



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

JUDICIAL REVIEW DIVISION

JR CAUSE NO. 2 OF 2019

IN THE MATTER OF AN APPLICATION BY XTREME ENGINEERING LIMITED FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD IN APPLICATION NUMBER 16 OF 2019 DATED AND DELIVERED ON 7TH MARCH 2019 IN RESPECT OF TENDER NUMBER: CDA/T/007/2018-2019 FOR THE PROPOSED CONSTRUCTION OF WANANCHI COTTAGES AND CONFERENCE FACILITIES IN KILIFI

BETWEEN

EXPARTE APPLICANT: XTREEME ENGINEERING SERVICES LIMITED

VERSUS

REPUBLIC

PUBLIC PROCUMENT AND

ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

COAST DEVELOPMENT AUTHORITY.....2ND RESPONDENT

DOCHAR CONSTRUCTION AND

TRADE INC LTD.....INTERESTED PARTY

Coram: Hon. Justice R. Nyakundi

Mr. Hussein for the 2nd Respondents

Mr. Mbura holding brief for Mr. ogle for the exparte Applicant

JUDGEMENT

The Application before me was brought before court by way of a Notice of Motion dated 29th March 2019 seeking for an order of Certiorari to bring into this Honourable Court for purposes of being quashed the entire decision of the **PUBLIC PROCUMENT ADMINISTRATIVE REVIEW BOARD**, the 1st Respondent herein in Application Number 16 of 2019 dated 7th March 2019 and that costs of this Application be provided for.

The notice of motion is hinged upon grounds and matters set out in the statutory statement and the verifying affidavit of the Chamber summons application dated 20th March 2019 and filed on the 21st March 2019 as well as upon annexed supporting affidavit of Farah Muhumed Musa. In the said supporting affidavit, it is indicated that on the 2nd Respondent advertised Tender Number CDA/T/007/ 2018-2019 in the standard newspaper and MyGov website on the 4th of December 2018 inviting bidders to submit tenders for the said tender.

It is indicated that the eligibility criteria provided in the advertisement notice of the said tender was open to all tenderers with no restriction as to who should apply. The ex-parte applicant submitted its bid on the 17th of December 2018. It is stated that the 2nd respondent communicated to the Ex-parte Applicant vide a letter of Notification of Award dated 3rd January 2019 which was received on the 7th of January 2019 via post. The 2nd Respondent also communicated to the Interested Party notifying them of their unsuccessfulness vide a letter dated January 2019 in compliance with the law.

It is averred that the Interested Party filed a request for review of the Public Procurement Administrative Review Board (hereinafter the 1st Respondent) on the 18th February 2019, forty-six days after the notification of the award by the 2nd Respondent. At that time, the ex-parte Applicant claims to have already signed a contract with the procuring Entity, the 2nd Respondent herein. The PPARB, the 1st Respondent nevertheless delivered its ruling on the 7th day of March 2019 cancelling and setting aside the tender award to the ex-parte applicant.

According to the Applicant, pursuant to section 167 (1) of the Public Procurement and Asset Disposal Act (PPADA), a request for review must be filed within fourteen days of notification of award and where an applicant files the same outside the mandatory stipulated time, then the 1st Respondent (PPARB) has no jurisdiction to hear and determine the request for review.

It is also indicated by the ex-parte applicant that pursuant to Section 167(4) of the Public Procurement and Asset Disposal Act (PPADA), there lies no request for review where a contract has already been signed in terms of Section 135 of the PPADA and where the PPARB, the 1st Respondent decides that it can hear the request for review, it would be acting in violation of the law and outside its jurisdiction.

It is the applicant's view that the impugned decision by the PPARB, the 1st Respondent herein was based on misapprehension of the law and in violation of the right to fair administrative action under Section 4 of the Fair Administrative Action Act.

The 2nd Respondent responded by way of a replying affidavit filed on 24th April 2019. The confirmed that it indeed issued an advertisement inviting tenders as claimed by the Applicant. It indicated that a total of 17 bids were received including those of the Applicant and Interested Party, evaluated the same in accordance with the required procedure and thereafter recommended the Applicant as the successful bidder for the tender. (*annexure attached and marked as Exhibit MKH-2 are copies of the Bill of Quantities, minutes of the tender opening meeting and statement of professional opinion for the Tender*).

