REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

IN THE JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 129 OF 2017

IN THE MATTER OF AN APPLICATION BY MAGIC GENERAL CONTRACTORS LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS AGAINST PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

AND

IN THE MATTER OF SECTIONS 66 (2) AND 100 OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005 AND THE PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS, 2006 AND 2013

AND

IN THE MATTER OF ARTICLE 227 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD MADE ON 3RD MARCH 2017 ON THE TENDER NO. BADEA/AWSB/PWSP/GoK/01/2015 FOR THE REHABILITATION AND AUGMENTATION OF OLOITOKTOK WATER SUPPLY AND SANITATION PROJECT

BETWEEN

REPUBLIC.....APPLICANT

AND

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

MACHIRI LIMITED.....1ST INTERESTED PARTY

ATHI WATER SERVICES BOARD.....2ND INTERESTED PARTY

EX PARTE: **MAGIC GENERAL CONTRACTORS LIMITED**

JUDGEMENT

Introduction

1. This judgement is the subject of the Tender No. BADEA/AWSB/OWSB/GoK/01/2015 for the Oloitoktok Water Supply and Sanitation project, a tender whose award has been devilled by litigation at every stage of the award. This Tender was the subject of JR Application No. 240 of 2016 which was consolidated with Miscellaneous Application No. 235 of 2016 between **Republic vs. Public Procurement Administrative Review Board and Another ex parte Athi Water Services Board and Machiri Limited** in which this Court found that the Respondent failed to appreciate that its decision directing the Procuring Entity to carry out a financial evaluation of the tender of the interested party alongside the other bidders who had made it to the financial evaluation stage had not been complied with hence the stage for the award of the tender had not been reached. Its decision was therefore prematurely arrived hence the decision amounted to irrationality. Secondly, the Court found that the said decision failed to appreciate that that there were other bidders who stood to be adversely affected without their bids being taken into consideration before awarding the tender to the interested party in breach of Article 227 of the Constitution and section 3 of the ***Public Procurement and Asset Disposal Act, 2015***.

2. In the result the Court issued an order of certiorari removing to the Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board dated and delivered on 11th May, 2016 in Review Application No. 27 of 20th April, 2016: Magic General Contractors Limited =versus= Athi Water Services Board in respect of tender number BADEA/AWSB/OWSP/GoK/01/2015 for Rehabilitation of Water Supply and Sewerage for Oloitoktok Town Project, to the extent that the Respondent awarded the said tender to the interested party M/s Magic General Contractors Limited and directed the 1st Applicant to issue a letter of award and complete the procurement within fourteen (14) days from the date of the decision, which decision was quashed. The Court however clarified that the Procuring Entity, if minded to proceed with the tender and subject to the provisions relating to termination of the tender, was to subject the Interested Party's tender to Financial Evaluation alongside those of three bidders who made it to the financial evaluation stage.

3. It is the decision taken pursuant to the said judgement that has provoked these proceedings.

4. By a Notice of Motion dated 23rd March, 2017, the ex parte applicant herein, **Magic General Contractors Limited**, seeks the following orders:

> **1. This Honourable Court be pleased to grant the ex parte applicant, Magic general Contractors Limited, judicial review order of Certiorari to remove and bring to this Honourable Court for purposes of quashing, the respondent's entire decision delivered on 3rd March, 2017 in respect of the Tender No. BADEA/AWSB/OWSB/GoK/01/2015 for the Oloitoktok Water Supply and Sanitation project dismissing the Applicant's request for review No. 15/2017 of 10th February 2017 and which upheld the award of the tender to the 1st Interested Party.**
>
> **2. This Honourable Court be pleased to grant the ex parte applicant an order of Mandamus directed at Athi Water Services Board, the 2nd Interested Party, compelling it to enter into a contract with the ex parte applicant as the lowest evaluated bidder for the performance of Tender No. BADEA/AWSB/OWSP/GoK/01/2015 for the Oloitoktok Water Supply and Sanitation Project.**

3. The court be at liberty to grant further orders as it may deem just

4. The costs of this application be provided for.

The Applicant's Case

5. According to the ex parte applicant, it participated in the Tender No. BADEA/AWSB/OWSP/GoK/01/2015 for the Oloitoktok Water Supply and Sanitation Project ("the Subject Tender") as advertised by the Procuring Entity, the 2nd interested party herein and after the close of the bids, the Procuring Entity undertook the tender evaluation and comparison and thereafter notified the applicant of the award outcome by a letter dated 3rd March 2016 by which the Procuring Entity informed the applicant that its bid was not successful technically.

