



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT GARSEN**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION (JR) NO. 1 OF 2019**

**IN THE MATTER OF AN APPLICATION BY SUPERSERVE LIMITED FOR**

**JUDICIAL REVIEW ORDERS OF MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 ARTICLES 23 (3) (F)**

**AND**

**IN THE MATTER OF: REVIEW OF THE ACTIONS OF THE COUNTY GOVERNMENT OF LAMU**

**AND**

**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF: THE TENDER NO. CGL/TR/PMS & ADMN/008/2017-2018**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY GOVERNMENT OF LAMU.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY SECRETARY COUNTY GOVERNMENT OF LAMU.....2<sup>ND</sup> RESPONDENT**

**CHIEF OFFICER-FINANCE, STRATEGY AND ECONOMIC**

**PLANNING COUNTY GOVERNMENT OF LAMU.....3<sup>RD</sup> RESPONDENT**

**AND**

**SUPERSERVE LIMITED.....EXPARTE APPLICANT**

**JUDGMENT**

1. By way of a Notice of Motion Application dated 12<sup>th</sup> April 2019, the ex parte applicant seeks the following Orders:

**i. THAT** this Honourable Court be pleased to issue **AN ORDER OF MANDAMUS** compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to complete the procurement process of **TENDER NUMBER CGL/TR/PMS & ADM/008/2017-2018** as per the recommendations made by the tender evaluation committee and which was approved by the Head of Procurement of the 1<sup>st</sup> Respondent and as per the Public Procurement Administrative Review Board in its Ruling on 3<sup>rd</sup> July 2018.

**ii. THAT** this Honourable Court be pleased to issue **AN ORDER OF MANDAMUS** compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to issue a letter of award to the Applicant as per the recommendations made by the tender evaluation committee and which was approved by the Head of Procurement of the 1<sup>st</sup> Respondent as well as Public Procurement Administrative Review Board in its Ruling on 3<sup>rd</sup> July 2018.

**iii. THAT** this Honourable Court be pleased to issue **AN ORDER OF PROHIBITION** against the Respondents preventing any re-advertisement of and or re-evaluation of **TENDER NUMBER CGL/TR/PMS & ADM/008/2017-2018**.

**iv. THAT** costs of this application be in the cause.

#### **The Ex-Parte Applicant's Case.**

2. The core grounds relied upon as far as I can discern them from the Application and the ex parte's Supporting Affidavit sworn by Yusuf Idris, a director of the Ex-Parte Applicant herein is that the Ministry of Transport, Infrastructure, Housing and Development put up a tender invitation notice for the main works of the proposed construction of Sub County Offices at Faza, Lamu East County. The Ex-Parte Applicant applied and submitted for **TENDER NUMBER CGL/TR/PMS & ADM/008/2017-2018** in accordance to the pre-requisite requirements of the Tender.

3. It is the Ex-Parte Applicant's case that on 16<sup>th</sup> April 2018, the 1<sup>st</sup> Respondent cancelled the entire **TENDER NUMBER CGL/TR/PMS & ADM/008/2017-2018**. The Applicant further stated that the cancellation of the Tender was done in contravention of Sections 63(2) and (4) of the Public Procurement and Asset Disposal Act. That further the cancellation was irregular, unlawful and illegal.

4. The Ex-Parte Applicant being aggrieved by the decision of the 1<sup>st</sup> Respondent, filed a Review at the Public Procurement Administrative Review Board; Review Number 77 of 2018. The Board in its Ruling on 3<sup>rd</sup> July 2018 ruled that the decision to terminate **TENDER NUMBER CGL/TR/PMS & ADM/008/2017-2018** as communicated vide the letter of notification dated 16<sup>th</sup> April 2018 was improper and it was set aside.

5. It is the Ex-Parte Applicant case that the Board directed the 1<sup>st</sup> Respondent to complete the procurement process of **TENDER NUMBER CGL/TR/PMS & ADM/008/2017-2018** within 14 days and issue a Letter of Award to the Ex-Parte Applicant as per the recommendations of the tender evaluation committee. The Applicant further contends that despite the lapse of 14 days, the 1<sup>st</sup> Respondent failed to comply with the Board's orders and as a result the Ex-Parte Applicant continues to incur financial loss and damages.