Further that both the successful (Applicant) and the Unsuccessful bidders were notified vide letters dated 3rd January 2019. (*annexure attached and marked as Exhibit MKH-3 are copies of the letters of notification*.) The 2nd Respondent indicated that the notification were sent by ordinary mail by use of postal services to all bidders. It is contended by the 2nd Respondent that the 1st Respondent denied the 2nd Respondent the right to fair hearing and administrative action when it declined to grant the 2nd Respondent an opportunity to present this evidence. (*annexure attached and marked as Exhibit MKH-4 is a copy of the dispatch register*).

It is also indicated that the decision to cancel the Award by the 1st Respondent was irregular since the 1st Respondent illegally and unlawfully heard and determined the said Application for Request of Review No. 16 of 2019 on 18th February 2019 at a time it was bereft of jurisdiction. The 2nd Respondent is of the view that the decision of the 1st Respondent is tainted with procedural impropriety and unreasonableness for reason that during the hearing, the 1st Respondent unfairly allowed the Interested Party, who was the Applicant in that matter, to canvass its application before the Preliminary Objection challenging jurisdiction of the 1st Respondent filed the 2nd Respondent, notwithstanding the objection by both the 2nd and the Ex-parte Applicant.

The 2nd Respondent avers that it was ready to proceed with its Preliminary Objection dated 28th February 2019 for which it requested the 1st Respondent to allow it to proceed with the same in the first instance to no avail. Further, the 2nd Respondent feels that it was not given a fair chance for the Hearing of the Request for Review having not filed a substantive response to the same. The 2nd Respondent holds the view that the 1st Respondent's decision is marred with arbitrariness, unreasonableness and manifest irrationality.

The 2nd Respondent stated that the 1st Respondent made an error of law and fact in finding that the 2nd Respondent failed to comply with the requirements of Section 87(3) of the Public Procurement & Disposal Act, to notify the 2nd Respondent of its unsuccessful bid and consequently failed to discharge its burden of proof. Further that the claim by the Interested Party it only became aware of the outcome of the tender on 4th February 2019 was not backed by any evidence and was solely based on assumptions and conjecture. The 2nd Respondent termed the same to be outright bias and unfairness against it.

It was also contended that the Interested Party did not proffer any evidence of access to the 2nd Respondent's website showing the publication of the outcome of the Tender. It is also indicated by the 2nd Respondent that the 1st Respondent made an irrelevant consideration making a finding that the 2nd Respondent was under a legal obligation to clarify the Tender pursuant to a request by the Interested Party on 8th January, 2019, after dispatch of notification letters on 3rd January 2019 and closure of tender process.

The 2nd Respondent also averred that the 1st Respondent made an error of law and fact by finding that the 2nd Respondent entered into a contract on 13th February 2019, that is, six days after notification of award. Consequently, according to the 2nd Respondent, the finding that the 2nd Respondent and Ex-parte Applicant entered into a contract with respect to the Tender before the lapse of 14 days after notification is erroneous. (*annexure attached and marked as Exhibit MKH-5 is a copy of the contract*). Further that the 1st Respondent made an error of law and fact in finding that the Ex-parte Applicant did not satisfy the mandatory requirement of the Tender Documents.

The 2nd Respondent brought to the attention of the Court that the 1st Respondent purported to nullify the award of the tender and awarded the same to the second lowest bidder notwithstanding that the Ex-parte Applicant was the best evaluated bidder for both technical and financial

scores. It is contended that this attempted improper evaluation of the tender outside the criteria set out in the tender document flies in the face of express provisions of the PPADA, 2015.

According to the 2nd Respondent, the action of the 1st Respondent to award the tender to the next lowest evaluated price was ultra-vires since the PPADA, 2015 does not give the 1st Respondent such powers to award tenders and neither does it have power to evaluate bids and determine a winning bidder. It is indicated that the 1st Respondent usurped the powers of the 2nd Respondent by purporting to evaluate and award the tender.

The 2nd Respondent is of the view that irreparable damage is likely to be caused to the Ex-parte Applicant since it had already complied with the contractual prerequisites, mobilized the equipment and has commenced the execution of the contract.

