



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 101 OF 2020**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD.....RESPONDENT**

**-AND-**

**THE ACCOUNTING OFFICER**

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

**ON THE MARK SECURITY LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**1<sup>ST</sup> EX-PARTE APPLICANT :.....SKAGA LIMITED**

**AS CONSOLIDATED WITH**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 102 OF 2020**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD.....RESPONDENT**

**-AND-**

**SKAGA LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**ON THE MARK SECURITY LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**2<sup>ND</sup> EX-PARTE APPLICANT :.....KENYA REVENUE AUTHORITY**

**JUDGMENT**

**Introduction**

1. The judgment herein is on two consolidated applications brought by the Skaga Limited and the Kenya Revenue Authority, who are hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants respectively. The said applications both concern the decision made on 5<sup>th</sup> May 2020 by the Public Procurement Administrative Review Board, the Respondent herein. The Respondent is a statutory body created under section 27 of the Public Procurement and Assets Disposal Act of 2015, and mandated to review, hear and determine public tendering and asset disposal disputes.

2. The impugned decision was made by the Respondent in Request for Review App No. 51 of 2020 lodged with it by Mark Security Limited, which is joined as the 2<sup>nd</sup> Interested Party in the consolidated applications herein, and which concerned Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 dogs. The said tender had been advertised by the 2<sup>nd</sup> *ex parte* Applicant. The 1<sup>st</sup> *ex parte* Applicant and 2<sup>nd</sup> Interested Party were both bidders in the said tender.

3. The Respondent in its decision made the following orders:

**1. The Procuring Entity's Letter of Notification of Unsuccessful bid dated 24<sup>th</sup> March 2020 with respect to Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9dogs and training of dog handlers addressed to the Applicant, be and is hereby cancelled and set aside.**

**2. The Procuring Entity's Letter of Notification of Award dated 24<sup>th</sup> March 2020 with respect to the subject tender addressed to M/S Skaga Limited, the 2<sup>nd</sup> Respondent herein, be and is hereby cancelled and set aside.**

**3. The Procuring Entity is hereby directed to re-admit the Applicant's bid and the 2<sup>nd</sup> Respondent's bid at the Technical Evaluation Stage and re-evaluate the Applicant's bid and the 2<sup>nd</sup> Respondent's bid at the Technical Evaluation Stage in accordance with the Act and the Constitution, taking into consideration, the Board's findings in this case.**

**4. Further to Order No. 3 above, the Procuring Entity is hereby directed to conclude the procurement process to its logical conclusion including the making of an award within fourteen (14) days from the date of this decision.**

**5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

4. The 1<sup>st</sup> *ex parte* Applicant subsequently moved this Court by way of a Notice of Motion dated 26<sup>th</sup> May 2020 in **Nairobi H.C. J.R Application No. 101 of 2020** in which it is seeking the following orders:

**a) That this Court be pleased to grant the Ex-parte Applicant an Order of Certiorari to bring into this e Court for purposes of being quashed the entire decision of the Public Procurement Administrative Review Board, the Respondent herein, in Application Number 51 of 2020, On the Mark Security Ltd vs The Accounting Officer, Kenya Revenue Authority & Skaga Ltd, dated 5<sup>th</sup> May 2020, in relation to Tender No. KRA/HQS/NCB-046/2019-2020.**

**b) That this Court be pleased to grant the Ex-parte Applicant an Order of Prohibition to Prohibit the enforcement of the Final Orders made by the Respondent dated 5<sup>th</sup> May 2020 directed at the 1<sup>st</sup> Interested party to have the re-admission of the 2<sup>nd</sup> Interested party's bid and that of the Applicant to the Technical and Evaluation stage and the re-evaluation of the 2<sup>nd</sup> Interested party's bid and Applicants bid at the Technical Evaluation Stage, within the period of Fourteen (14) days from the 5<sup>th</sup> May 2020 as ordered by the Respondent.**

**c) That the costs of this application be awarded to the ex-parte Applicant.**

5. The application is supported by a statutory statement dated 13<sup>th</sup> May 2020, and two verifying affidavits sworn on the same date and on 26<sup>th</sup> May 2020 by Simon Njeru Kabuga, the 1<sup>st</sup> *ex parte* Applicant's Managing Director.

6. Likewise, the 2<sup>nd</sup> *ex parte* Applicant filed a Notice of Motion application dated 22<sup>nd</sup> May 2020 in **Nairobi H.C. J.R Application No. 102 of 2020** wherein it sought the following orders:

**a) An order of Certiorari to remove in to this Court and quash the decision made by the Respondent, the Public Procurement and Administrative Review Board (Review Board) on the 5th May 2020 by which it allowed the 2<sup>nd</sup> Interested Party's Request for Review.**

**b) A Declaration that the letter of Notification of Award dated 24<sup>th</sup> March 2020 with respect to tender number KRA/HQS/NCB-046/2019-2020 addressed to the 1<sup>st</sup> Interested party (SKAGA Limited) be and is hereby upheld and reinstated.**

**c) Costs of the Application be provided to the Applicant.**

7. The application is supported by a statutory statement dated 13<sup>th</sup> May 2020, and two verifying affidavits sworn on the same date and on 26<sup>th</sup> May 2020 by Simon Njeru Kabuga, the 1<sup>st</sup> *ex parte* Applicant's Managing Director.

8. The Respondent filed two replying affidavits sworn on 23<sup>rd</sup> July 2020 and 8<sup>th</sup> June 2020 as its response to **Nairobi H.C. J.R Application No. 101 of 2020** and **Nairobi H.C. J.R Application No. 102 of 2020** respectively. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicant, who were joined as 1<sup>st</sup> Interested Parties in each other's applications, indicated that they would support and would not be filing any responses to the other's application. The 2<sup>nd</sup> Interested Party on its part filed two Notices of Preliminary Objections both dated 8<sup>th</sup> June 2020, and two replying affidavits sworn on the same date by Solomon Kimeu, a director of the 2<sup>nd</sup> *ex parte* Applicant, as their responses to the consolidated applications.

9. This Court directed that 2<sup>nd</sup> Interested Party's Notices of Preliminary Objection dated 8<sup>th</sup> June 2020 would be heard and determined together with the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants' Notices of Motion, and by way of written submissions. The parties' respective cases as set out in their said pleadings are summarized in the following sections.

### **The 1<sup>st</sup> ex parte Applicant's Case**

10. The 1<sup>st</sup> *ex parte* Applicant explained that the 2<sup>nd</sup> *ex parte* Applicant advertised Tender Number KRA/HQS/NCB-046/2019-2020 on 7<sup>th</sup> January 2020, for the supply and delivery of K9 dogs and training of dog handlers, and pursuant to which it submitted its tender. That prior to the closure of the deadline for submitting the tenders, and at a pre-bid conference held on the 16<sup>th</sup> January 2020 at the offices of the 2<sup>nd</sup> *ex parte* Applicant, the 2<sup>nd</sup> Interested Party raised concerns as relates issues that it felt were not clear. The 2<sup>nd</sup> *ex parte* Applicant accordingly made an Addendum to the tender which was duly communicated to all bidders, which addendum indicated that the same formed part of the bidding documents and was to be binding to the bidders, and that all other terms and conditions remained the same.

11. That upon the closure and opening of the tenders and after the same were evaluated, the 1<sup>st</sup> *ex parte* Applicant herein emerged as the successful bidder, and this fact was duly notified to the said *ex parte* Applicant and the 2<sup>nd</sup> Interested Party by the 2<sup>nd</sup> *ex parte* Applicant on 1<sup>st</sup> April 2020 by e-mail. The 2<sup>nd</sup> Interested party being aggrieved by the award made to the 1<sup>st</sup> *ex parte* Applicant then lodged a Request for Review with the Respondent being Application No. 51 of 2020.

12. The 1<sup>st</sup> *ex parte* Applicant has made two claims in its application before this Court. The first is as regards the service upon it of the said Request for Review, and it averred in this respect that the 2<sup>nd</sup> Interested Party had no intention of serving the 1<sup>st</sup> *ex parte* Applicant. Further, that the 1<sup>st</sup> *ex parte* Applicant's director received an email on 24<sup>th</sup> April 2020, from a person by the name Philip Okumu using an email address [okumupi@yahoo.com](mailto:okumupi@yahoo.com) which forwarded to a copy of the application for the Request for Review, and the Response and the Preliminary Objection filed thereto by the 2<sup>nd</sup> *ex parte* Applicant. However, that the 1<sup>st</sup> *ex parte* Applicant was not served with the 2<sup>nd</sup> Interested Party's statement in support of the Request for Review dated 14<sup>th</sup> April 2020 and all the annexures thereto. Furthermore, that whereas the said Request for Review was filed on 14<sup>th</sup> April 2020, the Respondent failed in its statutory duty to effect service upon the 1<sup>st</sup> *ex parte* Applicant, who had been joined as a party in the Request for Review by the 2<sup>nd</sup> Interested Party.

