REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. E031 OF 2021

REPUBLIC...APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD...1ST RESPONDENT

KENYA BUREAU OF STANDARDS............................2ND RESPONDENT

MANAGING DIRECTOR, KEBS.................................3RD RESPONDENT

AND

M/S FIVE BLOCKS ENTERPRISES LTD.............INTERESTED PARTY

ex parte:

NIAVANA AGENCIES LIMITED

JUDGMENT

Before court is a motion dated 12 March 2021 brought under Order 53 Rule 1(2) of the Civil Procedure Rules, Section 8 of the Law Reform Act (Cap 26) and Articles 10, 227, 258 & 259 of the Constitution of Kenya.

The prayers sought in this motion are framed as follows:

> ***"1. THAT an order of Certiorari be and is hereby issued to remove into this Honourable Court and quash the decision of the Public Procurement Administrative Review Board rendered on 22nd February 2021 in Application No. 12 of 2021, regarding International Tender for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts (Tender No. KEBS/T012/2020-2023), dated Tuesday, 19th January 2021.***
>
> ***2. THAT an order of Certiorari be and is hereby issued to remove into this Honourable Court and quash the International Tender for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts (Tender No. KEBS/T012/2020-2023), dated Tuesday, 19th January 2021.***
>
> ***3. THAT costs of and incidental to this application be provided for.***
>
> ***4. THAT such further and other relief that the Honourable Court may deem just and expedient to grant."***

The motion is based on the grounds set out in the statutory statement of facts which have been verified by the affidavit of Benedict Kabugi Ndungu, a director of the applicant.

It is the applicant's case that around 19 January 2021, the 2nd respondent advertised, in various media, a tender described as *"International Tender for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts (Tender No. KEBS/T012/2020-2023)."*

On 20th January 2021, the applicant obtained the tender documents apparently to participate in the tender. Due to what the interested party thought were irregularities in the tender, the interested party initiated a request of review before the 1st respondent, no doubt, pursuant to section 167(1) of the Public Procurement and Asset Disposal Act, 2015.

The 1st respondent rendered its decision on 22 February 2021.

It is the applicant's case that the 1st respondent's decision is contrary to Article 227 of the Constitution and the provisions of the Public Procurement and Asset Disposal Act, 2015 together with the Regulations made thereto. In particular, it has been deposed that the 1st respondent has no power whatsoever to reconfigure tender documents or to direct the procuring entity on the procurement method to adopt.

Since the 1st respondent found the tender to be wanting in law, the only order that the 1st respondent could possibly make was to quash the tender.

The learned counsel for the applicant urged that it is the character and procedure of arriving at the final orders as framed by the 1st respondent that he found untenable; in particular, the 2nd order which the applicant impugns is framed as follows:

> ***"2. The Accounting Officer of the Procuring Entity is hereby directed to issue an addendum to amend the Tender document in International Tender for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts to provide for a margin of preference as a criterion for evaluation at the financial evaluation stage and at its discretion, provisions to satisfy the requirements for a framework agreement in accordance with section 114 of the Act read together with Regulation 102 and 103 of the Regulations 2020 or to unbundle the tender to provide for lots, within 30 days from the date of this decision, taking into consideration the findings of the Board in this Review."***

It is also urged on behalf of the applicant that the 1st respondent failed to draw a clear distinction between its mandate and the role of the 3rd respondent, as the accounting officer of the procuring entity. It is therefore the applicant's submission that the 1st respondent's orders are *ultra vires* and in excess of jurisdiction.

The case of **Republic vs Public Procurement Administrative Review Board & 2 Others *ex parte* Olive Telecommunications PVT Limited [2014] eKLR**, was cited for the proposition that as much as the 1st respondent's latitude in applications for review is wide, it is not that wide to render the idea conceived by the procuring entity inconsequential.

According to the applicant, the 1st respondent amended the bid documents in a manner that fundamentally altered the procurement course as initially envisaged by the 2nd respondent. Again section 167 (4) of the Public Procurement and Asset Disposal Act, 2015 specifies matters that are subject to review and that the choice of the procurement method is not one of them.