The Interested Party filed a replying affidavit on 28th June 2019, sworn by Mr. Charles Gatimu Njuguna. The Interested Party's side of the story is that on the 8th January 2019, the Interested Party wrote an official mail to the 2nd Respondent seeking clarification of the tender which was never replied. It was on the 4th February 2019, when the 2nd Respondent uploaded the Evaluation Report on Public Procurement Information Portal. (***Annexure attached and marked as Exhibit MHC-04 & MHC-05 are copies of the uploaded details dated 4th February 2019 and the downloaded Tender Evaluation Report respectively.***)

The 2nd Respondent's contention is that contrary para No. 7 of the 2nd Respondent sworn affidavit, the Interested Party did not receive any Notification Letter whatsoever notifying it of its unsuccessful bid and it only saw and came to learn of the notification letter on 28th February 2019 during the hearing of Public Procurement Administrative Review Board Application No. 16/2019. It that respect, the Interested Party holds the view that the 2nd Respondent violated Provisions of Section 87(3) and 176(1) (k) of PPADA, 2015 by failing to notify the Interested Party of its unsuccessful tender during the time it was notifying the Ex-Parte Applicant of its successful tender. The Interested Party came to learn of the results of the tender upon accessing the Public Procurement Information Portal.

On the 18th of February, 2019, the Interested filed its Request for Review with the 1st Respondent citing massive procurement irregularities. The interested party argues that the request for review was accepted by the 1st Respondent on the basis that it complied with Section 167(1) of the Act which stipulates that the same ought to be filed within 14 days. According to the Interested Party, that was from the time it learned of the alleged breach by the 2nd Respondent through the Public Procurement Information Portal. Further that the decision made by the 1st Respondent since it had jurisdiction to hear and determine the Application for Review.

It is the Interested Party's contention that the claim by the 2nd Respondent that the it did not adduce any proof that it only learnt of the tender results the portal was malicious and only meant to mislead this Court. Further that Exhibit MKH-4 annexed in 2nd Respondent sworn Affidavit dated 15th April 2019 has no merit and is only meant to mislead this Court and it was their plea that the same be disregarded and dismissed. It is argued that the said exhibit is just a mere list containing list of Companies including the Interested Party, its postal addresses and mode of postage and does not prove that the Interested Party was notified of its unsuccessful bid as per the Provisions of section 87(3) of Public Procurement and Disposal Act, 2015.

According to Interested Party, for any proof to meet merit before this court, it ought to be either in form of a copy showing that the interested party agrees to having received the Notification letter by appending his/her signature and the date received or an acknowledgement letter by the Interested Party addressed to the 2nd Respondent signifying receipt of the said Notification letter. Further that this court should declare the existing contract for tender in question unconstitutional and uphold the 1st Respondent decision to cancel and set it aside tender award. The Interested Party argues that this is because the period between the signing of the contract and the lodgment of the Request for review by the Interested Party was too short and nothing could have taken place concerning the execution of the contract, that the Ex-parte Applicant has not provided the court with any copy of the programme showing that it actually complied with this requirement, no evidence that then 2nd Respondent had obtained permission from the land owner and handed over to the ex-parte applicant to gain access to the Project Land and that no evidence of performance guarantee was brought before court to prove that the same was provided to the 2nd Respondent.

Ex-parte Applicant's Submissions

The Ex-parte Applicant filed submission on the 18/04/2019 in support of this Application. The arguments canvassed by therein are that the Public Procurement and Administrative Review Board acted outside its jurisdiction by hearing and determining the said request for review as filed by the Interested Party. This because the Ex-parte Applicant as well as the 2nd Respondent claim that the request for review in question was filed outside the mandatory 14 days stipulated in terms of Section 167(1) of PPADA. In that regard the Ex-parte cited the cases of *The Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd (1989) KLR 1, Macharia and Another vs Kenya Commercial Bank Ltd & 2 Others CA No. 2 of 2011* to advance the contention that without jurisdiction a court or tribunal cannot take any further step and has no option but to down its tools.

On the question of notification, the Ex-parte Applicant stated that the Business Questionnaire provided in the tender document determines the mode of communication with bidders. Further that all bidders indicated their postal addresses in the said Questionnaire as the preferred mode of communication and that includes the Interested Party. It was therefore submitted that the Ex-parte received its notification of award through the post and the Interested Party is presumed to have received its letter of regret through the same means.

