



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 115 OF 2020

BETWEEN

AFRICAN MERCHANT ASSURANCE

CO. LTD (AMACO).....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

MADISON GENERAL INSURANCE

KENYA LTD.....1ST INTERESTED PARTY

THE ACCOUNTING OFFICER

NAIROBI CITY COUNTY.....2ND INTERESTED PARTY

M/S BRITAM GENERAL INSURANCE

COMPANY (K) LIMITED.....3RD INTERESTED PARTY

JUDGMENT

The Application

1. On 21st May 2020, the Public Procurement Administrative Board (the Respondent herein) delivered a decision in Review Applications No. 56/2020 as consolidated with Review Application No. 61/2020 that were filed by Madison General Insurance Kenya Ltd (the 1st Interested Party herein) and Britam General Insurance Company (K) Limited (the 3rd Interested Party herein) with regard to Tender No. NCC/F&EP/AM/T/318/2019-2020 for provision of insurance services to the Nairobi City County for the year 2020/2021.

2. The Respondent in the said decision of 21st May 2020 cancelled and set aside a letter of notification of intention to enter into contract dated 14th April 2020, and nullified and set aside the contract dated 30th April 2020 between the African Merchant Assurance Co. Ltd (AMACO), the *ex parte* Applicant herein, and Nairobi City County. The Respondent also ordered the Nairobi City County to undertake fresh evaluation of financial bids excluding the *ex parte* Applicant's; and to award and sign a fresh contract with another tenderer excluding the *ex parte* Applicant within 7 days. The Nairobi City County is joined in these proceedings as the 2nd Interested Party.

3. The *ex parte* Applicant consequently filed the instant application by way of a Notice of Motion dated 3rd June 2020, after being granted leave by this Court, and is seeking the following orders therein:

1. THAT this Court be pleased to grant the following Judicial Review orders:-

(a) An order of certiorari to bring into the High Court for purposes of being quashed and quash the consolidated decision of the Public Procurement Administrative Review Board dated the 21st May 2020 in Review Applications No. 56/2020 and 61/2020 in regard to Tender No. NCC/F&EP/AM/T/318/2019-2020 for provision of insurance services for the year 2020/2021 for Nairobi City County.

(b) An order of prohibition restraining the 2nd Interested Party from entering into any other contract other than the contract dated 30th April 2020 and executed between the 2nd Interested Party and the Applicant.

(c) An order of mandamus to compel the 2nd Interested Party to fully perform the contract dated 30th April 2020 and executed between the 2nd Interested Party and the Applicant.

2. Costs of the application be provided for.

4. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 29th May 2020, and a verifying affidavit sworn on 29th May 2020 by Lawrence Tanui, the *ex parte* Applicant's General Manager. The Respondent filed a replying affidavit sworn on 11th August 2020 by its Secretary, Henock K. Kirungu.; the 1st Interested Party filed a replying affidavit sworn on 4th May 2020 by Hazoron Wambugu, its Managing Director, while the 2nd Interested Party filed a replying affidavit sworn on 9th July 2020 by Halqana Wako, its Chief Accounting Officer; as their respective responses. The 3rd Interested Party did not file any response to the application. The court also directed that the application be urged by written submissions.

5. A summary of the parties' respective cases now follows.

The *ex parte* Applicant's Case

6. The *ex parte* Applicant stated that it participated as a tenderer in Tender No. NCC/F&EP/AM/T/318/2019-2020 for provision of insurance services for the year 2020/2021 (hereafter "the subject tender") which was floated by the 2nd Interested Party. Further, that on 15th April 2020, the *ex parte* Applicant received a call from the City County of Nairobi requesting it to collect a letter of notification in relation to the tender, which it did on the same date. The *ex parte* Applicant averred that the said letter which was dated 14th April 2020, informed it that it was the successful bidder, and that the 2nd Interested Party intended to enter into contract for provision of insurance services with it. The *ex parte* Applicant also averred that it was required by the said letter to furnish the Nairobi City County a written acceptance and a Performance Bond of Kshs. 9,530,952 within 14 days, and did so on 29th April 2020. That thereafter, following the lapse of the 14 days' statutory period, the *ex parte* Applicant signed the contract dated 30th April 2020 for the provision of General Insurance for the year 2020-2021, a copy of which was annexed.

