REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI,

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 210 of 2018

In the matter of an application by Lordship Africa Limited for

Judicial Review orders of *Certiorari, Prohibition* and *Mandamus*

In the matter of Tender No. NCC/T/SS & H/098/2015-2016 LOT 2

Ngong Road-Redevelopment of Old Housing Estates within

Nairobi City County under Joint Venture Partnership (JVP)

and

In the matter of the purported cancellation of Tender Number

NCCT/T/SS & H/098/2015-016-LOT 2 Ngong Road

Estate Project by a letter dated 4th April 2018

and

In the matter of sections 4, 7,8, and 11 of the

Fair Administrative Action Act, 2015

and

In the matter of the Public Service (values and Principles) Act, No. 1A of 2015

Republic.....Applicant

versus

The Nairobi City County.....Respondent

and

Lordship Africa Limited.....*Ex parte* Applicant

JUDGMENT

Introduction.

1. I find it convenient to start by stating that Tendering plays a vital role in the delivery of goods and services in our society. For this reason the Constitution obliges organs of state to ensure that a procurement process is fair, equitable, transparent, competitive and cost-effective.[1] Where the procurement process is shown not to be so, courts have the power to intervene.

2. Perhaps I can add that Public procurement law contains the principles, policies and procedures that guide contracting public authorities and entities that buy works, goods or services on the market, with a view to ensure that public funds are spent efficiently, effectively, in a non-discriminatory and competitive manner, through transparent tendering processes.

3. More fundamental is the truism that the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the State procurement process is Article **277 (1)** of the Constitution which provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

4. The Public Procurement and Asset Disposal Act[2] (hereinafter referred to as the Act) and The Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the Regulations) prescribes the framework within which procurement policy must be implemented. Perhaps I should add that a decision to award a tender constitutes administrative action, hence, it goes without saying that the provisions of Article **47** of the Constitution and the Fair Administrative Action Act[3] from which a cause of action for the Judicial Review of administrative action arises, apply to the process.[4]

5. Section **3** of the Act provides that Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

> **(a)** the national values and principles provided for under Article 10; **(b)** the equality and freedom from discrimination provided for under Article **27; (c)** affirmative action programmes provided for under for under Articles **55** and **56**; **(d)** principles of integrity under the Leadership and Integrity Act, 2012; **(d)** the principles of public finance under Article **201**; **(e)** the values and principles of public service as provided for under Article **232**; **(e)** principles governing procurement profession, international norms; **(f)** maximization of value for money; **(g)** …and ….

6. Section **28** of the act provides that the functions of the Public Procurement 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. I will revert to this provision later.

7. As Lord Steyn observed, statutes do not exist in a vacuum.[5] They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.[6] The courts should therefore strive to interpret powers in accordance with these principles.

Factual matrix.

8. The relevant background to this suit is that the Respondent invited bids for various lots for redevelopment of old Housing Estates within Nairobi City County targeting to develop approximately 14,000 housing units in seven identified sites, among them, lot **2** for Ngong Road Estate(Meteorological Development) Bid No. **NCC/T/SS & 098/2015-2016.**

9. The *ex parte* applicant's states that it's was successful, but, no joint venture was signed principally because of the Respondents inability to fulfill conditions precedent to the signing, specifically procurement of land title deeds for the land parcels in question. The *ex parte* applicant states that notwithstanding the foregoing, by a letter dated **4th** April 2018, the Respondent purported to cancel the award in its favour ostensibly due to its failure to timeously sign the Joint Venture Agreement.

Legal foundation of the application.

10. The *ex parte* applicant challenges the impugned decision on grounds that section **68** of the Act and clause **3.26** of the Request For Proposals does not permit the cancellation. The *ex parte* applicant also states that the decision violates its rights under Articles **27** and **47** of the Constitution and sections **7(2)(a)(ii)(c)(d)(e)(h)(j)(m)&(0)** of the Fair Administrative Action Act.[7] Also, the *ex parte* applicant challenges the procedural propriety of the cancellation stating:- it was made without notice, its un fair and unreasonable. It also states that the demands for payment of VAT were made in excess of the Respondent's powers as it has no authority to cancel an award of a tender and that the demands for VAT were materially influenced by an error of law, namely, misinterpretation of section **68** of the act and clause **3.26** of the Request for Proposals0.

11. It also states that the decision was taken with ulterior motives calculated to prejudice its rights so as to confer benefits to a preferred party, and, that, it was made in bad faith as the Respondent sought to rely upon its failures to penalize the *ex parte* applicant. Also, it states that by making the decision, the Respondent violated its legitimate expectation. Lastly, it states that the decision violates sections **5(1)(2), 7** and **8** of the Public Service (Values and Principles) Act, 2015.

The Reliefs sought.

12. As a consequence of the foregoing, the *ex parte* applicant seeks the following orders:-

*1. A declaration that the Respondents decision contained in its letter dated **4th** April 2018 addressed to the ex parte applicant is unlawful and contravened the ex parte applicant's right to Fair Administrative Action under Article **47** of the Constitution and Section **4** of the Fair Administrative Action Act, 2015.*

*2. An order of certiorari t bring before this honorable court and quash the Respondent's decision contained in its letter dated **4th** April 2018 addressed to the ex pate applicant.*

3. An order for Mandamus directed at the Respondent to negotiate with the ex parte applicant a Joint Venture Agreement in terms of the said Tender.

4. That the costs of and occasioned by this application be provided for.

Respondent's Replying Affidavit.

13. **Dr. Patrick Mwangangi**, the Respondent's Head of County Supply Chain swore the Replying Affidavit dated **21st** August 2018. He averred that the Respondent invited expression of interest in a local daily and adopted what is referred to a two stage tender process which involves calling for expression of interest from companies to show interest in participating in the project and upon evaluation, qualified companies are shortlisted and issued with the Request For Proposal Document (RFP) to competitively bid for the project at stage two.

