



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 437 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 8 OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF AN APPLICATION BY NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED FOR ORDERS OF CERTIORARI

AND

IN THE PUBLIC PROCUREMENT AND DISPOSAL ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD IN REQUEST FOR REVIEW NCWSC/41/2017-IMPLEMENTATION OF AGENCY PAYMENT INTEGRATION PLATFORM AND DIGITAL BANKING CHANNELS- (MOBILE, AGENCY BANKING) FOR NCWSC (RE-ADVERTISEMENT) IN REQUEST FOR REVIEW NO. 150 OF 2018-WEBTRIBE LIMITED T/A JAMBOPAY LIMITED V NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED.

AND

IN THE MATTER OF ARTICLE 227 OF THE CONSTITUTION OF KENYA, 2010.

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

WEBTRIBE LIMITED T/A JAMBOPAY LIMITED.....INTERESTED PARTY

AND

NAIROBI CITY & SEWERAGE COMPANY.....EX PARTE APPLICANT

JUDGMENT

The Parties.

1. The *ex parte* applicant is a body corporate duly incorporated under the Companies Act. [1] It is a subsidiary of the Nairobi City County. It was the Procuring Entity in tender number NCWSC/41/2017-Implementation of Agency Payment Integration Platform and Digital Banking Channels- (Mobile, Agency Banking) for NCWSC (Re-advertisement), (herein after referred to as the Tender).

2. The Respondent is the Public Procurement Administrative Review Board, a central independent procurement appeals review board established under section 27 of the Public Procurement and Asset Disposal Act^[2] (herein after referred to as the act). Its functions pursuant to section 28 of the act are reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to it by the Act, Regulations or any other written law.

3. The Interested Party is a limited liability company registered under the Companies Act. It was a candidate in the procurement process.

Factual matrix.

4. The Procuring Entity's tender evaluation committee vide a professional opinion dated 10th September 2018 communicated that the said tender as floated would result in the breach of Regulation 63 (4) of the Act. ^[3] Following the said opinion, the *ex parte* applicant issued termination letters to all the parties.

5. Aggrieved by the cancellation, on 4th October 2018, the Interested Party filed a Request for Review being Application Number 150 of 2018 before the Respondent. After hearing the Request for Review, the Respondent by a decision dated 25th October 2018, annulled the *ex parte* applicant's decision to terminate the said tender.

Legal foundation of the application

6. The *ex parte* applicant states that the Respondent ordered it to proceed, and, conclude the procurement process by finalizing the evaluation process, and, proceed to award the tender to the winning bidder, in violation to the express provisions of Regulation 63 (4) of the Public Finance Management (County Governments) Regulations, 2015, Legal Notice No. 35 of 2015.

7. The *ex parte* applicant also states that the applicant being a procuring entity is allowed under section 63 (e) of the Act to terminate procurement process where material governance issues are detected. It also states that the tender has material governance issues that would render any award illegal and in breach of the ideals of procurement laws. In addition, it states that the effect of the impugned decision is that the resultant award would be made with the full knowledge of the breach of the law; hence, it would be void. Further, it states that the termination was within the law.

The Reliefs sought.

8. The *ex parte* applicant seeks the following orders:-

a. An order of *Certiorari* to quash the decision made by the Public Procurement Administrative Review Board on 25th October 2018 ordering the *ex parte* applicant to complete the procurement process of Tender No. NCWSC/41/2017-Implementation of Agency Payment Integration Platform and Digital Banking Channels- (Mobile, Agency Banking) for NCWSC (Re-advertisement), in Request for Review No. 150 of 2018: Webtribe Limited T/A Jambopay Limited v Nairobi City Water and Sewerage Company Limited.

b. An order of prohibition do issue directed at the Public Procurement Administrative Review Board restraining it from visiting any sanction upon the applicant on account of its decision delivered on 25th October 2018 in Request for Review No. 150 of 2018: Webtribe Limited T/A Jambopay Limited v Nairobi City Water and Sewerage Company Limited.

c. That the costs of these proceedings be borne by the Respondent.

Respondent's Replying Affidavit

9. **Henock K. Kirungu**, the Respondent's Secretary in his Replying Affidavit dated 21st December, 2018 averred that the *ex parte* applicant is seeking to appeal against the Respondent's decision. He averred that an essential requirement for termination is that the Procuring Entity is required to give sufficient reasons to all bidders for the termination, and give a report to the Public Procurement Regulatory Authority on the reasons to terminate.