13. In addition, that when the Respondent delivered its decision on 5<sup>th</sup> May 2020, the 1<sup>st</sup> *ex parte* Applicant's Advocates were in the process of preparing submissions in response to the 2<sup>nd</sup> Interested Party's submissions which were filed and served on them on 4<sup>th</sup> May 2020. Therefore, that in serving the 1<sup>st</sup> *ex parte* Applicant 10 days after the filing of the Request for Review while knowing very well that the Review Board had to complete the review process within 21 days, the Respondent acted illegally and failed to act with procedural fairness. The 1<sup>st</sup> *ex parte* Applicant further contended that that the failure to serve it with all the pleadings was a deliberate action to deny it ample opportunity of being heard. It is thus the 1<sup>st</sup> *ex parte* Applicant's case that the Respondent contravened the principles of natural justice and is guilty of procedural impropriety and bias against it.

14. The second claim by the 1<sup>st</sup> *ex parte* Applicant is that the Respondent's decision dated 5<sup>th</sup> May 2020 is not a reflection of the pleadings filed in court and is *ultra vires*. According to the 1<sup>st</sup> *ex parte* Applicant, the 2<sup>nd</sup> Interested Party's complaint in its Request for Review was anchored on requirement No 4 in Tables 1 and 2 of the subject tender that the dogs to be supplied are registered with East Africa Kennel Club, which was later on amended vide an Addendum dated 24<sup>th</sup> January 2020 which stated that the dogs may be registered with any other internationally recognized institution. That the 2<sup>nd</sup> *ex parte* Applicant thereupon filed a Preliminary Objection to the Request for Review, on the ground that the same was filed outside the timelines prescribed by Section 167(1) of the Public Procurement and Asset Disposal Act.

15. Thereafter, that the Respondent in its ruling on the said Preliminary Objection ruled that "*the Applicant had a right to approach this Board by 7<sup>th</sup> February 2020, being the fourteenth day after 24<sup>th</sup> January 2020, challenging the Addendum dated 24<sup>th</sup> January 2020. However, the Applicant failed to do so, subjected itself to the subject procurement process and is hereby estopped from raising an issue at this time with respect to its allegation that the Addendum dated 24<sup>th</sup> January 2020 failed to satisfy Section 60 of the Act in its entirety.*"

16. It is thus the 1<sup>st</sup> *ex parte* Applicant's case that the Respondent became *functus officio* after making the above ruling, and ought to have dismissed the 2<sup>nd</sup> Interested Party application for Request for Review, as the same was hinged on the requirement in the subject tender for registration of the proposed dogs which was in the Addendum. In addition, that the issues that the Respondent framed were not contained in the application for Request for Review and/or the responses filed by the *ex parte* Applicants. Therefore, that the Respondent's actions did not meet the threshold envisaged under section 7 of the Fair Administrative Act 2015, as they are malicious, dishonest and were not carried out in good faith.

### **The 2<sup>nd</sup> ex parte Applicant's Case**

17. The 2<sup>nd</sup> *ex parte* Applicant's case is that the Respondent allowed the Preliminary Objection raised that it had no jurisdiction to entertain the Request for Review, but still went ahead to entertain the said Request for Review. Therefore, that the Respondent made a fundamental

jurisdictional error.

18. The substance of the Respondent's decision was also faulted as being in error of the law, and the particulars given in this regard by the 2<sup>nd</sup> *ex parte* Applicant were as follows:

- a) The Respondent erred in its finding that the 2<sup>nd</sup> *ex parte* Applicant applied an extrinsic criteria/additional criteria when evaluating the Technical Bid of the Applicant.
- b) The Respondent found that the 2<sup>nd</sup> Interested Party fairly lost the 14 mandatory marks, which were mandatory at the Technical stage, yet directed the 2<sup>nd</sup> *ex parte* Applicant to re-admit the 2<sup>nd</sup> Interested Party's bid for further Technical evaluation.
- c) The Respondent in its ruling introduced an extrinsic evaluation criteria known as the weighted method in place of the set criteria in the tender document contrary to Section 80(2) of the Act.
- d) The Respondent ignored the instructions to tenderers which stated that bidders shall be required to meet all the mandatory requirements and score 86 and above for them to proceed to the next evaluation stage.
- e) The Respondent introduced adjustments to the tender document thus ensuring the 2<sup>nd</sup> Interested Party attains the maximum 86 marks and proceeds to the Financial Evaluation stage, by waiving the cut off score provided in the tender document and introducing weighted score criteria contrary to the Act.

19. The 2<sup>nd</sup> *ex parte* Applicant therefore claims that the Respondent was out rightly biased, and disproportionately applied the law, and that its decision is unfair, unreasonable and irrational. Furthermore, that the Respondent's decision cast aspersions on an alleged collusion between the 1<sup>st</sup> and 2<sup>nd</sup> *ex-parte* Applicants, when there was no evidence of collusion tabled by the 2<sup>nd</sup> Interested Party .

### **The Respondent's Case**

20. The Respondent in response stated that upon receiving the Request for Review, its Secretary immediately directed that the 1<sup>st</sup> *ex parte* Applicant together with all other bidders who participated in the subject tender be served and notified of the pending review, as required by the provisions of Section 168 of the Act. Further in notifying the 1<sup>st</sup> *ex parte* Applicant by email on 24<sup>th</sup> April 2020 the Respondent acted through Phillip Okumu, a member of the secretariat, who in executing his duty used his personal email address, namely, [okurnuppyahoo.com](mailto:okurnuppyahoo.com), due to technical challenges with the Respondent's official email address.

21. The Respondent averred that under Regulation 74(4) of the Public Procurement and Asset Disposal Regulations , it is only obligated to notify parties of an impending request for review within 14 days, and that once informed, the parties have the obligation to personally obtain copies of the request for review at their own cost. The Respondent conceded that it served the 1<sup>st</sup> *ex parte* Applicant ten days after the date of filing of the Request for Review 51 of 2020. Further, that the Respondent through Circular 02/2020 modified the mode of notifying parties of an impending review in response to the Covid-19 pandemic and subsequent government regulations, which circular dispensed with physical hearings of disputes and therefore the need for a notice for the hearing. The Respondent claimed that Circular 02 of 2020 served the same purpose as a notice for hearing.

22. On the substance of its decisions, the Respondent contended it dismissed the 2<sup>nd</sup> *ex parte* Applicant's Preliminary Objection challenging its jurisdiction after considering the pleadings filed by the parties, and for the reason that the 2<sup>nd</sup> Interested Party's Request for Review was founded on the 2<sup>nd</sup> *ex parte* Applicant's Letter of Notification dated 27<sup>th</sup> March 2020, and which the 2<sup>nd</sup> Interested Party was aware of on 1<sup>st</sup> April 2020. Therefore, that the time limit for raising a dispute was on 15<sup>th</sup> April 2020.

23. Furthermore, that it is within the Respondent's jurisdiction under section 167 of the Public Procurement and Asset Disposal Act to interrogate a procuring process in its totality, and in order to further the interests of justice as there is information asymmetry between a tenderer and Procuring Entity. The Respondent stated that in arriving at its decision, the Respondent was alive to all the issues raised by the parties; it observed the rules of natural justice and acted lawfully and reasonably in exercise of its statutory mandate, and that its decision was fair, rational lawful and within its jurisdiction. Lastly, the Respondent denied that there was any real or threat of bias on its part.

### **The 2<sup>nd</sup> Interested Party's Case**

24. The 2<sup>nd</sup> Interested Party on its part raised preliminary objections to the consolidated applications herein, on the ground that this Court lacks jurisdiction to hear and determine the said applications, as they were filed contrary to the provisions of section 5 of the Public Procurement and Assets Disposal Act and Regulation 222 of Public Procurement and Asset Disposal Regulations 2020.

25. The 2<sup>nd</sup> Interested Party also explained the background to the dispute herein, and confirmed that its representative attended a pre-bid meeting of the subject tender held on the 16<sup>th</sup> January 2020, wherein it sought for clarification and or explanations for several matters including the condition in Section V of the tender documents in Table 1 Item No. 4, and in Table 2 Item No. 4, relating to registration of the proposed dogs with the East Africa Kennels Club. However, that the 2<sup>nd</sup> *ex parte* Applicant failed, neglected and/or ignored to respond to the 2<sup>nd</sup> Interested Party's concerns. Further, that the 2<sup>nd</sup> Interested Party therefore submitted its tender documents without a response to the Section V Table 1 item No. 4 and Table 2 Item No. 4, and duly received an acknowledgement of successful submission of tender documents from the 2<sup>nd</sup> *ex parte* Applicant.