7. The *ex parte* Applicant's case therefore, is that the procurement proceedings in respect of Tender No. NCC/F&EP/AM/T/318/2019-2020 for provision of insurance services for the year 2020/2021 came to an end on 30th April 2020 upon the signing of the contract, and that the Respondent had no jurisdiction to entertain the Requests for Review by the 1st and 3rd Interested Parties. Further, that following the signing of the contract dated 30th April 2020 for the provision of General Insurance for the year 2020-2021 between the *ex parte* Applicant and the 2nd Interested Party, the relevant insurance policies were issued by the *ex parte* Applicant, and the contract was accordingly fully performed and executed as between the parties.

8. Accordingly, that the Respondent acted without jurisdiction, ultra vires and illegally in the consolidated decision dated the 21st May 2020 in Review Applications No. 56/2020 and 61/2020 by entertaining the Requests for Review, and by purporting to recall procurement proceedings that had been concluded by the signing of the contract on 30th April 2020, contrary to section 167(4) of the Public Procurement and Asset Disposal Act.

9. Furthermore, that the Respondent has no statutory authority, jurisdiction or power whatsoever to nullify and/or set aside a signed contract in the manner purported in its consolidated decision dated the 21st May 2020 or at all, and by purporting to nullify the contract dated 30th April 2020, it usurped the powers of the Court. In addition, that there was no request before the Respondent by any party to nullify or set aside the contract dated 30th April 2020, and that in so doing the Respondent also failed to consider a relevant matter, namely that after signing the contract, the parties proceeded to perform the contract. The Respondent's decision to debar the *ex parte* Applicant was also challenged on the ground that purported sanction was contrary to the provisions of section 41 of the Public Procurement and Public Assets Disposal Act and the Respondent acted ultra vires its powers. That in any event, the insolvency proceedings against the *ex parte* Applicant in Petition No E008 of 2020 was duly settled by a consent order entered into by the parties therein.

10. Lastly, the *ex parte* Applicant averred that being the successful bidder, it was never notified of proceedings or served with pleadings in Review Application No. 61/2020 filed by the 3rd Interested Party. The *ex parte* Applicant thus claims that the Respondent's decision was incurably defective and unreasonable, and in breach of its legitimate expectation and fair administrative action as provided under Article 47 of the Constitution.

11. The *ex parte* Applicant annexed copies of the letter of notification of award dated 14th April 2020 given to it by the 2nd Interested Party; its acceptance letter dated 29th April 2020, the Performance Bond it issued; the contract signed with the 2nd Interested Party on 30th April 2020 and policies issued thereto; the pleadings filed with the Respondent in Review Applications No. 56/2020 and 61/2020; and the Respondent's impugned consolidated decision on the said applications delivered on 21st May 2020.

The Respondent's Case

12. The Respondent stated that on 30th April 2020, it received the 1st Interested Party's Request for Review No 56 of 2020 and an Amended Request for Review on 4th May 2020, and subsequently on 7th May 2020 also received a Request for Review No.61 of 2020 from the 3rd Interested Party. Further, that it consolidated the two Requests for Review as the two disputes arose from the subject tender, and involved the same procuring entity, and to facilitate the just, expeditious, proportional and affordable resolution of the disputes. The Respondent explained that Mwaniki Gachoka & Co Advocates was on record for both the 1st and 3rd Interested Parties and raised similar issues on both Requests for Review, and Regulation 82 of the 2006 Public Procurement and Public Assets Disposal Regulations gives the Respondent discretion to consolidate two or more Requests for Review that arise from the same tender or procurement procedure.

13. According to the Respondent, the practice is that applicants serve the defendants with their respective pleadings, and therefore, there is a good chance Mwaniki Gachoka & Co Advocates acting on behalf of the 1st and 3rd Interested Parties served the *ex parte* Applicant with both Requests for Reviews. The Respondent averred that it then heard the consolidated Requests for Review and delivered its decision on 21st May 2020.

