



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW APPLICATION NO. E024 OF 2021**

**REPUBLIC..... APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**AND**

**KENYA PORTS AUTHORITY.....1<sup>ST</sup> INTERESTED PARTY**

**THE ACCOUNTING OFFICER, KENYA**

**PORTS AUTHORITY.....2<sup>ND</sup> INTERESTED PARTY**

**AND**

**JONA PESTCON.....3<sup>RD</sup> INTERESTED PARTY**

**KOTAA EAST AFRICAN LIMITED.....EX-PARTE APPLICANT**

**RULING**

**The Application**

1. Pursuant to a chamber summons dated 17/05/2021 and filed on 18/05/2021, leave to institute Judicial Review proceedings in the nature of *certiorari* seeking to remove to this court for purposes of quashing the entire decision and orders of the Public Procurement Administrative Review Board made on 6/05/2021 in Review Application 56/2021 was granted against the Respondent. It was further directed that the said leave was to operate as stay of implementation of the said decision. Consequently, the Ex-parte Applicants filed a Notice of Motion dated 19/05/2021 seeking orders as follows:

***a) An order of Certiorari to bring into this Honourable Court for the purposes of being quashed the Respondent's decision that "the procuring entity award of all the eight zones of the subject tender to the 3<sup>rd</sup> Interested Party met the threshold of Article 10, 47, 201, 227 and 232 of the Constitution" contained in the ruling dated 6<sup>th</sup> May,2021 and the award of the Tender Number KPA/074/2020-2021/MO for provision of Pest Control Services to the 3<sup>rd</sup> Interested Party.***

***b) Costs of this suit.***

2. The motion is premised upon the grounds set out in the Statutory Statement dated 17/05/2021 and the accompanying Verifying Affidavit sworn on 17/05/2021 by **Ms. Ruth Musindale Madagwa** who is a Director to the Ex-parte Applicant.

3. The Ex-parte Applicant's case is that she participated in the preparation of the tender documents for Tender No. KPA/074/2020-2020/MO for the Provision of Pest Control Services (hereinafter "*the subject tender*"). The tender opening date was set for 23/11/2020, but the same was extended to 30/11/2020 by an Addendum No. 1 dated 18/11/2020.

4. The Ex-parte Applicant avers that they were informed that they were not the lowest evaluated bidders vide regret letter dated 9/04/2021, and that the Respondents awarded the subject tender to the 3<sup>rd</sup> Interested Party contrary to the principles of Equity as provided for in Article

227(1) of the Constitution and clause 2.24 of the tender document which provided that “ ***the authority reserves the right to limit the number of zones awarded to a bidder to ensure fair and equitable distribution with due consideration to economy and efficiency***”, and that the same Clause 2.24 offends the requirement at page 27 of the tender document which requires that Award of the tender shall be to the lowest bidder evaluated per zone.

5. It is the Ex-parte Applicant’s case that the actions of the Respondent greatly prejudiced the Ex-parte Applicant’s chances of winning the bid, and that the 1<sup>st</sup> and 2<sup>nd</sup> interested parties in awarding all the zones in the subject tender to the 3<sup>rd</sup> Interested Party violated the mandatory requirements of the tender document provided at page 45 which provided that “***Award shall be per zone. No bidder shall be awarded more than one (1) zone.***”

6. Being dissatisfied with the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties decision, a request for review was lodged before the Respondent and on 6/05/2021 in respect to Review Application No. 56 of 2021 filed on 16/04/2021. The Respondent made a decision which failed to take into consideration all material information before it, which was that as per instructions to tenderers No. 1.9 of tender, the Respondent failed to make a sound decision on the issues that were before her and unless the Court intervenes by quashing the Respondent’s decision constrained in the aforementioned ruling, there is a risk that the Ex-parte Applicant’s right to a fair administrative action would be curtailed.

### **The Response**

7. The Respondent opposed the application through Replying Affidavit sworn on 7/06/2021 by **Philip Okumu**. The deponent is the Acting Board Secretary of the Respondent. It is the Respondent’s case that pursuant to Section 168 of the Act, and vide letter dated 16/04/2021, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties were notified of the pending review before the Respondent, filed on 16/04/2021 by the Ex-parte Applicant challenging the award of the subject tender to the 3<sup>rd</sup> Interested Party. The Respondent also required the Applicants to suspend the procurement proceedings relating to the subject tender and directed the Ex-parte Applicants to forward all confidential documents pertaining to the subject procurement proceedings and a list of bidders who participated in the tender and their contacts and after receiving the list of bidders, they were notified of the existence of Review No. 56 of 2021 and informed of their right to respond.