The Ex-parte Applicant cited Section 3(5) of the Interpretation and General Provisions Act to advance the narrative that notification through post is said to have been send by properly addressing to the last known postal address of the person served by registered post unless the contrary is proved. Further that the 2nd Respondent was willing to share the original dispatch book with the Board and the parties wherein as evidence that the regret letter was posted. That move was disregarded by the Board. The Applicant holds the view that the Board ought to have adjourned the proceedings since there was a possibility unfair hearing. The Applicant cited the case of **Republic vs Public Procurement Administrative Review Board & 2 Others (2015) eKLR JR Case No. 21 of 2015** in support of this argument.

It was also contended that the Review Board in determining that the Ex-parte Applicant did not fit within the NCA 7 requirement based its decision on the protection of small and medium enterprises. In its view, the same was not founded upon the provisions of the laws regards the protection of small and medium enterprises. It further argued that the tender document as advertised by the 2nd Respondent was an open tender. In that regard the Ex-parte Applicant contends that to argue that NCA 7 requirement was for purposes of protecting small and medium enterprises is not only misleading but is also a contravention of the provisions of the law and in that respect the Review Board misinterpreted the law and acted illegal.

It was therefore humbly submitted in conclusion that the 1st Respondent acted outside its jurisdiction, illegally and the 2nd Respondent the right to fair hearing and prejudiced the interests of the Ex-parte Applicant.

The 2nd Respondent's Submissions.

The 2nd Respondent basically submitted that the impugned decision delivered by the Review Board was rendered when the Board lacked jurisdiction to entertain the Request for Review by the Interested Party. It is further submitted that the 1st Respondent violated its right to fair hearing and administrative actions by declining to grant the 2nd Respondent an opportunity to present evidence in response to the aforesaid Request for Review despite request by it to be granted the opportunity. Further that the 1st Respondent misdirected itself by determining that the Ex-parte Applicant, being holder of NCA Category 2, is ousted from bidding for the subject tender thus arriving at the wrong decision.

Findings and Determinations.

Basically, the Applicant being aggrieved by the said decision has filed these proceedings. From the documents filed before this court, and in particular the statutory statement and the supporting affidavit filed on behalf of the applicant, the Applicant seeks relief on the basis that the Board lacked the requisite jurisdiction to entertain the request for review on the grounds that the application for review was filed out of time and that the Board's jurisdiction had been ousted since the Applicant and the 2nd Respondent had already signed a contract by the time the request for review was filed by the Interested Party.

I'm alive to the fact that the purpose of the remedy of judicial review has long been settled. Going by the decision of the House of Lords in **R v Chief Constable of North Wales, ex p. Evans [1982] UKHL 10 (22 July 1982)**, the remedy of judicial review was said to be available for the purposes of preventing excessive exercise of power by administrative bodies or officials; to ensure that an individual is given fair treatment by administrative authorities; to keep administrative excesses in check, that is to check maladministration; and to provide remedy to those aggrieved as a result of excessive exercise of power by administrative bodies. (See **Republic vs Public Procurement Administrative Review Board & 2 Others (2015) eKLR JR Case No. 21 of 2015**).

It is trite law that the scope of judicial review is limited to illegality, irrationality/unreasonableness and breach of the rules of natural justice. Useful guidance in respect of importance of judicial review is found in the Ugandan case of **Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300**, where Justice Kasule stated as under:

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

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

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

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

Whether the Board's decision was made in error of law?

Whether the Review Board had the requisite jurisdiction to hear and determine the request for review. The Ex-parte Applicant's and the 2nd Respondent's position is that the Board lacked jurisdiction for the reasons that the Request for Review was filed outside the mandatory fourteen (14) days contrary to Regulation 73 of the Public Procurement and Disposal Regulations, 2006 (“the Regulations”). The other reason is that a contract had already been signed in terms of section 135 of the Act and thus, the same automatically ousted the jurisdiction of the Review Board to entertain any request. In their view, the Review Board acted in violation of the law as well as outside its jurisdiction.

The Interested Party opposed the Ex-parte Applicant and the 2nd Respondent's position. The 1st Respondent's underlying argument is that the Interested Party was served with any notification letter informing it of its unsuccessfulness. In para 11 of its replying affidavit, it is indicated that the 1st Respondent had Jurisdiction to hear and determine the Request for Review. It argued that the request for review was

filed before the Review Board within fourteen days from the time it learned of the breach by the 2nd Respondent through the Public Procurement Information Portal which was on the 4th February, 2019.