14. In delivering its decision, the Respondent claims that it was well informed of the provisions of the law applicable, the facts and issues raised, and determined that it had jurisdiction over the subject tender, based on the date the 1st and 3rd Interested Parties received their respective letters of notification, as guided by section 170 (c) of the Act and section 57 (a) of the Interpretation and General Provisions Act. The Respondent contended that the 1st and 3rd Interested Parties' received letters of notification on 23rd April 2020 and 24th April 2020 respectively. Furthermore, that section 178 (a) and (e) of the Act, gives the Respondent powers to annul a decision by the accounting officer or to terminate a procurement process, and that where aggrieved tenderers learn of a tainted procuring process after the signing of a contract, the Respondent's jurisdiction is valid.

15. The Respondent also stated that it reviewed Kenya Gazette Notice No. 1929 of 6th March 2020 at page 11 on Insolvency Petition No. E008 of 2020, which showed that the *ex parte* Applicant was subject to liquidation proceedings; and also investigated Gazette Notice No. 468 of 24th January 2020 relating to Insolvency Petition No. E163 of 2019, and determined that the Applicant reached a consent in the particular insolvency petition and therefore was not relevant to the current dispute. That the Respondent did not consider Insolvency Petition No. E004 of 2020 in its decision since the 1st Interested Party raised new issues outside the timelines set for the exchange of pleadings and therefore, prejudiced the Applicant and 2nd Interested Parties right to a fair hearing as per Article 50 of the constitution; However, that it did not rule in favour of the *ex parte* Applicant's submissions since the said Applicant did not discharge its evidentiary burden in support of its allegations by either producing the purported consent letter.

16. In conclusion, the Respondent stated that it observed the rules of natural justice, acted lawfully, fairly and reasonably in discharging its mandate, and conducted itself as an impartial adjudicator and delivered a fair and balanced decision based on the relevant laws, legal principles and facts before it;

The 1st Interested Party's Case

17. The 1st Interested Party on its part averred that on the 28th February, 2020 the 2nd Interested Party invited eligible bidders to tender for provision of general insurance services for the year 2020/2021 by a tender notice appearing in the *Standard* newspaper, and that it duly submitted its bid for the subject tender in accordance with the timelines stipulated in the tender document.

18. That on 23rd April, 2020 the 2nd Interested Party thereafter communicated to the 1st Interested Party a notification of regret that its bid was unsuccessful, and being dissatisfied with the said decision, the 1st Interested Party lodged an appeal by way a Request for Review in application No. 56 of 2020 dated the 30th April, 2020 and as amended on 4th May, 2020, and on which a ruling delivered by the Respondent on the 21st May, 2020.

19. The 1st Interested Party's case is that the instant application lacks basis, is frivolous, and an abuse of the Court process for reasons that it is an appeal disguised as a Judicial Review, and invites this Court to re-examine the tender evaluation process and the Respondent's proceedings so as to arrive at an independent decision and/or replace the decision of the Respondent. In response to the claims of the ouster of the Respondent's jurisdiction, the 1st Interested Party stated that the *ex parte* Applicant alleges that it was notified that its tender was successful on the 14th April 2020, and collected the notification thereof on the 15th April 2020. That immediately thereafter, the *ex parte* Applicant provided a written acceptance of the contract, furnished a performance bond and proceeded to perform the purported contract all within 14 days, by the 30th April, 2020, and that it is on this basis that the *ex-parte* Applicant alleges that the jurisdiction of the Board was ousted by dint of Section 167 (4) of the Act.