10. He also averred that the Procuring Entity informed the applicant about the termination vide a letter dated 20th September 2018 and the Director General of the Public Procurement Regulatory Authority vide a letter dated 9th October 2018. He averred that the reason given in the letter to the Director General was substantial technological change. Further, he deposed that the reason given to the applicant was that the termination was to enable the Procuring Entity to align clause (a) under part 7 of section V, technical specifications of the Tender Document with section 63(4) of the Public Finance Management (County 2015 Regulations). He also averred at the hearing of the Request for Review, it submitted that there were material governance issues pursuant to section 63(1) (e) of the act.

11. **Mr. Kirungu** averred that the Respondent found that the Procuring Entity gave various reasons for the termination, that, the Procuring Entity advertised the Tender three times, and, the said change could have been effected in the first and or the second re-advertisements of the tender.

Interested Party's Replying Affidavit

12. **Danson Muchemi**, the Interested Party's Managing Director, swore the Replying Affidavit dated 16th November 2018. He deposed that the Respondent discharged its duty as set out in the Act and in accordance with the provision of Article 227 of the Constitution.

13. He averred that the Respondent has wide powers under section 173 of the act to give directions aimed at facilitating the completion of the procurement process. He deposed that vide a letter dated 20th September 2018, the Interested Party was notified the reason for the termination was to enable the procuring entity to align section v Technical specification, (a) scope of works part 7 integration with payment platform and transmission of the bid document with legal notice 35 County Regulations, section 63 (4). He further averred that the *ex parte* applicant at paragraph 8 of its replying affidavit dated 17th October 2018 changed its reason for termination of the tendering process to substantial technological change, yet no real or tangible evidence was put forward to demonstrate substantial technological change.

14. **Mr. Muchemi** further averred that the *ex parte* applicant failed to demonstrate the existence of substantial technological. He reiterated that the impugned decision is founded on law, and, that, the *ex parte* applicant's application is made *mala fides*. He added that the applicant has not established illegality, impropriety of procedure nor irrationality. Lastly, he averred that this is an appeal disguised as a judicial review application.

Submissions

15. Upon analyzing the opposing positions taken by the parties and the respective submissions tendered by the counsel representing the parties, I find that only one issue falls for determination, namely, whether the *ex parte* applicant has demonstrated sufficient grounds to warrant this court to grant the judicial Review orders sought.

16. The *ex parte* applicant's counsel submitted that if the tender is completed, it would contravene section 63 (4) of the Public Finance Management (County governments) Regulations, 2015 which provides:-

“All public moneys collected by a receiver of revenue or collector of revenue or collected and retained by a county government entity, shall be paid into the designated bank accounts of the county government and shall not be used by any public officer in any manner between the time of receipts and payment into the bank except as provided by law.”

17. In addition, counsel submitted that the tender process contravened the above provisions because section V (a) (7) contemplated an appointment of a collection agent which was not only to retain public revenue for 24 hours but was also to deduct its commission before remitting the funds to the *ex parte* applicant. He submitted that the Respondent could not be called upon to enforce an illegal contract or one, which is contrary to public policy. To buttress his argument, he cited *Mapis Investment (K) Ltd v Kenya Railways Corporation*^[4] which held that no court ought to enforce an illegal contract, or, allow itself to be used as an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the said conduct is himself implicated in the illegality.

18. To fortify his argument, he cited *Patel v Singh (2)*^[5] where the court^[6] stated the effects of illegality. In addition, counsel cited *Resley v The City Council of Nairobi*^[7] for the proposition that there is an obligation on public authorities to strictly comply with the laid down legal framework to render its decisions valid, and, that, a party cannot seek to enforce a transaction which is in plain defiance of a statutory provision.^[8]

19. Further, counsel relied on *Republic v Public Procurement Administrative Review Board & Another ex parte SGS Kenya Limited*,^[9] and argued that the *ex parte* applicant was entitled to terminate the tender under section 63 (e) of the act. He argued that the *ex parte* applicant terminated the tender after realizing that the Interested Party would have collected their fees before remitting the funds to *ex parte* applicant.