In the request for review before the Review Board, the Interested sought for the following orders in the Request for Review: -

- 1. An order annulling the decision to award Tender No. CDA/T/2018-2019 to Xtreme Engineering Limited and in its stead, Dochar Construction & Trade Inc. Limited be recommended for award of these same;**
- 2. An investigation be carried out on the alleged two officers claiming to be Evaluation Officers of the tenders (Cell No.0722450048 & 0726090822) for alleged corruption deals and if found guilty, to be punished in accordance with the law.**

In its decision, the Review Board identified the following issues for its determination:

- 1. Whether the Board has jurisdiction to entertain the Request for Review. On this question, the board identified two sub-issues as following: - whether the request for review was filed out of time contrary to Section 167 (1) of the Act; and depending on the determination of the first sub-issue, whether the contract between the Procuring Entity and the Interested Party meets the threshold of Section 135(3) of the Act for the jurisdiction of this Board to be ousted by section 167(4)(c) of the Act.**
- 2. Whether the Applicant and the Interested Party met the mandatory requirement of evidence of NCA Category 7 under Stage 1. Preliminary/Mandatory Requirements of the Tender Document.**
- 3. Whether the Procuring Entity corrected, adjusted or amended the Interested Party's tender sum contrary to section 82 of the Act.**
- 4. Whether the Procuring Entity made unsolicited communication to the Applicant in order to influence the evaluation to the Applicant in order to influence the evaluation process contrary to section 65(1) and (2) the Act.**

I have carefully perused the exhibits annexed to the affidavits tendered by parties herein. The 2nd Respondent reiterates that the Interested Party was notified by the Procuring Entity that its bid had failed on 3rd January, 2019 via post. I have noted that the Interested filed its application for review on 22nd February, 2019. The same indicates that the notification of award was send to the Ex-parte Applicant. That's, 46 days after the date with which the Procuring Entity insisted that it notified the Interested Party. When the request for review application came up for hearing the Procuring Entity, orally applied to furnish evidence of postage services used as the mode of communication of the outcome of the evaluation process.

I have noted further that, Procuring Entity requested the Board to allow it to submit the evidence at a later date, since it did not have it at the time it made the application. The same was declined by the Board noting that parties had confirmed that they were ready to proceed with the documents that were before it and further that other parties to the Request for Review would be prejudiced since they would not have a forum to interrogate such evidence following the conclusion of the hearing.

It is important to note that notification of regret to both successful and unsuccessful tenderers and giving reasons for the regret to the unsuccessful ones is not optional for the Procuring Entity. In **Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR** it was stated that It is a mandatory requirement under Section 87(3) of the Act which stipulates:

“Notification of intention to enter into a contract.

87. (1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.”

Section 126(4) of the Act complements the abovementioned provision. It stipulates that:

“(4) When a person submitting the successful bid shall be notified, the accounting officer of the procuring entity shall at the same time notify in writing all other persons who had submitted bids that their bids were not successful and give reasons thereof.”

In view of the above provisions of law, it is abundantly clear that the notifications in question herein goes to the core of the procurement process owing to its mandatory nature. The 2nd Respondent in its submissions indicated that it was willing to furnish the Review Board with the original dispatch book with them as an evidence that the regret letter posted which request was declined by the Review board. Despite

this, the Review Board proceeded to make a determination that the regret letter was not properly served.

The question that arises is whether the Review Board acted fairly. It is whether the Review Board observed rules or principles of natural justice or whether it acted with procedural fairness towards the both the Procuring Entity and the Ex-parte Applicant. For the Procuring Entity to prove its case, it only needed to furnish Board with evidence of postage services used as the mode of communication of the outcome of the evaluation process. That opportunity was not accorded by the Review Board.

I refer to the provisions of Section 4(4)(d) of the Fair Administrative Action Act, 2015 stipulates that an administrator shall accord the person against whom administrative action is taken an opportunity to – **(b) to be heard and – (b) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.**

These rights to a fair hearing imbodyed in terms of Article 50 of Constitution of Kenya 2010 are not subject to restriction or limitation on any aspects within the trial to conclusion. The scope of the right to a fair trial under Article 50 ranges from right to a fair and public hearing, right to an interpreter, right to adduce and challenge evidence, right to be informed in advance of the evidence the prosecution will rely on, right to legal representation of one's choice, and if substantial injustice would be occasioned, legal counsel be provided by the state at its own costs. This Article applies *mutatis mutandis* to civil matters.