14. He averred that the Respondent through Tender **NCC/T/SS &H/098/2015-2016** invited Request for redevelopment of housing units within Nairobi County Old Building Estates. He also averred that the consortium comprising of the applicant herein, and China Wu Yi Company Limited and Scope Designs System were subsequently prequalified to proceed to the Request for Proposal Documents (RFP) stage, but, before submission of Request For Proposals, the *ex parte* applicant who was the lead consortium wrote to the Respondent informing them that China Wu Ying Company Kenya Limited had withdrawn its membership from the consortium, hence, the Request for Proposal Documents (RFP) was thus submitted by a consortium comprising of the *ex parte* applicant and Scope Designs System.

15. **Dr. Mwangangi** also averred that according to the expression of interest documents, bidding entities applying to tender as a consortium were required to submit a Joint Bidding Agreement (JBA) specifying the role to be undertaken by each member of the consortium in the project and further declaring that all consortium members shall be jointly and severally liable for execution of the project as per the terms of the joint venture agreement. Also, he averred that clause **11** of the Joint Bidding Agreement provides that all consortium members expressly undertake not to sign or delegate their rights, duties or obligations under the contract except with prior consent of Nairobi County Government.

16. **Dr. Mwangangi** also averred that under clause **11** of the Joint Bidding Agreement, the provision of Joint Bid Agreement may not be amended or modified except in writing signed by each party and with prior written consent of the Respondent. Further, he averred that the *ex parte* applicant by a letter dated **7th** July 2016 brought an architect from Turkey to work on the project to replace Scope Systems without getting the Respondent's express authorization and consent as per clause **11** cited above and also it caused the incorporation of a Special Purpose Vehicle known as Azile Limited to undertake the implementation of the project as per the joint venture agreement but sidelined Scope Design Systems. He averred that the said move caused a rift between the applicant and Scope Design System prompting Scope Design System to move to the high court in civil suit No. **464** of 207 seeking compensation from the *ex parte* applicant for breach of the terms of the Joint Bidding Agreement particularly their unceremonious removal from the consortium and the *ex parte* applicant's arbitrary action of forming a Special Purpose Vehicle excluding the Scope Design Systems contrary to section **2.3.5(f)** of the Expression of Interest.

17. **Dr. Mwangangi** also averred that the *ex parte* applicant violated section **2.4.2** of the Expression of Interest which clearly spelt out that a change in the composition of the consortium shall be approved by the Respondent at its sole discretion and the approval must be in writing. He also averred that the consortium failed to submit revised form of Joint Bidding Agreement as required under section **2.4.3** of the Expression of Interest. Further, he averred that the *ex parte* applicant is the only surviving member of the consortium, and, that, it proceeded to incorporate a Special Purpose Vehicle to undertake the project without involving the other prequalified consortium in breach of section **2.3.5(f)** of the expression of interest thus occasioning irregularities in the process.

18. Additionally, he averred that it is impossible for the *ex parte* applicant to guarantee that the award will be executed whilst it is the only surviving member of the consortium that won the bid, and, that the reason why the Respondent called for bidding as a consortium is because of the nature of work, the expertise required and the colossal sum of funds needed to fund the project. Lastly, he averred that the *ex parte* applicant flouted clauses in the expression of interest document, hence, the Respondent acted legally.

Ex parte applicant's Supplementary Affidavit.

19. **Mr. Jonathan Jackson**, a Director of the *ex parte* applicant swore the supplementary Affidavit dated **8th** October 2018.The crux of the affidavit is that the Respondent's Replying Affidavit does not make any reference to the legality of impugned decision.

Issues for determination.

20. Upon analyzing the facts presented by the parties, I find that the following issues fall for determination, namely:-

a. Whether this suit offends the doctrine of exhaustion of available remedies.

b. Whether the impugned decision is tainted with illegality.

c. Whether the impugned decision was tainted by procedural impropriety.

d. Whether the Respondent violated the ex parte applicant's right to legitimate expectation.

e. Whether the ex parte applicant is guilty of material non-disclosure.

a. Whether this suit offends the doctrine of exhaustion of available remedies.

21. The Respondent's counsel assaulted this suit on grounds that *the ex parte applicant failed to refer the matter to the Public Procurement Administrative Review Board before approaching this court as provided under section **167(1)** of the Act. He argued that the ex parte applicant did not exhaust the remedies available under the law.*

22. The *ex parte* applicant's counsels rejoinder is that *the Public Administrative Review Board has no jurisdiction to entertain complaints against the Respondent's unlawful purported cancellation of the award in its favour. He argued that section **167** of the act properly construed applies whereby a person claims a loss or risk of a loss occasioned by a breach of a duty imposed by the act or regulations. He argued that the grounds cited in this case fall outside the ambit of section **167** of the act because this case is premised on violation of the Fair Administrative Action Act*[8] *and Judicial Review grounds of ultra vires, abuse of power and wednesbury principles,*[9] *hence, it falls under the exceptions*[10] *to the exhaustion requirement.*

23. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya.[11]It was perhaps most felicitously stated by the Court of Appeal[12] in *Speaker of National Assembly vs Karume**[13]*** in the following words:-

> *"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures*."

24. The above case was decided before the Constitution of Kenya, 2010 was promulgated. However, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution.[14] The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others*,[15] where it stated that:-

> *"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution*."

25. In the *Matter of the Mui Coal Basin Local Community,**[16]*** the High Court stated the rationale thus:-

> *"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."*

26. From the above jurisprudence at least two principles can be discerned:- *First*, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[17] The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

27. Section **9 (2)** of the Fair Administrative action Act[18](an act of Parliament that was enacted to bring into operation Article **47** of the Constitution), provides that the High Court or a subordinate court under subsection **(1) shall not** review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section **(3)** which provides that "the High Court or a subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section **(2)** have been exhausted, direct that applicant *shall* first exhaust such remedy before instituting proceedings under sub-section **(1).**

28. The use of the word *shall* in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[19]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[20] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

29. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

30. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[21] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[22] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

31. A proper construction of section **9(2) & (3)** above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by **9(4)** which provides that:- "Notwithstanding subsection **(3),** the High Court or a subordinate Court *may*, *in exceptional circumstances* and *on application by the applicant*, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. *First*, the applicant must demonstrate exceptional circumstances.

