



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 201 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF ARTICLE 10, 23 AND 47 OF THE CONSTITUTION 2010

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT 2015

IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

PEESAM LIMITED.....APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATION

REVIEW BOARD.....1ST RESPONDENT

AND

KENYA AIRPORTS AUTHORITY.....2ND RESPONDENT

AND

MUTURI MAINA T/A SAMJUSH

CONTRACTORS AND SUPPLIERS.....INTERESTED PARTY

JUDGMENT

1. The ex parte applicant herein **PEESAM LIMITED**, a limited liability company duly registered and incorporated in Kenya under the companies Act, together with the interested party **MUTURI MAINA T/A SAMJUSH CONTRACTORS AND SUPPLIERS** and 5 other bidders tendered for the 2nd respondent Kenya Ports Authority's Tender No. KAA/ES/MANDA/1082/EN for Environment Management Services (Grass cutting and vegetation, control, drainage and gardening at the 2nd respondent's Manda Airstrip.

2. The subject tender was advertised on various dates in November 2016. Upon receiving the bids, the 2nd respondent Procuring Entity Kenya Airports Authority carried out an evaluation of the tender upon which it found the applicant to be the successful bidder and on 9th

March 2017 it notified the award of the tender to the exparte applicant.

3. The exparte applicant did on 7th April 2017 which was within the 30 days; submit the performance bond to the Procuring Entity.
4. The exparte applicant claims that unknown to it, the interested party herein **MUTURI MAINA T/A SAMJUSH CONTRACTORS AND SUPPLIERS** had filed a request for review before the 1st respondent Review Board on 23rd March 2017 and the same was set for hearing on 6th April 2017.
5. It is alleged that the exparte applicant was never made a party to the request for Review and that neither was it notified of the hearing in good time to enable it appear and defend itself. Instead, the exparte applicant received the notification of hearing after the scheduled hearing date and that is when it discovered that the 1st respondent Review Board had proceeded with the hearing and on 13th April 2017 a decision was made setting aside the award of the tender made to the applicant by the Procuring Entity.
6. Aggrieved by the decision of the Review Board, the exparte applicant filed these proceedings and upon being granted leave to institute these proceedings, filed a notice of motion dated 8th May 2017 seeking the following Judicial Review orders:
 - 1) ***Certiorari to the 1st respondent, by itself, its servants and or agents or any other officer acting under its authority to bring to the court for the purpose of being quashed the decision by it in or about 13th April 2017 to annul and set aside a decision by the 2nd respondent (Procuring Entity) to award tender No. KAA/ES/MANDA/1082/ENV to the applicant;***
 - 2) ***Mandamus directed to the 2nd respondent (Procuring Entity) to finalize and sign the contract documents for tender No. KAA/ES/MANDA/1082/ENV between it and the applicant;***
 - 3) ***Costs of the application.***
7. The grounds upon which the application is predicated are on the face of the notice of motion as supported by the statutory statement and verifying affidavit sworn by Samuel Mburu Ng'ang'a in support of the chamber summons for leave dated 2nd May 2017.
8. The exparte applicant claims that it was condemned unheard as it was never made a party to the request for review by the interested party and that neither was it accorded an opportunity to participate in those proceedings to challenge the request for review which proceedings annulled a tender awarded in favour of the applicant, and that is the gist of these Judicial Review proceedings as summarized above and contained in the grounds and verifying affidavit, asserting that the exparte applicant had already paid performance bond of kshs 62,000 after applying for a loan of kshs 400,000 and purchased uniforms worth 104,400 in preparation for performance of the tender.
9. It is alleged that the exparte applicant was notified of the proceedings before the 1st respondent after it has already submitted the performance guarantee bond.
10. The exparte applicant complains that no telephone or email was sent to it yet the respondents had the applicant's telephone and other contacts as shown on the envelope posting a letter to it hence its conclusion that there was a scheme not to involve it in the request for review proceedings yet it was directly affected by the outcome of the review, which in effect re-awarded the tender to the Interested Party herein vide Review No. 31/2017 of 23rd March 2017 before the Review Board.
11. The application was opposed by the Interested Party who filed an affidavit sworn by Muturi Maina on 30th June 2017 contending that the Review Board made its decision on 13th April 2017 and that although the Judicial Review proceedings herein were filed in time as stipulated in Section 175(1) of the Public Procurement and Asset Disposal Act 2015, these proceedings have not been heard and disposed of within 45 days from the date of filing on 27th April 2017 which expired on 13th June 2017 hence by operation of law, the decision made by the 1st respondent on 13th April 2017 regarding the subject matter herein is final and binding on all parties including the applicant.
12. Further, it was contended that the applicant admits receiving the letter from the Review Board on 7th April 2017 while the hearing took place on 6th April 2017 and the ruling delivered on 13th April 2017 yet the applicant never attempted to set aside such proceedings prior to the delivery of the ruling by the 1st respondent and that therefore the applicant was not vigilant.
13. It was further contended that even after delivery of the impugned ruling on 13th April 2017, the applicant has not demonstrated that it acted vigilantly and that it waited until the last date to file the Judicial Review application and even failed to alert the court of the mandatory provisions of the Act that the application had to be heard and determined before 12th June 2017.
14. It was contended that the applicant was served with the letter on 3rd April 2017 and not 12th April 2017 as alleged and that had it exercised diligence it would have moved the Review Board before delivery of judgment on 13th April 2017. It was contended that the prayers sought more particularly mandamus is misplaced.
15. Further, that the applicant had failed to adhere to the established procedure which is prescribed by law. It was contended that the judicial review remedies are discretionary in nature hence they are not issued automatically and that therefore the applicant should not expect to be declared the winner of the tender when it was not the lowest evaluated bidder and that if it was to be awarded the tender, public money will be spent without due regard to the principles enshrined in the Constitution. The interested party urged the court to dismiss the exparte

applicant's notice of motion.

