



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 283 OF 2019

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION.

AND

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES 2010;

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT;

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD APPLICATION NO. 94 OF 2019;

BETWEEN

REPUBLIC.....APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY.....2ND RESPONDENT

NUFLOWER FOODS AND NUTRITION PVR LIMITED.....3RD RESPONDENT

SAI PHARMACEUTICAL LIMITED.....4TH RESPONDENT

EX-PARTE :

TECNO RELIEF SERVICES LIMITED

JUDGMENT

Introduction

1. Tecno Relief Services Ltd, the *ex parte* Applicant herein, is a limited company incorporated under the Companies Act, and carrying on the business of general trading in Kenya. The said *ex parte* Applicant is aggrieved with a decision made on 12th September 2019 in PPARB Case

No. 94 of 2019 by the Public Procurement Administrative Review Board, the 1st Respondent herein. The 1st Respondent is a statutory body created under section 27 of the Public Procurement and Assets Disposal Act of 2015, and mandated to review, hear and determine public tendering and asset disposal disputes.

2. PPARB Case No 94 of 2019 concerned a second Request for Review lodged by the *ex parte* Applicant with respect to tender number GF ATM HIV NFM-18/19-O1T) 15 for Supply of Nutritional Supplements, that was being procured by the Kenya Medical Supplies Authority, the 2nd Respondent herein. The 2nd Respondent is a body corporate established under the Kenya Medical Supplies Authority Act mandated, *inter-alia*, to procure and supply drugs and medical supplies for use in public health programmes and institutions.

3. A brief history of this application is as follows. The *ex parte* Applicant was an unsuccessful bidder in tender number GF ATM HIV NFM-18/19-O1T) 15 for Supply of Nutritional Supplements, by reason of not being responsive in respect to Item 1, Ready to Use Therapeutic Food (RUTF) 500-520 KCAL/92G and Item 2, Ready to Use Supplement Food (RUSF) 520-550 KCAL 92G. The 2nd Respondent had initially awarded Tender No. GF ATM HIV NFM-18/19-O1T-15 for Supply of Nutritional Supplements for Item 2, Ready to Use Supplement Food (RUSF) 500-520 KCAL/100g) to Nuflower Foods and Nutrition PVR Limited, which is sued as the 3rd Respondent herein. Tender No. GF ATM HIV NFM-18/19-O1T-15 for Supply of Nutritional Supplements for Item 1, Ready to Use Therapeutic Food (RUTF) 520-550 KCAL/92gm, was awarded to Sai Pharmaceutical Limited, which is sued as the 4th Respondent.

4. The *ex parte* Applicant lodged its first Request for Review against the 2nd Respondent's initial decision to award the said tenders to the 3rd and 4th Respondents in PPARB Case No. 70 of 2019 (hereinafter referred to as "the First Request for Review"). The 1st Respondent delivered a ruling on the First Request for Review on 26th July 2019, in which it made the following orders:

"1. The letter of Notification of award in Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of Nutritional Supplements (II) for Item No. 1. Ready to use Supplemental Food (RUSF) 500-520 KCA/100G address to M/s Nuflower Foods and Nutrition PVT Limited, be and is hereby cancelled and set aside.

2. The letter of Notification of Award of Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of Nutritional Supplements (II) for Item No. 1. Ready to use Therapeutic Food (RUTF) 520-550 KCAL/92G, addressed Sai Pharmaceuticals Limited be and is hereby cancelled and set aside.

3. The Evaluation Report signed on 20th May 2019 with respect to Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of Nutritional Supplements (II) be and is hereby cancelled and set aside.

4. The Procuring Entity is hereby directed to conduct a re-evaluation of all bids received by it in Tender No. GF ATM HIV NFM-18/19-OIT-015 for supply of Nutritional Supplements (II) from the Preliminary Evaluation Stage in accordance with the Mandatory documents listed in Preliminary Examination of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document, including the following mandatory documents: -

a. Minimum number of 3 (three) supply contracts of items within the past 3 years, the tenderer should provide documentary evidence in support of the experience of previous supply (Contracts, Purchase Orders, Reference letters and Contact Details of previous supply contracts (Mandatory)

b. Copies of the tenderer's audited financial statements for the past three fiscal years (Mandatory)

c. Average annual turnover in the last three years at least two times the value of the items offered (Mandatory)

d. Statement of manufacturers manufacturing capacity (Mandatory) and to proceed with the procurement process to its logical conclusion, taking into consideration the Board's findings in this case, including the making of an award within fourteen (14) days from the date of this decision.

5. The Tender Validity period for Tender No. GF ATM HIV NFM-18/19-OIT-015 for supply of Nutritional Supplements (II) is hereby extended for a further period of forty-five (45) days from 5th July 2019.

6. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request of Review."

5. After re-evaluation, the 2nd Respondent proceeded to again award the same tenders to the 3rd and 4th Respondents. The *ex parte* Applicant consequently preferred a second Request for Review with the 1st Respondent, being PPARB Case No. 94 of 2019, (hereinafter referred to as "the Second Request for Review") in which it challenged the 2nd Respondent's decision. The *ex parte* Applicant in its Request for Review contended that the 2nd Respondent award the 3rd and 4th Respondents the tenders on the basis that their bids was the lowest responsive evaluated bidder, and failed to state whether it had complied with the orders of the 1st Respondent given on 26th July 2019. Further, that the 2nd Respondent awarded the tenders in violation of the said orders of the 1st Respondent.

6. The 1st Respondent thereupon made its decision on the Second Request for Review on 12th September 2019, which decision is the subject of the instant application. The 1st Respondent made the following orders therein:

1. "The Procuring Entity's Letter of Notification of Award of Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of

Nutritional Supplements (II) dated 9th August 2019 addressed to M/s Nuflower Foods and Nutritional Pvt Limited with respect to Item 2, Ready to use Supplemental Food (RUSF) 500-520 KCA/100G is hereby upheld.

2. The Procuring Entity's Letter of Notification of Award of Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of Nutritional Supplements (II) dated 9th August 2019 addressed to M/s Sai Pharmaceuticals Limited with Respect to Item 1, Ready to use Therapeutic Food (RUTF) 520-550 KCAL/92G, be and is hereby cancelled and set aside.

3. The Procuring Entity is hereby directed to award of Tender No. GF ATM HIV NFM-18/19-OIT-015- for Supply of Nutritional Supplements (II) in Respect to Item 1, Ready to use Therapeutic Food (RUTF) 520-550 KCAL/92G to the next lowest evaluated bidder, taking into consideration the Board's findings in this case and to proceed with the procurement process to its logical conclusion.

4. The Tender Validity period of the subject tender is hereby extended for a further sixty (60) days from 19th August 2019.

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

7. The *ex parte* Applicant, being aggrieved, subsequently filed the instant judicial review proceedings after being granted leave, by way of a Notice of Motion application dated 1st November 2019. A summary of the parties' respective cases is as follows.