8. The deponent avers that the Ex-parte Applicant sought orders annulling and setting aside its letter of notification of unsuccessful bid dated 9/04/2021 and the 2<sup>nd</sup> Interested Party’s decision awarding the subject tender to the 3<sup>rd</sup> Interested Party vide letter dated 9/04/2021. The Ex-parte Applicant also sought an Order directing the 2<sup>nd</sup> Interested Party to reinstate its bid and conduct a re-evaluation at the Financial Evaluation Stage, and lastly, the Ex-parte Applicant sought an Order directing the 1<sup>st</sup> Interested Party to award the subject tender to it.

9. The Respondent avers that having considered each of the parties’ pleadings filed before it, and confidential documents submitted by the Ex-parte Applicants herein, pursuant to Section 67(3)(e) of the Act, it framed the following issues for determination;

***a) Whether the procuring entity’s award of the subject tender to the Interested Party met the threshold of Article 10, 47,201, 227 and 232 of the Constitution.***

***b) Whether the Applicant’s letter of notification of unsuccessful bid dated 9/04/2021 meets the threshold of Section 87930 of the Act and Regulation 82 of the Public Procurement and Assets Disposal Regulations, 2020(hereinafter referred to as “Regulations 2020”)***

10. The Respondent avers that on the first issue for determination, it found that the Request for Review 56 of 2020 was not fatally defective since the 3<sup>rd</sup> Interested Party did not suffer any prejudice having been joined as a party to the review in accordance to Section 170 (c) of the Public procurement and Assets Disposal Act (hereinafter “*the Act*”).

11. In addressing the second issue, the Respondent avers that pursuant to Section 80(2) of the Act, which binds it to the procedures and criteria for evaluation and comparison of bids as provided in the appendix to the instructions to the tenderers of the tender document, it found that the “*price schedule of services form*” did not form part of the mandatory documents that are evaluated at the preliminary evaluation or the parameters of technical evaluation, and further, that the price schedule did not provide the criteria applicable during financial evaluation and that the financial evaluation was to be to the lowest evaluated tenderer.

12. With regard to whether the 2<sup>nd</sup> Interested Party could abandon their award criteria of “*lowest evaluated bidder per zone*” provided under clause 2.21 of the Appendix to Instructions to Tenderers of the Tender Document and instead apply the clause found at the foot of the standard forms for price schedule of services on page 44 of the tender document which provided that “*award shall be per zone and that no bidder shall be awarded more than one (1) zone*”, the Respondent considered the prices quoted by all bidders in the eight zones and found that the 3<sup>rd</sup> Interested Party had the lowest evaluated tender price in all the eight zone. Therefore, the Respondent found that it was erroneous for the procuring entity to add clause on award criteria under Section VIII of the tender documents, which dealt with price Schedule of services and provided a Price Schedule of Services, herein listed as one of the Standard Forms under Section IX on page 45 of the tender document. However, the same did not form part of the procedures and criteria for evaluation and award of the subject tender as provided in the Appendix to instructions to the Tenderers of the Tender Document.

13. It is the Respondent’s case that it considered the import of Articles 10, 47, 201, 227(1) and 232 of the Constitution and found that the procurement method was open tendering; no provision of the tender limited the number of zones that a bidder could bid for; that at the Financial Stage, the Ex-parte Applicant and other 15 bidders were all subjected to the financial criteria under Clause 2.22(iii) and Clause 2.224 of the Appendix to Instructions to Tenderers of the Tender Document; that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party had an obligation of awarding the subject tender in a cost effective manner, thus could not consider the next lowest evaluated bidder in any other zone simply because the 3<sup>rd</sup> Interested Party had the lowest evaluated bid in one zone and it would not amount to fair competition to allow a bidder to quote prices for all the zones, only to deny award of the tender to that bidder in some zones, yet such bidder was the lowest evaluated in all the eight zones.