16. The interested party also filed an application dated 30th June 2017 seeking to have the ex parte applicant's application dated 2nd May 2017 struck out with costs on the grounds inter alia, that the same had not been heard and determined within 45 days as stipulated under Section 175(4) the Public Procurement and Asset Disposal Act. It was also claimed that the applicant had failed to adhere to the procedure provided under the Public Procurement and Asset Disposal Act; That the applicant was not the lowest bidder hence it would be a waste of public funds to award it the subject tender; that the applicant should have acted promptly, having received the letter on 7th April 2017; and that Judicial Review remedies are discretionary and not automatic and so, having regard to constitutional principles of accountability and credibility in matters of public finance, it is in the interest of justice and fairness that the application be struck out.

17. The 1st respondent Review Board opposed the ex parte applicant's notice of motion and filed a replying affidavit on 2nd October 2017 sworn by **Stanley C. Miheso** on 7th April 2017 contending that when the 1st respondent received a request for review from the Interested Party on 23rd March 2017 the 1st respondent served the applicant with a copy notifying it of the review and requiring it to appear for hearing in accordance with Regulation 74(1) and 74(2) of the 2006 Regulations.

18. That on 6th April 2017 the 1st respondent Review Board heard the request for review and delivered its ruling on 13th April 2017 taking into account facts presented before it including the litigation history which would have knocked out the applicant at the preliminary stage.

19. Secondly, that Clauses 2.24.1 and 2:24.3 of the tender documents are vague and so, no due diligence could be done on a matter like litigation.

20. That the debarment based on a yet to be determined arbitration is contrary to Section 41 of the Act and that in any case the Procuring Entity had no jurisdiction to debar a tenderer.

21. That the Procuring Entity's refusal to award the tender to the lowest evaluated bidder offends the spirit of Section 3 of the Act and Article 227 of the Constitution as it does not maximize value of money.

22. That the Review Board made a decision within its mandate after considering all the issues. That there is no demonstration that the Review Board was unreasonable in arriving at its decision or that it was irrational or that it is guilty of any illegality, impropriety of procedure and irrationality on its part.

23. The Review Board maintained that it complied with Section 173 of the Act in arriving at its decision hence the motion by the applicant is made in bad faith and has no merits, only meant to discredit the credibility of the respondent's mandate and function while ultimately eroding the public confidence in the procurement procedures and processes. The court was urged to dismiss the application.

24. The 2nd respondent Procuring Entity Kenya Airports Authority also opposed the ex parte applicant's application and filed a replying affidavit sworn on 17th October 2017 by **Margaret Muraya**, the Acting General Manager, Procurement and Logistics of the Authority contending that the application by the ex parte applicant is fundamentally flawed, ill-conceived as it fails to successfully demonstrate the threshold required for granting of the prerogative reliefs sought.

25. Further that the applicant does not contest the Judicial Review process leading to the decision of the 13th April 2017 by the 1st respondent.

26. That Section 168 of the Act only mandates the Review Board to notify the Procuring Entity of the receipt of the request for review.

27. That the performance bond was received by the 2nd respondent but no contract has been signed hence the 2nd respondent cannot be held liable for the alleged losses. That the jurisdiction of this court on process and not merits of the decision has not been invoked by the applicant and that the Authority followed the required procedure while the Review Board exercised its powers conferred upon it by Section 173 of the Act, heard the respective parties and proceeded to annul the Authority's decision.

28. That the applicant has not demonstrated any irregularity, illegality or procedural impropriety on the part of the respondents nor breach of the principles of natural justice since it received the notification of the existence of the request for review and the reasoning behind the decision of the 1st respondent.

29. It was contended that the application is only intended to delay the procurement process and causing it to incur expenses which are uncalled for hence the Procuring Entity should be allowed to execute a proper contract as per the Act.

30. The 2nd respondent Procuring Entity urged the court to strike out the motion by the applicant with costs.

SUBMISSIONS

31. The parties agreed and filed written submissions.

32. The ex parte applicant filed its submissions on 25th July 2017 giving the history of the matter and relying on its grounds, statutory statement and verifying affidavit and annexures, and framed three issues for determination namely:

a) *Whether the failure to list the applicant as a party in the review proceedings and not affording it an opportunity to be heard violates the right to a fair hearing and a fair administrative action;*

b) *If the review decision resulting from proceedings in (a) above is a nullity and the consequences thereof.*

c) *Who should bear the costs of this suit?*

33. However, the applicant's counsel first dealt with the preliminary issue of whether the failure by the court to hear and decide the application within 45 days as required under Section 175 of the Act makes the application a nullity.

34. The applicant's counsel submitted that the 45 days stipulated are not available to court because of time constraints to the Judiciary and that the right to fair trial under Article 50 of the Constitution could not be limited. Reliance was placed on **JR 502 and 503/2016 Republic vs Public Procurement Administrative Review Board exparte Kleen Homes Security Services [2017] e KLR.**

35. On the contextual analysis, it was submitted that Section 170 of the Public Procurement and Asset Disposal Act, 2015 mandates that the parties to a review shall be (material to these proceedings).

(a).....

(b).....

