REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

JUDICIAL REVIEW APPLICATION NO. 12 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF ARTICLE 47(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 4(1), 5(2)(B)(C), 9(1) OF THE FAIR ADMINISTRATIVE ACT NO. 4 OF 2015

BETWEEN

1. GREGORY KITONGA WAMBUA

2. ANN MUNYIRA KIMEU

3. PATRICK NDAMBUKI (Suing as the Officials of BEGA KWA

BEGA PLUS SELF HELP GROUP..........................APPLICANT

VERSUS

COUNTY GOVERNMENT OF KIAMBU..........RESPONDENT

J U D G M E N T

1. The *ex parte* Applicants' Notice of Motion filed on 20th June, 2018 invokes Article 47(1) of the Constitution, Sections 4, 5 and 9 of the Fair Administrative Action Act. It is expressed to be brought under Sections 8 and 9 of the Law Reform Act and Order 53 Rule 3(1) of the Civil Procedure Rules and seeks the following orders:

a. An order of Certiorari be issued to remove into this Honourable court and quash the decision of the Respondent conveyed by way of notice dated 10/04/2018 purporting to terminate the agreement dated 06/06/2017 for the management of the facility being Thika Main Bus Park Toilet No. 001 as stipulated under Lease No. CGK/WENR/001/2017-2020.

b. An order of Certiorari be issued to remove into this Honourable Court and quash the decision of the respondent conveyed by way of notice dated 10/04/2018 purporting to issue the applicant a 30 days' notice to terminate the agreement dated 06/06/2017 for the management of the facility being Thika Main Bus Park Toilet No. 001 as stipulated under Lease No. CGK/WENR/001/2017-2020.

c. An order of Prohibition be issued to stop the Respondent from interfering with the Applicant's management of the facility being Thika Main Bus Park Toilet No. 001 during the period of the lease stipulated on the lease agreement dated 6/6/2017 and from taking over the facility during the period of the lease agreement.

2. The Application is premised on the grounds *inter alia* that the Respondent in arriving at its decision to terminate the lease agreement did not afford the applicant an opportunity to be heard therefore, offends the rules of natural justice; that the decision is irrational and arbitrary and violated the e*x parte* Applicants' legitimate expectation to enjoy the full term of the lease

3. Gregory Kitonga Wambua swore the verifying affidavit in his capacity as the Chairman of **Bega Kwa Bega Plus Self Help Group**

(hereinafter, the Applicants). He deposed that Applicants were first awarded the tender for managing the Thika Main Bus Park Toilet No.001 by the Respondent on 23rd June, 2008 and subsequently entered into a partnership agreement in that regard. That since then, the said agreement has been renewed on several occasions. That the latest partnership agreement was entered into on 6/6/2017, and was stipulated to run for 3 years, at a monthly rent of Kshs. 45,000/=. He deposed further that on 13/4/2018 the Applicants received a notice of 30 days from the Respondent informing them that Respondent had decided to terminate the partnership agreement. He laments that the Respondent did not afford the Applicants an opportunity to be heard; that the decision was irrational, arbitrary and violated the basic rules of natural justice and as such the decision ought to be quashed.

4. The Respondent through the replying affidavit of **Dr Martin N. Mbugua** the County Secretary, opposed the motion. He stated that there existed between the Applicants and the Respondent a contractual engagement commenced in June 2008 and renewed for 3 years in January 2015 under which the Applicants managed the public toilet in question. That before the expiry of the renewed contract, the Applicants purported to enter into a new contract running from July 2017 to the year 2020.He deposed that upon the coming into office of the new County government in 2017, it emerged that the manner of extension of the contracts was irregular as no tendering process had been conducted. Citing Section 114(2) Public Procurement and Disposal Act he posited that that such agreements could only run for a maximum period of three years, and as such, the purported extension was illegal and ultra vires. His view was that the court should not grant the remedies sought in light of the illegality surrounding the extensions. In conclusion he deposed that the Respondent cannot compelled to participate in a contract against its wishes.

5. The application was canvassed by way of oral submissions. Mr. Magara counsel for the Applicants submitted that the applicant was not accorded a hearing prior to the decision to terminate the agreement herein. He stated that the applicant had a legitimate expectation to operate the facility until the full term of the contract, thus, the decision to terminate the same by the Respondent was arbitrary and unreasonable. He emphasised that the applicant was challenging the process of termination. He relied on the case of **Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR** where the court granted the orders sought. The respondent being a public body, its decisions must be procedurally fair under the constitution.