The Application

8. The *ex parte* Applicant is seeking the following orders in the instant application:

(a) An order of certiorari to remove into this Court and quash the decision of the 1st Respondent dated 12th September in PPARB Case Number 94 of 2019: Techno Relief Services Limited vs The Accounting Officer Kenya Medical Supplies Authority, Kenya Medical Supplies Authority, Nuflower Foods and Nutrition PVT Limited and Sai Pharmaceuticals Limited;

(b) An order of mandamus to compel the 2nd Respondent to produce the 3rd Respondent's original entire bid document in Tender No. GF ATM HIV NFM-18/19-OIT-15 for Supply of Nutritional Supplements (II) for items No. 1 Ready to Use Supplement Food (RUSF) 500-520 KCAL/100g;

(c) An order of mandamus to compel the 2nd Respondent to produce the 3rd Respondent's original entire bid document in Tender No. GF ATM HIV NFM-18/19-OIT-15 for Supply of Nutritional Supplements (II) for item No. 1 Ready to use Therapeutic Food (RUTF) 500-520 KCAL/92G;

(d) An order of prohibition to remove into this Court and prohibit the 2nd Respondent and 3rd Respondent from implementing and/or performing the contract entered with respect to Tender No. GF ATM HIV NFM-18/19-OIT-15 for Supply of Nutritional Supplements (II) for item No. 1 Ready to Use Supplement Food (RUSF) 500-520 KCAL/100g that form the subject matter of this Application;

(e) An order of prohibition to remove into this Court and prohibit the 2nd Respondent and 3rd Respondent from implementing and/or performing the contract entered with respect to Tender No. GF ATM HIV NFM-18/19-OIT-15 for Supply of Nutritional Supplements (II) for item No. 1 Ready to Use Therapeutic Food (RUTF) 500-520 KCAL/92g that form the subject matter of this Application;

(f) Such further and other reliefs that this Court may deem just and expedient to grant.

9. The application was supported by the *ex parte* Applicant's amended statutory statement dated 14th October 2019, a verifying affidavit of even date sworn by Ketan K. Goswami, its tender and product development manager, and a further and supporting affidavit sworn by the said deponent on 8th October 2019 and 1st November 2019 respectively. The *ex parte* Applicant annexed a number of documents to its affidavits, including the subject tender documents, the pleadings filed in the second Request for Reviews and the 1st Respondent's decisions.

10. The *ex parte* Applicant averred that the 1st Respondent in its ruling on the Second Request for Review dated 12th September 2019 held that it lacked jurisdiction to entertain the issue whether the 3rd Respondent satisfied the criteria of "average annual turnover the last three years at least two times the value of the items offered" as required in the Tender Documents, on the basis that it was barred by the plea of *res judicata*.

11. It is the *ex parte* Applicant's case that the 1st Respondent applied wrong principles of the law and interpretation in concluding that it was *res judicata* and an abuse of the court process for the 3rd Respondent to be subjected to an evaluation process in accordance with the mandatory terms spelt out in order 4 of PPARB no 70 of 2019 and the tender documents. Further, that the parameters set by the 1st Respondent in PPARB no 70 of 2019 equally applied to the 4th Respondent thus leading to the 1st Respondent's cancellation of its notification of award. The *ex parte* Applicant contended that the 1st Respondent's reasoning was therefore *ultra vires*, irrational and unreasonable, and was tainted with illegality.

12. Further, that the 1st Respondent failed to appreciate that re-evaluation of all bids was to apply to all bidders, including the 3rd Respondent, and its decision was therefore made with procedural impropriety and unfairness, was illogical and violated the legitimate expectation that any public tender be fair.

13. Lastly, the *ex parte* Applicant averred that only bids conforming to the requirements in the tender document, the Act, the Regulations and the Constitution should be awarded the tender, a rule of fair process, competency and equality. It is the Applicant's case that paramount to the award of a tender is its responsiveness, and that the 1st Respondent allowed the 3rd Respondent to escape compliance with lawful mandatory terms.

The Responses

14. The 1st Respondent filed a Replying Affidavit sworn on 24th October 2019 by Henock K. Kirungu who is its Secretary, in response to the application. The 2nd Respondent on its part filed a Replying Affidavit sworn on 18th November 2019 by Dr. Jonah Manjari Mwangi, its Chief Executive Officer, as its response. The 3rd Respondent's likewise responded through a Replying Affidavit sworn on 18th November 2019 by Carolyn Njeri Githu, its authorized local representative. The 4th Respondent did not file any response to the application and did not participate in the proceedings. An account of the 1st, 2nd and 3rd Respondents' respective cases is given in the following sections.

The 1st Respondent's Case

15. The 1st Respondent averred that on 22nd August 2019, it received the *ex parte* Applicant's Request for Review of the same date in the matter of Tender No. GF ATM HIV NFM-18/19-01T-125 for the Supply of Nutritional Supplements. That it directed that the 2nd Respondent be served and notified of the pending review, and that the said Respondent subsequently filed its responses and relevant documents in relation to the Request for Review. It was also averred that despite efforts by the 1st and 2nd Respondents to notify the 4th Respondent of the hearing of the Request for Review, the 4th Respondent did not participate in the review proceedings though it was enjoined therein.

16. According to the 1st Respondent, it partially allowed the said Request for Review in its ruling of 12th September 2019, and that in reaching its decision, it considered the original tender documents, the evaluation reports, the professional opinion issued by the 2nd Respondent's Head of Procurement, written and oral submissions, and other documents supplied by the parties to the Request for Review. Further, that it was alive to all facts raised by the parties as well the applicable provisions of the law.

17. The 1st Respondent's case is that the *ex parte* Applicant in the Request for Review challenged the award made to the 3rd Respondent in respect of Item 2, Ready to use Supplemental Food (RUSF) 500-520 KCAL/100G, by disputing the 3rd Respondent's "*annual average turnover in the last three years at least two times the value of the items offered*". It is averred that the said issue was found to be *res judicata* as it ought to have been raised in PPARB Application No. 70/2019, which involved the same parties litigating in PPARB Application No. 94/2019. In this regard, it is averred that the *ex parte* Applicant learnt of the 3rd Respondent's failure to meet the requirement of "*annual average turnover in the last three years at least two times the value of the items offered*" when it received the 1st Respondent's ruling in PPARB Application No. 70/2019

18. The 1st Respondent further contended that it considered the provisions of the 2nd Respondent's Tender Documents, and found that bidders could not supply any other pharmaceutical drugs, save for Nutritional Supplements that meet the technical specifications of the RUTF and RUSF suitable for HIV positive patients, and that the 2nd Respondent failed to take this issue into account during its re-evaluation on the 4th Respondent. Further, that the 2nd Respondent in conducting a re-evaluation failed to consider the findings of the 1st Respondent in its decision in PPARB Application No. 70/2019 and as a result the 4th Respondent could not qualify for an award, having failed to meet a mandatory requirement.

19. Lastly, the 1st Respondent contended that it observed the rules of natural justice and acted lawfully, fairly and reasonably in discharging its statutory mandate under the Public Procurement and Asset Disposal Act, 2015. It is the 1st Respondent's case that it was supplied with, and considered all documents pertaining to the procurement process, including confidential ones submitted by the procuring entity pursuant to Section 67 (3) (e) of the Act, which comprised of, among other documents, notification letters issued to bidders who participated in the procurement process. Further, that the letters of notification of the outcome of evaluation of the subject tender were simultaneously issued to the successful and unsuccessful bidders on 25th June 2019 before the expiry of the tender's validity period on 1st July 2019 as required under Section 87 of the Act.

The 2nd Respondent's Case

20. The 2nd Respondent contended that after the ruling on the First Request for Review made on 26th July 2019, it re-evaluated all bids submitted in accordance with the orders of the 1st Respondent and the law, and the 3rd and 4th Respondents were duly notified after their bids were determined to be the most responsive. It was averred that the *ex parte* Applicant's Second Request for Review against the results of the re-evaluation was heard and determined by the 1st Respondent, which considered all relevant facts in evidence in arriving at its decision, in exercise of its mandate under the Public Procurement and Asset Disposal Act 2015.