6. The Ex-Parte Applicant therefore seeks an order of Mandamus to compel the 1<sup>st</sup> Respondent to complete the procurement process and issue him with the award, **TENDER NUMBER CGL/TR/PMS & ADM/008/2017-2018** as directed by the Review Board.

#### **The Respondents' case.**

7. The Respondents had initially filed a Preliminary Objection dated 18<sup>th</sup> June 2019 contesting the jurisdiction of the court to hear the Application. The same was dismissed on 27<sup>th</sup> November 2019.

8. In opposing the Application, the Respondents filed a Replying Affidavit dated 13<sup>th</sup> February 2020 sworn by John Mburu, the County Secretary of the 1<sup>st</sup> Respondent. It is the Respondents' case that after following due process in the procurement process, the Tender Evaluation Committee of the Respondent gave its recommendation that considered the ex parte applicant for the award of the contract for the proposed sub county offices at Lamu at Kshs 195,219,070.

9. It is the Respondents' case that the Head of the Procurement Department gave his professional opinion where he confirmed the Evaluation Committee's recommendation to award the Tender to the ex parte applicant and forwarded the same to the Accounting Officer for approval or rejection.

10. The Respondents contend that in strict compliance with Section 44 (2) (a) of the Public Procurement and Asset Disposal Act, the Accounting Officer declined to approve the recommendation to award the ex parte Applicant the Tender after noting that 70% of the project funds had not been disbursed to the County from the National Government and that there was no indication as to when the same was to be disbursed.

11. It is the Respondents case that in strict compliance to Section 63 (4) of the Public Procurement and Asset Disposal Act, the Accounting Officer of the Respondent duly notified all persons who had submitted for the Tenders within 14 days of termination and the Notice contained reasons for the cancellation of the Tender. The Respondents further contend that those people who had applied for the Tender including the Ex parte Applicant were notified by the Respondent about the termination via phone call on 27<sup>th</sup> April 2018 and pursuant to the said communication, the Ex parte Applicant collected the termination letter on 30<sup>th</sup> April 2018.

12. According to the Respondents, they had not entered into a contract with the Ex parte Applicant neither had they confirmed the award of

Tender to the Applicant.

13. The Respondents contend that they were well within the law in cancelling the tender as it did so on account of inadequate budgetary provision as provided for in Section 63 of the Public Procurement and Asset Disposal Act. That a Tender cancelled under any grounds stated under Section 63 of the Public Procurement and Asset Disposal Act cannot be said to offend the principle of legality.

14. It is the Respondents' case that the 1<sup>st</sup> Respondent is a County Government entity and its accounting officer is mandated to ensure that the resources of its respective entity are used in a way that is lawful and authorized, effective, efficient, economical and transparent as per the provisions of Section 68 of the Public Finance Management Act 2012.

15. It is the Respondents' case that Clause 33.1 of the Tender Document provides that the procuring entity reserved the right to accept or reject any Tender, and to cancel the tendering process and reject the tenders, at any time prior to the award of the contract, without incurring any liability to the affected tenderer or tenderers or any obligation to inform the tenderer or tenderers of the grounds of the actions hence the Respondent cannot be faulted for cancelling the tender for a lawful reason.

16. According to the Respondents, the decision of the Public Procurement Administrative Board ordering the Respondent to complete the procurement of **TENDER NUMBER CGL/TR/PMS & ADM/008/2017-2018** and issue a letter of award to the Ex parte Applicant was irrational and unreasonable as it requires the Respondent to commit public funds without any budgetary approval contrary to the provisions of the Public Procurement and Asset Disposal Act. That the decision of the Review Board failed to find that the determination was made in line with the provisions of the Public Procurement and Asset Disposal Act as read together with Article 227 of the Constitution.

17. The Respondents contend that in allowing the Review, the Review Board frustrated the legal purpose to which it was established and failed to give effect to fairness, equity, transparency and competition contrary to the provisions of Article 22 (2) of the Constitution and Section 3 of the Public Procurement and Asset Disposal Act.