6. It was averred that the applicant was aggrieved by that decision and therefore sought administrative review to the Respondent herein (hereinafter referred to as "the Board") by filing of the request for review application No. 17 of 10th March 2016. Upon conclusion of the hearing, the Board annulled the decision of the Procuring Entity awarding the tender to the successful bidder and directed that the applicant's tender be subjected to financial evaluation.

7. According to the Applicant, it subsequently received a notification of award letter dated 14th April 2016 informing the applicant that following the re-evaluation as per the Board's orders, its tender was still unsuccessful. The applicant was once again aggrieved by this decision and filed a Request for Review No. 27 of 2016 which was allowed by the Board on 11th May 2016 and the respondent was directed to award the tender to the applicant.

8. It was averred that the Board's decision of 11th May 2016 was the subject of judicial review applications 235 and 240 of 2016 referred to at the beginning of this judgement.

9. It was averred that by a letter dated 20th January 2017, the Procuring Entity requested the applicant to confirm a number of errors that had been identified in their bid during financial evaluation which errors and numerous other small errors according to the Procuring Entity had increased its bid price by 47% to Kshs. 1,274,736,874.80. To this, the applicant responded vide its letter dated 27th January 2017, informing the Procuring Entity that pursuant to Clause 5.5 of the tender document, they were willing to undertake the works at the sum indicated in the bid they submitted.

10. In the applicant's view, a reading of that clause shows that the original tender sum quoted by the applicant will be deemed to be the total tender sum in the event that the corrected tender sum is higher than the total tender sum. Therefore, it was contended, the Procuring Entity should have considered the applicant's original tender sum for purposes of making the award. However, on 27th January 2017, the Procuring Entity notified the applicant that its corrected bid was total sum of Kshs 1,274,736,874.80 and therefore it was not the lowest financially evaluated bidder.

11. It was averred that in arriving at its decision the Board at page 24 stated that:

> ***"The board finds that the financial evaluation was carried out and also finds that the applicant's form of tender set out a price of Kshs. 868,021,884.24 but the applicant in its letter of acceptance of the corrected tender sum accepted to do the works at the corrected sum of Kshs 1,274,736, 874.80".***
>
> ***"……..by accepting to do the works at Kshs 1,274,736,874.80, the applicant had simply went outside the price offered in its form of tender to a new but higher price offer and there is no way the procuring entity could have awarded the tender to it"***

12. It was averred that the Board went on to uphold the supremacy of the form of tender.

13. It was the applicant's case that applying the finding of the Board that the form of tender is supreme, it follows that the in applying clause 5.5 as required and in reading the figure in the applicant's form of tender, then the applicant's bid would have emerged as the lowest evaluated bid.

14. The applicant averred that this matter has previously been brought to the Board twice and further to the High Court and that in all the first two instances, the respondent had declined to consider the financials of the applicant as directed. The High Court however concurred with the findings of the board with regard to evaluation of the financials and the respondent was directed to proceed and evaluate the said financials. It was however the applicant's case that the Procuring Entity once again acted in breach of the Act and evaluated the document by considering issues outside the evaluation criteria. To the applicant the tender document is very clear with regard to errors and that the Procuring Entity was duty bound by the provisions of Article 227 of the Constitution, which requires a procuring entity to ensure that the process is conducted in accordance with a system which *is fair, equitable, transparent, competitive and cost effective*. It was however its case that it has spent a lot of time and resources because the procuring entity is determined to ensure that as the lowest bidder, it does not get evaluated as such. The same conduct has also led to loss in terms of the amount of time spent on litigation and also the lack of development of the project which is of immense importance of Kenyans.