Without doubt whatsoever, according parties to a dispute the right to adduce and challenge evidence relied upon by the opposing party is intrinsic as it gives both parties a chance to fully ventilate the dispute and also in achieving equality of arms. Parties must be at equal arms. Denying one party the chance to produce the only evidence that supports its case for the sole reason that the parties said they were ready at the beginning of the trial as in this case is undoubtedly prejudicial and the same amounts to procedural impropriety.

Fair hearing lies not in the correctness or propriety of the decision but rather in the procedure followed in the trial and determination of the case. It is only when the opponent has been heard that the Judge would be seen to be discharging the duty of an unbiased umpire. The violation of the rule of audi alteram partem perse lies in the breach of the fundamental human right. Once the right is violated, it is irrelevant whether the decision made subsequent thereto is correct.

I'm also inclined to refer to the provisions of **Article 159 (d)** and state that the rationale for substantive justice is to protect the fair administration of justice where the larger measure of justice would be assured in the adjudication of disputes which find their way to the courts and tribunals.

The evidence of the dispatch of the notification in question by the 2nd Respondent was key in ascertaining whether or not the Board had jurisdiction to hear and determine the application of review. Declining to grant the 2nd Respondent to present such important evidence amounts to an infringement on his right to fair hearing. Further by declining to be furnished with this evidence, the Board failed to grab a chance to ascertain whether or not it had jurisdiction to entertain the request for review.

Having made the above findings, the issue as regards whether the Review had the requisite jurisdiction to hear and determine the Request for Review in question is made crystal clear. In the celebrated case of **The Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd (1989) LKR 1**, where Nyarangi J made the following assertions:

"Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction"

The Supreme Court of Kenya in the case of **Macharia and Another vs Kenya Commercial Bank Ltd and 2 Others Civil Application No. 2 of 2011**, stated that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

In **Republic v Principal Secretary Ministry of Health and another, exparte Apex Communication Limited trading as Apex Porter Novelli**, Odunga, J upheld the decision of the Public Procurement Administrative Review Board not to entertain a request for review on the ground that the same had been filed outside the period for filing such a review and it did not have jurisdiction to deal with it. The decision of Odunga, J, confirms the fact that the Board's jurisdiction is limited to entertaining applications for review filed within the timeframe provided by the Regulations.

Section 167(1) of the Procurement and Administrative Review Board 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."

I'm in agreement with the Review Board's observation that the aforementioned section has two limbs with which a candidate or tenderer may lodge a request for review. Firstly, a request for review may be filed within fourteen days after the notification of the award, or

secondly, on the date of occurrence of the alleged breach at any stage of the procurement process or disposal process. The later can also be explained as to file a request for review within fourteen days from the date the aggrieved tenderer learns of the alleged breach by the Procuring Entity at any stage of the procurement or disposal process. As correctly observed by the Review Board, this connotes that the aggrieved tenderer or candidate has two alternatives available to approach the Board.

In the premises, the Review Board acted unfairly by denying the Procuring entity a chance to produce evidence on the question Notifications. This gave Interested party an unfair advantage over both the Procuring Entity and the Review Body. Furthermore, the Board violated the rules of natural justice and the right to a fair hearing hence in light of judicial review, it occasioned procedural impropriety. Without interrogating the said evidence, the Board cannot be said to have ascertained the question as to whether or not it had jurisdiction to hear and determine the review. Further that where in any proceedings the rules of natural justice or the principles of fair hearing are breached, such a breach renders the entire proceedings null and void. The making of the decision by the Review Board without the underlying duty of procedural fairness affected the rights and interest of the 2nd respondent. I hold a strong view under Article 50 (1) of the Constitution the Review Board should have allowed an adequate opportunity for the 2nd respondent to present their case in view of the fact that jurisdiction to entertain the matter was based on notification with regard to the outcome of the tender to the interested party. It was not necessary for the board to adopt an approach which denied it a chance to receive and consider evidence on communication in terms of Section 167 (1) of the Act.