21. The 2nd Respondent further averred that the instant application does not challenge the decision making process by the 1st Respondent, but rather the merits of the decision of the 1st Respondent, particularly its interpretation and application of the law. In particular, that the issue of *res judicata* is substantive and goes to the merits of the 1st Respondent's decision, and is a contested matter of law which is not open for challenge by way of judicial review but in an appeal. As such, it is contended that the 1st Respondent in its decision on the Second Request

for Review correctly held that it lacked jurisdiction to determine issues that were raised or ought to have been raised in the First Request for Review between the same parties.

22. Further, that the said decision was not only sound but correct in law under the doctrine of *res judicata*. It is also the 2nd Respondent's case that the *ex parte* Applicant has not demonstrated how the finding by the 1st Respondent is unreasonable, defeats its legitimate expectation and a breach of Article 227 of the Constitution. That on the contrary, it conformed to the legal principle of *res judicata*.

23. On the *ex parte* Applicant's prayer that this Court compels it to produce the 3rd Respondent's original tender bid for Tender No. GF ATM HIV NFM-18/19-OIT-012 Supply of Nutritional Supplements, the 2nd Respondent averred that the said original bid document constitute confidential information protected by virtue of section 67 of the Public Procurement and Asset Disposal Act 2015. Therefore, that such a prayer is in bad faith and aimed at undermining the judicial authority of the Court. It is also averred that the said prayer is without any factual or legal basis but only meant to waste precious judicial time and vex the application of sound judicial review principles.

24. Lastly, the 2nd Respondent contended that the decision in the First Request for Review was determined on 26th July 2019, and no decision was brought to challenge the same thus making it final and binding. It is also averred that the 1st Respondent procedurally conducted itself in a fair and just manner as it heard all the parties to the review, considered all documents of evidentiary value and the submissions placed before. Therefore, the decision was rational, reasonable, logical, lawful, and within the mandate and jurisdiction of the 1st Respondent as provided by the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Disposal Regulations 2006.

The 3rd Respondent's Case

25. The 3rd Respondent averred that it submitted its bid documents on 4th April 2019 in respect of Ready to Use Supplemental Food (RUSF) 500-520KCAL/100GM (100G sachet) and Ready to Use Therapeutic Food (RUTF) 520-550 KCAL/100GM (92G sachet) before the deadline for submitting tenders lapsed at 10.00a.m. That, the 3rd Respondent's bids were adjudged to be responsive, having satisfied all the eligibility and mandatory requirements. Accordingly, that its bids were thereafter subjected to both technical and financial evaluation and compared with other responsive tenders using the Tender Documents. Subsequently, that the 3rd Respondent's unit price of USD 0.2675 at a total price of USD 1,350,767.465 was found to be the lowest evaluated bidder in respect of the tender for Ready to Use Supplemental Food (RUSF) 500-520KCAL/100GM, hence it was awarded the tender to supply. Further, that the tender for Ready to Use Therapeutic Food (RUTF) 520-550 KCAL/100GM (92G sachet) was not awarded to the 3rd Respondent as its bid was considered unsuccessful.

26. It is contended that the *ex parte* Applicant's sole gravamen against the award made in favour of the 3rd Respondent in the First Request for Review was that the Ready to Use Supplemental Food (RUSF) 500-520KCAL/100GM products which the 3rd Respondent intended to supply were infringing on the patent of Nutriset. On the other hand, the *ex parte* Applicant's gravamen against the 4th Respondent was that it had not met the mandatory criteria of "*minimum number of three (3) supply contracts of items within the past three (3) years*" as set out in the Tender Documents. According to the 3rd Respondent, this complaint was limited to the 4th Respondent and was not raised against the 3rd Respondent in the First Request for Review.

27. Further, that the 1st Respondent in its decision delivered on 26th July 2019 on the First Request for Review nullified the awards made to the 3rd and 4th Respondents on the basis that some parameters of post-qualification in the Tender Documents of the 2nd Respondent which were considered by the evaluation committee at that stage, comprised of mandatory requirements which ought to have been considered during the preliminary evaluation. Consequently, the 2nd Respondent was ordered to conduct a re-evaluation of all bids received by it from the preliminary evaluation stage. It is averred that the 4th Respondent was also found to have not demonstrated that it had previously supplied the Nutritional Supplements that it had bid for as required under the Tender Document. However, that no similar finding was made against the 3rd Respondent.

28. It was further contended that after the re-evaluation, the only complaint made by the *ex parte* Applicant in the Second Request for Review in respect of the award made to the 3rd Respondent, was that the 3rd Respondent's average turnover for the last three (3) years was not double the value of the price quoted, as required under Clause D.3 of the Tender Documents. The 3rd Respondent averred it filed a Replying Affidavit in which it indicated amongst other defences, that the 1st Respondent ought not to deal with the said issue for the reasons that it was a part of the subject matter of the dispute determined in the First Request for Review. Therefore, that the Applicant could have and ought to have raised it at that time for determination and as such, the issue was barred by the doctrine of *res judicata*.

29. Further, that the 3rd Respondent stated that it had fully satisfied all the mandatory, technical and financial requirements of the subject tender, including the mandatory requirement that the average annual turnover of the 3rd Respondent in the last three (3) years should be at least two times the value of the items offered in the Tender; and had included documents in its bid demonstrating compliance. Further, that the said documents were reviewed by the 2nd Respondent, and found to be fully compliant and satisfactory. The 3rd Respondent also contended that it invited the 1st Respondent to review the Tender Documents to satisfy itself of the foregoing.

30. On the decision rendered on 12th September 2019 by the 1st Respondent, the 3rd Respondent averred that the said decision did not violate the provisions of sections 79 and 86 of the Public Procurement and Asset Disposal Act, as read together with Article 227 of the Constitution as alleged by Applicant. The 3rd Respondent reiterated its averments that the issue raised in the instant application being *res-judicata*, and that it had fully complied with the mandatory technical and financial requirements outlined in the Tender Documents, hence the *ex parte* Applicant's allegations are baseless. It averred that the 1st Respondent was bound to consider and apply the doctrine of *res judicata* in light of Article 47 of the Constitution as read together with Section 4 of the Fair Administrative Actions Act, which requires it to act a manner which was expeditious, efficient, lawful, reasonable and procedurally fair and to apply the law. It is contended that the *ex parte* Applicant's argument that the 1st Respondent applied wrong principles of law in applying the doctrine of is indicative of an appeal from the decision of

the 1st Respondent disguised as a judicial review of the decision.

31. It is the 3rd Respondent's case that the allegation that the 1st Respondent's decision was *ultra vires* and in excess of its powers is unfounded, as the 1st Respondent properly exercised its powers as set out in sections 28 and 173 of the Public Procurement and Asset Disposal Act. In addition, that the *ex parte* Applicant has not demonstrated the alleged excess of power. It is averred that the *ex parte* Applicant's legitimate expectation that the 1st Respondent would not apply the doctrine of *res judicata* was unreasonable as there cannot be legitimate expectations against clear provisions of law. Further, the impugned decision was within the range of legally and factually justifiable outcomes which any reasonable Tribunal faced with the same facts and law would have arrived at, and as such, is neither unreasonable nor irrational.

32. On the prayers seeking that the 2nd Respondent be compelled to produce the 3rd Respondent's original bid documents, the 3rd Respondent contended that they ought not to be granted because the *ex parte* Applicant is seeking for confidential information, and granting the orders would be in contravention of the provisions of sections 67 and 176(f) of the Public Procurement and Asset Disposal Act. That in any event, issuance of the prayers would be in vain because once this matter is determined, the said documents will not aid the *ex parte* Applicant in this matter as the review process contemplated under the Act in respect of the tender in question will have been finalized.