(c) ***The tenderer notified as successful by the Procuring Entity.[emphasis added].***

36. Accordingly, it was submitted that the applicant was deliberately denied an opportunity to be heard, which denial offends Article 47 of the Constitution on the right to Fair hearing and natural justice as stipulated in the Fair Administrative Action Act, 2015.

37. It was also submitted that fair hearing, according to Article 50 of the Constitution constitutes being present and adducing and challenging evidence. Reliance was placed on **Martin Wambora vs Speaker of the National Assembly [2014] e KLR.**

38. It was submitted that none of the rights under the principle of natural justice were extended to the applicant when the review proceedings were commenced and concluded. Further reliance was placed on **Judicial Service Commission (JSC) v Mbalu Mutava & Another [2015] e KLR** on the right to be heard; to be issued with notice; to be heard by an unbiased tribunal and to be heard in answer to those charges; the legal authority under which the hearing is to be held and statements of specific charges which the person had to meet; the right to know evidence against him and the right to counsel.

39. It was therefore submitted that the applicant having been the successful bidder as per the notification of award, it should have been included/enjoined to the request for review and that it had acted expeditiously in filing this application after receipt of the ruling by the Review Board, through its own efforts and that the applicant was qualified and that it had prepared itself to perform the tender.

40. The applicant urged the court to grant it orders of certiorari and mandamus asserting that it was also entitled to mandamus because it had been awarded the tender and was ready to perform it. Reliance was placed on **Republic vs Cabinet Secretary Ministry of Interior and Coordination of National Government & 2 Others Exparte Patricia Olga Howson [2013] e KLR** on the nature and extent of mandamus. Counsel urged the court to quash the decision of 13th April 2017 as it is a nullity for want of adherence to procedural and substantive justice.

41. In the **Interested Party's Submissions** dated 30th June 2017 and **supplementary submissions** filed on 14th September 2017, it was contended that the applicant claims that it was not served with notice to appear yet claims that it received notice late which is contradictory and an attempt to tilt the scales. Counsel for the interested party maintained that jurisdiction of this court is ousted by the failure to hear and determine the application in 45 days from date of filing. Reliance was placed on the **Owners of Motor Vessel "Lilian S" vs Caltex (K) Oil Ltd [1989] KLR 1 CA and Supreme Court Petition No. 10/2013- Ali Hassan Joho & Another vs Suleiman Said Shabhal & 2 Others[2014] e KLR** on the consequences of hearing a matter where there is no jurisdiction on the part of the court **and on the timely settlement of electoral disputes under Article 87(1) of the Constitution**, where the Supreme Court in the Ali HASSAN Joho case(supra) affirmed that constitutional timelines and any statute are not negotiable.

42. It was submitted that even in this matter, the applicant failed to file submissions in good time as a result, the interested party filed his submissions before the applicant because the interested party was conscious of time.

43. Reliance was also placed on **Cook 'N'Lile Ltd vs Silvester Mutia Jonathan [2015] e KLR** where Kasango J cited **Martha vs Said & Another CA 292/1998** on the timelines set in the Court of Appeal Rules for filing an appeal to the Court of Appeal from the High Court which must be adhered to.

44. It was submitted that the stipulated time for deciding this case having lapsed, the decision of the 1st respondent Review Board is final and binding on all parties.

45. Further, that the applicant was not vigilant in bringing these proceedings but indolent as it never filed an application to set aside the hearing/decision of the Review Board since they received a letter of notification of the hearing of the request for review.

46. It was submitted that the letter of notification of hearing was served in time. Reliance was placed on **William Cheruiyot Kandie v**

Republic Nakuru Criminal Appeal 21/96 for the proposition that whoever alleges must produce evidence if not they prejudice their case.

47. Further reliance was placed on **Linus Nganga Kiongo & 3 Others vs Town Council of Kikuyu [2012] e KLR and Trust Bank Ltd Vs Paramount Universal Bank Ltd & 2 Others HCC 1243/2001 Nairobi** and a submission made that this case had not been proved and that the applicant had not come to court with clean hands hence its claim should be dismissed with costs.

48. The **1st respondent's submissions** were filed on 2nd October 2017 reiterating the averments in their affidavit sworn by **Mr Miheso Stanley** in material particulars hence it is not worth reproducing the affidavit in the submissions as I have reproduced the contents of the affidavit above, save that the cases of **Republic vs Business Rent Tribunal & 3 Others exparte Christine Wangare Gachege[2014] e KLR; Republic vs Kenya Power and Lighting Company & Another [2013]** on the threshold for granting Judicial Review orders and the discretionary nature of Judicial Review remedies was emphasized. The **1st respondent** maintained that the applicant had not demonstrated that it is entitled to the Judicial Review orders sought hence the application should be dismissed.

49. The **2nd respondent** filed its submissions on 17th October 2017 relying wholly on its replying affidavit and framing the issues for determination namely:

1. Whether the applicant's application satisfies the threshold for grant of Judicial Review orders.

50. Reliance was placed on the often cited cases of **Pastoli vs Kabale District Local Government Council & Others [2005] 2 EA 300 cited in JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Company Ltd vs Public Procurement Administrative Review Board and 2 Others [2015] e KLR** where the courts held that Judicial Review is not granted as a matter of course but that the applicant must demonstrate that the decision complained of is tainted with illegality, irrationality and procedural impropriety or that the decision was made outside the Review Board's jurisdiction.

51. It was submitted that Judicial Review seeks to prevent statutory bodies from abusing their powers in execution of their statutory duties or acting outside their jurisdiction and cannot therefore be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their mandates.