15. It was averred that on the basis of the above averments the applicant made a request for a review No. 15/2017 dated 10th February, 2017 in which the Board dismissed the applicant's request and directed that the Procuring Entity should award the 1st Interested Party the tender.

16. It was the applicant's case that the respondent acted unreasonably, irrationally and illegally in not considering the issues as submitted by the applicant and instead considered only the issue of the letter dated 25th January 2017 which it also grossly and unreasonably misinterpreted in light of clause 5.5 of the Tender Document. It was averred that the request of review No. 15 of 2017 in which the Board rendered the impugned decision raised several issues which issues the procuring entity and the 1st interested party responded to at length which resulted in the same becoming issues for determination by the Board and for which the Board ought to have considered in rendering its ruling.

17. It was therefore the applicant's case that in rendering the ruling the Board unreasonably disregarded the five (5) out of the six (6) issues of determination and proceeded to determine the matter in its entirely based on one issue despite and without due consideration for all the other matters as pleaded and as submitted upon by the parties. To the applicant, the respondent in doing so failed to accord a decision to the issues brought before it for review under section 93 of the Act and for which it has a duty to hear and to render a decision and reasons for the said decision. Based on legal advice, the applicant believed that by failing to accord consideration, render decision and reasons for decision to the applicant on those issues, the Board acted in breach of the applicant's rights under Article 50 of the Constitution and also fettered the applicant's right to fair administrative action under Article 47 of the Constitution.

18. It was asserted that if a decision making body has entertained unreasonableness, irrationality or illegality over a matter, then its decisions however precisely certain and technically correct are mere nullities. Consequently, the impugned decision should not be allowed to stand.

Respondent's Case

19. The application was opposed by the Respondent. According to the Respondent Board, it received the ex parte applicant's request for review in the matter of Tender No. BADEA/AWSB/OWSP/GoK/01/2015 for the Augmentation of Oloitoktok Water Supply and Sanitation Project on 11th February 2017, filed as PPRA/ARB/7/15/2017.

20. Thereafter, it heard all parties who attended the hearing, considered their submissions, determined the application for review and delivered its ruling on the 3rd of March 2017 in which it denied the request for review by the ex parte applicant and pursuant to section 173 of the ***Public Procurement and Asset Disposal Act 2015*** (hereafter referred to as 'the Act'), upheld/approved/affirmed the award of the Tender

No. BABEA/AWSB/OWSP/GoK/01/2015 for the Augmentation of Oloitoktok Water Supply and Sanitation Project to the successful bidder, the 1st Interested Party herein. Further, the Board directed the Procuring Entity (the 2nd Interested Party herein) to enter into contractual relations with the successful bidder, **M/s Machiri Limited**.

21. It was the Board's position that in arriving at the above decision, the Board was alive to all facts raised by the parties and was well informed of all the provisions of the law applicable to the facts, issues and dispute(s) raised, including the provisions of the Constitution of Kenya (2010), the Act and all other relevant legislation. According to the Board, its decision was reasonable, rational and lawful and the ex parte applicant's application is made in bad faith, has no merit and is only calculated to harass the credibility of the respondent's mandate and functions, while ultimately eroding the public's confidence in procurement procedures and processes.

22. The Board insisted that it has continued to uphold procurement procedures as required by law and has promoted the integrity and fairness of these procedures and processes, and has not flouted any law nor acted in excess of their powers.