6. On behalf of the Respondent, Mr. Ranja submitted that a termination notice was issued due to the illegality attending the into coming into existence of the lease agreement. He contended in defending the notice that the lease had been renewed without following the tendering process. He invoked Section 114 of the Procurement & Public Disposal Act which stipulates that a retendering should be done after 3 years of an award of a contract. That the renewal in this instance was done illegally thus the Applicants cannot assert a legitimate expectation borne of such illegality. Counsel submitted that the application did not fall under the purview of Judicial Review as it relates to a contract between two parties. He relied on the case of **Zakhem Construction (Kenya) Ltd vs. Permanent Secretary, Ministry of Roads & Public Works & Another (2007) eKLR**.

7. The court has considered the substantive motion, respective affidavits and submissions by the parties. It appears that despite raising several grounds in the motion the Applicants in urging the motion focused their arguments on two grounds i.e. the Applicants' right to be heard and legitimate expectation.

8. There was no dispute that the Applicants were in June 2008 awarded a tender to manage a public toilet facility referred to **as Thika Main Bus Park Toilet No. 001** under **Partnership No. 1 MCT/CPHO:001/2008** *vide* a letter dated 23/6/08 by the Town Clerk Municipal Council of Thika, the predecessor of the County Government of Kiambu. Subsequently an agreement in respect of the partnership was executed between the parties on 3rd July 2008. The partnership was to run for 2 years from that date. This agreement is annexure **GKW – 4** to the Verifying affidavit of **Gregory Kitonga Wambua**.

9. It appears that the Applicants continued to operate and manage the facility after the expiry of this first agreement even though there is no evidence of subsequent tendering or signing of agreements between 2010, when the initial agreement was set to lapse, and the agreement of 15th January, 2015 executed with the County Government of Kiambu, and stated to run for 3 years commencing 1st May 2014 **[annexure GKW – 5a**]. The latter agreement, and that executed on 6th June 2017 and commencing 1st July 2017 for a period of 3 years (**annexure GKW – 5b) bear** refence to Lease Nos. **CGK/WENR/2014 – 2017 – 001** and **CGK/WENR/001/2017 – 2020,** respectively**.** By the agreements, the Applicants, referred to as "stakeholder", was to maintain the facility in question. These agreements state inter alia that the "Leaser" (sic) meaning the County Government had **"accepted the bid submitted by the stakeholder for the maintenance of such facility".**

10. There is no dispute that on 10th April 2018 the Respondents' County Secretary wrote to the Applicants giving a 30 days' notice to terminate the latest lease, the declared intention being the offering up of the facility to public tendering under the Public Procurement and Asset Disposal Act (PPAD Act). The key reason given for this action was that the agreement "**was entered into in total violation of the Public Procurement and Disposal Act"** (sic) , in that the lease agreement was not preceded by a tendering process as stipulated under the Act. The Applicants' chief complaints are that the decision to terminate the agreement was made without affording the Applicants a hearing, that the Respondent has thereby violated the rules of natural justice and the Applicants' legitimate expectation to enjoy the entire period of the agreement.

11. As has been stated time without number, judicial review is primarily concerned not with the merits of the impugned decision but with the process. In **R v Attorney General & 4 Others** *ex parte* **Diamond Hashim Lalji and Ahmed Hashim Lalji [2014] e KLR,** the court observed that:

> "**Judicial review proceedings do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision maker had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters and did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determine contested matters of fact and in effect urges the court to determine the merits of two or more different versions presented by the parties, the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review**

proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined........" see also Municipal Council of **Mombasa v Republic** and **Umoja Consultants Ltd Civil Appeal No.188 of 2001**.

12. In **Kenya National Examination Council v R *Ex parte* Geoffrey Gathenji Njoroge** and **9 Others [1997] e KLR** the Court of Appeal stated that orders of certiorari and prohibition will lie where a public body has acted in excess of or without jurisdiction or has departed from the rules of natural justice. Undoubtedly, the province and scope of judicial review has continued to expand with the entrenchment of the right to fair administrative action in the bill of rights under the Constitution and the enactment of the Fair Administrative Action Act (FAAA).