52. It was submitted that albeit the 2nd respondent Procuring Entity had initially awarded the tender to the applicant, this position was overturned by the **1st respondent Review Board** on account that the applicant **was not the lowest bidder and on account that the 2nd respondent erred in failing to award the tender to the interested party on the basis that there was pending litigation between the 2nd respondent and the applicant.**

53. It was submitted that upon delivery of Ruling and noting the rationale for arriving at the decision, the **2nd respondent** had to comply with the decision of the Review Board within the stipulated timelines.

54. It was submitted that there is no demonstration on the part of the applicant as to how the respondents acted in an unfair manner hence the applicant does not deserve the orders sought.

55. The second issue raised by the 2nd respondent is whether there was a breach of the applicant's right to fair hearing.

56. In answer thereof, the **2nd respondent** submitted that albeit the applicant complained that Section 170 of the Public Procurement and Asset Disposal Act, 2015 provides for parties to a review, but that Section 168 of the same Act provides that upon receiving a request for review under Section 167, the Secretary to the Review Board shall notify the accounting officer of the Procuring Entity of the pending review from the Review Board and the suspension of the procurement proceedings in such a manner as may be prescribed.

57. It was submitted that the **1st respondent** complied with the above provision of Section 168 of Act by sending notification to the parties to the request for review including the exparte applicant herein hence the applicant cannot purport to claim that it was not notified as the notification was sent to its address as indicated in the bid documents and that as such the applicant cannot claim to have been denied the right to a fair hearing owing to alleged lack of notification. Further, that neither were the rules of natural justice breached.

58. **On the third issue of whether the 2nd respondent breached the applicant's legitimate expectation,** the **2nd respondent** submitted that the performance bond as submitted did not amount to any implementation of the same by the **2nd respondent**, since the interested party filed a request for review which automatically discontinued the procurement process and as no contract has been executed between the applicant and the respondent.

59. It was also submitted that the **2nd respondent** is not responsible for the loss suffered by the exparte applicant as it is not privy to the agreements entered into between the applicant and financial institutions of its choice for funding or performance of the tender **and that since the tender was contingent upon the execution of a contract which is not done,** then notification of an award cannot form a contract. Reliance was placed on Section 78(4) of the PPAD Act.

60. Reliance was also placed on **Republic vs Permanent Secretary of Mining Exparte Airbus Helicopters Southern Africa (PTY) Ltd [2017] e KLR** where the court held that there was no legitimate expectation where the public authority had not committed itself to do anything for the applicant.

61. The **2nd respondent** contends that it should be allowed to proceed and execute a contract with the successful bidder. This court was

urged to dismiss this case with costs to the 2nd respondent.

62. The parties' advocates also highlighted the submissions adopting their written submissions wholly. The exparte applicant's counsel Mr Malenya submitted in a rejoinder that Articles 47,48 and 50 of the Constitution had not been alluded to by the respondents and the interested party. Further that Section 175(1) of the Act does not override Articles 47,48 and 50 of the Constitution.

63. On the mode of communicating to the exparte applicant that a review had been filed by the interested party, it was submitted that the respondent had 2 telephone contacts for the applicant since they had previously had dealings of similar nature yet chose not to call the applicants and yet the two had done business together and that the interested party is known to the applicant.

64. On delay, it was submitted that the notification reached the applicants on 7th April 2017 which was a Friday hence the applicant had only 3 days away to the delivery of the decision by the 1st respondent Review Board, within which time the applicant could not have done anything about it.

65. On the authority of **JGN Marine Services**, it was submitted that at page 20 thereof, it is clear that the court can interfere with the decision if the tribunal commits procedural impropriety in its decision. It was also submitted that mandamus can also issue because the notification of award of tender at paragraph 2 states that the contract shall be signed upon submission of the performance guarantee in 14 days and that the notification says "shall" not may' which former is a mandatory terminology.

DETERMINATION

66. I have carefully considered all the foregoing and in my humble view, the issues that flow for determination are:

a. Whether these proceedings are tenable for being determined outside the 45 days stipulated in Section 175(3) of the Public Procurement and Asset Disposal Act.

b. Whether the applicant was indolent in approaching this court.

c. Whether the applicant had an alternative remedy of seeking for setting aside or review of the ruling or decision of the Review Board before the Review Board instead of rushing to court for Judicial Review.

d. Whether the exparte applicant was accorded any hearing by the 1st respondent Review Board and therefore whether its right to fair administrative action was violated.

e. Whether the applicant is entitled to the prayers sought.

f. What orders should this court make.

g. Who should bear the costs of these proceedings.

67. On the first issue of whether these proceedings are tenable and therefore whether this court has any jurisdiction to hear and determine this matter, as the determination was not made within 45 days from the date of the filing into court, in view of Section 175(1) of the Public Procurement and Asset Disposal Act, which stipulates that the High Court shall hear and determine the Judicial Review application within 45 days from the date of filing in default, the decision of the Review Board shall be final and binding, it was contended more particularly by the interested party herein that the above provision are mandatory and therefore these proceedings are merely an academic exercise.

68. In response, the applicant averred that Section 175(3) of the Act is not superior to the Constitutional provisions of Articles 47 on fair administrative action; Article 48 on access to justice and Article 50(1) on the right to a fair hearing. Further, that this court had already pronounced itself on the issue of timelines given to the court by the very statute as not being tenable in the circumstances under which the court generally operates.