As regards the issue of NCA, the Ex-parte Applicant contends that the argument by the Review Board that it did not meet the requirements of NCA 7 Category since it had NCA 2 was a misapprehension of the law and in doing so, the Board acted illegally. In judicial review, illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the Act, the subject of the complaint. It also includes acting without jurisdiction or *ultra-vires*, or contrary to the provisions of a law or its principles are all instances of illegality. (**Pastoli vs Kabale District Local Government Counsel & Others (2008) 2 EA 300 at pages 303 to 304**).

In determination of this particular issue, useful guidance is also found in the description of illegality by **Lord Diplock in Council of Civil Service Union v Minister for the Civil Service (1984) AC 374 at 410** as a failure by public body to understand correctly the law that regulate its decision making power, or a failure to give affect effect to the said law. According to Halsbury's Laws of England, 4th Edition at page 77, errors of law arise in decisions made by a public body when:

“A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power.”

In my view the issue at hand touches on the responsiveness of a tender. The parameters on responsiveness of a tender are enshrined in Section 79 of the Act of which stipulates as follows:

“A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

- a) minor deviations that do not materially depart from the requirements set out in the tender documents; or***
- b) errors or oversights that can be corrected without affecting the substance of the tender.***

(3) A deviation described in subsection (2)(a) shall—

- a) be quantified to the extent possible; and***
- b) be taken into account in the evaluation and comparison of tenders.”***

In **Judicial Review Miscellenous Application No. 33 of 2019**, it was observed that the time at which responsiveness of a tender is material is at the time of evaluation of the tender. In the same respect Section 80 of the Act provides as follows:

- 1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3).***
- 2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.***

In view of the foregoing, I have perused the tender advertisement which shows that Tender No. CDA T007/2008-2019 in relation to proposed construction of Wananchi Cottages and Conference facility in Kilifi whose eligibility is indicated to be “open”. Further stage 1 of the evaluation criteria titled preliminary/ mandatory requirements stipulates that bidders “*must submit evidence of NCA Category 7*”.

In this regard, I refer to para 4 of the Procuring Entity's replying affidavit filed 24th April 2019, where it is indicated that it was an express and unequivocal terms of the Tender that the eligibility for the same would be open to all bidders. This was reiterated by Dr. Hassan, the

Procuring Entity's Managing Director who enunciated that the mandatory requirement of evidence of qualification in the category NCA 7 included anyone in category NCA 7 and above (to Category 1).

I have noted that the Evaluation Committee which has the exclusive mandate of evaluation of bids under the Act, evaluated a total of 17 bids on preliminary/ mandatory requirements, technical capacity and financial capacity. Germane to the instant case is Stage, that is the evaluation Preliminary/Mandatory Requirements where the Evaluation determined whether the 17 bidders' documents were either Responsive(R) or Non-Responsive (NR). It is indicated that and at end of the stage fourteen (14) bidders were considered Responsive (R) hence eligible to proceed to technical evaluation.

It appears that in foregoing evaluation stage, the Ex-parte Applicant was part of bidders whose tenders were found to be responsive in terms of the abovementioned Section 79 of the Act as having complied with preliminary requirements which includes the question of at hand. This supports the Ex-parte Applicant and the Procuring Entity's position that the tender was open for anyone with Category NCA 7 and above because if that was not the position, the Ex-parte Applicant could not have satisfied stage 1.

Despite the foregoing account, the Review Board in its decision took a different approach that the intention of the Procuring Entity was in requiring evidence of NCA Category 7 **only**. It further reasoned that by requiring the Procuring Entity directing bidders to submit evidence of NCA Category 7 as a mandatory requirement, it meant that the subject tender required small and medium sized contractors that engage in small scale projects under NCA Category 7. The Review Board believes this ensures that small and medium sized contractors are afforded an opportunity to participate in public procurement.

The pregnant question to ponder at this juncture is as regards the intention of the Procuring Entity in relation to the mandatory requirement of evidence of NCA category 7. I find useful guidance in the dictum of Sir Charles Newbold P in *Damondar Jihabhai & Co Ltd and another v Eustace Sisal Estates Ltd* 1967 EA 153 at p 156 where he said as follows:

“Whatever may be the form of words, once the intention of the parties can be ascertained the Courts will give effect to that intention unless the words used cannot possibly bear that meaning. Further, if the words used are on the face of them meaningless in relation to the surrounding circumstances in which they were used, then, if the Court is satisfied that the words used were intended to give effect to an agreement between the parties, the Court will not discard the words as meaningless or complete surplusage but will construe them in such a manner as to give effect to the intention of the parties; and in order to ascertain that intention the Court will have regard to the surrounding circumstances.”