18. It is the Respondents case that they cannot be sued for actions they undertake while carrying out public duties as mandated by the Constitution of Kenya and the County Government Act

19. The Respondents contend that the power of the court to review an administrative action is an extraordinary power which is exercised sparingly and in exceptional circumstances where there is an illegality or irrationality. They contend that the Applicant has not proved any illegality or irrationality.

20. It is not in dispute that the Ex Parte Applicant was successful in its application for the **TENDER NUMBER CGL/TR/PMS & ADM/008/2017-2018**.

21. It is also not in dispute that the 1<sup>st</sup> Respondent cancelled **TENDER NUMBER CGL/TR/PMS & ADM/008/2017-2018**. There is however no common ground on the reasons for the cancellation.

22. It is also not in dispute that the Ex parte Applicant applied for a Review of that decision by the 1<sup>st</sup> Respondent to the Public Procurement Review Board who in its Ruling dated 3<sup>rd</sup> July 2018 stated as follows:-

**a) The Applicants Request for Review dated 7<sup>th</sup> June 2018 and which was filed with the Board on 12<sup>th</sup> June 2018 be and is hereby allowed.**

**b) The Procuring Entity's decision to terminate Tender No. CGL/TR/PSM & ADM/008/2017-2018 for the proposed Sub-County Offices (Main Works) at Faza, Lamu East- Lamu County communicated vide the letter of notification dated 16<sup>th</sup> April 2018 be and is hereby annulled and the same is set aside.**

**c) The Procuring Entity be and is hereby directed to complete the procurement process of Tender No. CGL/TR/PSM & ADM/008/2017-2018 for the proposed Sub- County Offices (Main Works) at Faza, Lamu East- Lamu County and issue a letter of award to the Applicant as per the recommendations made by the tender evaluation committee and which was approved by the Head of Procurement of the Procuring Entity.**

**d) The Procuring Entity is further directed to complete the award process as directed above within fourteen days from today's date.**

**e) Each party shall bear its own costs of the Request for Review.**

#### **Issues for determination**

23. Upon carefully considering the Notice of Motion Application, Supporting Affidavit both dated 12<sup>th</sup> April 2019 and the accompanying annexures, the Replying Affidavit dated 13<sup>th</sup> February 2020, the Applicant's Further Affidavit dated 28<sup>th</sup> February 2020 and the accompanying annexures, the Applicant's Written Submissions dated 17<sup>th</sup> February 2020 and the accompanying case law, and the Respondents Written Submissions dated 11<sup>th</sup> March 2020 and the accompanying case law, I find that the following issues are up for my determination:-

(i) Whether the Ruling by the Public Procurement Review Board was within the law.

(ii) Whether the decision by the Procuring Entity was finally determined by the Public Procurement Review Board.

(iii) Whether the Ex-parte Applicant has satisfied any grounds for the award Judicial Review Orders.

**(i) Whether the Ruling by the Public Procurement Administrative Review Board was within the law**

24. The Public Procurement Administrative Review Board is established under Section 27 (1) of the Public Procurement and Asset Disposal Act which states:-

***“There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.”***

25. The functions and powers of the Public Procurement Administrative Review Board are provided for in Section 28 of the Public Procurement and Asset Disposal Act which states:-

***“(1) The functions of the Review Board shall be—***

***(a) reviewing, hearing and determining tendering and asset disposal disputes; and***

***(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.***

***(2) In performance of its functions under subsection (1) (a) of this section, the Review Board shall have powers to develop rules and procedures to be gazetted by the Cabinet Secretary.***

***(3) The Authority shall provide secretariat and administrative services to the Review Board.”***

26. The key function of the Public Procurement Review Board is reviewing, hearing and determining of tendering and asset disposal disputes. The same is captured in Section 167 (1) of the Public Procurement and Asset Disposal Act which states:-

***“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.”***

27. The Public Procurement and Administrative Review Board in Application Number 77 of 2018 delivered its Ruling on 3<sup>rd</sup> July 2018. The Procuring Entity’s decision to terminate the **Tender No. CGL/TR/PSM & ADM/008/2017-2018** was annulled and set aside. The Procuring Entity was further ordered to complete the procurement process of **Tender No. CGL/TR/PSM & ADM/008/2017-2018** and issue a letter of award to the Applicant. It is clear from the evidence on record that the Procuring Entity did not comply with the orders of the Review Board.