32. What constitutes exceptional circumstances depends on the facts of each case.[23] Article **47** of the Constitution and the Fair Administrative Action Act[24] are heavily borrowed the South African Constitution and their equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions may offer useful guidance. The following points from the judgment of **Thring J** are relevant:-[25]"

> 1. *What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . . ."*
>
> *2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
>
> *3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.*
>
> *4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*
>
> *5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.*

33. There is no definition of 'exceptional circumstances' in the Fair Administrative Action Act,[26] but this court's interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[27] 34. In yet another South Africa decision***[28]*** the court said the following about what constitutes exceptional circumstances:-

> *"What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile."*

35. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule.

36. *Second*, on application by the applicant, the court may exempt the person from the obligation. It is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section **9(4)** of the Fair Administrative Action Act.[29] The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given. [30] Section **9(4)** of the Fair Administrative Action Act[31] postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy.

37. It is uncontested that the impugned decision constitutes administrative action as defined in section **2** of the Fair Administrative Action Act.[32] Therefore, an internal remedy must be exhausted prior to Judicial Review, unless the *ex parte* applicant can show exceptional circumstances to exempt it from this requirement.[33] In addition to what emerges from the above cited cases, I can add that what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue.[34] Factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[35] An internal remedy is adequate if it is capable of redressing the

complaint.[36]

38. The exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. Indeed, in this case, no convincing argument was advanced nor can I discern any virgin argument touching on constitutional interpretation.

39. The principle running through decided cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it. In the case before me, no argument was advanced that the mechanism under the above act was not adequate nor do I find any reason to find or hold so.

40. The *second* principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively. This argument was not advanced before me nor do I discern it from the facts of this case.

41. Section **167** of the act provides that "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**."

42. On principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. *The South African Constitutional Court held in the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others*[37]had this to say*:-*

> *"Jurisdiction is determined on the basis of the pleadings,**[38]**… and not the substantive merits of the case… In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim …, one that is to be determined exclusively by…..{another court}, the High Court would lack jurisdiction…"*

43. A casual look at the *ex parte* applicant's case shows that it is aggrieved by cancellation of a Tender, a procurement process falling under the provisions of the Public Procurement And Asset Disposal act[39] and the Regulations. To be specific, it falls within the ambit of section **167** of the act. That is the nature of the Dispute before the court. No amount of coloring can change the pith, substance and character of the case.

44. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The answer to this question lies in the powers of the Review Board. Section **173** of the Act provides for the powers of the Review Board. It provides that upon completing a review, the Review Board may do any of the following-

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

45. The above section has been the subject of determination in numerous case in this Country. Discussing a similar provisions in The Public Procurement and Disposal Act,[40] which was repealed by the current act, the Court of Appeal in *Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd*[41] stated:-

> *"The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity....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 procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with."*

46. Additionally, as stated earlier, section **28** of the act provides that the functions of the Public Procurement 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. This section is on all fours on the dispute raised in this case. I beg to say no more.

47. It should be recalled that the Public Procurement and Asset Disposal Act[42] was enacted to give effect to Article **227** of the

Constitution. The argument that the provisions of the act cannot apply to this dispute challenging cancellation of a tender lacks substance. In a constitutional democracy like ours, where the substantive enjoyment of rights and dispute resolution has a high premium, it is important that any existing statutory remedy be an effective one. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law. No serious argument was advanced before me to demonstrate the remedies under the act are effective. I have no doubt in my mind that the remedies stipulated in section **173** above are effective.

48. Additionally, I find myself compelled to mention a pertinent issue which the parties omitted to address. The impugned letter is dated **4th** April 2018. Under section **167** of the Act, an aggrieved party is required to lodge a Request for Review before the Board within **14** days. The *ex parte* applicant did not do so within the **14** days period. It instead moved to this court on **25th** May 2018, long after the expiry of the **14** days hoping to breathe life into its already time barred case. Unfortunately, this case was dead on arrival and no amount of injecting it with "constitutional principles" or "Judicial Review grounds" can bring it back to life.

49. In view of my analysis and the determination of the issue under consideration herein above, it is my conclusion that the *ex parte* applicant ought to have exhausted the available mechanism before approaching this court. I find that this case offends section **9 (2)** of the Fair Administrative Action Act.[43] Second, the *ex parte* applicant has not satisfied the exceptional circumstances requirement under section **9(4)** of the Fair Administrative Action Act.[44] Consequently, I find and hold that this suit offends the doctrine of exhaustion of statutory available remedies. It must fail. I dismiss it on this ground.

b. Whether the impugned decision is tainted with illegality.

50. The *ex parte* applicant's counsel argued that the cancellation of the notification of the award was pursuant to section **68** of the act and sub-clause **3.26.6** of the Request for Proposal. He argued that neither the said section nor the sub-clause authorized the cancellation. It was his submission that for the Respondent to invoke sub-clause **3.26.6,** the *ex parte* applicant ought to have failed to enter into a joint venture agreement within the stipulated period, which was not the case. He also argued that time had not even began to run for the said provisions to apply. Additionally, he argued that the Respondent had not met its obligations of getting land titles to facilitate the start of the project.