20. Lastly, the *ex parte* applicant's counsel argued that it has satisfied the grounds for the court to grant the orders sought, namely, illegality, irrationality and procedural impropriety,^[10] and, that, a merit review permissible in limited circumstances.^[11]

21. The Respondent's counsel argued that the application is essentially a merit review as opposed to grounds for review as laid down in *Pastoli v Kabale District Local Government Council and Others*.^[12] Citing *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited*,^[13] he argued that judicial review court is not meant to substitute its opinion with that of the Review Board.

22. The Interested Party's counsel argued that the Respondent complied with section 173 of the act. He argued that the proceedings were conducted in accordance with the law, and, that, the burden lies on the applicant to establish that the Respondent acted without jurisdiction. He argued that the application challenges issues of fact; hence, it is a merit review.^[14] He also argued that the application does not meet the threshold for the orders sought.^[15] He urged the court not to award costs maintaining that public procurement is initiated for public interest.

Determination

23. 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. A procuring entity is bound to adhere to the terms of the procurement process.

24. 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.^[16] 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.

25. Article 227 of the Constitution lays down minimum requirements for a valid tender process. The Article requires that the tender process preceding the conclusion of contracts for the supply of goods and services must be fair, equitable, transparent, competitive and cost-effective. Finally, as the decision to award a tender constitutes administrative action, it follows that the provisions of Fair Administrative Action

Act^[17] apply to the process.

26. A decision to award a procurement contract by an organ of state is a matter of public law and it is governed by the Constitution, and the power to award such procurement contract is constrained by the principle that the organ of state must exercise no power and perform no function beyond that conferred on it by law. The Constitution is the repository of all state power. That power is distributed by the Constitution – directly and indirectly – amongst the various institutions of state and other public bodies and functionaries and its exercise is subject to inherent constitutional constraint – if only for legality – the extent of which varies according to the nature of the power that is being exercised.

27. These constitutional requirements, in Article 227(1) of the Constitution must inspire all aspects of the process including termination. A policy, a tender process, or a decision terminating a tender process, which clashes with the requirements of Article 227, would be unconstitutional, and therefore legally invalid. It is for this reason that the Constitution obliges organs of state to ensure that a procurement process is fair, equitable, transparent, competitive and cost-effective. Where the procurement process including a termination of a tender process is shown not to be so, courts have the power to intervene.

28. As a State organ, the applicant is required to ensure compliance with the Constitution and the procurement legislation. A procuring entity is not allowed to act beyond the provisions of the procurement legislation. The exercise of all public power must be in accordance with the law. Organs of state may exercise no power and perform no function beyond that conferred upon them by law. It is central to the conception of our constitutional order that those who exercise public power, are constrained by the principle that they may exercise only those powers and perform only those functions which are conferred upon them by the law. Their sole claim to the exercise of lawful authority rests in the powers allocated to them under the law. The common law principle of *ultra vires* is now underpinned by the constitutional doctrine of legality, which is an aspect of the rule of law. Thus, what would have been *ultra vires* under the common law by reason of a public official exceeding a statutory power is now invalid according to the doctrine of legality.^[18]

29. It follows that if an organ of state fails to heed the provisions of the procurement laws and or a policy, it would be acting unlawfully and any of its decision, as a result thereof, would be open to an attack. As an administrative authority, therefore its action will be in conflict with the rule of law and the principle of legality, which requires that the organ of state to exercise only public power conferred on them and nothing more.

30. The national legislation prescribing the framework within which procurement policy must be implemented is the [Public Procurement and Asset Disposal Act^{\[19\]}](#) (the Act) and The Public Procurement and Disposal Regulations, 2006 (the Regulations). A decision to award a tender constitutes administrative action so the provisions of Article 47 of the Constitution and the Fair Administrative Action Act^[20] from which a cause of action for the Judicial Review of administrative action arises, apply to the process.^[21]

31. Section 3 of the Act provides that Public procurement and asset disposal by State organs and public entities shall be guided by the values and principles laid down in Article 227 of the Constitution and relevant legislation. Statutes do not exist in a vacuum.^[22] 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.^[23] The courts should therefore strive to interpret powers in accordance with these principles.

32. Section 63 of the act provides for termination or cancellation of procurement and asset disposal proceedings in the following words:-

(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—(a) the subject procurement have been overtaken by—(i) operation of law; or (ii) substantial technological change; (b) inadequate budgetary provision.