28. The proceedings and Ruling of the Public Procurement and Administrative Review Board are provided for and supported by the aforementioned sections of the Public Procurement and Asset Disposal Act. It is my finding therefore that the Board’s Ruling dated 3<sup>rd</sup> July 2018 was within the law.

**(ii) Whether the decision by the Procuring Entity was finally determined by the Public Procurement and Administrative Review Board.**

29. Section 175 (1) of the Public Procurement and Asset Disposal Act states that:

***“A person aggrieved by a decision made by the Review Board may seek Judicial Review by the High Court within fourteen days from the date of the Review Board’s decision, failure to which the decision of the Review Board shall be final and binding to both parties.”***

30. The Respondents submitted that the Ruling of the Public Procurement and Review Board was irrational as it was not supported by any evidence that the Tender process was wrongly terminated. That the same was also unreasonable and outrageous for favouring one side and failing to apply the rules of natural fairness in the decision making.

31. The Respondents chose to ventilate their displeasure with the decision of the Review Board in these proceedings. In my view, the Respondents ought to have filed a Judicial Review at the High Court as provided for by Section 175 of the Public Procurement and Asset Disposal Act after being aggrieved with the decision of the Review Board. There is nothing on record to show that the Respondents filed a Judicial Review within 14 days as required by the law. I am persuaded by the findings of Bwonwong’a J. in the case of **Republic V Public Procurement Administrative Review Board Ex Applicant Moi Teaching and Referral Hospital; Consortium of Rento Africa Ltd & Another (Interested Parties)[2021] eKLR** where he held that:-

***“I accept that a court of law has inherent powers to enable it to administer justice as enshrined in section 3A of the Civil Procure Act. It is the law that a court of law is not allowed to resort to its inherent and discretionary powers, where there are statutory provisions to meet the circumstances of the case. Inherent powers should not be resorted to, where they will be in conflict with***

*those statutory provisions. They may only be resorted to where there is a lacuna or ambiguity in a statute. They may also be resorted to in order prevent an abuse of the court process.*

*Furthermore, it is also important to point out that section 175 of the PPADA has not made any statutory provisions for the enlargement of time, within which an applicant may out of time file an application for judicial review; where such applicant has failed to file such an application within the permitted 14 days.”*

32. It is salient to note that the Public Procurement and Asset Disposal Act defines an appeal as a request for administrative review or complaint filed with the Appeals Review Board pursuant to Section 167 of the aforementioned Act. It is therefore my understanding that any appeal to a decision passed by a Procuring Entity is in the form of a Review to the Public Procurement and Administrative Board and any displeasure with the findings of the Board is governed by Section 175 of the Public Procurement and Asset Disposal Act.

33. It is my finding that the Ruling of the Review Board has not been subjected to any Judicial Review by the High Court and is therefore final and binding to both parties.

**(iii) Whether the Ex-parte Applicant has satisfied any grounds for the award Judicial Review Orders.**

34. In the case of **Republic Vs National Employment Authority & 3 Others Ex-Parte Middle East Consultancy Services Ltd (2018) eKLR**, the Court pronounced itself as follows:-

*“This case presents an opportunity to this court to restate the function, scope and nature of Judicial Review remedies and the test for granting such remedies. In Judicial Review, the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process is flawed in certain defined and limited respects. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the “forbidden appellate approach.”*

*Judicial Review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. Judicial Review is the review by a Judge of the High Court of a decision, proposed decision, or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction-reflecting the role of courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.*

35. After being aggrieved by the decision of the 1<sup>st</sup> Respondent in cancelling the Tender, the Ex-Parte Applicant applied to the Review Board for a Review of the decision by the Procuring Entity. Section 28 (1) (a) of the Public Procurement and Asset Disposal Act provides for the functions of the Review Board key among them being the power to review, hear and determine tendering and asset disposal disputes. As earlier stated, the Review Board heard the matter and subsequently delivered its Ruling on 3<sup>rd</sup> July 2018.

