Ex-Parte Applicant and the 3rd and 4th Respondent.

219. Given that a contract was executed, between the Applicant and the 4th Respondent, and on 2nd October, 2023 the Board lacked jurisdiction to adjudicate over any request for review filed after the execution of a contract pursuant to the provisions of Section 167 (4)(c) of the Act and I so hold.

220. On the controversial price adjustment issue, Section 82 of the PPAD Act provides that the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment, or amendment in any way by any person or entity.

221. Section 142 (1), (2) and (3) of the Act provide as follows:

> 1. Subject to the regulations, a successful tenderer shall submit a performance security equivalent to not more than ten percent of the Contract amount before signing of the Contract.
>
> 2. In case the contract is not fully or well executed, the performance security shall unconditionally be fully seized by the procuring entity as compensation without prejudice to other penalties provided for by the Act.

222. In the Letter of Acceptance, the 4thRespondent requested the 2nd Respondent to provide it with a separate performance bond from its Underwriters for each policy in the amount of 10% of the annual premium valid for the period of the policy and its CR12 Form from the Registrar of Companies within three (3) days from the date of the said letter prior to the signing of a Contract.

223. However, the 2nd Respondent's Acceptance letter dated 26th June 2023 was not accompanied by the performance Bond. On 30th June, 2023 the 2ndRespondent wrote to the 4th Respondent indicating that they could not place the cover with M/s Old Mutual General Insurance Company, their Underwriter for this policy, because they were unable to get reinsurance support. The reinsurer required the policy to be placed at the full gross premium of USD 1,911,756.66.

224. On 11thOctober 2023, the re-insurer in support of the 2ndRespondent had finally been able to obtain, Swiss Reinsurance informed the 4th Respondent that it would place cover at USD 2,237,039-FY 2023/2024 and USD 2,535,583-FY 2024/2025.

225. The foregoing is a clear expression on the part of the 2nd Respondent that it lacked the requisite capacity to provide cover to the 4th Respondent at the price set out in its bid document and it was seeking to adjust the price and qualifications that had been set out in the bid document after the event.

226. It is this court's finding that decision of the Board that the 2ndRespondent did not refuse to sign a contract with the 4thRespondent but had only made an "Award Adjustment" in its letter dated 30th June 2023 to the 4th Respondent amounts to a fundamental and incurable illegality for want of an express approval or amendment by the procuring entity. This court has the jurisdiction to issue judicial review orders to attend to illegalities like this within the principles as set out in the Pastoli case.

227. In Republic v Public Procurement Administrative Review Board & 2 Others Ex parte Rongo University (2018) eKLR, Mativo, J, as he then was, held as follows:

> " 54. Legal unreasonableness compromises any or all of the following, namely; specific errors of relevancy or purpose, reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight in the sense of more than was reasonably necessary-to some factors and insufficient weight to others."

228. Section 135 (6) of the PPAD Act clearly provides that the tender documents listed therein shall be the basis of all procurement contracts. Section 135 of The PPDA Act provides for the creation of procurement contracts:

1. The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

2. An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

3. The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

4. No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

229. Section 139 (1) (a) of The PPAD Act provides that an amendment or a variation to a contract resulting from a procurement proceeding is effective only if—the variation or amendment has been approved in writing by the respective tender awarding authority within a procuring entity. The has satisfied this court that there is no evidence of an approved variation or amendment in writing. If one existed, then the 2nd Respondent or the 3rd and 4th Respondents would have tendered such evidence.

230. In any event, having found that there was no contract signed between the 2nd Applicant and the 4th Respondent it is this court's finding and I so hold that there was nothing to vary or amend and this argument must fail.

231. It is this court's finding that there was no contract that had been formed between the 2nd Respondent and the 4th Respondent within Section 135 of The PPDA Act and I so hold.

232. It is this court's finding that there being no signed agreement between the 2nd Applicant and the 4th Respondent, the procurement process proceeded with the next lowest evaluated tenderer without any illegality.

233. It is also submitted that the holding by the Public Procurement Administrative Review Board in paragraph 171 of its aforesaid impugned decision that when the 3rdand 4th Respondents invoked Section 136 to award the tender to the Applicant herein, M/s Four M Insurance Brokers Limited, then new Notifications of Intention to Award were supposed to have been issued, is tainted with illegality.

234. The Board cannot impose a new requirement that new notifications of intention should be issued on the said respondents a purported legal requirement which is not prescribed under Section 136 of the Act or anywhere else in the said Act or by the Regulations. To place a requirement for the issuance of new Notifications of Intention would amount to an act ultra vires its powers on the part of the Board.

235. This court has to attend to the question whether or not the procuring entity was under a duty to expressly cancel the award in writing that had failed before entering into a new contract. The argument that the holding by the Board that the 3rd and 4th Respondents ought to have cancelled in writing the award made to the 2nd Respondent prior to awarding the relevant tender to the next successful bidder is misplaced since the PPAD Act does not make such a provision.

236. Section 136 (1) of The PPDA Act stipulates that if the person submitting the successful tender refuses to enter into a written contract in writing as required under Section 135 and Section 64 of this Act, he or she shall forfeit his or her tender security and the procurement process shall proceed with the next lowest evaluated tenderer. The Act does not make any provision for the express cancellation of the Award and I so hold.

237. The Applicant also sought for an order of PROHIBITION directed at the 3rd and 4th Respondent prohibiting and restraining it from implementing the decision of the 1st Respondent handed down on 2nd November, 2023 by proceeding to conclude the procurement proceedings and executing a contract with the successful tenderer with Respect to the All Risks Industrial Insurance Policy in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for the provision of Insurance Brokerage Services for the period 1st July, 2023 to 30th June, 2025 to issue.

238. In Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 eKLR:

> " Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to

> continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....an order of prohibition.....cannot quash what has already been done.

239. The Applicant also seeks: "An order that pending the hearing and determination of the substantive Notice of Motion in this matter, the contract entered into between the Ex-Parte Applicant and the 3rd and 4th Respondents dated 2nd October 2023, with Respect to the All Risks Industrial Insurance Policy in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for the provision of Insurance Brokerage Services for the period 1st July 2023 to 30th June 2025 to continue to be valid and in force."

240. This court finds no justification to interfere with through judicial review orders the contract entered into between the Ex-Parte Applicant and the 3rd and 4th Respondents dated 2nd October 2023, with Respect to the All Risks Industrial Insurance Policy in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for the provision of Insurance Brokerage Services for the period 1st July 2023 to 30th June 2025.This settles the prayer for a prohibition order and Prayer 5 of the Chamber Summons dated 6th November, 2023.

241. Pegged on the foregoing analysis, it is this courts' finding and I so hold that the second issues are settled in favour of the Applicant.

Disposition:

242. The Applicant has made out a case for the issuance of the Judicial review orders sought.

Order:

1. The Application dated 6th November, 2023 is allowed.
2. Prayer 5 of the Chamber Summons dated 6th November, 2023 is allowed.
3. Costs to the Applicant.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2023.

.....

JOHN CHIGITI (SC)

JUDGE