20. However, that contrary to the *ex parte* Applicant's arguments, the Board's jurisdiction can only be ousted if a contract has already been executed in accordance with Section 135 (3) of the Act; which provides for execution of the contract within the period specified in the notification of award, but not before 14 days have lapsed following the giving of that notification. According to the 1st Interested Party, the notification of the successful tender and regret is required under section 87 (3) to be issued simultaneously, so as to afford the losing bidders a window period within which to challenge the tender before the contract is executed. Therefore, that the 2nd Interested Party notified the 1st Interested Party that its tender was unsuccessful 9 days after it had notified the *ex-parte* Applicant, so as defeat the object of the review process by orchestrating the ouster of the Respondent's jurisdiction. The 1st Interested Party alleged that the purported execution of the contract smacks of a collusion and indicts the integrity of the tender process,

21. Therefore, that the Respondent determined the request for review pursuant to the Constitution, the Act and the Regulations and issued orders permitted under section 173 of the Act by holding that the contract was null and void, as the validity of the said contract was an issue for determination as per the pleadings filed by the parties, and the *ex parte* Applicant cannot seek to benefit from an outright illegality. The 1st Interested party also averred that the *ex parte* Applicant was aware of the existence of the 3rd Interested Party's request for review in application No.61 of 2020, and annexed a copy of a notice indicating service of the said notice. Further, that the Respondent consolidated

Application No. 56 and 61 of 2020 pursuant to Regulation 82 of the Public Procurement Regulations, 2006, and that upon consolidation the *ex-parte* Applicant was joined as the 2nd Respondent in the consolidated application.

22. Lastly, the 1st Interested Party contended that the issue of debarment was never before the Respondent for determination and the same never arose at any point in time or at all. Rather, that the challenge of the tender process was on account of the award being made to the *ex parte* Applicant contrary to the tender document, the Act and the Regulations. In particular, that the 2nd Interested Party purported to award the tender to the *ex parte* Applicant when the said *ex parte* Applicant was a subject of insolvency proceedings contrary to Clause 2.42.2 and Clause 2.25.2 of the tender document and Section 83 and 84 of the Act, Article 10 and 227 of the Constitution. Further, that the *ex parte* Applicant failed to prove the allegation it made concerning settlement of Petition No. E 008 of 2020.

The 2nd Interested Party's Case

23. The 2nd Interested Party on its part confirmed that it published Tender Number NCCF/F & EP/AM/T/318/2019-2020 for provision of General Insurance Services for the year 2020/2021, and thereafter awarded the tender to the *ex parte* Applicant on 14th April 2020. Further, that on 24th April 2020 it received a letter of acceptance from the *ex parte* Applicant, as well as the required a letter of guarantee and a performance Bond of Kshs. 9,530,952/= on 27th April 2020. According to the 2nd Interested Party, all the other parties were also notified on 14th April 2020 by sending the regret letters including the 1st Interested Party, and it annexed a copy of the said letter dated 14th April 2020.

24. Accordingly, that on 30th April 2020 the 2nd Interested Party signed the contract for the provision of General Insurance for the year 2020-2021 with the *ex parte* Applicant. The 2nd Interested Party further stated that after signing the contract, the *ex parte* Applicant provided it with insurance policies covering the period of the contract namely 01/05/2020 to 30/04/2021 for commercial vehicles, private vehicles and Motor Cycles, and that the contract is therefore performed and it is using the said policies.

25. It is the 2nd Interested Party's case that after the 1st and 3rd Interested Parties filed for review before the Respondent on 30th April 2020 and 7th May 2020 respectively, it was later informed that the 1st Interested Party herein had amended the Review to include the *ex parte* Applicant. However, that the said Amended Review was never served on it, and there was no formal application done to amend the Review. Therefore, that the 2nd Interested Party was denied its constitutional right to be heard and an opportunity to defend itself as against the amended Review. In addition, that there was a violation of natural justice and procedure by the Respondent, as they failed to demand a return of service to prove service of the amended Review on it.

26. The 2nd Interested Party thus averred that the Respondent's impugned decision is unlawful and contravenes its right to Fair Administrative Action under Articles 43(1) (a), 47, and 227 (1) of the Constitution of Kenya, 2010 and Sections 4 and 5 of the Fair Administrative Action Act 2015. The 2nd Interested Party faulted the said decision for compelling it to award the subject tender to the 1st Interested Party, as the Respondent in its decision eliminated all the others bidders irrespective of the fact that the 1st Interested Party did not submit the least, best and most economical bid. Therefore, that the Respondent also acted *ultra vires* the Public Procurement and Disposal Act by failing to appreciate that the 2nd Interested Party had lawfully awarded the tender to the *ex parte* Applicant at the corrected sum of Kshs. 190,619,042.00 which was the lowest evaluated price.