13. The three-Judge bench in **R v independent Electoral and Boundaries Commission (IEBC) *Ex parte* National Super Alliance (NASA) Kenya *and* 6 Others [2017] e KLR** considered this question and observed as follows:

> **"71. As can be seen, the entrenchment of the power of judicial review, as a constitutional principle should of necessity expand the scope of the remedy. Parties, who were once denied judicial review on the basis of the public-private power dichotomy, should now access judicial review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Court decisions should show strands of the recognition of the Constitution as the basis of judicial review. 72. Our courts need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on this front. Our courts must develop judicial review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution." Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution. In any event, the basic idea that courts must police the boundaries of administrative power is firmly based on the constitutional principle of the rule of law. The function thus ascribed to the judiciary vis a vis the limitation of executive actions is crucial to promote the virtues of legality, fairness, and reasonableness which this principle has traditionally embodied…. The judge is required to examine the legal framework within which the challenged decision was undertaken. This enhances the role of the courts as the guardians of the law and protectors of individual rights."** (emphasis added)

14. In the case of **Suchan Investment Ltd v Ministry of National Heritage** and **Culture and 3 Others [2016] e KLR** the Court of Appeal had this to say:

> **"Article 47 of the Constitution as read with the provisions of Section 5 (2) of the Fair Administrative Action Act establishes a non-exclusive approach to challenge of administrative action. The section permits bifurcation or a split approach for remedies. One approach is by way of statutory judicial review under the Act; the other is through proceedings for any other remedies as may be available under the Constitution or any written law. Subject to Section 9 (2), 3 and (4) of the Fair Administrative Action Act, the two approaches are not mutually exclusive. The bifurcated and non-exclusive nature of proceedings for remedies must be read in the context of Article 47 of the Constitution and Section 12 of the Fair Administrative Action Act. The common law principles of administrative review have now been subsumed under Article 47 Constitution and Section 7 of the Fair Administrative Action Act. In this regard, there are no two systems of law regulating administrative action - the common law and the Constitution - but only one system grounded in the Constitution. The courts' power to statutorily review administrative action no longer flows directly from the common law, but inter alia from the constitutionally mandated Fair Administrative Action Act and Article 47 of the Constitution. ... The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of Article 47 of Constitution as read with the Fair Administrative Action Act of 2015. The Act establishes statutory judicial review with jurisdictional error in Section 2 (a) as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision-making process in Articles 47 and 10 (2) (c) of the Constitution. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the Fair Administrative Action Act and the Constitution. As correctly stated by the High Court in Martin Nyaga Wambora v Speaker of the Senate [2014]eKLR it is clear that they - Articles 47 and 50(1)- have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi-judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases.**

15. Earlier, in **Judicial Service Commission v Mbalu Mutava** and **Another [2015] e KLR** the Court of Appeal [per Githinji JA) expressed the view that

> **"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed".**

16. The above principles are relevant to and will inter alia guide the determination of this matter. The key questions that have exercised my mind in this case are first, whether the matter before me falls within the purview of judicial review or in other words whether the action complained of consists of an administrative action; secondly whether a public law wrong has been made out by the Applicants and consequently whether the orders sought are deserved. As expected, the parties before me urged divergent views. Regarding the first issue, he Applicants' position was based on the identity of the Respondent. Thus it was argued that, the fact that the Respondent is a public body necessarily places a duty of procedural fairness on the Respondent in making decisions. The Applicants poured cold water on the authority of

Zakhem Construction relied on by the Respondent, in light of the fact that it was decided prior to the 2010 Constitution. The Court was urged to be persuaded by the more recent decision in ***ex parte*** **Airbus Helicopters Southern Africa.**

17. The Respondent's argument being that the subject matter of these proceedings is a contract as was the case in **Zakhem Construction** where the Court declined to assume judicial review jurisdiction. One of the objections raised in ***ex parte*** **Airbus Helicopters Southern African (hereinafter ex parte Airbus)** was similar to the Respondent's in this case, but unlike the instant case, the parties had not yet entered into a contract and the prayer sought by the Applicant was an order of mandamus to direct the Respondents therein who were the procuring entity to execute a formal contract, which they had delayed doing after the close of the tendering process.