23. It was submitted on behalf of the Board that in judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means lest he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals. In this respect the Board relied on **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR, Council of Civil Service Unions vs. Minister for the Civil Service [1984] 3 ALL ER 935, Grain Bulk Handlers Limited vs. J. B. Maina & Co. Ltd & 2 Others [2006] eKLR, Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479.**

24. The Board denied that its decision was unreasonable/bad in law as alleged by the Applicant and relied on **Republic vs. Kenya Power & Lighting Company Ltd & Another [2013] eKLR,** for the position that it is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of the rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted. It was submitted that there is an onus placed on the ex-parte applicant to demonstrate that the decision of the Respondent was so absurd that no sensible person could ever dream that it lay within the powers of the authority and for this proposition reliance was sought from **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR.**

25. According to the Board, applying that standard to the circumstances of the present case where the Respondent gave the reasons for its decision, the decision cannot be said to be unreasonable. It was the Respondent's submissions that what the ex-parte applicant was seeking from this Court is a merits review of the Respondents decision which this Court has no jurisdiction to do. According to the Respondent, the ex-parte applicant was not disputing the procedure adopted by the Respondent in reaching the decision in question, neither was the ex-parte applicant alleging any bias or *malafides* on the part of the Respondent; what the ex-parte applicant was disputing is the merits of the Respondent's decision which cannot be the subject matter of the judicial review application since a judicial review court does not sit as an appellate court over such matters. To support this position the Respondent relied on **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 **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001.**

26. As far as the order for certiorari is concerned the respondent submitted that that order should not be granted because the decision was arrived at in accordance with the sound provisions of the law, after

lengthy, exhaustive deliberations and opportunities to be heard accorded to all parties. To the Respondent, as far as the order for *mandamus* is concerned a statutory body and office cannot be compelled to act outside the four corners of the law within which it is supposed to operate. In this case and given the facts, it will not be prudent to interfere with the respondent's decision which was arrived at pursuant to its powers as per section 173 of the ***Public Procurement & Asset Disposal Act***. In this respect the Respondent relied on **Edward Gacau Kariuki & Others vs. Registrar of Societies [2007] eKLR** and submitted that similarly the Court should not issue the order of *mandamus* as sought by the ex-parte applicant.

27. The Court was therefore urged to dismiss the ex-parte applicant's notice of motion in its entirety with costs to the Respondents.

1st Interested Party's Case

28. According to the 1st interested party, **Machiri Limited** (hereinafter referred to as "**Machiri**"), the interested parties responded to the request for review and also filed their respective submissions. **Machiri**, it was averred opposed the request for review on grounds that the Procuring Entity acted within the law and arrived at the proper decision rejecting the ex-parte applicant's bid. **Machiri** relied on section 63(3), 66 of the PPDA, 2005 and regulation 50 on this aspect.

29. According to **Machiri**, the Respondent considered all the documents filed and oral submissions made before it and delivered a decision on 3rd March 2017 in which the Respondent clearly outlined the applicant's case and the interested parties' responses and identified only one issue for determination which the Respondent properly found that its determination would determine the proceedings and framed it as follows:

> ***"Whether the Procuring Entity carried out a financial re-evaluation pursuant to the High Court Miscellaneous Application No. 240 of 2016 orders and directions given on 9th January, 2017 and whether in doing so the Procuring Entity complied with the law".***

30. It was **Machiri's** view that the Respondent correctly found that the Procuring Entity undertook financial evaluation of the ex-parte applicant's bid as ordered by the Court and then proceeded to determine whether the Procuring Entity in carrying out the said financial evaluation complied with the law.

31. **Machiri** contended that the applicable substantive law is ***Public Procurement and Disposal Act 2005*** (hereinafter referred to as "the Act" or "the PPDA") and Regulations made thereunder as the Tender was advertised on 22nd October 2015 and accordingly not covered by 2015 Act. It was its case that, as found by the Respondent, the relevant provisions in respect to Financial Evaluation were sections 63 and 66 of the Act read together with regulation 50 of the regulations. The Respondent proceeded to determine whether the re-evaluation was carried out in accordance with section 63 of the Act and regulation 50(1) and (2)(a) and (b) which provisions were the basis of all parties' respective cases.