51. He also argued that the impugned letter is ultra vires Public Procurement and Asset Disposal Act,[45] the Request For Proposal, and section **7(2)(a)(i)** of the Fair Administrative Action Act.[46] To fortify his arguments, he cited Pastoli v Kabale District Local Council and Others[47] in which the court held that in order to succeed in Judicial Review, the applicant must demonstrate that the decision is tainted with illegality. He also cited Daniel Ingida Aluvala and Another v Council of Legal Education & Another[48] where the court held that public bodies no matter how well intentioned, may only do what the law empowers them to do. 52. He maintained that the Respondent's decision is tainted with abuse of power, unfairness/ irrationality. It was his submission that that statutory power can only be exercised validly if it is exercised reasonably.[49] He added that procurement must be done within the parameters defined in Articles **10, 47** and **227** of the Constitution and the Fair Administrative Action Act[50] and the Public Procurement And Asset Disposal Act.[51] He emphasized that public procurement has a constitutional underpinning.[52]

53. The Respondent's counsel submitted that the procurement process adopted by the Respondent is what is commonly referred to as a two stage tender process which involves calling for Expression of Interest from companies to show interest in participating in the project and upon evaluation, qualified companies are shortlisted and issued with Request for Proposal Document to competitively bid for the project at stage two. He submitted that the consortium comprising the applicant herein China Wu Yi Company Limited and Scope Designs Systems were prequalified to proceed to the Request For Proposal stage, but, just before submission of Request For Proposal, the *ex parte* applicant who was the lead consortium member wrote to the Respondent stating that China Wu Ying Company Kenya Ltd had withdrawn its membership from the consortium and the Request for Proposal was submitted by a consortium comprising of the applicant and Scope Designs System.

54. He referred to clause **11** of the Joint Bid Agreement which provides that all consortium members expressly undertake not to sign or delegate their rights, duties, or obligations under the contract except with prior written consent of the Respondent. Also, he argued that under the said clause the parties agreed that the provision of Joint Bid Agreement may not be amended or modified except in writing signed by each party and with prior written consent of the Respondent. Additionally, he submitted that the *ex parte* applicant brought an architect from Turkey to work on the project to replace Scope Designs without getting express authorization and consent of the Respondent as per clause **11** of the Joint Bid Agreement. Also, he argued that the *ex parte* applicant incorporated a special purpose project to implement the project thereby sidelining Scope Design Systems.

55. The Respondent's counsel also submitted that the *ex parte* applicant violated the provisions of section **2.4.1(a)-(d)** of the Expression of Interest which stipulates the conditions under which change in the consortium membership may be permitted by the Respondent during the qualification stage. Further, counsel submitted that the applicant violated section **2.4.2** of the Expression of Interest which clearly spelt out a change in the composition of the consortium shall be approved by the Respondent at its sole discretion and the approval must be in writing.

56. Additionally, he submitted that the *ex parte* applicant proceeded to incorporate a Special Purpose Vehicle to undertake the project without involving the other prequalified consortium in breach of section **2.3.5(f)** of the expression of interest thus occasioning irregularities in the process, hence, the Respondent took appropriate steps to safeguard the interest of Nairobi Residents.

57. Counsel further submitted that the *ex parte* applicant has failed to disclose to the court that the consortium that won the bid had collapsed, hence, it cannot perform the contract. Also, he argued that the *ex parte* applicant's action of replacing a party to the consortium is in consistent with the expression of interest bidding agreement. He added that the impugned decision was lawful[53] and that the *ex parte* applicant has not satisfied the threshold for the Judicial Review orders sought.[54]

58. A decision to award a tender constitutes administrative action. An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a)** contravenes or exceeds the terms of the power which authorizes the making of the decision; **(b)** pursues an objective other than that for which the power to make the decision was conferred; **(c)** is not authorized by any power; **(d)** contravenes or fails to implement a public

duty.

59. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations or in this case the Tender terms and conditions. A procuring entity is bound to adhere to the terms of the procurement process. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ‘‘four corners’’ of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[55]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. 60. *The ex parte applicant's counsel placed heavy reliance on clause **3.26.6** which provides that "in absence of an administrative review request, failure of the Successful Development Partner to enter into Joint Venture Agreement within the stipulated period shall constitute sufficient grounds for the annulment of the Letter of Acceptance and forfeiture of the bid security. In such event, NCC reserves the right to invite the second best evaluated Qualified Partner for negotiations or, call for fresh Bids, or take any such measures as may be deemed fit in the sole discretion of NCC including annulment of the bidding process."*

61. The Request for Proposal defines a Development Partner as follows*:- "shall mean the Successful consortium or single entity that offers the best evaluated technical and financial bid and which shall by itself or through a Special Purpose Vehicle enter into a joint venture Agreement." It is common ground that the ex parte applicant submitted its bid as a consortium. It is uncontested that the consortium disintegrated and some partners pulled out. I is common ground that the members of the consortium are battling in court. It is stated that the ex parte applicant is the sole surviving member of the consortium. In my view, this development altered the character of the ex parte applicant to the extent that it is no longer a consortium. Simply put, after the disintegration, the ex parte applicant as currently constituted does not and cannot claim to fall within the ambit of the above definition. Its character having changed fundamentally, this altered its legal position within the terms of the tender. The ex parte applicant as the remaining partner of the consortium cannot be said to be the "Development Partner that was the successful entity."*

62. *Section **63** of the act provides for termination or cancellation of procurement and asset disposal proceedings prior to signing of a contract on grounds inter alia where* subject procurement has been overtaken by operation of law, or, substantial technological change, *or,* material governance issues have been detected or force majeure. 63. In *Council of Civil Service Unions v. Minister for the Civil Service **[56]*** Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality, irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock’s classification, namely; *proportionality.*[57]What Lord Diplock meant by *“Illegality”* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *“Irrationality”* by succinctly referring it to *“unreasonableness”* in Wednesbury Case.[58] By *“Procedural Impropriety”* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

64. The role of the court in Judicial Review proceedings was well sated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[59]*where it was held that once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith.* Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament, then a court will not interfere with the decision. A decision which falls outside that area can therefore be described, interchangeably, as: a decision to which no reasonable decision-maker could have come; or a decision which was not reasonably open in the circumstances. 65. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple*ultra vires*anderrors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfillsubstantive legitimate expectationsare grounds within the second category.

66. The *ultra vires* principle is based on the assumption that Judicial Review is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts’ function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and also established its limits.