18. In this judgment, **Odunga J** eruditely laid out the parameters of judicial review before observing that:

> **"However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between parties and (2) an appeal ` (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is a public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represent the claimant invoking supervisory jurisdiction of the Court…. Whereas I agree that judicial review remedies may be invoked even in cases which were traditionally no go zones such as in matters of commercial self-interest, it is my view that for the court to do so, the transaction itself must have some elements of statutory underpinning. In this case, according to the Applicant what underpins the subject transaction in Section 68.... of the Public Procurement and Asset Disposal Act."** (emphasis added**)**

19. In determining the above dispute, the court found that the Respondent procuring entity was under a duty and the bidder entitled to a legitimate expectation that the procurement entity would make a decision either way and inform the Applicant accordingly. The key similarities between this case and ***ex parte*** **Airbus** are that the Respondent therein as in this case was a public body and the subject matter a public procurement governed by procurement law. For the purposes of the matter before it this court associates itself with the above passage from **ex parte Airbus** and for the reasons below.

20. It is useful in this case to briefly consider the background since 2008 of the dealings between the parties in this case and the character of subject matter. The Respondent is a public authority, the *ex parte* Applicant a Self-help Group. The initial contract was awarded pursuant to a tendering process. The letter communicating the decision of the then Municipal Council of Thika to the Applicants is dated 23rd June 2008. It states inter alia that:

> **"PARTNERSHIP NO.1: MCT/CPHO: 001/2008 MANAGEMENT OF MAIN BUS PARK PUBLIC TOILET NO 1**
>
> **The above Partnership that was opened on 21st May, 2008 in the presence of burden that chose to attend, hereby refers.**
>
> **This is to inform you that the tender Committee held on Friday 20th June 2008 awarded you the statutory Public Health Services to be executed as per the Public – Private Partnership Agreement, subject to your compliance with the following conditions within 14 days ...."**

21.The culmination of the process was the agreement entered into between the partners on 3rd July 2008 which was to run for 2 years. This was undeniably public procurement under the PPAD or the Public Private Partnership Act. The subsequent agreements executed on 15th January 2015 **[GKW 5 (a)** and on 6th June 2017 **[GKW5 (b)** take more or less the same format as **GKW4** albeit described as lease agreements. The subject matter in all instances was a public property entrusted by the people of Kiambu to the Respondent. The agreements entailed the handing over the management of a public facility, namely **Thika Main Bus Park Toilet No. 001** the Applicants. In all the agreements the works to be executed are described as statutory public health services.

22. By their termination notice, the Respondent invoked, albeit implicitly its statutory duty (under Article 227 and the PPAD ACT) as a procuring entity to ensure adherence to the provisions of the PPAD Act and indeed asserts the reason for the termination to be the non-adherence to the law in the procurement related to the terminated agreement. In contracting with the stakeholders, the Respondent and its predecessor were acting in their capacity as public administrators responsible for the provision/procurement of public health services. Significantly, the contract was terminated not because of breach thereof on the part of the Applicants, but for non- compliance with the procurement law, the Respondent exercising a clear duty under that law to ensure statutory compliance. The instant case is on these facts distinguishable from those in **Zakhem Construction** therefore. Secondly, the decision in **Zakhem** was made before the promulgation of the 2010 Constitution and in particular, Article 47(1) guaranteeing the right to fair administrative action and the enactment of the FAAA.

23. Section 2 of the Fair Administrative Action Act (FAAA) describes an administrator as a person who takes administrative action or makes an administrative decision. An administrative action is defined as including –

> "i**) the powers, functions and duties exercised by authorities or quasi-judicial tribunals or**
>
> **(ii) any act, omission of decision of any person, body or authority that affects the legal rights or interest of any person to whom such action relates."** (emphasis added**)**

24. Section 3 of the FAAA provides that:

> **(1) This Act applies to all state and non-state agencies, including any person—**
>
> > **(a) exercising administrative authority;**

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or cision relates.

25. In the letter communicating the decision to terminate the agreement made on 6th June 2017 **(GWK5b)** the County Secretary to the Respondent stated inter alia that:

> **"After close evaluation of your agreement made on 6th June 2017 giving you a lease of a period of three (3) years commencing 1st July, 2017, the County Government of Kiambu has decided to terminate the said agreement as it was entered into a total violation of the Public procurement and Disposal Act of 2015..."**

26. The letter proceeds to particularize the violations key among them including the fact that the agreement was not preceded by a tendering process as required by the law. Evidently, the Applicants perceive that their legal rights and interests have been affected by the termination. In my view therefore, this is a matter well within the purview of judicial review.

27. It has been said of Article 47(1) and the FAAA, that the object was to subject administrative processes to constitutional discipline. See **Dry Associates Ltd v Capital Markets Authority and Another (2011) eKLR.** Thus, insofar as the Respondent in terminating the contract herein purported to be acting in exercise of or under a statutory duty stipulated under the PPAD Act, this court is entitled to examine the exercise of that power, duty or function.