32. Financial evaluation, it was deposed, is provided for under Regulation 50. Under this regulation the Procuring Entity is required to conduct Financial evaluation to determine the lowest evaluated price which is the price used to rank the tenders as provided for under regulation 50 (3). According to **Machiri**, the requirements to be taken into consideration in determining the evaluated price are set out in Regulation 50(2) which includes taking into account any corrections made by the Procuring Entity relating to arithmetic errors in the tender. It was **Machiri's** position that the Respondent properly found that the Procuring Entity was entitled to correct arithmetic errors in the tender document during financial evaluation. In doing so the Procuring entity is governed by the provisions of section 64 of the Act under which the Procuring Entity is required to issue a notice of correction of the error to the Bidder. In this case it was contended that it is not in dispute that this notice was issued via letter dated 20th January 2017 to the applicant. It is also not in dispute that the Applicant tender had arithmetic errors as set out in the said letter which when corrected increased its Bid price to Kshs 1,274,736,874.80 which error according

to **Machiri** was admitted by the applicant during the proceedings before the respondent.

33. **Machiri** relied on section 63(3) of the Act, according to which the bidder upon receipt of the Notice of correction is required to either accept or reject the correction. If it rejects the correction its tender is required to be rejected and its bid security forfeited. In this instance the Applicant respondent by letter dated 25th January 2016 the contents of which as read together with applicant's submissions before the Board clearly shows that the Applicant accepted the correction. Upon correction and acceptance of the correction the applicant evaluated bid price became Kshs 1,274,736,874.80 and it was that evaluated price which was to be considered in ranking the tenders. Accordingly the finding by the respondent was in accordance with the law and was neither irrational nor unreasonable.

34. It was **Machiri's** position that the Respondent rightly interpreted clause 5.5 in light of regulation 50(3) which mandated the 2nd Procuring Entity to rank the bidders according to their evaluated price and make an award to the tender with the lowest evaluated price in accordance with section 66(4) PPDA. It was averred that the Respondent correctly found that the Procuring Entity could not be faulted for complying with the law that governed the tender and correctly making an award of tender to the lowest evaluated bidder. On that basis, the Respondent was also right in dismissing the request for review as having failed. Once the Respondent made this finding other issues raised by the applicant become moot and the respondent did not need to address them in its ruling as they would not affect the decision.

35. To **Machiri**, it is clear that the Respondent considered all the relevant factors, acted *intra vires* in arriving at the rational, reasonable, lawful impugned decision as stated in its final orders. In light of the foregoing, the ex-parte applicant in its statutory statement and in the verifying affidavit seeks to challenge the merits of the decision of the Respondent by inviting the court to arrive at a different interpretation of clause 5.5 which redress is not the purview of this Court. Accordingly, the said application ought to be dismissed *in limine* as judicial review is limited to the decision making process rather than the merits of the decision.

36. It was reiterated that the Respondent clearly identified the issue for determination based on orders of this Court delivered on 9th January, 2017, the documents and submissions made before it and its previous decided cases. The Respondent appreciated the fact that it had considered and reviewed the subject tender on two occasions and that was the third time only this time the Respondent was guided by the Orders of this Court.

37. In **Machiri's** view, the ex-parte applicant is inviting this Court to ignore the errors in its bid set aside the Respondent's decision and award the tender to it without any legal basis. Allowing this application, it was contended would result in aiding the ex-parte applicant to amend its bid and defeat the whole procurement process in total disregard of the law. It was averred that the Respondent is best equipped to determine issues of procurement and it clearly addressed its mind to the provisions of the ***Public Procurement and Disposal Act*** and the tender document and acted within the law in the process of arriving at the said decision and the decision is logically and legally sound. To **Machiri**, the ex-parte applicant has not demonstrated how the Respondent acted *ultra vires*, unreasonably, unlawfully, with bias, any error of law or fact, or what extraneous matters the Respondent took into consideration.

38. It was disclosed that **Machiri Ltd** lawfully entered into a contract on 3rd March 2017 with 2nd interested party and notice to commence works were issued on 7th March 2017 and the works are ongoing with expected completion being 8th September 2018. In its view, if the said works were to be suspended it would cause us irreparable damage.