Counsel also cited the decision of the Court of Appeal in **County Government of Nyeri & Anor. vs Cecilia Wangechi Ndungu [2015] eKLR** where it was held that interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose.

Accordingly, it was not the intention of Parliament that the 1st respondent would deal with matters of choice of procurement at any stage, irrespective of whether it was at the adjudication stage or at the stage of pronouncement of the final orders.

The Supreme Court's decision in **Samuel Kamau Macharia Vs Kenya Commercial Bank & 2 Others, [2011] eKLR** was invoked; in that case the Court held that a court's jurisdiction flows from either the Constitution or legislation or both and that a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot therefore arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

Also cited was the decision in **Republic V Public Procurement Administrative Review Board & Another [2008] eKLR**, where it was held that a fundamental misdirection or failure to address the applicable law or a fundamental error of law in reaching a decision renders the decision reached by a decision maker devoid of legality and is therefore void.

Again in **Republic v Public Procurement Administrative Review Board & 2 others ex-parte Numerical Machining Complex Limited [2016] eKLR**, the decision in **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd and Pride Enterprises vs. Public Procurement Administrative Review Board & 2 Others (2015) eKLR** was cited with approval for the position that the Public Procurement and Asset Disposal Act and the Regulations made thereunder only clothes the procuring entity with the power to amend a Tender Document.

The applicant's counsel urged that the remedy of judicial review is now firmly entrenched in the Constitution in addition to the Law Reform Act, cap. 26 the Fair Administrative Action Act, No. 4 of 2014 and the Civil Procedure Rules. There is therefore, no doubt that this Honorable Court is properly vested with the jurisdiction to interrogate actions of the respondents within the principles of the Constitution in addition to the doctrine of *ultra vires.*

As at the time of writing this judgment no response whatsoever had been filed by the 1st respondent. The 2nd and 3rd respondents filed replying affidavits and submissions. The affidavit filed on behalf of the 2nd and the 3rd respondents was sworn by Ms. Jane Ndinya who is the 2nd respondent's head of procurement.

According to Ms. Ndinya, if the tender documents are amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, or the time remaining is less than the period indicated in instructions to tenderers, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.

As far as the tender in question is concerned, it is yet to be opened and evaluated.

She further deposed that the choice of a procurement method and evaluation criteria are responsibilities of the procuring entity as enshrined in Article 227 (1) of the Constitution. Section 114 of the Public Procurement and Asset Disposal Act, on the other hand, prescribes the manner in which framework agreements should be undertaken.

It is the 2nd and 3rd respondent's case that contrary to the applicant's allegations, the tender meets both the requirements for use of open international tender and the framework agreement; if anything, this sort of agreement, requires use of open tenders.

The 2nd and 3rd respondents also agree that according to Section 167 (4) of the Public Procurement and Asset Disposal Act, choice of procurement method is not subject to review that would ordinarily apply to procurement proceedings. Nonetheless, they have urged that they stand the risk of having the tender being terminated or interfered with if the prayers sought by the applicant are granted.

It was also urged on behalf of these respondents that this court lacks jurisdiction to dispose of this dispute and on this point the cases of the **Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd (1989) 1KLR**; **Consolidated Bank of Kenya Limited v Arch Kamau Njendu t/a Gitutho Associates (2015) eKLR** and **Kenya Revenue Authority & 2 Others Vs. Darasa Investments Limited (2018) eKLR** were cited for the point that jurisdiction is what clothes a court with the authority to entertain a matter before it and issue appropriate orders; that a court either has jurisdiction or doesn't and that it cannot be inferred or presumed.

I have considered the submissions by both counsel for the applicant and the respondents.

It is not in dispute that the 1st respondent found some flaws with the tender floated by the 2nd respondent; to be precise, it singled out particular provisions of the Public Procurement and Asset Disposal Act and Regulations made thereunder, that in its view, had been flouted by the 2nd respondent in floating of the international tender; the provisions of the law said to have been breached are sections 157 and 158 of the Public Procurement and Asset Disposal Act and Regulations 77, 164 and 102 of the Public Procurement and Asset Disposal Regulations, 2020.