28. Now moving on to the remaining issues, Section 4(3) of the Fair Administrative Action Act provides that:

> **"Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—**
>
> **(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
>
> **(b) an opportunity to be heard and to make representations in that regard; notice of a right to a review or internal appeal against an administrative decision, where applicable;**
>
> **(d) a statement of reasons pursuant to section 6; € notice of the right to legal representation, where applicable;**
>
> **(f) notice of the right to cross-examine or where applicable; or**
>
> **(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action."**

29. Notably, the terminated agreement had been entered into by the same County Government less than a year before. Undeniably, the Respondent did not deem it necessary to give an opportunity to be heard or to make representations before the decision was made. Is a public body at liberty to operate in such an erratic manner? Granted, following general elections in 2017, a new administration took over power in the Kiambu County government. Granted too that a public authority is under a duty to operate within the law and ensure adherence to the procurement law among others

30. But as **Emukule J** (as he then was) famously stated in **Muslims for Human Rights (MUHURI)** and **Another v Inspector – General of Police** and **5 Others [2015]:**

> **"The principles of constitutionalism and the rule of law be at the root of our system of government .... The expression the rule of laws conveys a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its very basic level, the rule of law voudisates to the citizens and residents of Kenya; a stable predictable and ordered society in which to conduct their affairs..."**

31. At face value, on the undisputed facts of this case, it appears that what a public authority had given gave with its right hand, it peremptorily took away with the left hand. Good governance depends on predictability in the exercise of administrative power which engenders trust between the government and the governed. The powers enjoyed by public bodies must be exercised properly in every situation, not whimsically or capriciously. The court here is not concerned with whether the decision of the Respondent was right or wrong but whether the authority exercised its power properly.

32. I associate myself with a portion cited by **Odunga J** in **ex parte Airbus** from the treatise **Administrative Law** by Professor William Wade:

> **"The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is**

that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"

33. It is undisputed that the impugned contract was executed under the aegis of an erstwhile administration, but the irony inherent in the position adopted by the Respondent in this matter was not lost on the court: while its decision to terminate the contract in favour of the Applicants is expressly one premised upon an exercise of its administrative power in ensuring due compliance with the procurement law, the Respondents are keen to cast the contract to which it was evidently a party, as a matter falling within private law, in a bid to escape scrutiny of their actions under judicial review.

34. The ex parte Applicants' complaint is that they were not accorded an opportunity to be heard before the decision made by the Respondent to terminate the contract. It is a fundamental rule of natural justice that no person ought to be condemned unheard. This old and revered rule of natural *justice-audi alteram partem* is recognized as fundamental right under Article 47 and 50 of the Constitution. In **R v the Honourable the Chief Justice of Kenya** and **Others Ex part justice Moijo Mataiya Ole Keiwa [2004] e KLR** it was held that:

"The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that all persons who are likely to be affected by the proposed likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the legislative only in circumstances which warrant court and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence."

35. Where the principles of natural justice have been violated, it is immaterial whether the same decision would have been reached if the principles had been complied with by the decision maker. The Respondent in this case are evidently self-assured in the rightness of their decision given the reasons attached to it, namely, the asserted fact that the terminated contract was unlawfully procured. Nonetheless as observed by the Court of Appeal in **Onyango – Oloo v Attorney General [1986 – 1989] EA 456:**

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio." [Emphasis mine].

36. The legal deficiencies listed in the Respondent's notice in relation to the terminated agreement appear serious, and all facts remaining constant could possibly vitiate the contract between the Respondents and the Applicants. Secondly, it is in the public interest that public contracts are awarded through a transparent, competitive and legal process rather than through opaque backroom deals which benefit select individuals while denying a fighting chance to other potential bidders. It seems from the Applicants' pleaded facts that they have enjoyed economic benefits from the exclusive and continuous management of a public facility that belongs to the public for close to a decade. The intention expressed in the Respondent's notice to offer the facility to the public for public tendering in strict observance of the public Procurement and Disposal Act on the face of it is a noble one. Nonetheless, before arriving at the decision to terminate the contract, the Respondent was duty bound to but did not accord the Applicants hearing as required under the FAAA. Thus the Applicants' right to be heard was violated.

37. Regarding whether the decision violated the *ex parte* Applicants' legitimate expectation to run the public facility to the full term of the contract, the Respondent's argument was that no legitimate expectation could be founded on an illegality. Counsel relied on Section 114 of the Procurement and PPAD Act.