14. The Respondent avers that the Ex-parte Applicant notice of motion is not merited since it has failed to demonstrate that the Ex-parte Applicant was the lowest bidder in any of the eight zones; that the Ex-parte Applicant has not demonstrated any breach of the Constitution, Act, or Regulations by the Respondent in arriving at its decision; there is no specific mention of provisions of the Fair Administrative Action Act that were breached by the respondent; the Respondent found that the notification to the bidders did not meet the threshold of Section 87 of the Act and Regulation 82 of Regulations 2020, hence it directed the 1<sup>st</sup> Interested Party to issue fresh notification letters in accordance to the Act and Regulations 2020, and that the only left action to be undertaken in accordance to the laws was for the 1<sup>st</sup> Interested Party to issue letters of notification and proceed with the procurement process to its logical conclusion.

15. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties opposed the application through Replying Affidavit sworn by **Cosmas Makori**, the 2<sup>nd</sup> Interested Party's Head of Procurement & Supplies. The deponent avers that on 5/11/2020, the 2<sup>nd</sup> Interested Party advertised the subject tender on the Daily Nation and Daily Standard Newspapers, and the 2<sup>nd</sup> Interested Party's website inviting bidders to tender. Whereas the tender opening was scheduled on 23/11/2020, an Addendum No. 1 dated 18/11/2020 was issued, which amended the deadline of submission to 30/11/2020, and a second Addendum dated 20/11/2020 was issued giving various clarifications on the scope of the works and distinct zones tendered therein. Furthermore, the deponent avers that a mandatory pre-bid conference and site visits were carried out on distinct dates in various offices of the 2<sup>nd</sup> Interested Party.

16. The deponent avers that during the opening of the tender, the tender opening committee received a total of forty seven (47) bid documents in response to the tender. The bids were subjected to preliminary evaluation, technical evaluation and financial evaluation to examine their responsiveness to the bid guided by the requirements in the Tender Document, the Addenda and in strict adherence to the procedure, Rules, and Regulations under the Act.

17. The deponent avers that upon final evaluation, the 3<sup>rd</sup> Interested Party was identified as the lowest evaluated bidder of all the zones enumerated in the subject tender, and in accordance with Section 86 (1) of the Act, the 3<sup>rd</sup> Interested Party was recommended for award of the various zones listed in the subject tender and a notification of award was issued and the unsuccessful bidders were equally notified with reasons for disqualifications outlined in the notification letters.

18. The deponent avers that the Ex-parte Applicant being dissatisfied with the decision of the procuring entity requested for review before the Respondent. The review was heard and parties given a reasonable opportunity to be heard. The Respondent made the following findings: Cancellation of all the letters of notification to the unsuccessful bidders; cancellation of the notification of award of the subject tender issued to the 3<sup>rd</sup> Interested Party and issuance of notification letters pursuant to Section 87 of the Act and regulation 82 of Regulations 2020 within 7 days.

19. The deponent avers that the Ex-parte Applicant has failed to demonstrate which injustice or prejudice it is prone to suffer if the Respondent's decision is implemented. Consequently, the Respondent's decision ought to be upheld and the judicial review ought to be dismissed.

20. The 3<sup>rd</sup> Interested Party opposed the Application vide Replying Affidavit sworn on 26/05/2021 by **John Kivunzi**. The deponent avers that as correctly stated at paragraph 5 of the request for review, clause 2.24 requirement at page 27 of the tender document stated that the award of the tender should be to the lowest evaluated bidder per zone. Therefore, the Ex-parte Applicant's contention that page 45 of the tender document allegedly provided that no bidder should be awarded more than one zone is unfounded, since page 45 of the tender document provides for standard documents and not mandatory requirements as alleged. Therefore, since the 3<sup>rd</sup> Interested Party was the lowest evaluated bidder for zones 1 to 8, it is only fair that he be awarded the said zones.

21. The deponent avers that upon delivery of the Respondent's ruling, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties complied with the orders made therein by issuing a proper notification of award dated 7/05/2021, Therefore, the prayer for leave to operate as a stay granted by this Court was already overtaken by events.

### **Submissions**

22. Parties did file submissions pursuant to the Court's directions. The Ex-parte Applicants submissions were filed on 10/06/2021, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties submission were filed on 17/07/2020, while the 3<sup>rd</sup> Interested Party's submissions were filed on 21/07/2021. The Respondent did not file submissions but relied on their Replying affidavit submissions were filed on 10/06/2021,

23. **Mr. Sang** learned counsel for the Ex-parte Applicant reiterated the content of the Ex-parte Applicant's verifying Affidavit and statement, and submitted that clause 2.24 of the tender document provided that the authority reserved the right to limit the number of zones awarded to a bidder to ensure fairness and equitable distribution with due consideration to economy and efficiency. Therefore, the Respondent acted illegally and irrationally when it failed to set aside the award issued to the 3<sup>rd</sup> Interested Party, yet it was clear that the procuring entity had failed to adhere to the principles of equality enshrined under Article 227(1) of the Constitution.