As far as sections 158 and 157 are concerned, the 1st respondent noted as follows:

> ***"The Board finds that the procuring entity breached the provisions of section 158 of the Act read together with section 157 (8) (b) (ii) of the Act and Regulation 164 of the Regulations 2020 for failure to provide for a margin of preference in the tender document."***

And on breach of Regulation 77 of the Regulations, the 1st Respondent had this to say:

> ***"It is therefore the finding of this Board that the Tender Document does not provide for financial evaluation criteria in compliance with Regulation 77 of Regulations 2020, noting the procuring entities failure to provide in its financial evaluation criteria how it shall apply any margin of preference in the subject tender in accordance with Regulation 77 (2) (d) of the 2020 Regulations."***

The 1st respondent's position on the procuring entity's non-compliance with Regulation 102 was expressed as follows:

> ***"From the foregoing and from the title of the subject tender which is cited hereinbefore, the Board observes that the subject tender is an international open tender. Further, the subject services, that is, the provision of pre-export verification of conformity to standards are to be undertaken for a period of three years. However, the Board observes that the Procuring Entity's Invitation to Tender does not specify that the procuring entity intends to establish a framework agreement, the number of supplier or contractors in the said agreement, the evaluation criteria or an estimate of the total volume or scope of work to be made for the duration of the framework agreement as required under Regulation 102(1) of the Regulations 2020."***

The 1st respondent also faulted the procuring entity's addendum which, in its opinion, violated the law on stay of procurement proceedings once a request for review has been made; on this particular breach, the 1st respondent stated as follows:

> ***"In this regard therefore the Board finds that the Procuring Entity's Addendum to the Tender Document titled 'Extension and Clarification of Tenders dated 3rd February 2021, was issued after filing of the request for Review on 1st February2021, which filing stayed any further steps being taken with respect to the subject procurement process as from 1st February 2021, rendering the said addendum null and void."***

The 1st respondent then invoked section 173 of the Act and made specific orders to cure the flaws that had been identified in the procurement process; these orders were framed as follows:

"1. The Accounting Officer of the Procuring Entity's Addendum to the Tender Document in International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to standard services for used Motor Vehicles, Mobile Equipment and Spare Parts titled 'Extension and Clarification of Tenders' dated 3rd February 2021 be and is hereby cancelled and set aside.

2. The Accounting officer of the Procuring Entity is hereby directed to issue an addendum to amend the Tender document in International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts to provide for a margin of Preference as a criterion for evaluation at the financial evaluation stage and at its discretion, provisions to satisfy the requirements for a framework agreement in accordance with section 114 of the Act read together with Regulation 102 and 103 of the Regulations 2020 or to unbundle the tender to provide for lots, within thirty (30) days from the date of this decision, taking into consideration the findings of this Board in this review.

3. The Accounting Officer of the Procuring Entity is hereby directed to extend the tender submission deadline for a further fourteen (14) days from the date of issuance of the addendum referred to in Order No. 2."

The 1st respondent also ordered that parties bear their respective costs.

The questions before court are whether these orders prescribed by the 1st respondent directing the 2nd respondent to take specific actions with respect to the procurement process are either ultra vires the Act or, as I understand the applicant, whether they are tainted with illegalities; or whether the 1st respondent acted without jurisdiction or exceeded it. All these questions are related or intertwined and an answer to one may as well resolve the other.

In answering the questions, I am minded that in an application such as the present one, all that the court is concerned with is not the merits of the impugned decision but the process by which the decision was reached; thus, in determining this matter the court is not exercising its appellate jurisdiction but supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals or other persons or bodies such as the 1st respondent which perform public duties or functions. The words Lord Hailsham L.C. in **Chief Constable of North Wales Police vs. Evans (1982) 3 ALL E.R. at pg. 141** are always apt on this point; the learned judge said:

> ***"It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."***

Section 173 of the Public Procurement and Asset Disposal Act which the 1st respondent invoked in making its orders reads as follows:

173. Powers of Review Board

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

> ***(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***
>
> ***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***
>
> ***(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
>
> ***(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
>
> ***(e) order termination of the procurement process and commencement of a new procurement process.***

Going by the provisions of this section, the 1st respondent has powers immense enough not only to annul anything the accounting officer of the procuring entity has done but it can also terminate the procurement process altogether.