33. The 3rd Respondent also contended that the prayers for prohibition in the instant application ought not to be granted, since such orders cannot issue in respect of a decision which has already been made and only applies to a decision which is contemplated. Furthermore, that the Court's determination in respect of prayer to quash the impugned decision will render the said prayers superfluous and unnecessary. Lastly, it was contended that the instant application is an abuse of court process, as it is intended to delay and/or frustrate the completion of the procurement process and implementation of contracts tailored to avail nutritional supplements to persons living with HIV viruses, who have had to wait for a period of over nine (9) months.

The Determination

34. The instant application was canvassed by way of written submissions filed by the parties, which were wholly adopted and relied upon by the various counsel during its hearing. Mr. Kibet appeared for the *ex parte* Applicant, and relied on submissions dated 1st November 2019 filed by Kipyator Kibet & Associates Advocates. Ms. Nyakora, a Senior State Counsel in the Attorney General's chambers, filed submissions dated 2nd December 2019 on behalf of the 1st Respondent. Mr. Onganda Jr. adopted submissions by the firm of Migos-Ogamba & Co Advocates dated 27th November 2019 that were filed on behalf of the 2nd Respondent. On his part, Mr. Nyaburi, the counsel for the 3rd Respondent, relied on submissions dated 15th November 2019 filed by the firm of Iseme Kamau & Maema Advocates.

Preliminary Issue on Propriety of the Application

35. After considering the pleadings, submissions and arguments made by the parties, this Court found it prudent to first address a preliminary issue raised by the Respondents, as to the propriety of the instant proceedings. This argument arose from *ex parte* Applicant's pleading that it was illegal and irrational for the 1st Respondent to find that it lacked jurisdiction to entertain the issue whether the 3rd Respondent had satisfied the mandatory criteria of "annual average turnover in the last three years at least two times the value of the items offered" on account of it being *res judicata*.

36. The *ex parte* Applicant in this respect cited the decisions in **Public Procurement Administrative Review Board; Finken Holding Limited & Another (Interested Parties) ex parte Desbro Engineering Limited, JR. Application No. 286 of 2018, Administrative Review Board ex parte Meru University of Science & Technology, M/s Aaki Consultants Architects and Urban Designers, JR. Misc Application Number 85 of 2018, and Republic vs Public Procurements Administrative Review Board & 2 Others ex parte Rongo University (2018) eKLR** on the meaning of illegality and irrationality

37. The 1st Respondent submitted in this regard that the instant proceedings are an appeal disguised as a judicial review application, and should not be entertained. The Respondent stated that the distinction between the two types of proceedings is that in judicial review the court is only concerned with the fairness of the process under which the impugned decision or action was reached. Further, that once a judicial review court gives a clean bill of health to the process, it must down its tools without considering the merits of the decision, for to do so would amount to usurping the power of the body that was mandated by the law giver to make the decision.

38. Therefore, that this being a judicial review case and not an appeal, this court is not empowered to venture into correcting the decision of the 1st Respondent on the merits. The decision on the Court of Appeal in **Municipal Council of Mombasa vs Republic & Another, (2002) eKLR** was cited for this position. Various other decisions were also cited on the nature of the judicial review jurisdiction, including decisions in **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) eKLR**; **Seventh Day Adventist Church (East Africa) Limited vs Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR**; and **Kenya Pipeline Company Limited vs Hyosung Ebara Company Limited & 2 Others (2012) eKLR**.

39. The 2nd Respondent on its part cited Article 47 of the Constitution, section 8 of the Law Reform Act, and section 7 of the Fair Administrative Actions Act 2015 as the law guiding judicial review proceedings. It submitted that the *ex-parte* Applicant has not identified any procedural improprieties in the conduct of the 1st Respondent and is dissatisfied with the 1st Respondent's decision on the application of the law in *res judicata*. While citing the decision in **Kenya Pipeline Company Limited vs Hyosung Ebara Company Limited & 2 others (supra)** on the scope of judicial review proceedings, the 2nd Respondent's reiterated that the proper forum for the *ex parte* Applicant to challenge the 1st Respondent in this manner would be through the appellate court, and that it had failed to satisfy the minimum threshold for the grant of judicial review orders.

40. Similar sentiments were voiced by the 3rd Respondent, who submitted that by the *ex-parte* Applicant making the contention that the 1st

Respondent applied wrong principles of law and interpretation in concluding that it was barred by the doctrine of *res judicata*, it is seeking for this Court to sit on appeal of the decision of the 1st Respondent, when this Court is only required to consider the lawfulness of the process by which the decision challenged was made. Further, that this Court is only required to consider the manner in which the decision was made as opposed to the merits of the decision made. Therefore, that to the extent that the *ex parte* Applicant seeks the Court to delve into the merits of the decision, its application is incompetent and ought not to be allowed. Reliance was placed by the 3rd Respondent on the decision in **Republic vs Public Procurement Administrative Review Board & 3 others ex-parte Saracen Media Limited [2018] e KLR** on the distinctions between appeal and review.

41. This Court is alive to the broad grounds for the exercise of judicial review jurisdiction that were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 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 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*).”

42. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that *Article 47* of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Actions Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, *even though* the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can in this respect only remit the matter to the administrator or make the orders stipulated in Section 11 of the Act.

43. The Court of Appeal in its decision held as follows:

Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223* on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

44. It is therefore apparent that firstly, the grounds for judicial review are both procedural and substantive. At the core of the procedural grounds is the requirement to act fairly, while the substantive grounds require the public body that is subject to review to act lawfully. Secondly, the substantive grounds for judicial review have been expanded to include merit review in limited circumstances. Consequently, there are now established grounds for judicial review that require Courts to review the substance of a decision, quite apart from the jurisdictional and procedural aspects of decision making.

45. It is therefore not the true position as argued by some of the Respondents that judicial review is only concerned with the procedural aspects of decision making, or that there can be no merit review of a decision that may be undertaken in judicial review proceedings. Likewise, it then follows that some grounds that allow for merit review can be raised both in judicial review as well as on appeal.

46. In this respect, the grounds that allow review of the substance of a decision are now explicitly provided for in section 7 of the Fair Administrative Action Act, and include the grounds of relevant and irrelevant considerations in a decision, the rationality and reasonableness of a decision, its proportionality, whether legitimate expectations have been violated by the decision, and whether the decision was made for proper or improper purposes. These grounds are questions of law on which there are settled applicable principles, and which of necessity also entail a merit review of the impugned decision in the context of the adduced evidence.

47. Acting lawfully in this respect therefore requires a body exercising a public function not only to act within the four corners of the law that empowers it, but to also in the process observe the above requirements when exercising its powers and duties. In addition, this Court is also guided by the expose on when errors of law will arise in decisions made by a public body, as expounded in Halsbury's Laws of England, 4th Edition at paragraph 77 as follows:

“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.”

48. Specifically, on the ground of illegality, which is the *ex parte* Applicant's main contention in his application, regard is made to the description of the ground by Lord Diplock in Council of Civil Service Union vs Minister for the Civil Service [1985] AC 374 at 410, as the failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law. In this respect in order to identify the scope of a statutory power or duty, it is necessary for the court to construe the empowering legislation by way of statutory interpretation, using established principles of statutory construction. One of the presumptions in this regard is that of the application of ancillary laws, which provides that Parliament does not legislate in a vacuum, but on the basis of existing law relating to both procedural and substantive rights.