33. What must be borne in mind is that public procurement has a constitutional underpinning as clearly stated in Article 227. In addition, the scheme of the act is such that procurement process including cancellation of the tender process must strictly conform to the constitutional dictates of transparency, openness, accountability, fairness and generally, the rule of law and such rights cannot be narrowly construed.

34. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity, if established, must be evaluated to determine whether it amounts to a ground of review. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the requirements, before concluding that a review ground has been established. Consistent with the above approach, the first question is whether an irregularity occurred in this case.

35. The law as I understand is that a Procuring Entity is obliged to give sufficient reasons to all bidders for the termination. It is also obliged to submit a report to the Public Procurement Regulatory Authority stating the reasons for the termination. Here is a case where the Procuring Entity wrote to the Interested Party communicating the termination 20th September 2018. The reason cited in this letter for the termination was “to enable the Procuring Entity to align clause (a) under part 7 of section V, technical specifications of the Tender Document with section 63(4) of the Public Finance Management (County 2015 Regulations)”. The said Regulation is reproduced later in this judgment.

36. The Procuring Entity wrote a report to the Director General of the Public Procurement Regulatory Authority on 9th October 2018. This time the Procuring Entity gave the reason for the cancellation as substantial technological change.

37. Lastly, at the hearing of the Request for Review, it was argued on behalf of the Procuring that there were material governance issues pursuant to section 63(1) (e) of the act.

38. The above scenario discloses three versions given by the Procuring Entity to explain cancellation of the same procurement process. *First*, it is illogical and a grave abuse of discretion for a decision maker to cite three different reasons for the cancellation of the same procurement process.

39. *Second*, the reasons cited viewed under the lens of the dictates of Article 227 and section 3 of the act as read with section 63 of the act, leaves me with no doubt that the said reasons cannot be read in a manner that is consistent with the enabling provisions.

40. The reason cited in the letter addressed to Interested Party is Regulation 63(4) of the *Public Finance Management (County 2015 Regulations)*). The said Regulation provides that:-

All public moneys collected by a receiver of revenue or collector of revenue or collected and retained by a county government entity, shall be paid into the designated bank accounts of the county government and shall not be used by any public officer in any manner between the time of their receipts and payment into the bank except as provided by law.

41. The justification for invoking this provision was said to be that the *ex parte* applicant terminated the tender after realizing that the Interested Party would have collected their fees before remitting the funds to *ex parte* applicant. I am unable to appreciate the rationale for such reasoning. This is because the Regulation exempts payments provided under the law. Payment of fees for services rendered is a lawful process provided under the law of contract. The only legal sanction is that payment is within the contractual terms. It is a lawful payment

42. *Third*, the reason given to the Director General of the Public Procurement Regulatory Authority is substantial technological change. Section 63 (1) (ii) of the act provides for cancellation of a tender process in the event of "substantial technological change." The New Oxford American Dictionary defines "substantial" as "**(a)** of considerable importance, size, or worth . . . **(b)** concerning the essentials of something . . . **(c)** real and tangible rather than imaginary."^[24] On the one hand, 'substantial' means 'not seeming or imaginary'; on the other, it means 'that specified to a large degree.'^[25] It also means "being significant or large and having substance."^[26]

43. My understanding of section 63 of the Act is that there must be evidence that there is real and substantial technological change. A party invoking the said provision must put forward sufficient evidence for a court to conclude that, on the probabilities, the technological change cited is of such a nature that it renders it imprudent for the contract to proceed on the original terms, and the nature of the change and how it substantially affects the contract ought to be clearly stated. Differently put, the report to the Director General did not provide reasons to support the existence of substantial technological change.

44. *Fourth*, the existence of governance issues, the third reason cited by the Procuring Entity, just like the other reasons discussed above, were not supported by reasons.

45. The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the ambit of the law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63.

46. I am unable to fault the impugned decision because the purported termination was based on jurisdictional error on the part of the Procuring Entity. A useful starting point for a discussion of jurisdictional error is the following proposition: "*any grant of jurisdiction will necessarily include limits to the jurisdiction granted, and any grant of a power remains subject to conditions.*"^[27] When the legislature grants authority to an administrative decision-maker, the authority will perforce be limited; the decision-maker must act within the jurisdiction it has been granted. The purported termination was undertaken in violation of section 63 of the act. Differently put, the Procuring Entity grossly misconstrued the law governing termination of tender processes.