As far as the question at hand is concerned, it has power to substitute its own decision for that of the 3rd respondent and also direct him to do or undo anything in the procurement proceedings.

On the face of it, it would appear that the 1st respondent was well within its powers to make the sort of orders it made and to direct, as it did, the 3rd respondent to take certain actions to mitigate the flaws identified in the procurement process.

Of the three directives issued by the 1st respondent, it is the second one that appears to be the main bone of contention; it is certainly the basis of the applicant's argument that choice of a procurement method cannot be a subject of review and thus implying that the 1st respondent has effectively directed the 3rd respondent on the choice of a procurement method.

There is no doubt that section 167 (4) of the Public Procurement and Asset Disposal Act is clear on that point that the choice of a

procurement method is not subject to review; subsection (4) is understood better in the context of the entire section 167 and therefore it is only prudent that I reproduce the entire section here; it reads as follows:

167. Request for a review

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

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.

(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.

(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).

The question is whether indeed the 1st respondent has directed the respondents or any of them on the choice of the procurement method. In interrogating this question, I have found some guidance in sections 91 and 92 of the Public Procurement and Asset Disposal Act; section 91 talks of open tendering as the preferred mode of tendering while section 92 prescribes a raft of procurement methods that an accounting officer of a procuring entity may employ in a procurement; they respectively state as follows:

91. Choice of procurement procedure

(1) Open tendering shall be the preferred procurement method for procurement of goods, works and services.

(2) The procuring entity may use an alternative procurement procedure only if that procedure is allowed and satisfies the conditions under this Act for use of that method.

(3) Despite sub-sections (1) and (2) open tendering shall be adopted for procurement of goods, works and services for the threshold prescribed in the respective national and county Regulations.

92. Methods of procurement

Subject to this Act and prescribed provisions, an accounting officer of a procuring entity shall procure goods, works or services by a method which may include any of the following—

(a) open tender;

(b) two-stage tendering;

(c) design competition;

(d) restricted tendering;

(e) direct procurement;

(f) request for quotations;

(g) electronic reverse auction;

(h) low value procurement;

(i) force account;

(j) competitive negotiations;

(k) request for proposals;

(l) framework agreements; and

(m) any other procurement method and procedure as prescribed in regulations and described in the tender documents.

My understanding of the tender in issue is that it is an open tender prescribed under section 92 (a) and which, as noted in section 91, is the preferred mode of procurement. In my humble opinion, there is nothing in the 1st respondent's directive or directives that would suggest that the 2nd and 3rd respondents or any of them has been directed to alter the method of procurement they have chosen. Indeed, there is no evidence that after the directive given by the 1st respondent, they will now be compelled to employ any alternative mode of procurement other than the open tender method. As a matter of fact, all the 3rd respondent has been asked to do is to ensure that whichever method he has chosen, the relevant provisions of the Act pertaining to that method are complied with to the letter.

The provision in issue is section 157 (8) (b) (ii) of the Act and Regulation 164 of the Regulations 2020 on the margin of preferences. This concept of preferences is found in Part X11 of the Act; section 155 in that Part reads as follows:

155. Requirement for preferences and reservations

(1) Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.

(2) Subject to availability and realisation of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.

(3) Despite the provisions of subsection (1), preference shall be given to—

(a) manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or

(b) firms where Kenyans are shareholders.

(4) The threshold for the provision under subsection (3) (b) shall be above fifty one percent of Kenyan shareholders.

(5) Where a procuring entity seeks to procure items not wholly or partially manufactured in Kenya—

(a) the accounting officer shall cause a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya; and

(b) the procuring entity shall require successful bidders to cause technological transfer or create employment opportunities as shall be prescribed in the Regulations.