49. This Court explained the said presumption as follows in Republic vs Attorney General; Law Society of Kenya (Interested Party) ex-parte: Francis Andrew Moriasi [2019] eKLR

“A key presumption that comes to play in construing and interpreting the Respondent's powers and functions in making the said guidelines, is that of the application of rules of constitutional law and ancillary rules of law. This is particularly so because the Respondent's role and functions as the principal legal adviser to the National Government is to ensure that the rule of law is maintained, and that Government actions are legally and constitutionally valid. Therefore, unless any contrary intention appears, the provisions on the functions and powers of the Respondent by implication import any principle or rule of the Constitution and of law which prevails and is relevant to the operation of the Respondent's powers. Put another way, the Respondent's powers cannot be construed as operating in a vacuum, but in tandem with the existing Constitutional and legal infrastructure. Therefore, a statute cannot change the existing law unless it has clearly indicated such an intention either expressly or by necessary implication”

50. Likewise, the 1st Respondent while exercising its statutory functions is bound by existing laws, and any misapplication of existing law will be a ground of illegality that will attract judicial review. The upshot of the foregoing is that the claims by the *ex parte* Applicant's that the finding by the 1st Respondent that its Second Request for Review was *res judicata* was erroneous and irrational are amenable to judicial review, and the *ex parte* Applicant's application is therefore properly before this Court.

51. This Court will therefore proceed to address the substantive issues arising for determination, which are as follows:

- a) Whether the 1st Respondent's decision made on 12th September 2019 that it lacked jurisdiction to entertain the issue whether the 3rd Respondent satisfied the criteria in the subject Tender Documents of “*annual average turnover in the last three years of at least two times the value of the items offered*”, on account of it being *res judicata*, was illegal.
- b) Whether the said decision made on 12th September 2019 was irrational and unreasonable.
- c) Whether the *ex parte* Applicant merits the relief sought.

On Whether the 1st Respondent's decision was illegal

52. On the first issue as to the legality of the Respondent's decision, The Applicant submitted that it was not legal for the 1st Respondent to find that it lacked jurisdiction to entertain the issues whether the 3rd Respondent satisfied the criteria of *average annual turnover in the last three years at least two times the value of the times offered*, as ordered by the very 1st Respondent in its decision on the First Request for Review of 26th July 2019. Moreover, that the requirement was mandatory and gives credence to a responsive bid as exemplified in Section 79(1) of the Public Procurement and Asset Disposal Act, which provided that a tender is responsive if it conforms to all the eligibility and other mandatory requirement in the tender.

53. Therefore, that the 3rd Respondent despite not passing the due diligence test of was awarded the tender in breach of Article 227 of the Constitution, and section 83 and 79 of the Public Procurement And Asset Disposal Act 2015. Reliance was also placed on the decisions in Republic vs Public Procurements Administrative Review Board & 2 Others Masinde Muliro University of Science & Technology (2016) eKLR, and JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs Public Procurements Administrative Review Board & 2 Others, (2015) eKLR for the position that errors of law apparent on the record rendering a decision devoid of legality, and on Republic vs Public Procurements Administrative Review Board & 2 Others, (2019) e KLR for the argument that failure to observe statutory requirements amounts to procedural impropriety.

54. The 1st Respondent reiterated that it acted as expressly authorized under section 98 of the Public Procurement and Disposal Act, 2015 in discharging its mandate, and had power to do so. Further, that it has not been demonstrated that the 1st Respondent is in breach of any statutory provision, or that they acted in excess or without jurisdiction, or breached rules of natural justice envisaged in a particular statute.

Thus, that the instant application does not meet the basic tenets of judicial review application and should be dismissed.

55. The 2nd Respondent on its part gave a detailed explanation of the basis and application of the doctrine of *res judicata*, and submitted that the 1st Respondent in its decision on the Second Request for Review correctly held that it lacked jurisdiction to determine issues that were raised or ought to have been raised in the First Request for Review. As a result the decision by the 1st Respondent was not only sound but the correct position in law under the doctrine of *res judicata*.

56. This argument was reiterated by the 3rd Respondent who submitted that when the *ex parte* Applicant filed its First Request for Review, it did not question the responsiveness of the 3rd Respondent's bids, and only contended that the products which the 3rd Respondent intended to supply were in violation of one Nutriset's patent. Further, that the question regarding compliance with tender requirements was only raised as against the 4th Respondent. In addition, that the source of the information which the *ex parte* Applicant wanted to use to challenge the responsiveness of the 3rd Respondent's bids was an internet source, which was available and could have been obtained by the time the First Request for Review was filed.

57. That the *ex parte* Applicant therefore failed to bring its whole case in the First Request for Review and as such, the doctrine of *res judicata* barred it from raising the issue at the Second Request for Review, and the 1st Respondent from delving into the matter. The 3rd Respondent cited the decision of the Court of Appeal in **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others (supra)** on the ambit of *res judicata*, and submitted that taking into account the parameters of the doctrine, the 1st Respondent was right in holding that the issue was *res judicata* and as such, it lacked the jurisdiction to deal with the matter. Further, that the doctrine of *res judicata* is a fundamental principle of law that relates to the jurisdiction of any court or tribunal, whose scope permeates broad aspects of the civil law and practice, including procurement practice. Therefore, that the 1st Respondent was under a Constitutional and statutory duty to apply the law, including the doctrine of *res judicata* as held by the Court of Appeal in **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others (supra)**.

58. The 3rd Respondent also submitted that the powers of the 1st Respondent are set out in sections 28 as read together with Section 173 of the Public Procurement and Disposal Act as read together with Part VI of the Public Procurement and Disposal Regulations, 2006. Further, that under those provisions, the 1st Respondent is empowered to hear, review and determine tendering disputes and to render the range of decisions set out in section 173 of the Public Procurement and Disposal Act, and that the *ex parte* Applicant has not established how the 1st Respondent acted *ultra vires* in this respect.

59. I have considered the arguments made by the parties on the issue at hand, and it is necessary at the outset to emphasise that the 1st Respondent's jurisdiction to hear and determine the *ex parte* Applicant's Second Request for Review under the Public Procurement and Disposal Act is not in issue, as it is not disputed that it had statutory powers to do so and render the decision of 12th September 2019. This was affirmed by the Court of Appeal in **Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others (supra)** when it made reference to the wide powers accorded to the 1st Respondent in this regard.

60. The issue at hand is whether the 1st Respondent, in exercising this jurisdiction, made an error of law or committed an illegality specifically in its decision that it had no jurisdiction to hear the complaint on the 3rd Respondent's bid on account of the doctrine of *res judicata*. In addition, this Court has already found that this is an issue that can be properly raised in judicial review proceedings.

61. The relevant findings by the 1st Respondent in this regard are on pages 33 to 35 of its decision dated 12th September 2019. The said findings were made after the 1st Respondent exhaustively discussed the doctrine of *res judicata* and its effects in the decision. The relevant findings were as follows:

“The cause of action whether the 1st Interested Party complied with the criterion on Average Annual Turnover in the last three (3) years at least two times the value of the items offered, is a cause of action which could have been raised in Review No. 70/2019, but was not raised at that time.

Just like the case herein, the Applicant raised the issue of Average Annual Turnover and relied on an internet source to argue its case, save that it did so with respect to the 2nd Interested Party, in Review No. 70/2019. The Applicant had the obligation to “bring its whole case” to this board in Review No. 70/2019 and was capable of challenging the 1st Interested Party's evidence of Average Annual Turnover, noting further that the Applicant is relying on an internet source, which he was capable of obtaining at the time it filed Review No. 70/2019 for the Board to consider the admissibility or lack thereof, of that evidence.

The Board is therefore not a stranger to the issue of “Average Annual Turnover in the last three (3) years at least two times the value of the items offered” as the same is still a criterion in the Tender Document which could have been raised by the Applicant in Review No. 70/2019 with respect to the 1st Interested Party, Notably, the 1st Interested Parties herein were also joined by the Applicant as parties to review No. 70/2019

We find, the plea of *res judicata*, is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. As rightly observed in Civil Appeal No. 40 of 2014:-

“... *Res judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in

the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence...