69. It is true that the above issue of the mandatoriness of Section 175 (3) of the Public Procurement and Asset Disposal Act on timelines for hearing and determining Judicial Review application within 45 days from the date of filing of the application; and Section 8 of the Fair Administrative Action Act, 2015 on the timelines for determining proceedings under the Act have been subject of several Divisions including **JR 502 and 503 of 2016 Republic vs Public Procurement Administrative Review Board & Another exparte Kleen Homes Security Services Ltd**, citing and relying heavily on the **Selesti Sistem Integrati** case where the court held that courts frown upon provisions like Section 175(3) and (5) of the Act in order to preserve the jurisdiction of the court and that the provisions of the Public Procurement and Asset Disposal Act are not to be compared to the Elections Act which is grounded on Article 87(1) of the Constitution on timely disposal of electoral disputes which provisions of the Constitution are hinged on democratic governance and as such, the timelines are contemplated in the Constitution on account of the nature of electoral disputes and historical perspectives.

70. Historically, Election Petitions used to drag on and on from the time of filing until the next general election/electoral cycle of 5 years and therefore the makers of the Constitution and the Elections Act had to craft an Article and statute stipulating timelines of a maximum of 6 months within which the election disputes (other than Presidential Election Dispute which is to be determined within 14 days from date of filing) are to be determined. Elections are a cycle. They come once every 5 years. Public procurement and claims of infringement of the constitutional right to fair administrative action are the order of the day in this new devolved governance structure and the first time expansive Bill of Rights under Chapter five of the Constitution.

71. This Court, in the **Kleen Homes Security Services Ltd** case (supra) did not hesitate to declare that Section 175(3) of the Public Procurement and Asset Disposal Act, 2015 unconstitutional.

72. In so doing, this court emphasized the importance of Judicial Review as stated in the **Selex Sistemi integrati** case by Nyamu J that:

“Judicial Review plays an important role in our society which is to check excesses, omnipotence, arbitrariness, abuse of power and also accountability and maintainance of constitutionalism and the rule of law. As Chief Justice marshall powerfully argued in Marbury vs Madison 5 vs 137[1803], Judicial Review provides the best means of enforcing the people’s will as declared in the written Constitution, without resort to the drastic remedy of revolution. He warned that, without Judicial Review, the legislative branch would enjoy a practical and real omnipotence and would reduce to nothing what is deemed the greatest-improvement on political institution of a written Constitution.

The concerns raised in Marbury vs Madison are still applicable in our jurisdiction. It should be observed that Judicial Review is the cornerstone of the doctrine of the doctrine of separation of powers and the principle of the rule of law. On the clear provisions of the law, the High Court is the principal interpreter and guardian of the Constitution.

Section 65(2) of the Constitution provides:

.....The High Court has powers of Judicial Review arising from an Act and the 1938 English Act, and Order 53 of the Civil Procedure Rules. This jurisdiction is distinguishable from the Constitutional Judicial Review. The matter before the court fell squarely under ordinary Judicial Review, which is a tool used by the High Court to ensure that public institutions exercise power in accordance with the law.

It is still within the jurisdiction of the High Court to review legislation in order to establish whether it complies with the Constitution.

Judicial Review also enables the High Court to review acts, decisions, and omissions of public authorities in order to establish whether they have exceeded or abused their power.

The essence of Judicial Review was posited by Sir Professor Wade as follows:

“The powers of public Authorities are essentially different from those of public persons. A man making his will may, subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or spirit of revenge but in law, this does not affect his exercise of power. In the same way a private person has absolute power to allow whom he likes to use his laid (sic) regardless of his motives. This is unfettered discretion.

But a public body may do more of those things unless sit acts reasonably and in good faith and upon lawful and relevant grounds of public interest.

The whole conception of unfettered discretion, is inappropriate to public authority which possesses power solely in order that it may use then for public good.

Michael Fordham in Judicial Review Hand book [1994] argues that Judicial Review allows the High Court to supervise the activities of public bodies. It brings to the Judicial forum a wide range of subject matter and enjoys an increasing prominence in the English legal system. The foregoing is true to the Kenyan scenario.”

An on the question of whether or not Section 100(4) now Section 175(3) of the Public Procurement and Asset Disposal Act, 2005 ousted the jurisdiction of the court, the Learned Nyamu J (as he then was) stated and I concur that;

“ouster of jurisdiction: The High Court’s jurisdiction in Judicial Review matters inheres from the Law Reform Act and also Articles 23, 165 (6) of the Constitution. The Constitution is the Supreme Law of the land and the will of the people of Kenya. See Article 2(1) of the Constitution. It is superior to all laws and any law that is inconsistent with it is void to the extent of the inconsistency.(4) the legality of the Constitution cannot be challenged before any court or state organ (3) Section 100(4) of the Public Procurement and Asset Disposal Act, 2015 submits decisions of the Review Board to Judicial Review by the High Court but imposes a true bar of 30 days within which the High Court must determine the Judicial Review otherwise the decision of the Review Board takes effect.....”

73. In this court’s own decision in the **Kleen Homes Security Systems Ltd** case, the court stated:

“ Indeed, courts of law recognize that jurisdiction may be restricted by the Constitution (see Article 165(5) (b) of the Constitution as well as other statutory enactments but they also guard their jurisdiction jealously so as to do justice, for a court of law exists to do justice to the parties (see Article 159 of the Constitution).

It is also the same Constitution which commands the court in their exercise of judicial authority to ensure that justice is not delayed (Article 159(2)(b). Therefore, when the court is faced with such a situation, it must deploy balancing techniques (sic) between what appears to be the ouster clause and the challenged decision so as to ensure that access to justice is not impeded. It must apply the principle of proportionality, for a court of law does not exist to do an injustice.”