The idea behind preferences and reservations is, *inter alia*, to promote locally manufactured goods or locally available services; it is to promote local industry and, in other instances, to support those who are likely to be disadvantaged by unfair competition and discrimination. This concept is expressly acknowledged in Article 227 of the Constitution. That Article reads as follows:

227. (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

(a) categories of preference in the allocation of contracts;

(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;

(c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and

(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices. (Emphasis added).

Thus, the attributes of fairness, equity, competitiveness and cost-effectiveness are a constitutional requirement and a public procuring entity is enjoined to demonstrate that they have been applied in procurement of goods or services. The Act referred to in clause (2) of Article 227 is, no doubt, the Pubic Procurement and Asset Disposal Act which, as noted, has embraced the principles of preferences and reservations as a

way or one of the means of ensuring that public procurement of goods and services is guided by fairness, equity, competitiveness and cost-effectiveness. Section 157 of the Act goes further to show how these principles are applied. In view of its centrality to the question at hand, it is important that I reproduce the entire section here; it states as follows:

157. Participation of candidates in preference and reservations

(1) Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.

(2) Subject to subsection (8), the Cabinet Secretary shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and asset disposal.

(3) The preferences and reservations referred to in subsection (2) shall—

(a) be non-discriminatory in respect of the targeted groups;

(b) allow competition amongst the eligible persons; and

(c) be monitored and evaluated by the Authority.

(4) For the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination, reservations, preferences and shall apply to—

(a) candidates such as disadvantaged groups;

(b) micro, small and medium enterprises;

(c) works, services and goods, or any combination thereof;

(d) identified regions; and

(e) such other categories as may be prescribed

(5) An accounting officer of a procuring entity shall, when processing procurement, reserve a prescribed percentage of its procurement budget, which shall not be less than thirty per cent, to the disadvantaged group and comply with the provisions of this Act and the regulations in respect of preferences and reservations.

(6) To qualify for a specific preference or reservation, a candidate shall provide evidence of eligibility as prescribed.

(7) The Authority shall maintain an up-to-date register of contractors in works, goods and services, or any combination thereof, in order to be cognizant at all times of the workload and performance record.

(8) In applying the preferences and reservations under this section—

(a) exclusive preferences shall be given to citizens of Kenya where—

(i) the funding is 100% from the national government or county government or a Kenyan body; and

(ii) the amounts are below the prescribed threshold;

(iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings;

(b) a prescribed margin of preference shall be given—

(i) in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or

(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

(9) For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

(10) Despite subsection (2) or any other provisions of this Act, every procuring entity shall ensure that at least thirty percent of its procurement value in every financial year is allocated to the youth, women and persons with disability.

(11) Every procuring entity shall ensure that all money paid out to an enterprise owned by youth, women or persons with disability is paid into an account where the mandatory signatory is a youth, woman or a person with disability.

(12) The procuring entities at the national and county level shall make a report after every six months to the Authority.

(13) A report under subsection (12) shall—

(a) certify compliance with the provisions of this section; and

(b) provide data disaggregated to indicate the number of youth, women and persons with disability whose goods and services have been procured by the procuring entity.

(14) The Authority shall make a report to Parliament after every six months for consideration by the relevant committee responsible for equalization of opportunities for youth, women and persons with disability, which report shall contain details of the procuring entities and how they have complied with the provisions of this section.

(15) The Cabinet Secretary shall prescribe the preferences that shall facilitate the attainment of the quota specified in subsection (10) in order for the State to achieve the objectives of Articles 55 and 227(2) of the Constitution.

(16) The preferences referred to in subsection (15) shall—

(a) be prescribed within ninety days after commencement of this Act;

(b) be subject to such conditions as the Cabinet Secretary may specify therein but such conditions shall not pose any unnecessary impediment to the youth from participating in public procurement.

(17) The National Treasury shall operationalize a preference and reservations secretariat to be responsible for the implementation of the preferences and reservations under this Act which shall be responsible for—

(a) registration, prequalification and certification of the persons, categories of persons or groups as provided for in under Part XII;

(b) training and capacity building of the above target groups;

(c) providing technical and advisory assistance to procuring entities in the implementation of the preferences and reservations under this Act; and

(d) monitoring and evaluating the implementation of the preferences and reservations under this Act.