67. The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.[60] 68. The consortium that won the bid having disintegrated, the ground upon which the *ex parte* applicant stood collapsed. No amount of bringing in new partners or professionals could cure the position. Worse still, this was being done without the consent of the Respondent in violation of the same bid documents the *ex parte* applicant stands on in this case. Differently stated, the *ex parte* applicant did not win the bid alone. It was an express term of the Request for Proposal that bidders were to bid as *" a consortium"* and it was on that basis that the winning bid was chosen. Having won the bid as a consortium, I find no convincing argument to show that the Respondent acted outside its legal mandate nor can it be said that it improperly exercised its discretionary powers by cancelling the tender after the consortium collapsed. Differently stated, the Respondent acted within its mandate and statutory powers. In Judicial Review proceedings, the court can only determine the process not the merits of the decision.

69. A proper construction of the impugned decision, the bid documents and the relevant statutes leave me with no doubt that the impugned

action is legal and in conformity with the bid documents and terms. Put differently, the *ex parte* applicant has not demonstrated that the Respondent acted *ultra vires* its statutory mandate. Simply put, the applicant has not demonstrated *illegality.* 70. There is nothing before me to suggest that the decision is either unreasonable or irrational. Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (a)(i)** of Fair Administrative Action.[61] which provides that:- "A court or tribunal under subsection (1) may review an administrative action or decision, if— the person who made the decision— was not authorized to do so by the empowering provision." 71. The test for rationality was stated as follows*:-**[62]* *"The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."* In applying the this test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at."[63]

72. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the Fair Administrative Action Act.[64] A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout is whether the decision in question is one which a reasonable authority could reach. The converse was described by Lord Diplock[65] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.' Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.[66]

73. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Differently stated, the following propositions can offer guidance on what constitutes unreasonableness:- 1. *Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;* 2. *This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;* 3. *The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it;* 74. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[67] I have carefully examined the impugned decision. There is nothing to show that a reasonable body, faced with the same set of facts and the law would have arrived at a different conclusion. In other words, applying the above tests of unreasonableness and irrationality, I find that the *ex parte* applicant has not demonstrated that the decision was tainted with unreasonableness or irrationality. The decision is rationally connected to a lawful process, that is, enforcing the provisions of the Request for Proposal which clearly stipulated that the bidders were to submit bids as a consortium, and went a step further to define a consortium. The sole purpose of this requirement is to ensure that the work because of its nature is handled by a consortium as opposed to a single entity. The *ex parte* applicant submitted its bid as a consortium. It cannot now be heard to advance the argument that it is competent to proceed with the tender alone by reconstituting a new consortium different from the one that won the bid. The changes fundamentally altered its character to its detriment. On this ground, this case must fail.

76. The court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

77. It is trite that Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter. 78. The essence of a discretion in the true sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a court would have preferred him to have followed a different course among those available to him. A discretion in the true sense is found where the functionary has a wide range of equally permissible options available to it. 79. In contrast, where a body has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, a discretion in the loose sense – means no more than that the body is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.

80. When a body exercises a discretion in the true sense, it would ordinarily be inappropriate for a Review court to interfere unless it is satisfied that this discretion was not exercised – "judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a body or tribunal properly directing itself to all the relevant facts and principles.

81. A Judicial Review court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the body. Where a body is granted wide decision-making powers with a number of options or variables, a Judicial review court may not interfere unless it is clear that the choice preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, a Judicial Review court may not interfere only because it favours a different option within the range.

*c. **Whether the impugned decision was tainted by procedural impropriety.***

82. The *ex parte* applicant's counsel argued that *the law places a heavy premium on fair process at the heart of which is the requirement for adequate notice and opportunity to make representations before the decision is made. He argued that this is constitutionally anchored in Article **47** of the Constitution. He submitted that the applicant was denied due process before the impugned letter was written, hence, the decision was unilateral, arbitrary and procedurally unfair and offended section **4(3)(4)** of the Fair Administrative Acton Act.*[68]

83. He also argued that a key component of due process is notice and that a party must be granted a reasonable opportunity to know the allegations against him/it[69] *and that an individual is entitled to be informed that a decision which will have adverse consequences for him may be taken and notification of possible consequences.*[70]

*84. The Respondent's counsel's rejoinder was that the Respondent pointed out to the ex parte applicant the reason for the termination which was based on clause **2.26.6**, hence, the decision was legal. He argued that the court can only intervene if it's clear that the decision is illegal, irrational and impropriety of procedure.*[71]

85. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not been followed or if the "rules of natural justice' are not adhered to. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.

86. There are three broad bases on which a decision maker may owe a duty to exercise its functions in accordance with fair procedures. *First*, legislation or another legal instrument which gives a decision making power may impose a duty to follow specific procedures. The requirements relating to procedure contained in the statute or other instrument must be complied with. However, failure to comply with required procedures does not automatically mean that the decision which follows is invalid. The courts take a range of factors into account in deciding whether or not to nullify a decision.

87. Second, no-one may be the judge in his or her own cause. This strikes at decision making where the decision maker is connected with the party to the dispute or the subject matter. In this context, justice should not only be done, but should be seen to be done. Consequently, appearance of bias may be as relevant as actual bias.

88. Third, no person against whom an adverse decision might be taken should be denied a fair hearing to allow them to put their side of the case. What constitutes a fair hearing depends on the particular circumstances of the case. These include the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it has to work.

89. Fourth, statutes often require that decisions made under them to be supported by reasons.

90. The term*procedural impropriety*was used by Lord Diplock in the House of Lords decision *Council of Civil Service Unions v. Minister for the Civil Service****[72]***to explain that a public authority could be acting *ultra vires*(that is, beyond the power given to it by statute) if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other two being illegalityand irrationality.[73]

91. impropriety generally encompasses two things: procedural*ultra vires*, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common lawrules of natural justiceand fairness. [74] Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety.[75]

92.The common law rules of natural justice consist of two pillars: impartiality (the rule against bias, or*nemo judex in causa sua*– "no one should be a judge in his own cause") and fair hearing (the right to be heard, or *audi alteram partem*– "hear the other side").[76]The rule against bias divides bias into three categories: actual bias, imputed bias and apparent bias. More recent case law from the UK tends to refer to a duty of public authorities to act fairly rather than to natural justice. One aspect of such a duty is the obligation on authorities in some cases to give effect toprocedural legitimate expectations. These are underpinned by the notion that a party that is or will be affected by a decision can expect that he or she will be consulted by the decision-maker before the decision is taken.[77]

93. In recent years, the common law relating to Judicial Review of administrative action on the basis of procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness", have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.[78] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the Judge who decided it.