39. **Machiri** asserted that prerogative orders are discretionally remedies and are not warranted in these proceedings. Further the Applicant cannot seek prerogative orders against interested parties as the same can only be sought as against the Respondent in the application. Lastly the Applicant has not suffered and will not suffer any prejudice.

40. While reiterating the foregoing, **Machiri** relied on section 63 of the Act which provides that the

procuring entity may correct an arithmetic error in a tender; that it shall give prompt notice of the correction of an error to the person who submitted the tender (in our case the Applicant); and that if the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security shall be forfeited.

41. It was submitted that section 63 of the Act does not give a bidder a choice when requested to correct arithmetic errors. The bidder can only accept or reject. There is no middle ground. The holding of the Respondent that the Applicant accepted the correction was in line with the law and the applicant's own submissions and cannot be faulted. Even if the same was to be attacked the said finding cannot be said to be so grossly unreasonable as to have met the test of irrationality. The decision is not so grossly unreasonable that no reasonable authority addressing itself to the facts and the law would have arrived at that decision.

42. It was submitted that the Respondent once clothed with jurisdiction is entitled to err in its findings and that an error by the inferior tribunal can only be remedied through an Appeal and not through judicial review

43. As to what happens after the correction of arithmetic error, **Machiri** relied on Regulation 50 of the PPDA, which provides guidelines for financial evaluation. Under Regulation 50(2)(b) the PE at financial evaluation is required to take into account any corrections made by it relating to arithmetic errors in the tender in computing the evaluated price. In essence once arithmetic error is corrected the original tender sum is replaced with the corrected tender.

44. It was submitted that in this instance, as required by provisions of section 63 and regulation 50, the applicant initial tender sum of Kshs 887,173,642.75 was upon correction of arithmetic errors substituted with the corrected sum of Kshs. 1, 274,736,874.80. The applicant having failed to reject the correction is presumed to have accepted the same which led to the holding by the respondent. The said holding was neither unfair nor unreasonable as alleged by the applicant.

45. It was submitted that a clear reading of the tender document will show that the Provisions of clause 5.5 have no application in the evaluation process. For purposes of evaluation and award, the procuring entity is required by law and tender document to only consider the evaluated price. In this respect **Machiri** relied on clause 9.1 of the Tender Document.

46. It was submitted that from these provisions it's clear the PE in considering the award is limited to considering the Evaluated Tender Price in tandem with provisions of Regulation 50((3) and section 66(4) of the Act.

47. In **Machiri's** view, the provisions of clause 5.5 of the tender document relied upon by the applicant only come into play after evaluation and determination of the lowest evaluated bid. It is at that point the procuring entity is required to compare the evaluated price of the successful bidder against the tender sum as entered by the bidder. If the tender sum is lower, then the contract would be based on the tender sum and if higher the contract is based on the evaluated price.

48. It was **Machiri's** position that the proposition advanced by the applicant cannot hold as the applicant's interpretation would clearly override the provisions of the law and specifically mandatory provisions of sections 63 and 66(4) of the Act and regulation 50. The procuring entity is required to observe the law. A provision in the Tender document cannot oust the application of the law as set in the Act and regulations. Further a provision in the Tender document cannot oust mandatory provisions of the law. Accordingly even if the applicant interpretations were to be considered the same cannot be applied as they would be overridden by the express provisions of the law.

49. It was emphasised that the Board with jurisdiction, properly identified one issue for determination that, "whether the procuring entity carried out the financial re-evaluation pursuant to the High Court Miscellaneous Application No. 240 of 2016 orders and directions given on 9th January 2017 and whether in doing so the Procuring entity complied with the law." It then analyzed the issue and started by

outlining the undisputed facts. First, it is not in dispute that the Board had jurisdiction to determine the issue before it. Second, the Board considered all the provisions of the procurement law relevant on the issue. The Applicants contention that the Board ignored the purport of clause 5.5 has no basis.