26. Subsequently thereto, the 2<sup>nd</sup> Interested Party stated that it learnt that the 2<sup>nd</sup> *ex parte* Applicant had published an addendum to the subject tender through its website on the 24th January 2020, which was the last date for submission of and opening tenders. Further, that the addendum was to the effect that requirement for registration with East Africa Kennel Club appearing as Item No. 4 in both Table 1 and 2 under Section V of the Tender to read that "The dogs can be registered with not only the East Africa Kennel Club but also any recognized club worldwide". Therefore, that the 2<sup>nd</sup> *ex parte* Applicant unfairly failed, refused and/or ignored to bring to the 2<sup>nd</sup> Interested Party attention to the fact that there was an addendum to item No. 4 of Table 1 & 2 of Section V of the tender, despite the 2<sup>nd</sup> Interested Party having raised its concerns on the same .

27. According to the 2<sup>nd</sup> Interested Party, the purported addendum dated 24th January 2020 offends the provisions of Section 75 (5) as it was done on the material date when the tenders were closing without giving the parties an opportunity to comply with the purported addendum, and was also contrary to Section 75 (3) of the Public Procurement and Asset Disposal Act as it was never communicated to all the bidders. Further, that the 2<sup>nd</sup> *ex parte* Applicant violated the provisions of section 60 (4) of the Act by purported to make it a mandatory requirement for the tenderers to be members of a specific club being "The East African Kennel Club" without a legal justification, which fact prejudiced the 2<sup>nd</sup> Interested Party's tender's chance of a fair process of evaluation.

28. Nevertheless, that the 2<sup>nd</sup> *ex parte* Applicant proceeded to open the tenders and thereafter evaluated the bids according to the terms of the tender and the addendum thereof, and on 1st April 2020 awarded the 1<sup>st</sup> *ex parte* Applicant tender No. KRA/HQS/NCB-046/2019-2020 by way of a Notice of Award dated 27<sup>th</sup> March 2020, which also indicated that the 2<sup>nd</sup> Interested Party had failed to provide documentary proof of an internationally recognized kennel where dogs are registered. The 2<sup>nd</sup> Interested Party averred that it is a registered member of an international body known as KNPV which is in the Netherlands, and had provided a certificate proving the membership. Therefore, that on the 14th April 2020 the 2<sup>nd</sup> Interested Party filed with its request for review of the award of the tender with the Respondent.

29. The 2<sup>nd</sup> Interested Party's case is that its request for review was premised on the grounds *inter alia* that the 1<sup>st</sup> Respondent applied extrinsic/ additional criteria that was not supposed to be applied at the technical evaluation stage but at the pre-delivery stage of the tender, and on the unfair evaluation and award of tender to the 1<sup>st</sup> *ex-parte* Applicant on the basis of Table 4 applicable at pre-delivery of the dogs. The 2<sup>nd</sup> Interested Party denied that its complaint was anchored on the addendum of 24th January 2020, but was premised on the letter of award.

30. Further, that it was within its constitutional right to file the Request for Review on the ground that the criteria applied was unfair, unreasonable and an apparent breach of law. Lastly, that the Respondent proceeded on the right premise of the law and properly considered the import and implication of the reasons given by the 2<sup>nd</sup> *ex parte* Applicant for awarding the tender to the 1<sup>st</sup> *ex parte* Applicant.

### **The Determination**

31. I have considered the pleadings, submissions and arguments made by the parties, and note that a preliminary issue has been raised by the 2<sup>nd</sup> Interested Party as to the jurisdiction of this Court, that will need to be determined first.

32. In the event that the Court finds that it has jurisdiction, it will proceed to determine the four substantive issues raised by the parties, namely,

- a) Whether the Respondent's jurisdiction to hear and determined the 2<sup>nd</sup> Interested Party's Request for Review was ousted by virtue of the provisions of section 167 of the Public Procurement & Assets Disposal Act.
- b) Whether the Respondent acted fairly when hearing the 2<sup>nd</sup> Interested Party's Request for Review.
- c) Whether the Respondent's decision on the 2<sup>nd</sup> Interested Party's Request was unreasonable and irrational.
- d) Whether the remedies sought are merited.

### **On this Court's Jurisdiction**

33. The issue of this Court's jurisdiction to hear the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants' applications was raised by the 2<sup>nd</sup> Interested Party in its Notice of Preliminary Objection. The 2<sup>nd</sup> Interested Party submitted in this respect that according to the provisions of Article 165 (3) (e) of the Constitution, as read with Section 175 (2) of the Public Procurement & Assets Disposal Act and Regulation 222 of the Public Procurement & Assets Disposal Regulation 2020, the jurisdiction of the court is limited to cases where the applicant have along with the application for review deposited 3% of the value of the tender in issue, otherwise that the court's jurisdiction shall not vest at all.

34. The 2<sup>nd</sup> Interested Party therefore contended that arising from the fact that no deposit was made by the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants contrary to the mandatory provisions of Section 175 (2) as read with Regulation 222 of the Public Procurement & Assets Disposal Regulations of 2020, the Court's jurisdiction has not been invoked and the consolidated applications must fail. Further, that given that the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants did not respond to the objection to this Court's jurisdiction, they admitted the fact as raised. The 2<sup>nd</sup> Interested Party relied on the decision of the Court of Appeal in the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] e KLR** for its submissions.

35. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants did not make any submissions on this issue.

36. It is notable that the objection by the 2<sup>nd</sup> Interested Party's as regards this Court's jurisdiction is pegged on the requirement in Regulation 222 of the Public Procurement & Assets Disposal Regulations of 2020, which provides as follows:

**“The filing of the judicial review application under section 175(2) of the Act shall be accompanied by a refundable security fee valued at 3% of applicant tender sum subject to a maximum ten million shillings in a mode of payment determined by the High Court.”**

37. I will dispose of the preliminary objection by proffering three reasons why it is not merited and cannot lie. Firstly, the payment or non-payment of security by an applicant is a question of fact, and under Regulation 222 Public Procurement & Assets Disposal Regulations of 2020, its manner of enforcement is subject to the discretion of this Court. The issue of the payment of security cannot therefore be the subject of a preliminary objection. The circumstances in which a preliminary objection may be raised, as explained by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, are as follows:

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

38. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of Oraro vs Mbaja, (2005) 1 KLR 141, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in Mukisa Biscuit Company -vs- West End Distributors Ltd (supra) that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

39. A determination of the issues raised in the preliminary objections will require evidence to be called on the payment or otherwise of the security, and for this Court to give further directions thereon, and the issue of such security cannot therefore be raised as a preliminary objection.

40. Secondly, a regulation cannot confer jurisdiction, neither can it override constitutional and statutory provisions that expressly confer jurisdiction to this Court to hear and determine of the applications brought by the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants. A Court's jurisdiction flows from either the Constitution or statute or both, or and by principles laid out in judicial precedent as explained by the Court of Appeal in the case of Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (1989) KLR 1. The Court of Appeal proceeded to define jurisdiction and its source as follows:

**“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”**

41. It is a general principle of statutory interpretation that unless the enabling Act so provides, delegated legislation cannot override any Act or any rule of general law (see Bennion on Statutory Interpretation, Fifth Edition at section 50). Even if Regulation 222 of the Public Procurement & Assets Disposal Regulations of 2020 were to be interpreted as detailing out how section 175 of the Public Procurement & Assets Disposal Act was to be implemented when applications for judicial review in the High Court from decisions made by the Respondent are being made, it certainly cannot affect or limit the supervisory jurisdiction of this Court granted by Article 165 (6) of the Constitution. This is for the reason that the said regulation does not and cannot purport to implement the provisions of the Constitution, and also in light of the provisions of section 174 of the Public Procurement & Assets Disposal Act that the right to request for a review under section 175 is in addition to any other legal remedy a person may have.

42. Lastly, the implementation and operation of Regulation 222 of the Public Procurement & Assets Disposal Regulations of 2020 was suspended by interim conservatory orders given by Korir J on 27<sup>th</sup> July 2020 in Roads and Civil Engineering Contractors Association and Energy Sector Contractors Association vs The Attorney General and the Public Procurement Administrative Review Board and Another, Nairobi H.C. Petition No.E226 of 2020, which Petition is *inter alia* challenging the Constitutionality of the said regulation.

43. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants' applications are therefore found to be properly before this Court, which is seized of jurisdiction to hear and determine the same. I will therefore proceed with a determination of the substantive issues raised in the said applications in the succeeding sections of this judgement.

44. Before doing so, it is imperative at the outset to delineate the parameters of this Court's powers in judicial review. The broad grounds for the exercise of 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)."**

45. With the enactment of a new Constitution in 2010, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others**, (2016) KLR that *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, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.*

46. Consequently, there are now established grounds for judicial review that require Courts to review the substance of a decision, quite apart from the jurisdictional and procedural aspects of decision making. These grounds are now explicitly provided for in section 7 of the Fair Administrative Action Act, and include the grounds of relevant and irrelevant considerations in a decision, the rationality and reasonableness of a decision, its proportionality, whether legitimate expectations have been violated by the decision, and whether the decision was made for proper or improper purposes. These grounds are questions of law on which there are settled applicable principles, and which of necessity also entail a merit review of the impugned decision in the context of the adduced evidence.

47. It is in the context of the foregoing legal parameters that this Court will proceed to address the substantive issues raised in the consolidated applications.

#### ***On Whether the Respondent had Jurisdiction***

48. The arguments on the Respondent lacking jurisdiction were reiterated by the by the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants, who submitted that the issue of the Respondent's jurisdiction was raised by the 2<sup>nd</sup> *ex parte* Applicant in its preliminary objection to the Request for Review which was allowed, which rendered the Respondent *functus officio*. Therefore, that the Respondent in taking further proceedings, made an illegality and an error in law, as it did not have jurisdiction.

49. The *ex parte* Applicants argued that despite upholding the 2<sup>nd</sup> *ex parte* Applicant's Preliminary Objection, the Respondent went ahead and proceeded to determine what it terms "other issues" that it framed. According to the *ex parte* Applicants, a Preliminary Objection is meant to dispose of proceedings in their entirety, and relied on the decision in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd** (1969) EA 696 on the circumstances in which a Preliminary Objection may be raised, and the case of **Stephen Mbilo & 5 Others vs John Kutna & 4 Others** [2011] eKLR for the submission that if a tribunal before which a contest to jurisdiction is raised holds that it lacks jurisdiction, then it must dismiss the matter placed before it.

50. The Respondent submitted that it indeed had jurisdiction to hear and determine the request for review pursuant to the provisions of section 173 of the Public Procurement and Disposal Act, 2015. The 2<sup>nd</sup> Interested Party supported the Respondent's position and insisted that this Court is the one that did not have jurisdiction, which issue has already been disposed with.

51. In deciding this issue, this Court is guided by the often cited decision of the Court of Appeal in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** [1989] KLR 1 reproduced hereinabove, and the statutory provisions on the Respondent's jurisdiction. Specifically on the Respondent's jurisdiction as regards review of procurement processes, section 167(1) of the Public Procurement and Asset Disposal Act (hereinafter "the Act") states as follows:-

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

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

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

**(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—**

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

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

52. A copy of the 2<sup>nd</sup> *ex parte* Applicant’s preliminary objection on the Respondent’s jurisdiction was annexed by the *ex parte* Applicants, and was on the ground that “the Request for Review No. 51 of 2020 is improperly before the Public Procurement Administrative Review Board by reason of having been filed outside the timelines prescribed by Section 167 (1) of the Public Procurement and Asset Disposal Act 2015.” The Respondent in its ruling on the Preliminary Objection found as follows:

**“It is therefore recognized as was held in the foregoing case, that the letter of notification of unsuccessful bid dated 27th March 2020 was brought to the attention of the Applicant on 1st April 2020 as confirmed by the Applicant and the 1st Respondent.**

**In computing time within which the Applicant was required to approach this Board, we are guided by the provision of section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which states as follows:-**

*"57. In computing time for the purposes of a written Jaw, unless the contrary intention appears-*

*(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done"*

**It therefore follows that 1st April 2020 is excluded from the computation of time meaning that time started running on 2nd April 2020 and the fourteenth day within which the Applicant was required by law to lodge its Request for Review was 15th April 2020. The Request for Review was lodged on 14th April 2020 and is therefore within the 14-day period specified under section 167 (1) of the Act.”**

53. it is notable from an ordinary reading of section 167(1) of the Act, that 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. A reading of the grounds in the 1<sup>st</sup> Interested Party’s Request for Review which was annexed by the *ex parte* Applicants, shows that the 2<sup>nd</sup> Interested Party was aggrieved by 2<sup>nd</sup> *ex parte* Applicant’s entire tender evaluation process, which it stated did not meet the threshold expressed under sections 79(1) , 80(2) and 60(1) and 86( 1)of the Act as well as Articles 201 and 227 of the Constitution and proceeded to give particulars thereof.

54. I will reproduce the grounds for review raised by the 2<sup>nd</sup> Interested Party in paragraph 7 of the its Request for Review for full effect:

**“7. THAT the Applicant is aggrieved by the 1st Respondent's tender evaluation process and aforesated decision on the grounds that;**

**i. The 1<sup>st</sup> Respondent's decision constituting the underlined part shown in paragraph 3 above, confirms that the 1st Respondent's evaluation committee applied additional extrinsic criteria that was not provided for in the tender document for use at the technical evaluation stage, thus contrary to section 79(1) and 80 (2) of the Public Procurement and Asset Disposal (PPDA) Act No. 33 of 2015 and Clause 2.22.4 of Instruction to Tenderers part of the tender document.**

**ii. That the said additional criteria ought to have been applied at the post qualification stage at the time of assessing pre-delivery conditions provided for at Table 4, page 31 of the tender document. The 1<sup>st</sup> Respondent's conduct was thus not fair, equitable, competitive and transparent in respect to the Applicant's bid contrary to Article 227 of the Constitution of Kenya.**

**iii. The technical requirement that proposed dogs MUST be registered with East Africa Kennels Club or equivalent international Kennel Club, did not give a clear and complete description in terms of its underlying technical objective thus did not allow for fair and open competition among the tenderers contrary to section 60 (1) of the PPDA**

**iv. The said technical requirement refers to a particular name of a Kennel Club contrary to section 60 (4) of the PPDA. The *proviso* in part (a) and (b) of the said section ought to be applied conjunctively for purposes of compliance with the said law. The tender document sufficiently and intelligible described the criteria for evaluating dogs health and performance at post qualification stage under the pre -delivery conditions (Table 4, page 31 of the tender document), which is in concurrence with the underlined part of the notification letter (see paragraph 3 above) thus rendering use of a name an abrogation of section 60 (4) of the PPDA and reference to an equivalent club cannot cure the defect.**

**v. There is no statutory or regulatory requirement for registration of narcotic or explosive sniffer dogs (jointly referred to as "working dogs") with any Kennel club whether locally or internationally. East Africa Kennels Club is a private members club and not a statutory body and/or a state agency. The technical requirement for registration of dogs to the said club or its equivalent was solely intended to benefit the 2nd Respondent. This is because the said**

requirement does not give any additional technical value to the benefit of the 1st Respondent in terms any known local or international norms and/or standards applicable in the choice of working dogs hence contrary to section 3 (g) and section 60 (3) (b) of the PPDA. This amounted to creating unjustified obstacle to the advantage of the 2nd Respondent thus unfair restriction of competition among tenderers.

vi. Even if the requirement that the proposed dogs MUST be registered with East Africa Kennels Club was a justified component of the technical evaluation criteria, the marks assigned to it ought to have been split for purposes Tables 1 & 2 referred to in paragraph four (4) above and accorded half of the maximum marks in each table noting that it is the same evaluation criteria being applied in one tender requiring a maximum aggregate of 100 marks. This was prejudicial to fair competition in that it accorded the 2nd Respondent disproportionate marks in view of the subject matter thus not fair, equitable and competitive contrary to Article 227 (1) of the Constitution.

vii. The Applicant's bid having purportedly failed to meet the cut off point on the sole basis of not providing documentary proof of an internationally recognized kennel club where dogs are registered thus missing the mandatory 14 marks at the technical evaluation stage, which is in any event disputed, it follows that the Applicant's bid ought to have been eligible to proceed to financial evaluation stage. Consequently, the 1st Respondent ought to have made its decision about the successful bidder in accordance with section 86 (1) (a) of the PPDA.

viii. The 1st Respondent's decision did not take into account comparison of the financial bids of the Applicant and the 2nd Respondent thus offending the mandatory provisions of section 3 (h) of the PPDA, Article 201 (d) and Article 227 (1) of the Constitution of Kenya in relation to cost effectiveness of the tender award thus a nullity *ab initio*."