36. The Applicant submits that the 1<sup>st</sup> Respondent has continuously failed to comply with the order of the Review Board. That the 1<sup>st</sup> Respondent is under a legal duty to act pursuant to the Orders of the Review Board that imposed a 14 day timeline for the 1<sup>st</sup> Respondent to act but the 1<sup>st</sup> Respondent has remained indifferent and unconcerned despite several requests by the Ex-Parte Applicant. The Applicant further submitted that the Order of the Review Board is as competent as a Court Order and the same is bound to be respected. They have relied on the case of **Republic Vs Principal Secretary, Ministry of Defence Ex-Parte George Kariuki Waithaka (2018) eKLR** to support their case. The Applicant also relied on Section 7 (1) and (2) of the Fair Administration Act.

37. This court will have failed the forbidden appellate approach were it to indulge the Respondents submissions regarding the legality or illegality of the Orders of the Review Board.

38. The Respondents submit that court orders shall not be issued in vain. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are completely unable to implement the decision of the Review Board because it lacks the financial capacity to complete the procurement process as 70% of the project funds were not disbursed to the County Government from the National Government. They further submit that the 30% of the project money that had been disbursed to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from the National Government was returned back to the Treasury at the end of the 2017/2018 financial year.

39. Section 63 (1) of the Public Procurement and Asset Disposal Act provides instances where an accounting officer of a procuring entity may terminate and/or cancel tenders. The aforementioned Section states:-

*“An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—*

*(a) The subject procurement have been overtaken by—*

*(i) operation of law; or*

*(ii) substantial technological change;*

*(b) Inadequate budgetary provision;*

(c) No tender was received;

(d) There is evidence that prices of the bids are above market prices;

(e) Material governance issues have been detected;

(f) All evaluated tenders are non-responsive;

(g) Force majeure;

(h) Civil commotion, hostilities or an act of war; or

(i) Upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.”

40. Section 63 (4) of the Public Procurement and Asset Disposal Act provides:-

**“An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.”**

The Respondents through their Replying Affidavit dated 13<sup>th</sup> February 2020 attached a letter marked “JM-2” addressed to all Tenderers informing them that the Procurement process had been terminated because of inadequate budgetary provision. The Applicant has stated that the Procuring Entity failed to communicate their decision to cancel the Tender within the stipulated 14 days.

41. The Applicant stated that they were informed of the cancellation on 30<sup>th</sup> April 2018 when they were asked to collect the cancellation letters dated 16<sup>th</sup> April 2018. The Applicant has not attached anything or produced evidence to support its claim. Nonetheless, it is still common ground that the Applicant did receive a cancellation letter and that is why they proceeded to the Review Board as aforesaid.

42. On the other hand, the Respondents through their Replying Affidavit dated 13<sup>th</sup> February 2020 have attached a Professional Opinion marked as “JM-1” which had the Accounting Officer’s Opinion that Approval had not been granted. The Opinion is dated 16<sup>th</sup> April 2018. “JM-2” which was a letter informing the Tenderers of the cancellation was also dated 16<sup>th</sup> April 2018. It is my finding that the communication by the Procuring Entity complied with the provisions of Section 63 (4) of the aforementioned Act.

43. The Ex-Parte Applicant prays for the Judicial Review Orders of Mandamus and Prohibition and states that they have satisfied all the requirements of Order 53 of the Civil Procedure Rules. The Ex-Parte Applicant relied on the Court of Appeal case of **Kenya National Examination Council Vs Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR** to support their case on instances under which the Order of Mandamus is issued.

44. The Respondents submit that the general rule is that the issuance of mandamus is limited to where there is specific legal right and there is no specific legal remedy for enforcing it or in the alternative the legal remedy is less convenient, beneficial and effectual. Its scope against public bodies is limited to performance of a public duty where the statute imposes a clear and unqualified duty to do that act. The Respondents relied on the case of **Makupa Transit Shade Limited & Another Vs Kenya Ports Authority & Another (2015) eKLR** to support their case.