50. According to **Machiri**, the Board clearly acted in good faith, considered all the relevant facts and legal provisions applicable, acted within the law, observed the rules of natural justice and ultimately arrived at a rational decision which any authority faced with similar facts would arrive at. The Respondent's decision is sound and does not warrant any review and the Instant Application ought to be dismissed with costs.

51. As regards the order of mandamus, it was submitted that while this court has undisputed jurisdiction to grant order of mandamus directing an inferior tribunal or body to perform its functions, the Court has no jurisdiction to direct or instruct the inferior tribunal or body on how to perform its functions. Secondly an order of mandamus can only issue against a respondent a public body, whose decision or action is subject of the judicial review application. Such an order cannot be issued to an interested party more so a private body to the application or any other party who is not a respondent.

52. It was submitted based on **Civil Application number 119 of 2015 (UR 95/2015) Cortec Mining Kenya Limited vs. Cabinet Secretary, Attorney General & 8 others [2015] eKLR,** it is clear that the Order is sought against the government, or government official or government or departments especially under the Government Act where execution cannot be levied. Also, it is issued against public bodies which are creatures of statute where their duties are clearly outlined such that failure to perform such a duty accrues a right for an order of mandamus. It was therefore submitted that the 2nd interested party does not fall within this category and an Order of Mandamus cannot issue against it. Accordingly, the prayer for mandamus as sought is incompetent as it is being sought against an interested party rather than the respondent.

53. **Machiri** submitted that prerogative writs are discretionally remedies. Even if warranted the court has discretion to decline to issue the same upon considering other competing interests or supervening factors. And reliance was placed on **Republic vs. Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR pg 43.**

54. In respect to this matter it was submitted that the tender was being financed by Arab Bank of Economic Development in Africa (BADEA) for implementation of the rehabilitation of water supply and sewerage for Oloitokitok town. The PE was just the implementing authority and the funds financing the project were through a loan payable by the Kenyan public. The tender was advertised in 2015. It was subject to litigation in the Respondent board in 3 different occasions and was subject to this court intervention in JR 235 and 240 of 2016. In line with this Court direction the PE evaluated the bids afresh and the respondent reviewed the said process and was satisfied it was done within the law and in accordance with directives of this court in JR 240 of 2016. A contract was executed between the 1st and 2nd interested party, works commenced and the works are at advance stage with the contract scheduled to be completed in September 2018. Nowhere has the applicant alleged that either the 1st or 2nd interested parties have in the process of awarding the contract breached any law. The proceedings have been taken out by a bidder in the procurement and solely on interpretation given by the respondent.

55. The Court was urged to consider and weigh the prejudice if any to be suffered by the applicant against the prejudice to be suffered by the 1st interested party against whom no allegation of impropriety has been made; the public for whom the public funds have been expended and whom will repay the loan to BADEA, and the public to whom benefit the project is being undertaken among other stake holders. We submit that the prejudice to be suffered by other stake holders far outweigh that to be suffered by Applicant (if any) and the balance of convenience would lie in rejecting the application.

56. Based on the decision of the Court of Appeal in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR** the Court was urged to dismiss the application with costs.

2nd Interested Party's Case

57. According to the Procuring Entity, the Applications are filed to propagate the Ex-parte Applicant's unlawful and irregular resolve of ensuring that the subject project is not carried out unless and to ensure that the subject project contract is awarded to it despite being fully aware that in addition to not being the lowest evaluated bidder, the Ex-parte Applicants tender is none responsive and the Ex-parte Applicant lacks the requisite capacity and the required experience to carry out the subject works.

58. It was contended that both the two Applications are filed in bad faith with the sole intention of frustrating the subject water project herein and to scare away the project donor hence the two Applications as filed lacks merit and do not disclose any factual and/or legal basis.