55. Therefore, the relevant act when time started to run for purposes of the 2<sup>nd</sup> Interested Party's Request for Review was when it was notified of the outcome of the tender evaluation process which was by a letter dated 27th March 2020 which was e-mailed to it on 1<sup>st</sup> April 2020. The 2<sup>nd</sup> Interested Party filed its Request for Review in Application No. 51 of 2020 on 14<sup>th</sup> April 2020. It is the finding of this Court therefore, that the 1<sup>st</sup> Interested Party filed its Request for Review within 14 days of its knowledge of the alleged breach by the procuring entity, as found by the Respondent in its findings. The Respondent therefore lawfully assumed jurisdiction.

56. In determining the date of occurrence of this breach, I am persuaded by the decision by Elias JA of the English Court of Appeal in SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services Authority (2010) 2 CMLR 47 the Court extensively discussed when time starts to run with respect to a breach in procurement proceedings as follows:

**"....In Uniplex, the Court of Justice decided to adopt a test of discoverability, not a test which would result in time running from the happening of an event of which the victim might not know. The paragraphs of the judgment in Uniplex which I wish to emphasise are paragraphs 30 and 31:**

**"30 However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.**

**31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings. "**

I accept that the question under reply by the Court of Justice only required the Court to decide whether the three month period began with the date of the date of the infringement or on the date when the claimant knew or ought to have known of the infringement, but it is clear that in paragraphs 30 and 31 the Court of Justice moved to consider the degree of knowledge necessary to constitute knowledge for the purpose of starting the three month period.

The conclusion in paragraph 31 that time only starts to run once the unsuccessful tenderer can "come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings" reflects a number of decisions that the Court of Justice must have taken with respect to the test of discoverability. The most obvious question that arises for consideration, given that the unsuccessful tenderer has such a small window of time in which to start proceedings and given that the factual basis of a claim may be complex, is what happens if the information which the unsuccessful tenderer has is incomplete? It seems to me that in effect the Court of Justice resolves the problem of gaps in knowledge by treating the existence of an informed view as sufficient to bridge this gap. Once that is reached, there is no further threshold test in terms of prospects of success or indeed any other reason to escape the consequence of knowledge, such as lack of resources or failure to realise the true position in law, that can be taken into account. From this analysis it must follow that it is irrelevant that the unsuccessful tenderer's evidence is incomplete. The unsuccessful tenderer has the requisite knowledge once he has sufficient information to enable him to reach an informed view as to the matters stated in paragraph 31 of the judgment of the Court of Justice. Finally, the formulation provided by the Court of Justice, involving an informed view as to the appropriateness of bringing proceedings, may well mean that knowledge of some trivial breach not justifying the start of proceedings would not be enough..."

57. It is also notable that the contention by the 2<sup>nd</sup> *ex parte* Applicant in its Preliminary Objection was on whether the Request for Review was filed within time in line with section 167 (1) of the Act, on which the Respondent gave its ruling as stated hereinabove, by applying the provisions of the said section 167(1). The Respondent's ruling being relied upon by the *ex parte* Applicants to argue that the Respondent thereafter became *functus officio* was on the other hand not on the 2<sup>nd</sup> *ex parte* Applicant's Preliminary Objection, but on a specific substantive ground and issue raised by the 2nd Interested Party in the Request For Review, which was whether the Addendum dated 24th

January 2020 failed to fully satisfy the requirement of section 60 (4) (a) of the Act, and on which the Respondent found as follows:

**“The Applicant had a right to approach this Board by 7th February 2020, being the fourteenth day after 24th January 2020, challenging the Addendum dated 24th January 2020. However, the Applicant failed to do so, subjected itself to the subject procurement process and is hereby estopped from raising an issue at this time with respect to its allegation that the Addendum dated 24th January 2020 failed to satisfy section 60 of the Act in its entirety.**

**Having noted that the Request for Review raises other issues which the Applicant learnt of after receiving its letter of notification of unsuccessful bid, the Board finds that in so far as the contention that the Addendum dated 24th January 2020 failed to satisfy section 60 (4) of the Act, is concerned, this Board lacks jurisdiction to entertain such allegation. However, the Board finds that it has jurisdiction to entertain the other issues framed for determination in the Request for Review and we now proceed to address them as follows:-...”**

58. It is evident that the Respondent did not down its tools with respect to the entire Request for Review as claimed by the *ex parte* Applicants, but only with respect to a specific issue. Arising from these reasons, I find that the Respondent did not commit any jurisdictional error in admitting the 2<sup>nd</sup> Interested Party’s Request for Review and proceedings to hear and determine the remaining issues in the said Request for Review.

#### ***On Whether the Respondent acted Fairly***

59. Both the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants submitted on the allegations that the Respondent did not act fairly and acted in breach of the rules of natural justice. The gist of the 1<sup>st</sup> *ex parte* Applicant’s submissions was that it was not afforded a fair hearing, as there was non-compliance by the Respondent and the 2<sup>nd</sup> Interested Party of the Regulations contained in the circular No. 02/2020 dated the 24<sup>th</sup> March 2020 and resulted in the 1<sup>st</sup> *ex-parte* Applicant not being served in good time and did not have ample time to prepare its pleadings and submissions.

60. Further, that these actions denied the 1<sup>st</sup> *ex parte* Applicant an opportunity to fully participate in the proceedings and be heard, and was an affront to the dictates of the rules of natural justice and occasioned procedural impropriety. Reliance as placed on the case of **Republic Vs Public Procurement And Administrative Review Board & 2 Others, Malindi HC JR Cause No 2 of 2019** for the holding that, the right to a fair hearing is embodied in terms of Article 50 of the Constitution and is not subject to restriction or limitation on any aspects.

61. The 2<sup>nd</sup> *ex parte* Applicant on its part submitted that the Respondent acted unfairly and exhibited outright bias by introducing adjustments to the tender document that ensured marks were awarded to the 2<sup>nd</sup> Interested Party, and provided a summary of the adjustments made by the Respondent. According to the 2<sup>nd</sup> *ex parte* Applicant, the Respondent clearly set out to look for places where the 2<sup>nd</sup> Interested Party lost marks and added marks to the said party so as to ensure that its bid was readmitted, and it thus qualified at the Technical evaluation stage and moved onto the Financial evaluation. The 2<sup>nd</sup> *ex parte* Applicant submitted that this was contrary to section 80 (2) of the Act and the tender documents.

62. The 2<sup>nd</sup> Interested Party’s submissions on the issue were that the Respondent acted in pursuant to the powers donated under section 28 of the Act and in conformity with the Circular No. 02/2020 dated 24<sup>th</sup> March 2020 which was issued in response to the COVID 19 pandemic, and which under paragraph 3 thereof required a successful tenderer is to file its reply and submissions within 3 days of being served with the Request for Review. Further, that the 1<sup>st</sup> *ex parte* Applicant admits that it was served electronically through an email sent by Mr. Okumu on the 24<sup>th</sup> April 2020, and promptly proceeded to file a Notice of Appointment of Advocate on the 29<sup>th</sup> April 2020 and submissions on the 30<sup>th</sup> April 2020 all within 3 days of service as per the Circular No. 02/2020. In addition, that under the circumstances prevailing then service of process via email was deemed as proper service. As regards the delay in serving the 1<sup>st</sup> *ex parte* Applicant, the 2<sup>nd</sup> Interested Party submitted that the delay did not any prejudice to the said *ex parte* Applicant, as it was availed the 3 days to respond and file its submissions. Lastly, that there was no requirement for any of the parties to file submissions in reply/response to submissions by other parties as alleged by the 1<sup>st</sup> *ex parte* Applicant.

63. Article 47 of the Constitution, and the provisions of the Fair Administrative Act now import and imply a duty to act fairly by a decision maker in any administrative action. Article 47 of the Constitution provides as follows in this regard:

**(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

64. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

**“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

**(b) an opportunity to be heard and to make representations in that regard;**

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

65. Procedural fairness is embedded in the natural justice requirements that no man is to be a judge in his own cause, no man should be condemned unheard and that justice should not only be done but seen as done. The duty to act fairly therefore relates to procedural fairness in decision making, and not the fairness in a substantive sense of a decision. There is no fixed content to the duty to afford procedural fairness, and the answer to a question whether the threshold of fairness has been met will depend on the nature of the matters in issue, and whether there was a reasonable opportunity for parties to present their cases in the relevant circumstances.