24. With regard to the letters of notification issued to unsuccessful tenderers dated 9/04/2021, counsel submitted that the said letters offended the mandatory provisions of Section 87(3) of the Act by being issued by a person who was not an accounting officer, and the said letters did not disclose the tender sum quoted by the successful tenderer. Consequently, the Respondent's decision was unlawful.

25. **Mr. Sang** submitted that the Ex-parte Applicant had a legitimate expectation that the process leading to the Respondent's decision would take into consideration all the relevant information and material and that the process would not sanitize an illegality already made. Consequently, the Respondent violated the Ex-parte Applicant's legitimate expectations.

26. **Mr. Cheruiyot** learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties submitted that the Respondent's decision was sound in law, was

rational and reasonable since it was guided by Section 80(2) of the Act, which stipulates that the evaluation and comparison process shall be done guided by the procedures and criteria set out in the tender document, in this case, the said instructions were in the appendix to instructions to tenderers of the Tender document.

27. Counsel submitted that the criteria provided under Clause 2.24 of the Appendix on lowest bidder per zone superseded the provision that was found at the foot of Section VIII, and that the criteria during the evaluation process was in a bid to uphold the spirit of Article 201 of the Constitution which provides for the principle of public finance and prudent utilization of public funds.

28. **Mr. Mwanzia** learned counsel for the 3<sup>rd</sup> Interested Party reiterated the contents of the 3<sup>rd</sup> Interested Party Replying Affidavit and submitted that the page 45 annexed to the Ex-parte Applicant's Verifying Affidavit filed before Court, is not the page 45 on the tender document and the same was not before the Respondent.

### **The Determination**

29. I have considered the application herein, affidavit evidence in support thereof and the response thereto. I have also taken into account rival submissions by parties' advocates on record together with relevant applicable law and precedents relied upon. The Ex-parte applicant is challenging the award of the subject tender to the lowest bidder in all the eight zones of the subject tender, which in the Ex-parte Applicant's view is contrary to the principle of equity and fairness as captured at page 45 on the mandatory requirement of the tender document. Consequently, the sole duty of the Court will be to establish whether the Respondent decision dated 6/05/2021 was illegal, in error of law, irrational and/or unreasonable.

30. The Ex-parte applicant seeks a singular relief in the nature of an order of certiorari, which is ordinarily issued where a public authority or body has acted without authority or in excess of its jurisdiction. Where the impugned decision is arrived at contrary to the law or illegally, irrationally or in breach of rules of natural justice or, where there is proof that the authority relied on irrelevant matters in reaching the decision, the High which is the institution seized of supervisory jurisdiction over tribunals and subordinate courts will not hesitate to quash such a decision. See **Captain Geoffrey Kugoya Murungi v A.G Misc. Civil Application No.293 of 1993** where the court held that:

**“Certiorari deals with decisions already made ...such an order(certiorari) can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice or contrary to the law. Thus, an order of certiorari is not a restraining order”**

31. However, to grant or not to grant an order of certiorari or generally any judicial review orders is a matter of discretion of the presiding judge subject to attainment of substantive justice. 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** 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 favours a different option within the range...”**

32. In **Municipal Council of Mombasa v Republic & Another [2002] eKLR** the Court of Appeal expressed itself as follows:

**“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 or did he take into account irrelevant matters? These are the kind of 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 sufficient evidence to support the decision –and that, as we have, is not the province of judicial review”.**

33. However, this Court is alive to the fact that the scope of Judicial Review proceedings has since expanded under the 2010 Constitution, and in appropriate cases, the court will enter into the merits of a decision made by an inferior body. The Court of Appeal in **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] eKLR** held as follows:

**“that while Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator.”**

#### **(a) Whether the Respondent decision dated 6/05/2021 was illegal, in error of law, irrational and/or unreasonable**

34. This Court's duty in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. Courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ambits of their powers or duties.

35. Section 173 of the PPAD Act provides for the powers of the Review Board. It provides that upon completing a review, the Review

Board may do any 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 (d) order termination of the procurement process and commencement of a new procurement process.