27. Likewise, that the Respondent contravened the Constitution which makes it mandatory that contracts for goods or services should be in accordance with a system that is fair, equitable transparent, competitive, and cost-effective. The 2nd Interested Party averred that it is a waste of public resources and time to have the same tender reevaluated a second time, and that the Respondent deliberately issue directions on the margin of preference that would expressly disqualify the lowest evaluated bid that had passed the technical evaluation, and thus exposed the tax payers to pay more for the supply of the insurance services.

28. Lastly, the 2nd Interested Party asserted that the Respondent acted *ultra vires* and had no jurisdiction to entertain the reviews as the contract with the *ex parte* Applicant had already been signed, and the policies already running under it.

The Determination

29. The instant application was canvassed by way of written submissions. Nyaanga & Mugisha Advocates, the *ex parte* Applicant's advocates on record, filed submissions dated 24th July 2020, while the submissions for the Respondent dated 19th October 2020 were filed by Munene Wanjohi, a senior state counsel in the Attorney General's chambers. The 1st Interested Party's advocates on record, Mwaniki Gachoka & Company Advocates, filed submissions dated 29th July 2020, and Njenga Maina & Co Advocates for the 2nd Interested Party also filed submissions dated 29th July 2020.

The Applicable Principles

30. The Respondent and 1st Interested Party have pleaded and also submitted that the *ex parte* Applicant's application is an appeal disguised as a judicial review application, and it is therefore necessary to set the parameters of this Court's judicial review jurisdiction at the outset.

31. The Respondent in this regard submitted that the *ex parte* Applicant's motion is essentially a review of the merits of the decision of the Respondent, and for all intents and purposes though framed as a judicial review application, and is seeking to improperly invoke an appellate jurisdiction of the High Court. The Respondent submitted that the High Court's jurisdiction in judicial review is circumscribed by the provisions of the Law Reform Act, wherein it is incumbent upon a party in a judicial review application to prove the settled criteria for issuance of judicial review orders which include illegality, impropriety of procedure and irrationality, as held in **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43** and **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, which is not the case in this matter.

32. Further reliance was also placed in this regard on the decisions in **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR** and **Seventh Day Adventist Church (East Africa) Limited vs Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR**.

33. The 1st Interested Party also submitted that the power of the Court to review an administrative action is extra ordinary, and is to be exercised sparingly and in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved as held in **Republic vs Public Administrative Review Board & 2 Others (2019) e KLR**. Further, that in this case the ex parte Applicant has failed to demonstrate that circumstances exist as to justify disturbing the decision of the Board. Furthermore, that there are prayers sought by the ex parte Applicant whose purport and object is to substitute the decision of the Respondent, and that if the Court allows the application, it can only remit the same back to the decision maker for a fresh determination, as held by the Court of Appeal in **Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others KLR**

34. This Court is expressly granted supervisory jurisdiction over decisions made by quasi-judicial bodies such as the Respondent under Article 165(6) of the Constitution, and to this extent the ex parte Applicant's application is properly before this Court. The broad grounds for the exercise of its judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

35. After the enactment of the Constitution of 2010, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** 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, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.*

36. **This Court will therefore proceed to distill the issues raised in the instant application that properly fall within its jurisdiction with the foregoing principles in mind.**

37. The substantive issues arising for determination from the pleadings and submissions filed by the parties are in this regard four. The first issue is whether the Respondent's jurisdiction to hear and determine Review Applications No. 56/2020 and 61/2020 was ousted as a result of the signing of the subject tender's contract by the *ex parte* Applicant and 2nd Interested Party.

38. If the Respondent is found to have had jurisdiction, the Court will then proceed to consider the other two substantive issues namely:

- a) Whether the Respondent acted fairly in the hearing and determination of Review Applications No. 56/2020 and 61/2020?
- b) Whether the Respondent's decision on Review Applications No. 56/2020 and 61/2020 was reasonable and rational.