47. It is correct to say that where a decision-maker commits an error of law by interpreting the law incorrectly, a reviewing court may intervene. *Anisimic v Foreign Compensation Commission*^[28] was a watershed case. A majority of the House of Lords held that an error in interpreting an Order in Council justified judicial intervention, even in the face of a privative clause.^[29] As Lord Pearce put it, administrative decision-makers must "confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament."^[30] When courts intervene to keep an administrative decision-maker within boundaries established by legislation, this represents "simply an enforcement of Parliament's mandate to the tribunal."^[31] That the "very effectiveness" of statute should be ensured by judicial review^[32] is underpinned by rule-of-law concerns: "By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law."^[33]

48. Judicial review is about setting the boundaries for exercise of statutory power. It is about ensuring public bodies obey the law and act within their prescribed powers. It is my finding that the Procuring Entity overstepped its jurisdictional boundaries while purporting to terminate the procurement process. Differently put, I am unable to fault the Respondent's decision, on any of the known judicial review grounds.

49. Further, the Procuring Entity provided different reasons for the termination, which suggested bad faith or abuse of discretion. The giving of reasons is a normal incident of the judicial and administrative process. The obligation to explain how, and why, a particular decision has been reached stems from the common law. This duty has a constitutional dimension as well.^[34] This is consistent with the dictates of the Constitution.

50. The benefits of giving reasons cannot be understated. *First*, it enables the recipient to see whether any appealable or reviewable error had

been committed, thereby informing the decision whether to appeal, or let the matter lie. *Second*, it answers the frequently voiced complaints that good and effective judicial process could not win support or legitimacy unless it is accountable to those whose rights are affected. *Third*, the prospect of public scrutiny provides a disincentive not to act arbitrarily. *Fourth*, the discipline of giving reasons could make decision-makers more careful, and rational. *Fifth*, the provision of reasons provides guidance for future cases. The merits of giving reasons can never be doubted.

51. The giving of reasons for a judicial decision serves at least three purposes. *First*, it enables the parties to see the extent to which their arguments were understood, accepted, as well as the basis of the judge's decision.^[35] Thus, the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. *Second*, the giving of reasons furthers judicial accountability. As Professor Shapiro stated:-

“... A requirement that judges give reasons for their decisions — grounds of decision that can be debated, attacked, and defended — serves a vital function in constraining the judiciary's exercise of power.”^[36]

52. *Third*, under the common law system of adjudication, courts not only resolve disputes — they formulate rules for application in future cases.^[37] Hence, the giving of reasons enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future.

53. The Respondent correctly observed that the Procuring Entity reported to the Director General during the pendency of the Request for Review or when the Board had stayed all procurement proceedings. I find no illegality in the said finding.

54. In *Council of Civil Service Unions v. Minister for the Civil Service*^[38] 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*.^[39] 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*.^[40] 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.

55. 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* and *errors 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 fulfill *substantive legitimate expectations* are grounds within the second category.

56. 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. 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 established its limits.

57. 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. A proper construction of the impugned decision and the relevant provisions of the law cited herein above leave me with no doubt that the impugned decision is not tainted with an error of the law. Put differently, the *ex parte* applicant has not demonstrated that the Respondent acted *ultra vires* its statutory mandate and that the decision is tainted with *illegality, error of law, unreasonableness or procedural impropriety*.

Conclusion and final determination.

58. 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'. The grounds cited by the applicant are essentially grounds for appeal. 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. 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.

59. What must be borne in mind is that public procurement has a constitutional underpinning as clearly stated in Article 227 and disputes arising from procurement processes are concerned with constitutional rights, which include the Right to reasonable expectation once a bidder is successful. In addition, the scheme of the act is such that procurement process must strictly conform to the constitutional dictates of transparency, openness, accountability, fairness and generally, the rule of law and such rights cannot be narrowly construed. And what is more, the public body terminating the tender bears the onus of establishing that the termination meets all these constitutional dictates.