62. The 1st Respondent proceeded to hold as follows:

“The board is inclined to adopt the position of the court in Civil Appeal No. 40/2014 and will therefore resist the invitation to address an issue governing the same parties, litigating under the same title, in the same tender, with respect to an issue which ought to have been raised in Review No. 70/2019 (in reference to the 1st Interested Party) as was raised by the Applicant with respect to the 2nd Interested Party in Review No. 70/2019.

The Board finds that it lacks the jurisdiction to entertain the issue whether the 1st Interested Party satisfied the criteria of “Average Annual Turnover in the last three (3) years at least two times the valued of the items offered” as required in Clause (D) (3) of Section VIII. Stages of Tender and Evaluation criteria of the Tender Document, as it is barred by the plea of *res judicata*.”

The 1st Interested Party referred to in the said decision is the 3rd Respondent herein, while the reference to the 2nd Interested Party is with respect to the 4th Respondent.

63. As noted by the 1st Respondent in its decision of 12th September 2019, the doctrine of *res judicata* is founded on section 7 of the Civil Procedure Act which provides as follows:

“ No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

64. Therefore, for a matter to be *res judicata* the suit must raise issues that are directly and substantially similar to those in a former suit. As observed by the 1st Respondent in its decision, and held by the Court of Appeal in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 others** (*supra*), the purpose of the doctrine is to bring an end to litigation and ensure that litigants do not abuse the Court process by bringing suits which evoke issues that have already been determined by the Court in other suits.

65. When a plea of *res judicata* is raised, the doctrine of estoppel becomes applicable, as was also noted by the 1st Respondent in its decision. This effect is explained in **Halsbury’s Laws of England, Fourth Edition (2001 Reissue) Volume 16(2)** at paragraph 976:

“A prior judgment may give rise to cause of action estoppel or issue estoppel. In order to prove cause of action estoppel it is necessary to show that the subject matter in dispute is the same, namely that everything that is in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit; while in order to prove issue estoppel it is necessary to show that an issue which arose in the previous proceedings has been raised in the current proceedings.

The cause of action or the issue must have come in question before a court of competent jurisdiction; the result must have been conclusive (or final) so as to bind every other court; and the parties to the judicial decision or their privies must have been the same persons as the parties to the proceedings in which the estoppel is raised or their privies.”

66. In the present application, the 1st Respondent found that the cause of action in the Second Request for Review as regards the 3rd Respondent’s bid was the same or similar to the one in the First Request for Review. A cause of action is defined in **Black’s Law Dictionary, Ninth Edition** at page 251as “a group of operative facts giving rise to one or more bases of suing; a factual situation that entitles one to obtain a remedy in court from another person.” The operative facts giving rise to the First and Second Request for Reviews were two separate awards both made by the 2nd Respondent with respect to tender number GF ATM HIV NFM-18/19-O1T) 15 for Supply of Nutritional Supplements to the 3rd and 4th Respondents, which the Applicant claims were made illegally.

67. To this extent, one would not be faulted in concluding that the matters raised in the Second Request for Review would be *res judicata*, were it not for intervening facts that arose after the First Request for Review, which were of the 1st Respondent’s own making. The 1st Respondent in this respect in its decision of 26th July 2019 on the First Request for Review annulled the first award, and specifically directed on the manner the second award was to be made by the 2nd Respondent as follows:

“The Procuring Entity is hereby directed to conduct a re-evaluation of all bids received by it in Tender No. GF ATM HIV NFM-18/19-OIT-015 for supply of Nutritional Supplements (II) from the Preliminary Evaluation Stage in accordance with the Mandatory documents listed in Preliminary Examination of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document, including the following mandatory documents: -

a. Minimum number of 3 (three) supply contracts of items within the past 3 years, the tenderer should provide documentary evidence in support of the experience of previous supply (Contracts, Purchase Orders, Reference letters and Contact Details of previous supply contracts (Mandatory)

b. Copies of the tenderer's audited financial statements for the past three fiscal years (Mandatory)

c. Average annual turnover in the last three years at least two times the value of the items offered (Mandatory)

d. Statement of manufacturers manufacturing capacity (Mandatory) and to proceed with the procurement process to its logical conclusion, taking into consideration the Board's findings in this case, including the making of an award within fourteen (14) days from the date of this decision."

68. In the second Request for Review, the *ex parte* Applicant alleges that there was non-compliance by the 2nd Respondent with the 1st Respondent's directives to re-evaluate all bids in accordance with its stated criteria, as regards the 3rd Respondent's bid. Therefore, the new set of intervening facts created a new cause of action, which arose as a result of the 1st Respondent's own orders. In other words, even though the same set of circumstances may have existed in the First Request for Review as regards the 3rd Respondent's bid, the 1st Respondent's orders of 26th July 2019, which were final and binding, that the 3rd Respondent's bid among others be re-evaluated in line with specified criteria opened the gate for a new cause of action, in the event that there was non-compliance. It is also notable that the complaints raised by the *ex parte* Applicant's Request for Review was specifically on the non-compliance by the 2nd Respondent with the 1st Respondent's orders of 26th July 2019.

69. This Court therefore finds that in the circumstances of the Second Request for Review, the 1st Respondent did make an error of law in holding that the doctrine of *res-judicata* on account of cause of action estoppel applied to the complaints raised by the *ex parte Applicant* as regards the 3rd Respondent's bid. This is for the reasons that its orders of 26th July 2019 materially changed the context in which the parties were operating after the First Request for Review and created a new cause of action.

Whether the 1st Respondent's decision was irrational and unreasonable.

70. The *ex parte* Applicant also submitted on the issue of rationality and reasonableness of the 1st Respondent's decision of 12th September 2019. Specifically, that it was irrational for the 1st Respondent to find that it lacked jurisdiction to consider whether the 3rd Respondent's bids were responsive, when it had ordered for a re-evaluation of all the bids. Further, that if the 1st Respondent had acted reasonably, it would have arrived at a different decision as to whether the 3rd Respondent's bid in respect to the two tenders conformed to the mandatory requirements in the tender documents or not.

71. Reliance was placed on Section 7 (2) (k) of the Fair Administrative Action Act which provides that reasonableness is a ground for the review of an administrative action, as well as the decisions on reasonableness in **Republic vs Public Procurements Administrative Review Board & M/s Aaki Consultants Architects and Urban Designers ex parte Meru University of Science & Technology, Misc Application Number 85 of 2018** and **Republic vs Public Procurements Administrative Review Board; Leeds Equipments & Systems Limited (Interested Party); ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR**,

72. The 1st and 2nd Respondents did not address this issue in their submissions, while the 3rd Respondent submitted that the decision of the 1st Respondent was rational as it was in furtherance of the 1st Respondent's obligation to render decisions which are expeditious, efficient, lawful, reasonable and procedurally fair taking into account its mandate under Section 28 as read together with section 173 of the Public Procurement and Asset Disposal Act in resolving procurement disputes in an expeditious manner.

73. Further, that the decision of the 1st Respondent was justifiable and transparent, as the 1st Respondent gave clear reasons why it arrived at the decision. Therefore, that the decision falls within a range of possible and acceptable outcomes where similar facts and law are applied and was not unreasonable. The 3rd Respondent in this respect cited the decision in **Republic vs Kenya Bureau of Standards & 4 others; ex parte United Millers Limited; Department of Health Services, Nakuru County (Interested Party) [2019] eKLR**, for the position that rationality and reasonableness of a decision are different concepts.