66. In the present case, the 1<sup>st</sup> *ex parte* Applicant’s grievance is that it was served late with the Request for Review pleadings, which were also incomplete. It averred that it was served with the Request for Review by email on 24<sup>th</sup> April 2020 and filed its response on 30<sup>th</sup> April 2020. Section 168 of the Public Procurement and Assets Disposal Act in this regard provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribe.

67. The Public Procurement and Assets Disposal Regulations of 2020 which were gazetted on 22<sup>nd</sup> April 2020 specifically provide as follows as regards service of Requests for Review in Regulation 205:

**(1) The Secretary shall immediately after the filing of the request under regulation 203 serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act**

**(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated in writing by the Review Board Secretary**

**(3) Upon being served with a notice of a request for review the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified**

**(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3) commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years or to both**

**(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)**

68. The Procurement Administrative Review Circular NO. 02/2020 titled Administrative and Contingency Management Plan to Mitigate COVID-19 at the Public Procurement Administrative Board also provided the following timelines with regard to filing and service of pleadings in paragraphs 2 to 7 thereof:

**2. “Upon being notified of and served with an electronic copy or hard copy of a Request for Review, an Accounting Officer of a Procuring Entity and/ or any other Respondent to the Request for Review shall file and submit to PPARB Secretary his/her Memorandum of Response and/ or Preliminary Objection to the Request for Review within 5 days of such service together with all documentation (including the confidential documentation referred to herein before) with respect to the procurement or asset disposal proceedings in issue.**

**3. The tenderer notified as successful by an Accounting Officer of a Procuring Entity and/ or such other persons as PPARB may determine shall file its/his/her response to the Request for Review together with its/his/her written submissions within 3 days of such Request for Review being served (electronically or hard copy) upon the said tenderer notified as successful and/ or such other persons as determined by PPARB.**

4. The Applicant shall file its supplementary affidavit and/ or further statement in support of its/his/her Request for Review together with its/his/her written submissions within 3 days of the Applicant being served with the Accounting Officer of a Procuring Entity's responses to the Request for Review and the responses to the Request for Review of the tenderer notified as successful and/ or such other persons as determined by the PPARB.

5. The Accounting Officer of a Procuring Entity and/ or any other Respondent to the Request for Review shall file his/her submissions within 3 days of service to him/her of the written submissions of the Applicant, the tenderer notified to be successful and/ or such other persons as determined by the PPARB.

6. All Requests for Review applications shall be canvassed by way of written submissions and physical hearings of the same are hereby dispensed with. The PPARB shall consider the written submissions together with all documentation filed before it including confidential documents submitted to it pursuant to section 67 of the Act and render a decision electronically (i.e. via email) by notice to all parties to the Review within the statutory period required of 21 days provided in section 171 of the Act.

**7. Failure to adhere to the strict timelines provided herein by any party to a review will be at the detriment of such a party since PPARB shall strictly rely on the documentation filed before it within the timelines specified herein to render its decision.”**

69. Since the purpose of giving adequate notice is to ensure that an individual has effective opportunity to make representations in respect of a prospective decision, fairness will therefore require that any such notice be given in sufficient time to enable adequate preparation. The question of whether the time afforded is sufficient will depend on the circumstances. Relevant factors to consider is the extent to which an individual will be disadvantaged by the period of notice given, including by the complexity of the matter, the amount of materials needed to be considered, the familiarity with the issues and evidence, and whether the facts are disputed. The reasons and justification given by a decision maker for adopting a particular timeline will also be a relevant consideration.

70. Three observations are material in this respect. Firstly, the requirement for immediate service is upon the accounting officer of the procuring entity, whereupon its response is also supposed to be served on a successful tenderer and other parties together with the Request for Review. Therefore, there was no duty upon the Respondent to immediately serve the 1<sup>st</sup> *ex-parte* Applicant with the Request for Review, and the ten days' delay was as a result of the requirement of the law that the Request for Review be served together with the response by the procuring entity. In addition, the 1<sup>st</sup> *ex parte* Applicant does confirm that it was indeed served with the pleadings on 24<sup>th</sup> April 2020, ten days after filing of the Request for Review, and was able to comply with the timeliness given of three days to file its response and submissions. The delay in service of the pleadings by the Respondent was therefore neither unreasonable nor prejudicial to the 1<sup>st</sup> *ex parte* Applicant.

71. Secondly, the parties were specifically instructed to file their responses together with submissions. Indeed, given that the Respondent is required to determine a review application within twenty-one days of its receipt under section 171 of the Act, and given the prevailing circumstances of the COVID-19 which this Court takes judicial notice of, this was not an unreasonable direction. The 1<sup>st</sup> *ex parte* Applicant on the contrary chose not to comply with the directions and filed a response without submissions, and cannot fault the Respondent for not being able to file its submissions in good time. Lastly, the 1<sup>st</sup> *ex parte* Applicant did not provide any evidence that it brought the fact of missing pleadings to the attention of the Respondent, or sought these materials from the Respondent or other parties. This is therefore a fact that is not proved that this Court can make a finding on.

72. It is thus evident that in the instant application that prior notice was given to the 1<sup>st</sup> *ex parte* Applicant of the 2<sup>nd</sup> Interested Party's case and that it was able to respond to the same. I therefore find that the Respondent acted fairly to the extent that it gave the 1<sup>st</sup> *ex parte* Applicant adequate notice in the circumstances, and an opportunity to make representations.

73. On the allegations by the 2<sup>nd</sup> *ex parte* Applicant that the Respondent was also biased in its decision-making, it is notable that the test to be applied in determining whether there is a likelihood of bias was stated in **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge, [1995-1998] 1 EA 134** by Lakha, JA as follows: -

**"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "The judge was biased."**

74. The applicable test therefore, is whether a fair minded person, who was informed of the circumstances in which the decision against the Applicant was made, and having considered the facts, would conclude that there was a possibility that the decision makers may be biased. I find the responseto the said test to be negative in this application for two reasons. Firstly, the 2<sup>nd</sup> *ex parte* Applicant did not bring any evidence of any relationship between members of the Respondent and 2<sup>nd</sup> Interested Party that would have raised an apprehension of bias.

75. Secondly, the Respondent's duty and requirement to make a decision one way or another is set by law, and the fact that its decision is faulted for being erroneous or unreasonable is not on its own evidence that the Respondent is biased, in the absence of other evidence of

circumstances leading to an apprehension of bias. I thus find that there was no apparent bias on the part of the Respondent's Board for these reasons.

### ***Whether the Respondent's Decision was Unreasonable and Irrational***

76. I will on this issue address the arguments made by the parties as regards whether the Respondent's decision was unreasonable and irrational, and predicated on extraneous matters. Both the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants in this respect submitted that the 2<sup>nd</sup> Interested Party's Request for Review was based on the sole issue of Registration of dogs with the East African Kennel Club or any other club worldwide with proof attached, and with the requirement of item 4 under Table 1 and Table 2 of the tender document. Therefore, that the rest of the judgment was on issues that were not raised by the 2<sup>nd</sup> Interested Party. The Review Board went on to frame its own questions and answer them and introduced issues that were not before it.

77. The 2<sup>nd</sup> *ex parte* Applicant in addition submitted that the finding by the Respondent in its judgment that the procuring entity applied extrinsic/additional criteria when it applied the requirements of table 4 of the tender document in evaluating the bid at the technical evaluation stage, was unreasonable and unfair. Further, that this was because the criterion under consideration was outlined in item 4 of both Table 1 and Table 2 and provided that the minimum requirement for both narcotic sniffer dogs and explosive sniffer dogs was that the proposed dogs must be registered with the East African Kennels Club, with proof attached, or any other recognized institution worldwide, with proof attached.

78. Furthermore, the 2<sup>nd</sup> Applicant alleged that the 2<sup>nd</sup> Interested Party did not comply with this minimum requirement, a fact the Respondent was aware of, as it observed in its judgment that the 1<sup>st</sup> *ex parte* Applicant was awarded score of 14 marks for providing evidence of registration, while the 2<sup>nd</sup> Interested Party did not receive any score under this criterion for not demonstrating with evidence the minimum requirements, and found that the procuring Entity fairly evaluated the 2<sup>nd</sup> Interested Party's bid under this criterion.

79. Therefore, that the Respondent upheld the evaluation criteria that the minimum requirements was that proposed dogs be registered with the East African Kennel club or my other recognized club worldwide, and it was thus unreasonable, irrational and unfair for the Respondent to make two different findings on the exact same issue.