60. On the issue whether or not the applicant has satisfied the threshold for granting judicial review orders, broadly speaking, the grounds upon which the courts grant judicial review were stated in the case of *Pastoli vs Kabale District Local Government Council and Others*^[41] where it was held as follows:-

“in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted ...illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without **jurisdiction** or **ultra vires** or **contrary to the provisions of a law or its principles are instances of illegality**. ...**irrationality** is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such decision is usually a defiance of logic and acceptable moral standards...**procedural impropriety** is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice...It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument....”

61. It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private 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 some recognizable public law wrong that has been committed.^[42]

62. In view of my analysis and determinations of the issues discussed above, the conclusion becomes irresistible that the *ex parte* applicant's application dated 9th November 2018 lacks merit. Consequently, I dismiss the said application with no orders as to costs.

Signed and Dated at Nairobi this 8th day of August 2019

John M. Mativo

Judge

[1] Cap 486, Laws of Kenya-Repealed.

[2] Act No. 33 of 2015.

[3] Ibid.

[4] {2005} 2 KLR 410.

[5] {1987} 585.

[6] Citing *Archbolds (Freight) Ltd v S. Spanglett Ltd* {1961} 1 QB 374.

[7] {2006} 2 EA 311.

[8] Citing *Alexander Gray Patterson & Another v Badrudin Mohamed Seleh Kanji* {1956} 23 EACA 106.

[9] {2017} e KLR.

[10] Citing *Republic v Public Procurement Administrative Review Board & Another ex parte SGS Kenya Limited* {2017} e KLR.

[11] Citing *Suchan Investment Limited v Ministry of National Heritage, Culture & 3 Others* {2016} e KLR.

[12] {2008} 2 EA 300.

[13] {2008} e KLR.

[14] Citing *Energy Regulatory Commission v SGS Kenya Limited & Others* {2018} e KLR.

[15] Citing *Republic v Kenya Power and Lighting Company Limited & Another* {2013} e KLR.

[16] 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.

[17] Act No. 4 of 2015.

[18] See *Masetlha v President of the Republic of South Africa and Another* {2007} ZACC 20 at para [173], Ngcobo J.

[19] Act No. 33 of 2015.

[20] Act No. 4 of 2015.

[21] 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.

[22] *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”).

[23] *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, “Parliamentary’ Sovereignty under the New Constitutional Hypothesis” [2006] P.L. 262.

[24] The New Oxford American Dictionary 1335 (2d ed. 2005), p 1687.

[25] Webster’s Third New International Dictionary, at 2280.

[26] <http://thelawdictionary.org/substantial/>.

[27] *Union des employés de service, local 298 v Bibeault* [1988] 2 SCR 1048 at 1086, per Beetz.

[28] {1969} 2 A.C. 147.

[29] It is now widely accepted that the logic of *Anisminic* means that errors of law will generally justify judicial intervention. See e.g. *In re A Company*, [1981] A.C. 374, at p. 383, per Lord Diplock: “The break-through made by [*Anisminic*] was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished”; *R. v Hull University Visitor, ex parte Page*, [1993] A.C. 682, at p. 701, per Lord Browne-Wilkinson: “In my judgment the decision in [*Anisminic*] rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires”.

[30] {1969} 2 A.C. 147, at p. 194.

[31] {1969} 2 A.C. 147, at p. 196. See similarly *R. v Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 K.B. 338, at p. 346.

[32] *R. (Cart) v Upper Tribunal*, [2009] EWHC 3052, [2010] 1 All E.R. 908, at para. 38, per Laws L.J.

[33] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 29.

[34] *Wainohu v New South Wales* (2011) 243 CLR 181. In *Wainohu*, legislation which empowered Supreme Court judges to make specific declarations and decisions, but included a provision stating that any judge making such an order was not required to provide reasons, was held to be invalid. The exemption from the duty to give reasons was repugnant to institutional integrity and incompatible with the exercise of judicial power. At the same time it was recognised that not every judicial order need be accompanied by reasons.

[35] See McHugh JA in *Soulezis v Dudley Holdings*

[36] In Defence of Judicial Candor (1987) 100 Harv L Rev 731 at 737

[37] Taggart “Should Canadian Judges Be Legally Required to Give Reasoned Decisions In Civil Cases” (1983) 33 *University of Toronto Law Journal* 1 at 3-4.

[38] {1985} AC 374.

[39] 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

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

[41] {2008} 2EA 300

[42] See *R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake* [1996] COD 248.