74. The court also acknowledged that however, where the statute is framed in a manner that expressly ousts the jurisdiction of the court, such provisions should be construed strictly and narrowly as was held in **Smith vs East ELLOE Rural District Council [1965] AC 736** by Lord Viscount Simmonds that :

“....Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal.”

75. In the **Anisminic vs Foreign Compensation [1969] 1ALL ER 208** case, Lord Reid added his voice to the conversation on ouster of courts jurisdiction and stated that:

“where the provision tending to oust the court’s jurisdiction is capable of two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.”

76. In my humble view, the intention of Section 175(3) of the Act, having regard to the present constitutional order and dispensation, was never intended to deny the court an opportunity or to afford it sufficient time to investigate any challenge to alleged breach of the right to fair administrative action so as to ensure that the public procurement processes are undertaken in a transparent, accountable and fair manner.

77. Article 227 of the Constitution does not stipulate to the fact of time limit within which Judicial Review in public procurement matters should be heard and determined unlike Article 87(1) of the Constitution on resolution of electoral disputes.

78. The Article 227(1) guarantees a system that is fair, equitable, transparent, competitive and cost effective. It therefore follows that in order to accord justice to all as guaranteed in Article 48 of the Constitution and a fair hearing as stipulated in Article 50(1) of the Constitution, such cases, owing to their very nature should be given priority and heard and determined within reasonable period of time in view of the funds that may be tied up in the procurement process.

79. However, expedition alone in determining cases cannot override justice and if that were to be the case, then what matters is expedition, and therefore illegalities and injustice, will be countenanced by the court merely because an offending party is overzealous to complete the development project which might go counter the objectives of the Act in achieving and promoting integrity, fairness, transparency and accountability in the public procurement and asset disposal procedures.

80. Deserving litigants will also suffer injustice owing to the limitations placed on the court to restrict its judicial discretion which limitation is also a tool by the legislature to chain the judicial arm of government thereby arresting operational judicial independence in the determination of disputes.

81. In addition, there is a conflict between Section 175(3) of the Act, and Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules with the latter provision making no stipulations on time limits for determination of Judicial Review proceedings challenging public administrative decisions; and Section 8 of the Fair Administrative Action Act 2015 which determines the time limit to 90 days. A decision made by Public procurement Administrative Review Board is an administrative decision challengeable by Judicial Review under the Fair Administrative Action Act.

82. And since under the Law Reform Act and order 53 of the Civil Procedure Rules leave must first be obtained to commence Judicial Review proceedings, the ambiguity in Section 175(3) (5) is, when does time begin to run?

83. This question is posed because the Statutes and Rules are silent, whereas under the Fair Administrative Action Act, 2015, there is no requirement for leave to institute Judicial Review proceedings.

84. For all the above reasons, I have no reason to depart from the **Kleen Homes**(supra) case and **Selex Sistemi Integrati** case and distinguish the decisions in **Supreme Court Petition 10/2013 Ali H. Joho & Another vs Suleiman Said Shabhal & 2 Others [2014] e KLR** which mater was an election petition concerning the constitutional dictates for timely settling of electoral disputes.

85. In addition the case of **Cook “N” Lite Ltd vs Silvester Mutia Jonathan (supra) citing Maitha vs Said & Another CA 292/98** concerned the time limited for exercising the right of appeal by a party and not limiting the court to determine a matter within a stipulated period like in this case.

86. Accordingly, I find and hold that the proceedings herein are tenable and no time lapse can invalidate them. Moreso, I had deliberated on this matter on 19th September 2017 and made a decision which was not challenged hence the subsequent raising of the same is not justified in the circumstances and therefore it is Resjudicata.

87. *On the second issue of whether the applicant was indolent*, the interested party claims that the applicant rushed to this court after inordinate delay and that the court declined to accord it stay on the grounds that the applicant dragged its feet.

88. Further, that the applicant admitted receiving letter of notification of the review hearing, by the 1st respondent Review Board a day after the hearing which is unproven but that it never did anything to arrest the delivery of the ruling hence it cannot cry foul and claim that it was not accorded a hearing yet it failed to act promptly to secure the same.

89. I have considered the argument in line with the proceedings for 28th April 2017 wherein the court noted that although the application

for leave had been filed within 14 days from the date of the decision made on 13th April 2017, the applicant had pulled its feet until the last day before challenging the Review Board's decisions and so I declined to grant stay.

90. In my humble view, the delay alluded to by the court is the period between the date that the decision was taken to the time of filing the application for leave and stay, not that the application was filed out of time.

91. In addition, the court, did not say that the application was filed too late. It stated that albeit the application was filed within 14 days stipulated in the Act, there was no justification given for delay in filing it earlier than the last day when they sought a stay which STAY the court declined but in the ensuing proceedings, the court was persuaded to grant the stay which is still in force.

92. I therefore find and hold that the application which was filed within time cannot be faulted at the substantive stage for being filed out of time or too late as to attract penal consequences from the court.

93. *The next and third issue is whether the applicant had an alternative remedy of seeking for setting aside or review of the ruling or decision of the Review Board instead of rushing to court for Judicial Review.*

94. According to the interested party, the applicant upon learning that the request for review had proceeded exparte and that it had not been made a party to the proceedings thereof, it should have applied for setting aside of the ruling or to stay the delivery of that ruling instead of waiting until after the decision WAS RENDERED for it to challenge the decision in court.