39. The last issue that will be considered is whether the *ex parte* Applicant merits the remedies it seeks.

On Whether the Respondent's Jurisdiction was Ousted

40. On the first issue of the Respondent's jurisdiction, the *ex parte* Applicant relied on section 167(4) of the Public Procurement and Asset Disposal Act (hereinafter referred to as “the Act”) to urge that a contract signed in accordance with section 135 of the Act cannot be subject to review proceedings before the Respondent. Further, that it had demonstrated that it was the successful bidder of the subject tender and that following the lapse of 14 days' statutory period and availing the acceptance and the Performance Bond, it signed a contract dated 30th April 2020 with the 2nd Interested Party for the provision of General Insurance for the year 2020-2021, and had proceeded to effect the insurance covers.

41. Reliance was placed on the decision in **Revital Health (EPZ) Limited vs Public Procurement Oversight Authority, Mombasa High Court Petition No. 75 of 2012** that where the contract the subject of a tender has been fully executed, the remedy lies in damages. The *ex*

parte Applicant also relied on the holding by the Court of Appeal on jurisdiction in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**.

42. The Respondent on the other hand submitted that it had jurisdiction to hear and determine the request for review, and acted as expressly authorized under section 173 of the Act. Accordingly, that it only discharged its mandate and had power to do so.

43. The 1st Interested Party’s submissions on the issue were that the Respondent’s functions and powers are donated under section 28 of the Act, which includes to hear, review and determine tendering and asset disposal disputes. Further, that the Respondent hears matters lodged within the parameters set out in section 167(1), and is enjoined to issue appropriate remedies as provided under Section 173 of the Act upon consideration of relevant facts and applying the law.

44. The 1st Interested Party further submitted that whereas the Respondent’s jurisdiction would correctly be ousted under Section 167 (4) of the Act in the event that parties have already signed a contract, the said contract has to be validly signed in accordance with Section 135(3) of the Act. Further, that if there is a dispute regarding the validity of the contract, the Respondent bears the mandate to examine the validity of the alleged contract before ruling on the question of jurisdiction. The 1st Interested Party cited the decisions in **Lordship Africa Limited vs Public Procurement Administrative Review Board & 2 Others [2018] e KLR** and **R vs Public Procurement Administrative Review Board & 2 Others ex parte Team Engineering Spa [2014] e KLR** in support of this position.

45. The position of the 1st Interested Party was that the contract between the *ex parte* Applicant and 2nd Interested Party was not signed in accordance with Section 135 (3) of the Act, since the notification of regret was not issued to the bidders simultaneously as required under Section 87(3) of the Act so as to afford them a window period of 14 days within which to challenge the same as required in the Act. Therefore, that the 2nd Interested Party and the Applicant colluded to steal the match from the other bidders including the 1st Interested Party, and in considering the validity of the contract the Respondent did not violate any law, neither did it act without jurisdiction.

46. Further, that in any case, the 2nd Interested Party did not place any material before the Respondent to demonstrate that the notification of the successful tender and that of regret was communicated to the parties simultaneously. The decision in **Republic vs Public Procurement Administrative Review Board Ex-Parte Zhongman Petroleum & Natural Gas Group Company Limited & Others [2014] e KLR** was cited for the holding that the signing of the contract could not be done before the applicants therein exhausted their right to challenge the decision, and that the said contract was therefore illegal and null ab initio.

47. The 2nd Interested Party adopted the *ex parte* Applicant’s position that the Respondent lacked jurisdiction to hear and determine Review Applications Nos. 56/2020 and 61/2020, since a contract had already been performed between the 2nd Interested Party and the *ex-parte* Applicant on 30th April 2020, and after the *ex parte* Applicant had emerged as the successful bidder and availed an acceptance letter together with a performance bond. Reliance was placed on the decision in **Republic vs Public Procurement Administrative Review Board & the Cabinet Secretary for Defence and Sameer Ltd [2018] e KLR**, where it was held that when a contract is already performed there is nothing to nullify.