45. The Respondents further submit that the Order of Mandamus cannot be issued in the instant case as the Applicant has an alternative legal remedy. That the Applicant can get such remedy in an ordinary civil court where it can seek for a refund of monies used or damages for the loss incurred if any. The Respondents further relied on the case of **Republic Vs Director General of East African Railways Corporation Ex-Parte George Nume Kaggwa (1977) eKLR**, which case set out bars and limitations in the issuance of Mandamus Orders.

46. Mandamus is an equitable remedy that serves to compel a public authority to perform its legal duty and it is a remedy that controls procedural delays. The circumstances under which an Order of Mandamus can be issued was stated in the Court of Appeal case of **Kenya National Examination Council (supra)** as:-

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

47. The Court in the case of **The National Employment Authority (supra)** stated that:-

**“Mandamus is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.”**

48. The test for Mandamus is set out in **Apotex Inc Vs Canada (Attorney General)** and was also discussed in **Dragon Vs Canada**

(Minister of Citizenship and Immigration). The eight factors that must be present for the writ to issue are:-

*i. There must be a public legal duty to act.*

*ii. The duty must be owed to the Applicants.*

*iii. There must be a clear right to the performance of that duty, meaning that:*

*a. The Applicants have satisfied all conditions precedent and;*

*b. There must have been:*

*I. A reasonable time to comply with the demand, unless there was outright refusal and;*

*II. An express refusal, or an implied refusal through unreasonable delay*

*iv. No other adequate remedy is available to the Applicants.*

*v. The Orders sought must be of some practical value or effect.*

*vi. There is no equitable bar to the relief sought.*

*vii. On a balance of convenience, mandamus should lie.*

49. Clearly, there is a public legal duty on the part of the Respondents. The duty is owed to the Ex-parte Applicant. The Respondents have advanced grounds which are of no help to them in this Application. They confused this Application with a Judicial Review of the decision of the Review Board. It is my finding that there has been a reasonable time to comply with the Ruling bearing in mind that it was delivered on 3<sup>rd</sup> July 2018 and there has been outright refusal by the Respondents to comply.

50. It is my considered view that the Orders sought are justified though not practical. The Respondents have submitted that there was no budgetary allocation for the performance of the contract and it will be unreasonable to compel the Respondents to commit to a Tender that has not been budgeted for. Doing so will be compelling the Procuring Entity to go against Section 63 (b) of the Public Procurement and Asset Disposal Act. Granting the Orders will also compel the Procuring Entity to go against Section 44 (2) (a) which provides that an Accounting Officer shall ensure that procurement of goods, works and services of the public entity are within approved budget of that entity. Further, the Applicant has not proved any illegality, irrationality or procedural unfairness on the part of the Respondents. The Respondents are allowed by the law to cancel a tender process as explained earlier. In the event of a cancellation, the law also mandates the Procuring Entity to inform the tenderers within 14 days. This Court found that the Respondents complied with the aforementioned provisions of the law.

51. The discretionary nature of Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant the remedy. This discretionary nature entitles the court to satisfy itself that there is a reasonable basis to justify the Orders sought. It is my view that the Tender process has been overtaken by events and it is upon the Procuring Entity to advertise and issue Tenders on a need basis. The court cannot grant the Orders as it is now impractical considering the passage of financial years.

52. In this case however, it is not fair that the Respondents refuse to comply or apply for Judicial Review against the Board's decision then turn around to argue an appeal in response to a Judicial Review filed against them. The same smacks of mischief. The Respondents not having sought a Review of the Review Board's decision, cannot now claim that the Applicant should seek a remedy in the civil court to enforce any breach. This again smacks of mischief and an abuse of the court process. Justice in this case therefore demands that some compensatory damages be awarded to the Applicant.

53. In the final analysis and the Application dated 12<sup>th</sup> April 2019 has been overtaken by events and the Orders sought are impractical and cannot be granted. Consequently, the aforementioned Application dated 12<sup>th</sup> April 2019 is dismissed.

54. The Respondents shall pay the Applicant compensatory damages in the sum of one million shillings (Kshs.1,000,000/=).

55. Each party to bear the costs of this Application.

56. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 21ST DAY OF DECEMBER, 2021.**

.....

**R. LAGAT KORIR**

**JUDGE**

**Judgment delivered virtually and electronically to the parties.**