74. It has long been established that the decision of a public body will be unlawful if it is irrational or unreasonable, in the sense that it is a decision which no public body acting unreasonably would have reached. The two terms "irrational" and "unreasonable" are used interchangeably in this regard, after they were each used in two decisions namely **Associated Provincial Picture Houses vs Wednesbury Corporation (1948) 1 KB 223** and **Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374** to illustrate an unreasonable decision. These terms were also explained in **Pastoli vs Kabale District Local Government Council & Others, (supra)**, and are interchangeably used to describe cases where the nature of the outcome of a decision is not acceptable for established reasons, or where there are flaws in the process of reasoning used to arrive at the decision.

75. This Court has in this respect found that it was illegal for the 1st Respondent to decline jurisdiction on an issue it had expressly ordered required to be done after the decision of 26th July 2019. To this extent, its two decisions of 26th July 2019 and 12th September 2019 were contradictory and not rational, and in particular the decision of 12th September 2019 expressly the negate the lawful and legitimate expectations and duty that the orders of 26th July 2019 would be obeyed.

76. In addition, it is also notable that the 1st Respondent its decision of 12th September 2019 made specific findings on compliance with the previous orders it gave in its decision of 26th July 2019 as follows:

"The Board finds, the Procuring Entity had no obligation to state in the notification letter dated 9th August 2019, whether or not it has complied with Order 4 of the decision rendered in Review No. 70/2019.

Having studied the Bid Evaluation Report signed on 8th August 2019, which contains the results of a re-evaluation process conducted by the Procuring Entity pursuant to the orders issued in Review 70/2019, the board makes the following findings:-

At page 4 of the Evaluation Report, it is expressly stated that the Evaluation committee re-convened on 7th and 8th August 2019, and as directed by the Board, re-evaluated all the bids received by it from the preliminary Evaluation stage.

The Board notes, the four mandatory documents captured in Clause (D) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document were re-evaluated at the Preliminary Evaluation stage and the results of the same noted at pages 6 to 9 of the report.

The Board makes an observation that from the report, ten bidders were found to be responsive and recommended to proceed to technical Evaluation. The results of Technical Evaluation are captured in pages 10 to 29 of the report, notably, the Applicant was found non-responsive at the end of Technical Evaluation, whereas, the 1st and 2nd Interested Parties proceeded to Financial Evaluation.

At pages 30 to 31 of the report, a re-evaluation at the Financial stage was conducted. At the end of this stage, the Evaluation Committee recommended award of Item 1, i.e. Ready to use Therapeutic Food (RUTF) of the subject tender to the 2nd Interested Party, whereas recommendation of award of Item 2. i.e Ready to use Supplemental Food (RUSF) of the subject tender was made to the 1st Interested Party.

At page 31 of the report, the Evaluation Committee noted as follows:-

“Post Qualification

Pursuant to final court orders under Application No. 70/2019 of 5th July 2019, the post qualification criteria was moved to preliminary examination”

The Board finds, the Procuring Entity complied with Order 4 of the decision rendered in Review No. 70/2019, in so far as conducting a re-evaluation from the Preliminary Evaluation Stage in accordance with the Mandatory documents listed in Clause (A). Preliminary Examination, including the mandatory documents listed in Clause (D) of Section VIII. Tender and Evaluation Criteria of the Tender Document is concerned, and proceeded to the next stages of evaluation, including recommendation of award of the subject tender.

Further to this, a Professional Opinion dated 8th August 2019 was issued by the Head of Procurement function expressing his vies of the procurement process and notification of the outcome of re-evaluation, pursuant to the orders of the Board was issued by the Accounting Officer, to all bidders in letters dated 9th August 2019.12.16.

77. It is inexplicable why the 1st Respondent would proceed to make a finding that the 2nd Respondent complied with its orders of re-evaluation of all bids, which was a new intervening fact, without addressing a specific complaint and pleadings raised by the *ex parte* Applicant in this regard on the responsiveness of the 3rd Respondent’s bid in light of criteria which the 1st Respondent itself had ordered. It is also notable that this action is well within the 1st Respondent’s jurisdiction and powers as held by the Court of Appeal in Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others (supra) as follows:

“...The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. It has power to engage an expert to assist in the proceedings in which it feels it lacks the necessary experience. The Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by the procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.

Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1st Respondent’s tender had met the mandatory conditions. The issue whether or not the 1st Respondent’s tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it.”

78. Furthermore, the 1st Respondent nevertheless proceeded to specifically address a complaint raised about the 4th Respondent’s bid, and whether it met the set criteria arising from the re-evaluation, and held as follows in this regard:

“Despite the foregoing findings, the Board will still make a determination whether the 2nd Interested Party satisfied the criteria under Clause (D) (a) of Section VIII. Stages of Tender and Evaluation Criteria of the Tender Document, during re-evaluation conducted to the orders of the Board in Review No. 70/2019 as the third issue framed for determination.”

79. After considering the complaint, the 1st Respondent made the following finding as regards the 4th Respondent’s bid at page 59 of its decision:

“Accordingly, the Board finds, the Procuring Entity in conducting a re-evaluation, failed to take into consideration the findings of the board in its decisions dated 26th July 2019 in Review 70/2019, that the 2nd Interested Party did not demonstrate that the evidence it provided in its bid, satisfied the mandatory requirement under Clause (D) (1) of Section VIII Stages of Tender and Evaluation Criteria of the Tender Document and thus the 2nd Interested Party could not qualify for an award, having failed to meet a mandatory requirement.”

80. It is notable that the 1st Respondent had in its orders of 26th July 2019 required all bids and not just that of the 4th Respondent to be re-evaluated in light of the mandatory criteria in Clause D(1) in Section VIII of the Tender Documents which detailed the Stages of Tender and Evaluation Criteria. Clause D (1) provided that those tenderers selected as having submitted the least responsive tender would then be subjected to post qualification evaluation on the basis of minimum number of 3 (three) supply contracts of items within the past 3 years, documentary evidence in support of the experience of previous supply. The complaint against the 3rd Respondent was that it did not meet the criteria of average annual turnover in the last three years at least two times the value of the items offered, which criteria was provided in Clause D (3) of the same section, and also in the orders of the 1st Respondent of 26th July 2019. A reasonable person can only reach the conclusion that the 1st Respondent was applying double standards in its decision with respect to the complaints made on the 3rd and 4th Respondent's bids.

81. Lastly, the 1st Respondent made the following observation and finding in its decision of 12th September 2019 at page 60:

“The Board makes an observation that the Procuring Entity has taken the view that “Post Qualification” was moved to Preliminary Evaluation in the orders rendered in Review No. 70/2019. During oral submissions, the Board asked the Procuring Entity’s Supply Chain Specialist, what stage of evaluation are mandatory documents considered and the institution that would issue Standard Tender Documents to guide procuring entities.

In response, the Procuring Entity’s Supply Chain Specialist, confirmed that the Public Procurement Regulatory, Authority, issues Standard Tender Documents for use by procuring entities (which would be amended to suit the requirements of a specific procuring entity), and that mandatory documents should be evaluated at the preliminary stage. It was also his position that mandatory requirements may be found at the Preliminary and Technical Evaluation stages.

The Procuring Entity’s Supply Chain Specialist further confirmed that Post-Qualification is conducted on the lowest evaluation bidder and is such bidder is disqualified, a similar post-qualification process is conducted on the next lowest evaluated bidder.

It is the Board’s view that, the procuring entity misinterpreted its findings in Review No. 70/2019. The Board specifically directed the Procuring Entity to re-evaluate documents that were marked as “mandatory”, but captured in a column for “Post-Qualification”.