48. The 2nd Interested Party further submitted that the Respondent lacked jurisdiction to entertain the matter on the ground that applications No.56/2020 and 61/2020 were filed with the Respondent outside the statutory time contrary to section 167 (4) (C) of the Act which requires a party to file a review within 14 days. The 2nd Interested Party in this respect contended that the 1st Interested party and the 3rd Interested Party were notified that their bids were unsuccessful on 14th April 2020, yet they waited until 4th May 2020 and 7th May 2020 respectively to file their applications for review which was beyond 14 days.

49. Two aspects of the question of ouster of the Respondent’s jurisdiction of have been raised by the parties. The first, raised by the 2nd Interested Party, was that the Respondent had no jurisdiction on account of the fact that the 1st and 3rd Interested Parties’ Requests for Review were filed out of time. This issue was also raised with the Respondent in a preliminary objection filed by the *ex parte* Applicant herein during the hearing of 1st and 3rd Interested Parties’ Applications 56 and 61 of 2020. The Respondent in this respect held that time respectively started to run on 23rd April 2020 when the 1st Interested Party received its letter of notification, and on 24th April 2020 when the 3rd Interested Party was notified, and not 15th April 2020 as alleged by the Respondent. This decision was based on an analysis of the evidence before it.

50. The 2nd Interested Party has not shown that this analysis was in error or unreasonable to warrant this Court’s intervention, given that under section 167(1) of the Act, there are two instances when time will start to run for purposes of filing a request for review with the Respondent. These are the date of notification of the award, or the date of occurrence of the alleged breach at any stage of the procurement process or disposal process. For purposes of filing a request for review, the receipt of the notification is in the regard the trigger in terms of time starting to run.

51. The second aspect of the ouster of the Respondent’s jurisdiction raised by both the *ex parte* Applicant and 2nd Interested Party was the operation of section 167(4). In this respect, all the parties do not dispute that the law is that the Respondent’s jurisdiction is ousted by section 164(7) where a contract has been signed in accordance with the provisions of Article 135 of the Act. The contestation is whether the Respondent validly assumed jurisdiction in the circumstances of this case where a contract had been signed and executed. It is my view that section 164(7) implies a jurisdiction on the part of the Respondent to entertain an application as to whether a contract is signed in accordance with Article 135, and the Respondent’s jurisdiction in this regard will be ousted if it makes an error made as to the existence of this statutory precondition.

52. This position was explained in **Anisimic vs Foreign Compensation Commission (1969) 1 All ER 208 at 233**, wherein Lord Pearce held as follows on when a public body may lack jurisdiction:

“Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step out of its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

53. Section 135 of the Act provides as follows in this regard:

- (1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.**
- (2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.**
- (3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.**
- (4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.**
- (5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.**
- (6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum....”**

54. The requirements of the precondition that will operate to oust the Respondent’s jurisdiction therefore are that the contract is in writing, based on the tender documents, signed by all the parties namely the accounting officer of the procuring entity and successful bidder, and after fourteen days have elapsed following the giving of the notification. The section does not provide similar restrictions as regards the time within which a contract once signed should be performed so as to oust jurisdiction, and therefore it can be performed any time after the requirements of section 135 are met.

55. On the requirement of notification of intention to enter into a contract, section 87 of the Act provides as follows:

- (1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.**
- (2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.**
- (3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.**

56. The Respondent held as follows as regards the issue of notification of the award of the contract of the subject tender and its jurisdiction:

“From the foregoing, it is evident that, the mere fact that a contract exists does not mean that the jurisdiction of the Board would automatically be ousted by dint of section 167 (4) (c) of the Act. That provision is conditional that a contract must be signed in accordance with section 135 (3) of the Act, that is, within the tender validity period but not before the lapse of fourteen (14) days following the giving of the said notification.

This Board observes that one of the most important functions that a letter of notification serves is to enable an aggrieved tenderer to exercise its right to administrative review within fourteen (14) days from the date of receiving such letter of notification. The issuance of notification to bidders is not deemed to be the date of the letters of notification, but the date when bidders receive their respective letters of notification.