94. However erroneous the judgment or a decision may be in law or whatever injustice that erroneous judgment or decision may inflict, the erroneousness or injustice of the judgment or decision does not make the judgment contrary to natural justice. A decision contrary to natural justice is where the presiding Judge or Magistrate or Tribunal or decision maker denies a litigant some right or privilege or benefit to which he is entitled to in the ordinary course of the proceedings, as for instance refusing to allow a litigant to address the court, or where he refuses to allow a witness to be cross-examined, or cases of that kind.[79]

95. Article **47** of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[80]Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[81]Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.

96. The issue that inevitably follows is whether or not the manner in which the Respondent made the impugned decision or arrived at the impugned decision amounted to breach of the rules of natural justice. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed

the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals. In *Local Government Board v. Arlidge*,***[82]*** Viscount Haldane observed, *"...those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made*. *The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice." (Emphasis added)*

97. In *Snyder v. Massachussets*,[83] the Supreme Court of the United States observed that there was a violation of due process whenever there was a breach of a *"principle of Justice so rooted in the traditions and conscience of our people as to be ranked as fundamental*."

98. In India the principle is prevalent from the ancient times.[84] In this context, para 43 of the judgment of the Supreme Court[85] may be usefully quoted:-

> "*Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognized from earliest times and not a mystic testament of judge-made law*. *Indeed from the legendary days of Adam-and of Kautllya's Arthashastra-the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system." (Emphasis added)*

99. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action*,[86] observed, *"Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice."* **Wade** in *Administrative Law****[87]*** says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

100. As Sir William Wade in hisAdministrative Law put it "Natural justice is concerned with the exercise of power, that is to say, with the acts and orders which produce legal results and in some way alter someone's legal position to his disadvantage. But preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which do so. In this case the protection of fair procedure may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to the person affected."[88]

101. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[89]

102. Section **4** of the Fair Administrative Act[90] re-echoes Article **47** of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

103. Subsection **4**[91] further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing. As **Sedley J** put it[92]:- *"Public law is not about rights, even though abuse of power may and often do invade private rights; it is about wrongs-that is to say misuse of public power."*

104. Review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead the Constitution itself has conferred fundamental rights to administrative justice and through the doctrine of constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of Judicial Review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution.[93]

105. Procedural fairness contemplated by Article **47** and the Fair Administrative Action Act[94] demands a right to be heard before a decision affecting ones right is made. Whether or not a person was given a fair hearing of his case will depend on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case.In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[95]

106. What does fairness require in the present case? The standards of fairness are not immutable. They may change with the passage of time, both in the general, and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependant on the context of the decision, and this is to be taken into account in all its aspects.

[96]

107. Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[97]In addition, the foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used "fairness" as an explanation of other grounds of review. The courts have also used fairness as the explanatory basis for reviewing mistakes of fact. Courts also use fairness to rationalize judicial review of decisions based on "wrongful" or "mistaken" assessments of evidence.However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

108. Upon applying the legal principles discussed above to the facts and circumstances of this case, I find that no bidding contract had been signed when the Notification of Award was cancelled. Secondly, the impugned letter refers to several unsuccessful meetings and correspondence aimed at concluding the pre contract negotiations. At this point in time, no contract had been signed and the Respondent obligation was to communicate the notification of the cancellations and reasons for the cancellation which was done. Additionally, as held earlier, the consortium that had won the bid had collapsed, hence, the contract could not be awarded to the *ex parte* applicant under the changed circumstances. Further, the act permits cancellation of a tender before signing of the contract and in my view, the cancellation was grounded on the relevant provisions of the act permitting such cancellation.

109. I find no difficulty in concluding that the *ex parte* applicant has not demonstrated procedural impropriety or breach of the rules of Natural Justice or un fairness in the manner the cancellation was done.

c. Whether the Respondent violated the ex parte applicant's right to legitimate expectation.

110.The e*x parte applicant's counsel argued that the ex parte applicant had a legitimate expectation that upon submitting its bid, it would proceed to complete the Joint Venture Agreement with the Respondent and that this breach of legitimate expectation cannot be condoned by the court.*[98]

111.The importance of fair administrative action as a Constitutional right was appreciated in the South African case of ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others[99]*** where it was held as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

> ***"…The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"***

112. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims the court follows a two step approach. *Firstly*, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the *second* question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. Once a reasonable expectation exists the administrator is required to act in accordance with that expectation, except if there are public interest considerations which outweighs the individual's expectation.

113. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.[100] These include:- **(i)** that there must be a representation which is "clear, unambiguous and devoid of relevant qualification", **(ii)** that the expectation must be reasonable in the sense that a reasonable person would act upon it, **(iii)** that the expectation must have been induced by the decision-maker and **(iv)** that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator's actions on the ground of procedural unfairness. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

114.Addressing the subject of legitimate expectation, ***H. W. R. Wade & C. F. Forsyth[101]***at pages 449 to 450, thus:-

> *"It is not enough that an expectation should exist; it must in addition be legitimate….**First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….. **Second**, clear statutory words, of course, override an expectation howsoever founded…..**Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*

> *"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."*(Emphasis added)

115. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle

of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute.