82. Having observed that the 2nd Respondent misinterpreted and misapplied the directives in its orders of 26th July 2019, it is perplexing how the 1st Respondent could then have reached the decision that the said orders had been complied with in relation to the 3rd Respondent, and indeed that the 2nd Respondent’s re-evaluation exercise was in compliance with its orders. The 1st Respondent’s decision of 12th September 2019 is therefore found to be irrational and unreasonable for the reasons of the inherent contradictions and inconsistencies therein, as noted in the foregoing.

Whether the ex parte Applicant is entitled to the relief sought

83. The last issue is that of the remedies sought by the *ex parte* Applicant of certiorari, mandamus and prohibition. The Respondents opposed the grant of the said orders, and the 1st and 3rd Respondents specifically submitted on the orders sought of mandamus to compel the 2nd Respondent to produce the 3rd Respondent original entire tender bid with audited statements for the years 2016, 2017 and 2018 and to produce the second lowest responsive bidder original tender documents in Tender No. GF ATM HIV NFM-18/19-OIT-15 for supply of Nutritional Supplements (II) or item no.2.

84. The 1st Respondent’s submission was that the same should not issue as doing so this court will be usurping the powers of the 1st Respondent, and while citing the decision in **Republic vs Judicial Service Commission ex-parte Pareno [2004] KLR 203**, submitted that Courts should consider the public interest in declining the issuance of judicial review even where a party has made out a case of issuance of orders of judicial review. It was its opinion that the orders sought in the present application should be declined in the public interest, since that tender being challenged is on supply of supplements which will be helpful to the general citizenry of Kenya at large, especially those affected by HIV , thus the early the supply starts the better.

85. The 3rd Respondent on its part submitted that granting the orders of mandamus would violate the law on confidentiality and in particular Sections 67, 68(5) and 176(f) of the Public Procurement and Asset Disposal Act which provisions forbid disclosure of confidential information save as provided under Section 68(3) of the Public Procurement and Asset Disposal Act. Further, that the *ex parte* Applicant did not make a request to the 2nd Respondent for the record of procurement as contemplated under section 68(2) and (5) of the Act, and as such, the prayers sought are premature and in violation of the provisions of sections 9(2) and (3) of the of the Fair Administrative Actions Act which require exhausting internal mechanism provided in statute before approaching the Court for judicial review proceedings.

86. Lastly, that issuance of the orders of mandamus would amount to an exercise in futility and orders being issued in vain because once this matter is determined, the said documents sought by the *ex parte* Applicant will not be of any use or assistance to the *ex parte* Applicant in this matter as they cannot be used any further as the review process contemplated under the Public Procurement and Asset Disposal Act in respect of the tender in question will have been finalized.

87. The Court of Appeal in its decision in **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge, (1997) e KLR** held *inter alia* as follows as regards the judicial review orders sought by the *ex parte* Applicant:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

88. This Court has found that in arriving at the decision made on 12th September 2019, the 1st Respondent acted in error of the law, irrationally and unreasonably. The errors of law had the effect of rendering the final decision and orders of the 1st Respondent untenable. The *ex parte* Applicant is therefore entitled to the orders sought of *certiorari* to quash the impugned decision by the 1st Respondent.

89. The effect of the orders of *certiorari* once granted will be to restore the status to the position it was before the decision of 12th September 2019, and the determination of the *ex parte* Applicant's Second Request for Review will therefore still be outstanding. It is my view that for this reason, the orders sought of prohibition are also to this extent merited, as the acts leading to the contracts sought to be prohibited are still under inquiry, and arising from the need to maintain the *status quo* obtaining before 12th September 2019.

90. This Court is also granted the inherent powers by section 3A of the Civil Procedure Act to make such orders that are necessary in the interests of justice. Section 11 (1) of the Fair Administrative Action Act also provides as follows as regards the orders this Court can make in judicial review proceedings, which have now been greatly expanded. In this respect, this Court considers it necessary to give additional remedies in light of the fact that the *ex parte* Applicant's Second Request for Review remains undecided. Section 11 (1) (e) and (h) of the Fair Administrative Action Act in this respect permits this court to remit a matter back to the decision maker for reconsideration, and the 1st Respondent can therefore be compelled to determine the *ex parte* Applicant's Second Request for Review according to the applicable law.

91. The orders sought by the *ex parte* Applicant of *mandamus* will therefore in this regard be premature, as the same can be made before the 1st Respondent in its reconsideration of the *ex parte* Applicant's Second Request for Review, and there is no legal duty on the part of the 2nd Respondent to avail the bids sought by the *ex parte* Applicant at this stage.

92. The final aspect of the remedies sought that I would like to address is the plea by the 1st Respondent to decline the grant of orders even if merited, in the public interest. It is indeed the position that this Court has the discretion to refuse a remedy sought, even in cases where an applicant has been largely successful, as held in **Republic vs Judicial Service Commission ex-parte Pareno [2004] KLR 203**. The public interest as an overriding factor when determining whether or not to grant judicial review orders was explained by Majanja J. in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (2012) e KLR**, where the learned judge held that judicial review proceedings are public law proceedings for vindication of private rights.

93. The public interest in public procurement is captured by the principles set out in Article 227(1) of the Constitution, and which require a State organ or any other public entity contracting for goods or services, to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. It is my view that in light of the findings made herein on the illegality and irrationality of the 1st Respondent's decision of 12th September 2019, and the complaints raised as regards non-compliance by the 2nd Respondent of the 1st Respondent's order, the public interest would not be promoted by denying the orders merited by the *ex parte* Applicant.

94. On the contrary, denial of the orders would have a deleterious effect on good administration and governance, and on the public, who may be exposed to medical supplies that are not fit for purpose. It is thus my view that an expedited procurement process, which is undertaken in compliance with the applicable Constitutional values and legal framework, would serve the public interest better.

95. I accordingly find that the *ex parte* Applicant's Notice of Motion dated 1ST November 2019 is merited to the extent of the following

orders:

I. An order for Certiorari be and is hereby issued to remove into this Court for purposes of quashing, the decision of the 1st Respondent dated 12th September 2019 in PPARB Case Number 94 of 2019: Techno Relief Services Limited vs The Accounting Officer Kenya Medical Supplies Authority, Kenya Medical Supplies Authority, Nuflower Foods and Nutrition PVT Limited and Sai Pharmaceuticals Limited.

II. An order of prohibition be and is hereby issued prohibiting the 2nd Respondent and 3rd Respondent from implementing and/or performing the contract entered with respect to Tender No.GF ATM HIV NFM-18/19-O1T-)15 for Supply of Nutritional Supplements (II) for item No. 2 Ready to Use Supplement Food (RUSF) 500-520 KCAL/100g.

III. An order of prohibition be and is hereby issued prohibiting the 2nd Respondent and 3rd Respondent from implementing and/or performing the contract entered with respect to Tender No.GF ATM HIV NFM-18/19-O1T-)15 for Supply of Nutritional Supplements (II) for item No. 1 Ready to Use Therapeutic Food (RUTF) 500-520 KCAL/92g.

IV. The *ex parte* Applicants' Request for Review in PPARB Case Number 94 of 2019 be and is hereby remitted to the 1st Respondent for hearing and determination within three months of the date of this judgment, and in accordance with the provisions of the Constitution, the Public Procurement and Asset Disposal Act, the Fair Administrative Action Act and any other applicable laws, regulations, or legal principles.

V. Each party shall bear its own costs of the Notice of Motion dated 1st November 2019.

96. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF DECEMBER 2019

P. NYAMWEYA

JUDGE