It is also required of a procuring entity to notify the successful and unsuccessful bidders of the outcome of their bids simultaneously, so that all bidders receive their respective letters of notification around the same time for the fourteen-day stand-still period to start running. In this instance, the 1st Applicant received its letter of notification on 23rd April 2020 and had up to

7th May 2020 to approach this Board, whereas the 2nd Applicant received its letter of notification on 24th April 2020 and had up to 8th May 2020 to approach this Board. However, the 2nd Respondent was furnished with its letter of notification on 15th April 2020 as admitted in its Replying Affidavit. The earliest that the 1st Respondent could execute a contract with the 2nd Respondent is 9th May 2020, if the latest date of 24th April 2020 is considered, being the date when the 2nd Applicant received

its letter of notification.

57. Section 135 of the Act provides that it is the giving of notification which is the trigger of time for purposes of entering into contract with a successful bidder, while under section 87 of the Act is clear that it is the procuring entity that is required to give this notification. The Respondent relied on the date of receipt of the notification by the 1st and 3rd Interested Parties as the material act in determining the date when a contract is to be signed. The receipt of a notification by a bidder is however not a factor that is to be considered under section 135 of the Act with respect to when a contract is to be executed by a procuring entity, unlike in the case of filing for Requests for Review. The obvious mischief that was intended to be avoided by this distinction was the intentional delay that may be caused in entering into contracts by unsuccessful bidders.

58. The standstill time under section 135 of the Act therefore starts to run from the time of sending of the notification, and not the receipt of a notification. The Respondent, having applied an erroneous criterion, and having failed to interrogate and make a determination of the material factor as to when time started to run for the standstill time, thereby erroneously assumed jurisdiction to hear and determine the 1st and 3rd Interested Parties Request for Review. It therefore follows that the decision made by the Respondent was unlawful for this reason.

59. This Court cannot consequently review the procedural propriety of the Respondent's decision, nor its reasonableness, which are the outstanding issues herein, and they also fall by the wayside given that the Respondent had no jurisdiction to act or make the decision it did for want of jurisdiction. This Court will therefore proceed to consider the final issue of the reliefs sought by the *ex parte* Applicant.

Whether the relief sought is merited.

60. The *ex parte* Applicant has sought orders of certiorari, prohibition and mandamus. An order of certiorari nullifies an unlawful decision or enactment, while that of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct. The Court of Appeal in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances when the orders of certiorari and prohibition can issue as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

61. The remedy of mandamus on the other hand requires a public body to do some particular act as specified in the order, to enforce public law duties. The Court of appeal in the above cited decision held as follows on the applicable principles for an order of mandamus to issue:

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“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 and 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.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed....”

62. This Court has found that the impugned decision dated 21st May 2020 which was made by the Respondent in Review Applications No. 56/2020 and 61/2020 with regard to Tender No. NCC/F&EP/AM/T/318/2019-2020 was made without jurisdiction. The *ex parte* Applicant is therefore entitled to the orders sought of certiorari to quash the said decision, in light of the applicable principles as regards the grant of this remedy.

63. The orders of prohibition and mandamus sought to prohibit and compel the 2nd Interested Party with respect to the subject contract cannot lie and are not merited for two reasons. Firstly, a consequence of the quashing to the Respondent's decision by this Court is that the 2nd Interested Party is at liberty to contract with the successful bidder in the subject tender. To this extent the said orders are superfluous. Secondly, and more importantly, the decision which was under review in the instant application was the one made by the Respondent on 21st May 2020. The legality or otherwise of the 2nd Interested Party's actions was not canvassed or under review, to warrant any orders made against it.

64. I accordingly find that the *ex parte* Applicant's Notice of Motion dated 3rd June 2020 is merited to the extent of the following orders:

i. An order of certiorari be and is hereby issued to bring into the High Court for purposes of being quashed and to quash the consolidated decision of the Public Procurement Administrative Review Board dated the 21st May 2020 in Review Applications No. 56/2020 and 61/2020 with regard to Tender No. NCC/F&EP/AM/T/318/2019-2020 for provision of insurance services for the year 2020/2021 for Nairobi City County.

ii. Each party shall bear their respective costs of the Notice of Motion dated 3rd June 2020.

65. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF NOVEMBER 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondent's and Interested Parties' Advocates on record.

P. NYAMWEYA

JUDGE