I have considered the arguments canvassed by the Parties herein on this issue as well as the decision of the Review Board. I believe that the explanation given by the Procuring Entity that it meant that the tender was open to all bidders within the NCA Category 7 and above was quite satisfactory. This intention is seen in the fact that the Evaluation Committee evaluated all the bids submitted after which it was satisfied that the Ex-parte Applicant's tender was responsive. If the Ex-parte Applicant was not eligible, it could have been disqualified at the evaluation stage. Flowing from the language of the contract and the background circumstances when the procurement entity placed an advert of tenderers to bid for the project it is required that the contract document be read as an integrated whole with various clauses supporting one another. The effect of the reading in adopted by the Public Procurement Administrative Review Board, meant that a rigid interpretation be accorded in respect of tender number: CDA/T/007/2018-2019.

In any case, it is noteworthy that the Evaluation Committee is better placed by the Act than the Review Board as far as the determination of the responsiveness of the tenders is concerned. Thus, the Evaluation Committee is bestowed with the ability to take care of all the fine details when it comes to the evaluation of bids in any procurement process.

Therefore, I'm not able to concur with the Review Board's findings that the Ex-parte Applicant did not meet the preliminary/ mandatory requirements of the tender and this Court equally reject the view that the tender in question was meant to benefit small and medium enterprises only. This, was a serious misdirection on the part of the Review Board and I wish to add that a court or the Review Board cannot deviate from the intention contained in the terms and conditions of the tender. In view of the foregoing, this court finds that the Board acted illegally and in excess of jurisdiction by taking away the manifestation of what the parties herein intended.

As regards Clarifications, the Interested Party claims to have written an official mail to the 2nd Respondent seeking clarification of the tender which was never replied on the 8th January 2019. In this respect, the Review Board stated that this issue was not replied to by the Procuring Entity. It therefore made a finding that the Procuring Entity failed to discharge its burden of proof nothing that it was silent to the clarifications sought by the Interested Party. Further that it did not mention the outcome of the evaluation process on that date and that the Applicant's assertion that it became aware of the Evaluation Reports between 7th and 8th February 2019 which seem to have been published on 4th February 2019.

I have perused all the documents that were annexed and tendered as evidence before the Review Board. It seems that the Interested Party did not furnish the Review Board with an evidence in form of a document to show that indeed an email was sent by the Interested Party on the alleged date for the alleged clarification. It is an elementary principle of law that **he who alleges must prove the allegations**. This is stipulated in **Section 107(1)(2)** of the **Evidence Act** that provides thus:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Section 112 of the **Evidence Act** provides thus:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

In view of the foregoing provisions of law, it is clear that the burden of proving existence of a fact resides with party that asserts or allege its existence. In the instant case, the Interested Party alleges that it addressed an email to the Procuring Entity seeking clarification on the mandatory requirement under clause 4 of Stage 1 Preliminary Evaluation/Mandatory Requirements of the Tender Documents. In was incumbent upon the Interested Party to prove the same by way of documentary evidence. Having said so, the Review Board misdirected itself in finding that the Procuring Entity was bound to respond to a fact which had not been at all proved. I find that the Review Board misapplied the law in this issue and failed to appreciate that the alleged email was never produced before it. The same was not furnished with this Court either.

Whether the Applicant is entitled to the relief sought.

The order sought herein is certiorari to quash the decision of the Public Procurement Administrative Board, in application number 16 of 2019 dated 7th March 2019. This court finds that the Respondent acted in errors of law. Both these findings. These errors of law had an effect of rendering the final decision and the orders given by the Review Board null and void.

I find the Applicant’s Notice of Motion dated 29th March 2019 is meritorious in terms of the following orders:

1. An order of certiorari be and is hereby issued to remove into this Court for purposes of quashing, the Review Board’s decision dated 7th March 2019- Dochar Construction & Trade Inc Limited vs Coast Development Authority & Another in relation to Tender No. CDA/T/007/2018-2019.

2. Each Party shall bear its own costs of the Notice of Motion dated 29th March 2019.

It is so Ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF SEPTEMBER, 2019.

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R. NYAKUNDI

JUDGE