80. Lastly, that the Respondent in its judgment framed a fifth issue namely "*whether the Procuring Entity colluded with the 2<sup>nd</sup> Respondent to the exclusion of other tenderers contrary to Section 66 of the Act*", and despite lack of evidence or submission on the alleged collusion between the Applicant herein and the successful bidder, the Respondent went to great lengths of visiting the alleged website of the East African Kennel Club and analyse information found on the website to reach its finding.

81. Accordingly, that the conclusion by the Respondent that "*The Board finds that though the Applicant has not proven any collusion or corrupt practises between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent the striking similarities of the names between Simon Kabuga and S.G Kabuga should have an issue for consideration by the procuring Entity*" was unreasonable and irrational, as it insinuated collusion on the basis of similarity between a name and initials when there was no evidence to support a finding of collusion. Reliance was placed on the holdings on unreasonableness in the cases of **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation, (1948) 1KB 223** and **Civil Servants Union (CCU) vs Minister for Civil Service, (1985) AC 374 HL** in this regard.

82. The Respondent on its part submitted that it acted within its powers and mandate under section 173 of the Act in granting the subject orders, and that this Court being a judicial review Court is not empowered to correct its decision on merit. The Respondent proceeded to make lengthy submissions on the extent of this Court's jurisdiction and cited various judicial authorities in this regard.

38. The 2<sup>nd</sup> Interested Party similarly submitted that the *ex parte* Applicants' suits are in the nature of appeals disguised as an application for judicial review against the Respondent's decision. Further, that the Respondent did exercise its powers properly and within the provisions of section 173 of the Act in giving directions to the 2<sup>nd</sup> Applicant to readmit the 2<sup>nd</sup> Interested Party and admit the tender for financial valuation, and its findings were arrived at upon evaluation of the evidence and applying the relevant law to the dispute before it. The 2<sup>nd</sup> Interested Party cited various decisions in support of this submissions, including **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati [2008] KLR 728**.

83. This court has power to set aside a decision on the ground that the decision is irrational in its defiance of logic or of accepted standards, that no sensible person who had applied his mind to the question to be decided could have arrived at it. This principle was settled by the decisions in **Associated Provincial Picture Houses vs Wednesbury Corporation (1948) 1 KB 223** and **Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374**. This ground was also explained in **Pastoli vs Kabale District Local Government Council & Others, (supra) and is provided for in section 7 of the Fair Administrative Action Act**.

84. Likewise, the ground of taking into account irrelevant considerations which is an aspect of illegality was stated in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation (supra)**, is that a public body when making a decision, must only take into account the factors which the legislation conferring the relevant function expressly or implicitly requires it to have regard. The extent to which a public body inquires into a particular factor, and the weight to be attached to a factor, are however matters to be decided by the public body, provided its acts reasonably. In addition, the considerations to be taken into account will also depend on the circumstances of each case.

85. On the arguments made that the Respondent decided on extraneous matters that were not pleaded by the 2<sup>nd</sup> Interested Party, this Court has already reproduced the grounds raised in the subject Request for Review by the 2<sup>nd</sup> Interested Party hereinabove, when addressing the issue of the Respondent's jurisdiction. This Court has also has already made a finding that the said Request for Review was challenging the entire evaluation process, and a perusal of the said grounds show that while the majority were on the requirements of table 4 of the tender document, there were some which were not related to the said Table.

86. The powers and jurisdiction of the Respondent are provided by section 28 and section 173 of the Act. Section 28 provides for the functions and powers of the Respondent as follows;

**“(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.”**

87. Section 173 provides an elaboration of the powers of the Respondent upon review of a tender dispute as follows;

**“Upon completing a review, the Review Board may do any one or more of the following— (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety; (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;**

**(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;**

**(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and**

**(e) order termination of the procurement process and commencement of a new procurement process.”**

88. An ordinary interpretation of section 28 is that any tendering dispute can be the subject of a review before the Respondent, which the Respondent is thus empowered to hear and make a decision on. The Respondent accordingly has the jurisdiction and power to hear a tender dispute and review a tender, where an issue is raised as to whether the tender is responsive in accordance with section 79 of the Act, or whether it was evaluated in accordance with section 80 of the Act, as sought in prayers made by the 2<sup>nd</sup> Interested Party in the present application. The orders or remedies that the Respondent can give upon hearing such a dispute are provided in section 173 of the Act.

89. The Court of Appeal in this regard observed as follows in the case of **Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others [2012] eKLR** on 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.”**

90. Therefore, the Respondent's decision as to whether the subject tender was properly and legally evaluated in accordance with sections 79 and 80 of the Act cannot be unreasonable for the reason that this was an issue specifically raised in the 2<sup>nd</sup> Interested Party's Request for Review, which the Respondent has the jurisdiction and powers to decide upon.

91. As to whether the Respondent made contradictory findings in the process, the finding by the Respondent that the 2<sup>nd</sup> *ex parte* Applicant took into account extrinsic criteria in evaluating the 2<sup>nd</sup> Interested Party's Applicant's bid contrary to section 80 (2) of the Act was made in the context of the letter of notification of unsuccessful bid dated 27th March 2020 addressed to the 2<sup>nd</sup> Interested Party, which read in part as follows: -

**"The above subject refers**

**We have now completed the evaluation of the tender and regret to advise you that your bid was not successful as you failed to meet the cut off score for both Narcotic and explosive Sniffer Dogs, you failed to provide documentary proof of an internationally recognized kennel club where the dogs are registered. This registration authenticates the origin of the breed which provides critical details about specific history of a dog in regards to health and performance tracking"**

92. The Respondent elaborated on the issue before it as follows at page 18-20 of the judgment:

**“The Board having considered parties' submissions observes that, the Applicant contended that the 1st Respondent introduced extrinsic/additional criteria that was not supposed to be applied during Technical Evaluation. In the Applicant's view, the 1st Respondent having specified in the letter of notification of unsuccessful bid that "this registration authenticates the origin of the breed which provides critical details about specific history of a dog in regards to health and performance tracking; used a criteria applicable at the post qualification stage at the time of assessing pre-delivery conditions provided for under Table 4 at page 31 of the Tender Document.**

In response to this contention, the 1st Respondent submitted in its Written Submissions that, there was no extrinsic or new criterion to evaluate the bids as alleged by the Applicant and that the Applicant is only aggrieved by the wording on the letter of notification that its bid was unsuccessful. In the 1st Respondent's view, the letter of notification issued to the Applicant simply explained the reasons why the Applicant's bid was found non-responsive.

Having considered the foregoing submissions, the Board notes that the criterion under consideration is outlined in Table 1 and 2 at pages 28 and 29 of the Tender Document which provided the minimum requirements for Narcotics sniffer dogs and explosives sniffer dogs as follows:-.....

According to the above criteria, a bidder was required to propose dogs that are registered with East Africa Kennels Club and attach proof of such registration . Further to this, the Addendum dated 24th January 2020 further stated that *"the dogs can be registered with not only East Africa Kennels Club but also any other recognized club worldwide/*

This means, the Evaluation Committee only had the sole duty of evaluating the documentation provided by bidders with a view of establishing whether such documentation demonstrate registration of a dog with the East Africa Kennels Club and if a bidder proposed another recognized club worldwide....”

93. The Respondent, having made the finding as regards what ought to have been considered by the 2<sup>nd</sup> *ex parte* Applicant in evaluating the tenders before it, proceeded in its analysis as follows at pages 21 to 24:

**“The Board further studied Table 4 at pages 31 and 32 of the Tender Document which provides as follows:-**

*The winning bidder shall be required to meet the following pre- delivery condition.*

*Table 4: Pre-Delivery Conditions.....*

Having considered the requirements under Table 4 at pages 31 and 32 of the Tender Document, the Board observes that the 1st Respondent specified Pre-Delivery Conditions that the proposed dog of the winning bidder ought to meet. To assess the health of the proposed dog, the Tender Document specifies requirements relating to the medical record of the dog. The second section of Table 4 specifies requirements relating to the performance and competence of the dog in terms of the training it has received and how it would respond to its surrounding environment.

It is the Board's considered view that Table 4 at pages 31 and 32 of the Tender Document deals with the health and performance tracking of the dog proposed by a successful bidder, which the Procuring Entity would assess before delivery of the dogs.

Section 80 (2) of the Act provides that:-

*"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"*

In this instance, the requirements under Table 4 of the Tender Document did not form part of the procedures and criteria to be applied during Technical Evaluation . The requirements under Table 4 would only become relevant when assessing the health and performance of the dog proposed by the successful bidder but before delivery of the same. This means, the Evaluation Committee would have already concluded Preliminary, Technical and Financial Evaluation, determined the lowest evaluated bidder and award made by the 1st Respondent to that lowest evaluated bidder. It is only after award of the subject tender to the winning bidder has been made that the requirements under Table 4 of the Tender Document would be applied.