116. The e*x parte applicant argues that it had a legitimate expectation that upon submitting its bid it would proceed to complete the Joint Venture Agreement with the Respondent. But it is equally true that the signing of the contract rested on other requirements. The anticipated contract had to conform with the all the tender requirements. One of the bid requirements was that the contract was to be awarded to a consortium. The ex parte applicant is the sole surviving member of the consortium that won the bid. This alone takes away its legitimate expectation if at all it existed. Second, changes such as those the ex parte applicant purported to introduce among them introducing new members to the already dead consortium without the consent of the Respondent offended the same bid terms it stands on and amounts to a breach on its part. This also negates any legitimate expectation. Further, any valid legitimate expectation could only arise after the tender terms were complied with fully. Differently stated, the ex parte applicant cannot be heard to be enforcing the same terms it violated. In other words, no legitimate expectation could arise under such circumstances. I find and hold that the plea for legitimate expectation must fail.*

d. Whether the ex parte applicant is guilty of material non-disclosure.

117.The Respondent's counsel pointed out that the ex parte applicant failed to disclose the existence of a civil suit between it and Scope Design Systems who were part of the consortium and that the ex parte applicant cannot insist on proceeding with the contract as the sole surviving partner of the consortium. The *ex parte* applicant admitted the existence of HCCC No. **465** of 2017 in its supplementary Affidavit after it was mentioned in the Respondent's Replying affidavit.

118. It is settled law that a person who approaches the court or a Tribunal for grant ofrelief, equitable or otherwise, is under a solemn obligation to candidlydisclose at the earliest opportunity possible all the material/important facts/documents which have a bearing on theadjudication of the issues raised in the case. In other words, he/it owes a dutyto the court or the Tribunal to bring out all the facts and refrain from concealing/suppressingany material facts within his knowledge or which he could have known byexercising diligence expected of a person of ordinary prudence. If he isfound guilty of concealment of material facts or making an attempt topollute the pure stream of justice, the court not only has the right but a dutyto deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner*.***[102]***

119. A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage.[103]The suit in question involves the members of the consortium who bided in the tender the subject of this suit. In my view, the *ex parte* applicant was under a solemn duty to bring to the attention of the court the existence of the said suit at the earliest opportunity possible and leave it to the court to determine the relevancy if any to the instant suit.

120. The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court or Tribunal to know in dealing with the issues before the court or Tribunal. The duty of disclosure therefore applies not only to material facts known to the *ex parte* applicant, but also to any additional facts which it would have known if it had made inquiries. I find no difficulty in concluding that the *ex parte* applicant was under a duty to disclose to the court the existence of the said case at the earliest opportunity possible instead of waiting for the Respondent to raise it in its response.

Conclusion and final determination.

121. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

122. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:- the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it. I find no basis to grant the declaration sought in prayer one of the application.

123. Certiorari issues to quash a decision that is *ultra vires*.[104] Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

124. The *ex parte* applicant also seeks an order of *prohibition*. The writ of *prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A *prohibiting* order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a *prohibiting* order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

125. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant’s own conduct has been unmeritorious or unreasonable, where the applicant has not acted in good faith, or where a remedy would impede the authority’s ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

126. I have already held above that this suit offends the doctrine of exhaustion of available remedies. Further, he who comes to Equity must come with clear hands. The *ex parte* applicant's failed to disclose the existence of a suit between itself and members of its consortium. Further, the consortium having disintegrated, the signing of the contract cannot legally proceed. Also relevant is the *ex parte* applicant's attempt to change members of the consortium without the consent of the Respondent, thereby acting contrary to the same bid terms it seeks to enforce.

127. Since the grant of the orders or *certiorari*, *mandamus* and *prohibition* is discretionary, the court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that what emerges is that the *ex parte* applicant seeks to enforce a procurement process yet the consortium that bided ceased to exist. The intention of the parties from the bid documents is clear. The bid was awarded to a consortium as opposed to a single company because of the nature of the work and the expertise required. This court cannot allow itself to be used to award a contract to the *ex parte* applicant in total disregard of the tender terms, nor, can the court sanction the new members of the consortium contrary to the original terms.

128. There is the question is public interest. The Respondent has clearly stated that it took the impugned decision owing to the nature of the project which required that the work be undertaken by a consortium as opposed to a single company. This public interest dimension prevails over the *ex parte* applicant's private interest and would militate against exercising discretion in its favour even if it had established grounds for the grant of the orders. Lastly, public interest and sound exercise of judicial discretion calls for the need for this court to exercise caution, care and circumspection while exercising its discretion.

129. In view of my analysis and determinations of the issues discussed above, the conclusion becomes irresistible that the *ex parte* applicant's application has no merits. Consequently, I dismiss the Notice of Motion dated **31st** May 2018 with costs to the Respondent.

Signed and Dated at Nairobi this day of 2019

John M. Mativo

Judge

Signed, Delivered and Dated at Nairobi this **28th** day of **January** 2019

Pauline Nyamweya

Judge

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[1] Article 227 of the Constitution.

[2] Act No. 33 of 2015.

[3] Act No. 4 of 2015.

[4] See *Minister of Health and another vs New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 95-97; *Bato Star Fishing (Pty) Ltd vs Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) paras 25-26.

[5]*R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: ‘‘Parliament does not legislate in a vacuum. Parliament legislates for a…liberal democracy based upon the traditions of the common law . . . and . . ., unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law’’).

[6] *Jackson vs Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [120] (Lord Hope), [102] (Lord Steyn), [159] (Baroness Hale suggest that the rule of law may have become ‘‘the ultimate controlling factor in our unwritten constitution’’; and see J. Jowell, ‘‘Parliamentarys' Sovereignty under the New Constitutional Hypothesis’’ [2006] P.L. 262.

[7] Act No. 4 of 2015.

[8] Act No. 4 of 2015.

[9] Citing *Fleur Investiments Limited v Commissioner of Domestic Taxes & Another* {2018} eKLR.

[10] Citing *Fordham Judicial Review Handbook*, 5 Edition at paragraph 36.3.6.(f) & *U.P. State Spinning Co. Ltd v R.S Pandev and Another*, Appeal (Civil) 1346 of 2005.

[11] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

[12] Ibid.

[13] {1992} KLR 21.

[14] Ibid.

[15] {2015} eKLR.

[16] {2015} eKLR

[17] Ibid.