95. The question therefore is whether the Review Board had powers to stay its decisions or to entertain an application to set aside the decision which was made exparte without according the applicant a hearing as it was not a party to the Request for Review.

96. It should be noted that a tribunal or quasi-judicial body or authority has no inherent power. Its power must be derived from statute or Rules and that power is specific as stipulated in Section 173 of the Public Procurement and Asset Disposal Act, 2015 and the 2006 Regulations.

97. I have combed through Public Procurement and Asset Disposal Act, 2015 and the 2006 Regulations and I have not come across any provision stipulating that the Review Board can stay delivery of its decision or even set aside or review its own decision to allow a party who ought to have been enjoined to the review proceedings to challenge the Board's proceedings or decision before the Board itself.

98. In other words, I have not encountered any provision in the Public Procurement and Asset Disposal Act akin to the provisions under Order 10 of the Civil Procedure Rules on varying, reviewing or setting aside of exparte judgment in default of appearance of or for non-attendance by a party, or even recalling or stay of delivery of judgment.

99. In addition, what is not disputed is that the request for review, as seen from the proceedings/decision of the Review Board, though affecting the rights and interests of the applicant who was initially awarded the tender as a successful bidder, deliberately omitted the exparte applicant as a party and no reason has been advanced for doing so, especially in the obvious situation that the Act makes it mandatory for a successful tenderer to be made a party to the request for review, and the fact that any decision of the Review Board on the request by any other aggrieved party would no doubt affect the exparte applicant's interests since it had been awarded the tender and it even went ahead to submit a performance bond to the procuring entity, oblivious of the ongoing proceedings before the Review Board.

100. Section 170 of the Public Procurement and Asset Disposal Act, 2015 sets out the parties to a review and mandates that such parties shall be:

- a) ***The person who requested the review;***
- b) ***The accounting officer of a Procuring Entity;***
- c) ***The tenderer notified as successful by the procuring entity; and***
- d) ***Such other persons as the Review Board may determine.***

101. Accordingly, there was no discretion on the part of the Review Board to stay or set aside its own decision or to exclude the exparte applicant herein from being a party before the Review Board as the exparte applicant was the successful bidder in the concluded procurement process leading to a request for review.

102. In the same vein, the Review Board did not, therefore, have any statutory power to receive, hear and consider and determine a request for review which request excluded the exparte applicant successful bidder being a party.

103. My view is that it was not sufficient for the Review Board to merely notify the exparte applicant that there were review proceedings lodged before it by the interested party. This is so because the exparte applicant had every right to be enjoined to those review proceedings and not as a periphery party but as a major player since the award that was made to it as a successful bidder prompted the interested party to approach the Review Board seeking to set aside that award.

104. The exparte applicant had every right conferred by Section 170 of the Act to participate as a substantive party to the request for review and there are no two ways to this requirement which is coached in mandatory terms.

105. Infact, this court wonders why the Review Board merely notified the applicant herein of the hearing date of the review proceedings, yet the applicant was not made a party to the review, and only for the applicant to receive the hearing notice a day after the hearing.

106. There is sufficient evidence adduced by the exparte applicant, to show that the applicant received that notice on 7th April 2017 which evidence is believable.

107. On the other hand, there is no explanation given why the Review Board and the Procuring Entity who undeniably has the email and telephone contacts for the applicant and which telephone number was written on the posted letter, could not be used to call the applicant and it of the proceedings filed challenging the award of tender made in favour of the applicant, and calling on the applicant to participate in the request for review.

108. In my humble view, from the conduct of the Review Board, the Procuring Entity and interested party. It can be inferred that they were all in a calculated move to oust the exparte applicant from participating in the Review proceedings and therefore from the seat of justice or judgment seat, without according it a hearing.

109. Accordingly, I find and hold that the proceedings before the Review Board were illegal and irregular as they were conducted in total breach of the mandatory statutory provisions. The Review Board and the Interested Party had no discretion to oust the applicant successful bidder from participating fully as a substantive party in the request for review proceedings. Such proceedings therefore, cannot stand. They are must be quashed as they are a nullity ab initio. Moreso, where it is apparent that the request for review proceedings appear to have been deliberately conducted in mystery so as to oust the exparte applicant from the seat of justice, I find that they were not conducted in a transparent manner and therefore they lack integrity. They are a nullity.

110. Article 50(1) of the Constitution is clear that:

“ Every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

111. This court has authority conferred on it under Article 23 of the Constitution to uphold and enforce the Bill of Rights. The rights to a fair hearing and to fair administrative action as stipulated in Articles 50(1) and 47 of the Constitution are fundamental human rights which are enforceable by this court.

112. Where it is clear as is the case here that the applicant was not accorded a hearing let alone a fair hearing, and was never accorded an opportunity to be heard by the Review Board, which is under a statutory and constitutional duty to apply the Rules of natural justice in the conduct of its business, this court must of necessity intervene, when called upon to do so, to uphold the rule of law and human rights.

113. The Review Board is an administrative statutory body and in exercising its jurisdiction, makes administrative decisions. Article 47(2) of the Constitution is clear that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

114. In the case, it is obvious that the administrative action by the Review Board adversely affected the award of tender to the exparte applicant yet the latter was deliberately never made a party to those proceedings.