According to the Evaluation Report, the Evaluation Committee observed that:-

*"On the Mark Security Ltd failed to meet the cut off score for both Narcotics and Explosive Sniffer Dogs because the bidder failed to provide documentary proof of an internationally recognized kennel club where the dogs are registered. This registration authenticates the origin of the breed which provides critical details about specific history of a dog in regards to health and performance tracking"*

It is evident from the foregoing that the Evaluation Committee applied the requirements under Table 4 of the Tender Document when evaluating the Applicant's bid at the Technical Evaluation Stage, which requirements did not form part of the Technical Evaluation Criteria.

**Accordingly, the Board finds that the Procuring Entity applied extrinsic/additional criteria when it applied the requirements of Table 4 at pages 31 and 32 of the Tender Document in evaluating the Applicant's bid at the Technical Evaluation Stage contrary to section 80 (2) of the Act.”**

94. On the other hand, the finding that the 2<sup>nd</sup> Interested Party did not provide evidence demonstrating its compliance with the evaluation requirement was made in the process of examination of the issue of the evaluation criteria that ought to have been applied by the 2<sup>nd</sup> *ex parte* Applicant, and specifically with regard to the criteria on Registration of Dogs provided under Category 4 of Table 1 and 2 of the Tender Document. This examination was done when considering the issue as to whether the 2<sup>nd</sup> *ex parte* Applicant fairly evaluated the 2<sup>nd</sup> Interested Party's bid at the Technical Evaluation Stage in accordance with section 79 (1) and 80 (2) of the Act read together with Article 227 (1) of the Constitution. This issue arose pursuant to a specific prayer by the 2<sup>nd</sup> Interested Party in prayer (3) of the Request for Review that the 2<sup>nd</sup> *ex parte* Applicant be directed to re-admit the Applicant's bid at the Financial Evaluation Stage and evaluate its bid together with all other bidders eligible for consideration at the Financial Evaluation Stage .

95. The Respondent explained the reasons as to why it was undertaking the examination thus at page 25 of its judgment:

**“It is evident that the letter of notification issued to the Applicant does not specify the technical score achieved by the Applicant at the end of Technical Evaluation. However, in order to determine whether the Applicant qualifies for Financial Evaluation together with the 2<sup>nd</sup> Respondent, this Board must determine whether the Applicant's bid and that of the 2<sup>nd</sup> Respondent were fairly evaluated at the Technical Evaluation Stage.**

**In particular, the Board studied the manner in which the Evaluation Committee evaluated the Applicant's bid in the categories where the Applicant lost marks. Having studied the Evaluation Report, the Board notes that category 4 of Table 1 and 2 of Technical Evaluation is not the only category under which the Applicant lost marks, but also lost some marks in the following categories:-....”**

96. On the category of registration of dogs, the Respondent found as follows at pages 33 -34 of the judgment:-

**“The Board studied the Applicant's original bid but did not find any documentation of registration with the East Africa Kennel Club or any other recognized club worldwide with respect to the dogs it had proposed.**

**On the other hand, the 2<sup>nd</sup> Respondent attached the following in its original bid:-**

- 11 Certificates of Registration of German Shepherd dogs issued by the East Africa Kennel Club to Mr. S Kabuga as the owner;
- A Certificate of Registration of an Imported Dog-Belgian Shepherd Dog (Malinois) issued by the East Africa Kennel Club to S & G Kabuga.

**The Board observes that the 2<sup>nd</sup> Respondent was awarded a score of 14 under this criterion for providing evidence that the proposed dogs are registered by the East Africa Kennel Club. On the other hand, the Applicant did not achieve any score under this criterion noting that the Applicant indicated that its proposed dogs are registered with other international clubs, but did not provide documentary proof of such registration. In the absence of any documentation of registration of the dogs proposed by the Applicant either at the East Africa Kennel Club or any other recognized club worldwide, the Evaluation Committee could not allocate the Applicant any score under this criterion.**

**Accordingly, the Board finds that the Procuring Entity fairly evaluated the Applicant's bid under this criterion.”**

97. This finding therefore, not only flowed from and was in accordance with the Respondent's previous findings as regards the evaluation criteria that ought to have been applied by the 2<sup>nd</sup> Respondent, but was also based on a specific issue and evidence that was before the Respondent for determination. The finding cannot therefore in the circumstances be found to be unreasonable or irrational. It is also notable that contrary to the 2<sup>nd</sup> *ex parte* Applicant's argument that there were contradictory findings made on the same issue, the findings it cited were made by the Respondent on two different and mutually exclusive issues.

98. Lastly, as regards the arguments by the 2<sup>nd</sup> *ex parte* Applicant that the findings by the Respondent on collusion between it and the 1<sup>st</sup> *ex parte* Applicant were not based on any evidence, it is notable that the Respondent stated that the issue arose after the 2<sup>nd</sup> Interested Party contended that upon conducting a search of the directors of the 1<sup>st</sup> *ex parte* Applicant, it established that one of its directors was known as Mrs. G. Kabuga, who was the sitting Vice Chairperson of the East Africa Kennels Club, thus corroborating the 2<sup>nd</sup> Interested Party's suspicion that the subject tender document was prepared to unfairly favour the 1<sup>st</sup> *ex parte* Applicant at the exclusion of other tenderers, thus contravening the law.

99. On the evidence it relied upon in determining the issue, the Respondent stated as follows in its judgement at pages 41 to 42 thereof:-

**“The Applicant attached an extract of the Official Website of the East Africa Kennel Club to its Request for Review bearing the domain, [eastafrikakennelclub.com](http://eastafrikakennelclub.com), which the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent did not oppose neither did they respond to the same.**

**Upon studying the same, the Board visited the said website (i.e. <http://eastafrikakennelclub.com/aboutus/>) and noted that**

under the tab named as "About the EAKC", a brief history of the East Africa Kennel Club is given, members of the EAKC Committee 2019 are listed and an explanation given for anyone desirous of buying a dog

As regards the EAKC Committee 2019 membership, the following are listed on the said website.....”

100. Lastly, the Respondent’s findings on the said issue was as follows at pages 45 to 46:

“In the Board's view, the striking coincidence of names of the owners of the dogs proposed by the 2nd Respondent having been registered by the East Africa Kennel Club and the fact that one Simon Kabuga is a director of the 2nd Respondent, ought to have prompted the 1st Respondent to conduct a due diligence exercise on the 2nd Respondent after it was found to be the lowest evaluated bidder, with a view of establishing whether or not it provided false information in its Confidential Business Questionnaire Form.

Accordingly, the Board finds that though the Applicant has not proven any collusion or corrupt practices between the 1st Respondent and the 2nd Respondent, to the satisfaction of the Board, the striking similarities of names between Simon Kabuga and S. G Kabuga should have been an issue for consideration by the Procuring Entity at the due diligence stage.

Therefore, not only was there evidence that formed the basis of its findings presented to the Respondent by the 2<sup>nd</sup> Interested Party, but there was no finding of collusion as alleged by the 2<sup>nd</sup> ex parte Applicant, and the findings made were on the due diligence it need to undertake. The sum total of my findings is that the reasons for the findings made by the Respondent were indicated in its decision, which was also based on the evidence before it, and was therefore not unreasonable or based on extraneous factors.”

#### *Whether the Applicant is entitled to the relief sought*

101. The final issue for determination is that of the remedies sought by the *ex parte* Applicants. The *ex parte* Applicants have sought orders of certiorari, prohibition and a declaration. 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.”

102. The remedy of a declaration is on the other hand normally granted to state authoritatively the lawfulness of a decision, action or failure to act, the consequences that follow from a quashing order, the existence or extent of a body’s powers and duties, and the rights of individuals or the law on a particular issue.

103. This Court has found that the impugned decision dated 5<sup>th</sup> May 2020 which was made by the Respondent in Request for Review App No. 51 of 2020, was made within its jurisdiction, fairly, reasonably and rationally, and did not take into account irrelevant factors. The *ex parte* Applicants are therefore not entitled to the orders sought of certiorari to quash the said decision. Likewise, the orders of prohibition and declaration sought cannot lie, as the Respondent acted lawfully in making the said decision.

104. I accordingly find that the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* Applicants’ Notices of Motion dated 26<sup>th</sup> May 2020 and 22<sup>nd</sup> May 2020 respectively are not merited, and the said applications are dismissed with no order as to costs.

105. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> 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* Applicants’ and Respondent’s and 2<sup>nd</sup> Interested Party’s Advocates on record.

**P. NYAMWEYA**

**JUDGE**