36. Section 80 of the Act on evaluation of Tenders provides: -

*“80. Evaluation of tenders*

*(1) The evaluation committee appointed by the accounting officer pursuant to [section 46](#) of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under [section 82\(3\)](#).*

*(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.*

*(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—*

*(a) the criteria shall, to the extent possible, be objective and quantifiable;*

*(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation;*

*(4)...”*

37. In **Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University [2018] eKLR**, the court stated as follows:

*“Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple [ultra vires](#) and [errors as to precedent facts](#); while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill [substantive legitimate expectations](#) are grounds within the second category.”*

38. According to the Ex-parte Applicant, the Respondent disregarded the principles of equity in its decision upholding the procuring entity decision to award all the eight zones of the subject tender to the 3<sup>rd</sup> Interested Party contrary to the provisions of Article 10, 47, 201,227 and 232 of the Constitution and contrary to the mandatory requirement of the tender document at page 45 which provided: *“Award shall be per zone. No bidder shall be awarded more than one zone”*

39. The Respondent on the other hand vide its decision issued on issued on 6/05/2021 stated as follows:

*The foregoing definitions demonstrate that the phrase provided in the appendix to instruction to Tenderers was directory and not mandatory. In the instant case, the procuring entity would go against the principles of cost-effectiveness if it were to limit the number of zones to be awarded to a bidder for reasons stated hereinbefore. Similarly, it would not amount to fair competition to allow a bidder to quote prices for all the zones only to deny award of the tender to that bidder in some zones, yet such bidder was the lowest evaluated bidder in all the eight zones.*

*The board is persuaded that had the Applicant emerged the lowest evaluated bidder in all the eight zones, it is unlikely that it would have challenged that outcome neither would it make a proposal to the procuring entity for the Applicant to retain one zone while other zones are awarded to other bidders, yet other bidders did not have the lowest evaluated tender prices...*

40. The Court of Appeal in **Kenya Pipeline Company Ltd v Hyosung Ebara Company Limited & 2 Others [2012] eKLR** observed as follows with regard to the jurisdiction and powers of the Respondent:

*“...The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. It has power to engage an expert to assist in the proceedings in which it feels it lacks the necessary experience. The Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by the procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.*

Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1<sup>st</sup> Respondent’s tender had met the mandatory conditions. The issue

**whether or not the 1<sup>st</sup> Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it."**

41. In **Republic v Public Procurement Administrative Review Board & 3 Others, Ex Parte Olive Telecommunication PVT Limited eKLR**, the Court of Appeal stated as follows:

***"...In our view, to justify interference the decision in question must be so grossly unreasonable that no authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it."***

42. From the foregoing, this Court having considered the arguments by the Ex-parte Applicant and the decision by the Respondent, it is evident that the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties applied an open tendering method wherein all members of the public were invited to bid for the subject tender and in the said tender document, there was no provision limiting the number of zone a bidder could bid for. In fact, it is common ground that the Ex-parte Applicant and the 3<sup>rd</sup> Interested Party bid for all the eight zones and all their bids were subjected to the evaluation stages so as to determine the lowest evaluated bidder.

43. In my view, it would have been irrational and unreasonable for the procurement entity to encourage bidders to bid for the entire eight zones, then later on deny award of the tender to the lowest evaluated bidder in more than one zone. I also agree with the Respondent's finding that pursuant to Article 232 (1) (b) and (c) of the Constitution, there is need for efficiency, effectiveness and economic use of public funds and that the procuring entity would have gone against the principles of cost-effectiveness to deny award to the lowest bidder in all the zones and award the same to other bidders with higher quotes. Furthermore, If the Respondent was to implement the Ex-parte Applicant's argument of awarding the remaining 7 zones to bidders in the subject tender whose bids were not the lowest evaluated, then the Respondent action would have been discriminatory to the 3<sup>rd</sup> Interested Party who had submitted the lowest evaluated bid in all the eight zones. Therefore, in my view, the Ex-parte Applicant has not demonstrated how the Respondent has violated Articles 10, 47, 201, 227 and 232 of the Constitution and/or proved any illegality or error of law, irrationality, and or unreasonableness in the Respondent's decision dated 6/05/2021.

44. For the foregoing reasons, I do not find any merit in the Ex-parte Applicant's motion dated 19/05/2021 and it is hereby dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JUNE, 2021.**

**E. K. OGOLA**

**JUDGE**

Ruing delivered via MS Teams in the presence of:

Mr. Mwanzia for 3<sup>rd</sup> Interested Party

Mr. Cheruiyot for 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties

Ms. Kiti for Respondent

Ms. Peris Court Assistant