[18] Act No. 4 of 2015.

[19]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[20] Ibid.

[21] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[22] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[23] See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini; S v Dladla & others*; *S v Joubert; S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[24] Act No. 4 of 2015.

[25] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H

[26] Act No. 4 of 2015.

[27] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[28] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)*2010 (4) SA 327 (CC) para 39, Mokgoro J

[29] Act No. 4 of 2015.

[30] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

[31] Act No. 4 of 2015.

[32]Act No.4 of 2015. (See *SA Veterinary Council & another v Veterinary Defence Force Association* {2003} ZASCA 27; 2003 (4) SA 546 (SCA) para 34).

[33] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[34] Koyabe supra para 39.

[35] Ibid para 44.

[36] Ibid paras 42, 43 and 45.

[37] Case CCT 64/08 [2009] ZACC 26

[38] *Fraser v ABSA Bank Ltd* [2006] ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[39] Act No. 33 of 2015.

[40] Act No. 3 of 2005.

[41]{2012} eKLR.

[42] Supra.

[43] Act No. 4 of 2015.

[44] Ibid.

[45] Act. No. 33 of 2015.

[46] Act No. 4 of 2015.

[47] {2008}2 EA 300.

[48] Pet 254 OF 2017.

[49] Citing *R v Commissioner for Co-operatives ex parte Kirinyaga Tea Growers Co-operative Savings and Credit Society Ltd* {1999} 1EA 245, 249 and *Keroche Industries Ltd v The Kenya Revenue Authority & 3 Others*, HC Misc 743 of 2006.

[50] Act No. 4 of 2015.

[51] Act No. 33 of 2015.

[52] Citing *Republic v Public Procurement Administrative Review Board & Another ex parte SGS Kenya Limited* JR Misc App No. 496 of 2017.

[53] Citing Republic v Public Procurement Review Board & 2 Others JR Misc App No 496 of 2017.

[54] Citing *Pastoli v Kabale District Local Government Council & Others* {2008]2EA 300.

[55] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[56] {1985} AC 374.

[57] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[58] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[59] {2015} eKLR.

[60] See *Gauteng Gambling Board vs Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29

[61] Act No. 4 of 2015.

[62] By Chaskalson P, in*Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (4) SA 674(CC)*at page 708; paragraph 86.

[63] In*Trinity Broadcasting (Ciskei) v ICA of* SA, 2004(3) SA 346 (SCA)at 354H- 355A, Howie P

[64] Act No. 4 of 2015.

[65] {1976} UKHL 6;{1976} 3 All ER 665at 697{1976} UKHL 6; ,{1977} AC 1014at 1064.

[66]Lord Cooke in*R v ChiefConstable of Sussex, ex parte International Trader's Ferry Ltd,* {1995} 1 All ER 129(HL) at 157.

[67] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[68] Citing *Ikon Prints Media v Kenya National Highways Authority* {2014} eKLR

[69] Citing Geothermal Development Company Limited v Attoney General & 3 Othetrs NRB Petition 352 of 2012 {2013}eKLR.

[70] Citing Hilary Delany, *Judicial Review of Administrative Action*, Thomson Reuters, 2 Edition, p 22 and Ernst & Young LLP v Capital Markets Authority & Another {2017} eKLR.

[71] Citing Republic v The Commissioner of Lands ex parte Lake Flowers Ltd, HC Misc App No 125 of 1998.

[72] *Council of Civil Service Unions v. Minister for the Civil Service*[1984] UKHL 9, [1985] 1 A.C. 374,House of Lords(UK).

[73] Ibid.

[74] *Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness",Textbook on Administrative Law(6th ed.), Oxford:Oxford University Press, pp.342–360 at 331,ISBN978-0-19-921776-2.*

[75] Supra, note 18.

[76] Supra, Note 20, at p 342.

[77] Ibid, page 313.

[78] David J. Mullan, *Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?* http://www.lawjournal.mcgill.ca/userfiles/other/6927003-mullan.pdf.

[79] (1897) 18 N.S.W.R. 282, 288 (S.C.).

[80] Article 47(1) of the Constitution.

[81] Article 47(2) of the Constitution.

[82] {1915} AC 120 (138) HL

[83] {1934} 291 US 97(105)

[84] We find it Invoked in Kautllya's Arthashastra.

[85] In the case of *Mohinder Singh Gill v. Chief Election Commissioner*,AIR 1978 SC 851

[86] (1980), at page 161.

[87] (1977) at page 395.

[88] 6thEd at pages 570.

[89] *Kioa v West* (1985), Mason J.

[90] Act No. 4 of 2015.

[91] Ibid.

[92]in *R vs Somerset CC Ex parte Dixon(COD)*{1997} Q.B.D. 323.

[93] *I*n the South African Case *PharmaceuticalManufacturersAssociationof South Africa & Another: exparte President of the Republic of South Africa & Others, Chaskalson, J (CCT) 31/99) [2000] ZACC 1; 2000 (2) ZA 674.*

[94] Act No. 4 of 2015.

[95] See S. De Smith, *Judicial Review ofAdministrativeAction*,4th ed. J. Evans (1980), 352- 4.

[96] See R v. Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 at 560.

[97] See also *McInnes v. Onslow*-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[98] Citing *Republic v Kenya Revenue Authority ex parte Shake Distributors Limited* Misc Civ App No. 359 of 2012.

[99](CCT16/98) 2000 (1) SA 1,at paragraphs135 -136.

[100] 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in South African Veterinary Council and another v Szymanski 2003 (4) BCLR 378 (SCA) at paragraph 19 and in Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another [2003] 2 All SA 616 (SCA) at paragraph 65.

[101] Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000.

[102] {1917} 1 KB 486, byViscount Reading, Chief Justice of the Divisional Court.

[103] Brinks-Mat Ltd vs Elcombe {1988} 3 ALL ER 188

[104] See *Paul Kiplagat Birgen & 25 Others v Interim Indepe**ndent** Electoral Commission & 2 Others* {2011} eKLR.