(18) The National Treasury shall provide adequate staff and resources for the operations of the secretariat.

Looking at the 1st respondent's decision, it is apparent that the 1st respondent correctly applied its mind to these provisions of the law and noted that any of the tenderers or potential bidders could be entitled to these preferences and reservations and therefore it was necessary that this aspect of procurement must be disclosed in the tender.

The 1st respondent noted, correctly in my view, that under section 157 (8) (b) of the Act as read together with Regulation 164 of the Public Procurement and Asset Disposal Regulations, 2020 a margin of preference of the evaluated price is accorded to bidders in either of the two ways; to bidders offering goods manufactured, assembled, mined, extracted or grown in Kenya or to bidders offering works, goods and services depending on the percentage of shareholding of the locals on a graduating scale as prescribed in Regulation 164. This Regulation reads as follows:

164. For purposes of section 157(8) (b) of the Act, the margin of preference for international tendering and competition pursuant to section 89 of the Act shall be —

(a) twenty percent (20%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya and the percentage of shareholding of

Kenyan citizens is more than fifty percent (50%);

(b) fifteen percent (15%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya;

(c) ten percent (10%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);

(d) eight percent (8%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is less than fifty percent (50%) but above twenty percent (20%); and

(e) six percent (6%) margin of preference of the evaluated price of the tender, where percentage of shareholding of Kenyan citizens is above five percent (5%) and less than twenty percent (20%). (Emphasis added).

The 1st respondent noted that being an international tender for procurement of services to be provided outside the country, it would not be possible to place a margin of preference of the evaluated price of the tender for '*goods manufactured, assembled, mined, extracted or grown in Kenya.'* But it was possible for the preference to be applied to a prospective bidder's evaluated tender price if it met the percentage shareholding of Kenyan citizens as prescribed in Regulation 164 (c), (d) and (e) of the Regulations.

The 1st respondent also made reference to Regulation 147(2) which also removes any doubt that a citizen potential bidder or tenderer but registered in a foreign country could also benefit from the scheme of preferences. That Regulations reads as follows

(2) A citizen contractor registered outside Kenya shall only be eligible to benefit from the preferences and reservations scheme when bidding in international tendering and competition.

For these reasons, the 1st respondent correctly held that it is necessary in an international tender such as the one in question for the procuring entity to provide for a margin of preference in the subject tender.

I am therefore not persuaded that the applicant's decision is deficient on any of the judicial review grounds of illegality, irrationality or procedural impropriety. There is no evidence that, in making the orders it did, the 1st respondent acted without jurisdiction, or exceeded its jurisdiction, or there is an error of law on the face of the record, or the decision is unreasonable in the Wednesbury sense **(Associated Provincial Picture Houses Limited vs. Wednesbury Corporation (1948) 1 K.B. 223).**

On the contrary, I am persuaded that 1st respondent acted within its powers with which it is clothed under section 173 of the Act.

It is trite that a judicial review court will not interfere in any way with the exercise of any power or discretion which has been conferred on a body unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. It has been said that if the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power, be guilty itself of usurping power. **(See Chief Constable of North Wales Police vs. Evans (1982) 1 W.L.R 1155 at pg. 1173).**

It follows that the practicalities of the directives issued by the 1st respondent or whether the 2nd and 3rd respondents will be able to implement them is not a question that this honourable court is prepared to inquire into; it is more concerned with the process rather than the merits of the decision. In any event, the 2nd and 3rd respondents opposed the application and there is nothing in their affidavits or submissions that suggest that they will not be able to comply with certain provisions of the Public Procurement and Asset Disposal Act singled out by the 1st respondent.

In the final analysis, I do not find any merit in the applicant's motion and it is hereby dismissed with costs. Orders accordingly.

DATED, SIGNED AND DELIVERED ON 16TH APRIL 2021

NGAAH JAIRUS

JUDGE