38. The five-Judge bench in **Kalpana Rawal v Judicial Service Commission and Others (2015) eKLR** considered the nature of legitimate expectation and how it arises. The court stated that:

"Lord Diplock also discussed the doctrine of legitimate expectation in the case of **Council of Civil Service Unions Minister for the Civil Service [1985] 374** concluding at page 408 thus:

> **"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:**
>
> **…..**
>
> **by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."**

When is an expectation legitimate? That question was answered **by H. W. R. Wade & C. F. Forsyth (supra)** at pages 449 to 450, thus:

> **"It is not enough that an expectation should exist; it must in addition be legitimate….**
>
> **<u>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…..</u>**
>
> **<u>Second, clear statutory words, of course, override an expectation howsoever founded…..</u>**
>
> **<u>Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy….</u>**
>
> **<u>Fourth, there is no artificial restriction on the material on which a legitimate expectation rests, may be based. Thus a legitimate expectation can be founded upon an unincorporated treaty, but it is seldom that the terms of the treaty will be sufficiently precise or known to the individual concerned.</u>**
>
> **<u>Fifth, the individual seeking protection of the expectation must themselves deal fairly with the public authority.</u> Thus taxpayers seeking clearance for their proposals must make full disclosure before the Revenue's assurances will be binding. The assurance must itself be clear, unequivocal and unambiguous.**
>
> **<u>Sixth, consideration of the expectation may be beyond the jurisdiction of the court</u>. For instance, when it would involve questioning proceedings in Parliament contrary to the law of parliamentary privilege."** (Emphasis added)

The learned authors stressed the importance of the promise being *intra vires* by stating at pages 450 to 451 that:

> **"<u>An expectation whose fulfilment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation</u>. 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)

39. In view of the orders the court proposes to make in this matter, it suffices at this point to state only that on the matters disclosed herein, the Applicants' claim to legitimate expectation does not *prima facie* appear to be premised on firm ground.

40. Finally, the Applicants sought an order of certiorari to quash the Respondent's decision. Certiorari does not issue as a matter of right but it is the discretion of the court, and even where the Applicant has made out his case, the court may still decline to grant it.

41. As stated in **ex parte Gathenji** the court must weigh one thing against another in determining whether or not the remedy is the most efficacious in the circumstances of the case before it. Ordinarily an order of prohibition, as also sought in this case, will issue where a public body has acted without or in excess of jurisdiction and serves to prevent such body from so acting. It will not be granted where an alternative remedy is adequate or where the remedy would effectively clamp the authority's exercise of its proper administrative functions and powers.

42. Under section 11(1) of the FAAA the court may grant any order that is just and equitable including, including an order—

> **"(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;**
>
> **(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;**
>
> **(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;**
>
> **(d) prohibiting the administrator from acting in particular manner;**

(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

(g) prohibiting the administrator from acting in a particular manner;

(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions; No. 4 of 2015 Fair Administrative Action 10

(i) granting a temporary interdict or other temporary relief; or (j) for the award of costs or other pecuniary compensation in appropriate cases.

43. In light of the foregoing, this court whilst declining to grant prayers (a), (b) and (c) of the Motion filed on 8/5/118, will issue the following orders:

a) A declaration that in arriving at a determination on the agreement dated 6th June 2017 the Respondent was exercising an administrative function/power and was duty bound to observe the provisions of Article 47 of the Constitution and the Fair Administrative Action Act, and in particular Section 4 thereof.

b) A declaration that the process arriving at the impugned decision of the Respondent did not adhere to the fundamental principle of natural justice.

c) In terms of Section 11(e) of the FAAA the court hereby sets aside the decision of the Respondent as communicated in the letter dated 10th April 2018.

d) Pursuant to c above, the court hereby remits the matter for reconsideration by the Respondent, in compliance with Article 47 of the Constitution and the FAAA and in particular Section 4 of the said Act.

e) Proceedings in respect of (d) above are to be conducted expeditiously and to be concluded in any event within 30 (THIRTY) days to be reckoned from 23rd of April, 2019.

Considering the outcome and nature of these proceedings each party will bear its own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 17TH DAY OF APRIL 2019

...

C. MEOLI

JUDGE

In The Presence of:-

Mr. Kamwami for Mr. Magara for the Applicant

Mr. Olaka holding brief for Mr. Ranja for Respondent

Court Clerk - Kevin