115. Accordingly, I have no difficulty in finding that the applicant herein was condemned unheard. The applicant was by no means entitled to, not only notice of a claim that was likely to affect its interests in the awarded tender, but to know what evidence was being peddled against it; it had the right to present its case and the right to counsel as stipulated in Section 4 of the Fair Administrative Action Act, 2015 and more importantly, the right to be heard by an independent, impartial tribunal (see **Judicial Service Commission vs Mbalu Mutava & Another [2015] e KLR.**

116. In this case, the applicant was never made a party to the review proceedings yet it was not only a necessary party but a mandatory party; it was never notified in sufficient time of the time, place and nature of the hearing. The absence of all the above features make this case a suitable candidate for this court's interference with the Review Boards decision which decision as I have stated above is a nullity for want of observance of the mandatory provisions of Section 170 of the Public Procurement and Asset Disposal Act, 2015.

117. And the appropriate remedy in this case, for dealing with such an obvious illegality is none other than Certiorari, calling into this court for purposes of quashing and thereby quashing the entire proceedings and decision of the Review Board made on 13th April 2017.

118. I must mention that the 2nd respondent's contentions and submissions are defeatist. They white wash the mandatory provisions of Section 170 of the Act by selectively citing Section 168 of the Act which provides for notification of the accounting officer of the Procuring Entity of the pending review before the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. I say so because in citing the above provision of Section 168 of the Act, the 2nd respondent procuring entity says nothing about Section 170 of the Act. Provisions of the law must be read as a whole and not in isolation to suit a party's case and that is exactly what the procuring entity has done in this case, to escape the wrath of colluding with the interested party and the Review Board to oust the exparte applicant from the seat of justice.

119. in the end, i find and hold that the exparte applicant was denied the opportunity to be heard by the Review Board and therefore its right to a fair administrative action was denied and violated.

120. **The next issue is what orders should this court make?** The exparte applicant sought for Certiorari to call into this court for purposes of quashing and to quash the decision of the Review Board.

121. I have already found that the applicant was denied a hearing and that he had no other alternative remedy for ventilating its grievances and that it was a mandatory party to the Request for Review proceedings. Further, that the review Board's proceedings and therefore the decision impugned was a nullity for being illegally and irregularly conducted. That being the case, I have no hesitation in finding and holding that the applicant has satisfied this court that it is entitled to the judicial review remedy of Certiorari to wipe the slate clean. It is as if the Review proceedings before the Review Board never took place. For the foregoing reasons, those proceedings before the Review Board and its decision are all hereby brought before this court for purposes of quashing and are hereby quashed.

122. The *ex parte* applicant then proceeded to urge this court to grant it mandamus, compelling the procuring entity 2nd respondent to sign a contract with the *ex parte* applicant successful bidder, on account that the applicant had a legitimate expectation that having been a successful bidder and having been notified of the award and having submitted that performance guarantee, it expected to sign a contract for the services tendered.

123. It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate "in the sense of an expectation which will be protected by law" See **R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D**. This was the view adopted in **Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] eKLR** where it was held that:

"...legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise."

124. In this case, the interested party had an unfettered right to challenge the decision of the Procuring entity which decision awarded the tender to the applicant. The only fault and which fault has led to the quashing of the proceedings in the request for review is that it never enjoined the applicant to those request for review proceedings. It is not that the procuring entity refused to enter into the contract thereby failing to conclude the procurement process.

125. But since there was a request for review challenging the award in favour of the applicant, the applicant, in my humble view, cannot claim a legitimate expectation to be sign a contract with the procuring entity since the procuring entity did not unilaterally terminate the procurement proceedings. It therefore follows that albeit this court has found it befitting to quash the proceedings and decision of the Review Board, as the procuring entity did not terminate the procurement process, and as the Review Board and the interested party failed to involve the applicant in the Request for review proceedings, it would not be appropriate to compel the procuring entity to sign a contract as if the proceedings before the Review Board were determine in favour of the *ex parte* applicant.

126. This case can be distinguished from that of **Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR** because in the latter case, it was the procuring entity that terminated the procurement process after awarding the tender to the *ex parte* applicant without giving any reasons for such termination, while relying on sections 36 and 68 of the Public Procurement and Asset Disposal Act. The court, Odunga J issued judicial Review orders of *mandamus* compelling the Respondent to, within 30 days of service of the decision, to notify the applicant of the procurement process between it and the applicant. In default of compliance, an order of *mandamus* was issued forthwith compelling the Respondent to execute the formal contract in respect of the Tender No. MOM/T/2015-2016 dated 9/11/2015 for the Supply, Delivery and Commissioning of a new helicopter.

127. In this case, since the proceedings before the review Board are the ones that occasioned a miscarriage of justice for the *ex parte* applicant, it would be misplacement for this court to compel the procuring entity to sign a contract as that would then disentitle the interested party of the right to challenge the award made by the procuring entity. This is a court of justice and a court of law does not exercise judicial authority to occasion an injustice to a party or to oust a party from the judgment seat.

128. It is for those reasons that I would invoke the provisions of section 11(h) of the Fair Administrative Action Act, 2015 and having set aside /quashed the administrative action made by the Review Board, I hereby remit the request for review matter as filed by the interested party for reconsideration by the Review Board administrator, with directions that the *ex parte* applicant herein be enjoined to the request for review by the interested party to fully participate in the said proceedings which shall be expedited and considered on priority basis and in accordance with the provisions of the Public Procurement and Asset Disposal Act, 2015 and Regulations, 2006.

129. Having quashed the decision of the Review Board, and in line with section 175(5) of the Public Procurement and Asset Disposal Act, 2015 order that each Party shall bear their own costs of these judicial Review proceedings.

130. Those shall be orders of this court.

Dated, signed and delivered in open court at Nairobi this 25th day of January, 2018

R.E ABURILI

JUDGE