59. After setting out the background factual situation, it was contended that since this Court's earlier judgment was not challenged by any of the parties, the same is binding upon all the parties including the Ex-parte Applicant and the Respondent. According to the Procuring Entity, the orders of this Honourable Court in the said Judgment delivered on 9th January, 2017 therefore enjoined the 2nd Interested Party, if minded to proceed *with the tender, to subject the Interested Party's tender to Financial Evaluation alongside those of three bidders who made it to the financial evaluation stage and that* the Procuring Entity duly complied with the orders of the Court and subjected the four tenders to Financial Evaluation wherein the Ex-parte Applicant's financially evaluated tender price after making necessary corrections was Kshs. 1,274,736,874.80 thus resulting to a tender price variation of upto 47%.

60. It was submitted that in compliance with Regulation 50(3) of the ***Public Procurement and Disposal Regulations 2006*** (the Regulations), the 2nd Interested Party upon conclusion of the Financial Evaluation ranked the bidders in terms of their evaluation scores and that the lowest financially evaluated tender price after making all the necessary corrections was Kshs. 887,173,642.75. The Ex-parte Applicants financially evaluated and none disputed price was Kshs. 1,274,736,874.80 and as such it was therefore not the lowest evaluated tender and could not be awarded the subject tender. It was therefore averred that the 2nd Interested Party on 27th January 2017, proceeded to award the tender to the lowest evaluated bidder in compliance with the judgment of the Court and with a view of concluding the procurement process herein and its decision was communicated to the 1st Interested Party and other bidders on 27th January 2017.

61. It was however averred that in a deliberate effort to frustrate the implementation of the judgment delivered herein on 9th January 2017 and curtail the completion of the procurement process, the Ex-parte Applicant on 10th February 2017 once again challenged the implementation of the judgment herein and the conclusion of the procurement process by lodging a third purported Review Application No. 15 of 2017; **Magic General Contractors Ltd –vs- Athi Water Services Board** with the Respondent which application was for the third time heard and was determined to be lacking in merit and dismissed.

62. That the Board having arrived at the above decision proceeded to uphold the tender as awarded to the 1st Interested Party and expressly directed the Procuring Entity as follows;-

> ***The Procurement Entity is directed to enter into a contract with the successful bidder in view of the length of time that this litigation has taken.***

63. It was the Procuring Entity's belief that the Board in making the above order was fully cognizant of the fact that the subject contract had delayed for a period over one and half years and that there was no lawful and/or factual ground to continue delaying the same considering that the matter had been substantively heard and the rights of the parties considered and determined by both the Review Board and the High Court as provided for by the law.

64. It was disclosed that following the ruling of the Board, the 2nd Interested Party lawfully entered into a contract with the 1st Interested Party on 3rd March 2017 as directed by the Board and the Notice to

Commence works issued on 7th March 2017. The works commenced on 8th April 2017 and will be concluded on 8th September 2018. It was contended that the contract was lawfully awarded and executed between the Procuring Entity and the Successful Bidder in compliance with the law and the contracted bidder has already mobilized equipment and commenced the works which are currently ongoing.

65. According to the Procuring Entity, the Judicial Review Application herein lacks merit and is a bare scheme to frustrate and stall the subject project herein.

66. It was the Procuring Entity's view that the Applicant is abusing the right to file judicial review applications before this Court by filing a frivolous application only designed to harass and frustrate the Procuring Entity and to arm-twist it into unlawfully awarding this project to the Applicant. According to it, the Applicant is abusing the due process of this Honourable Court by using it for ulterior motives only aimed at ensuring that the project herein does not take-off to the detriment of the Kenyan people. The Procuring Entity contended that the importance and the public interest of the subject project herein cannot be over emphasized and the Applicant should not be allowed to stop the same merely because it wants to benefit itself by acquiring the project unlawfully.

67. It was its case that the Applicant failed to demonstrate any breaches of section 2 and/or 82 of the Act as alleged and/or at all in its review application presented to the 1st Respondent Board and the same was dismissed for want of merit in accordance to sections 2, 82 and 93 of the Act, the Applicant cannot be allowed to re-submit on the merits and/or demerits of the said Application as those are matters that has been considered and decision rendered on which decision is not subject of any appeal.

68. The Procuring Entity invited the Court to take into consideration the public interest of the project in issue, its value to the Kenyan citizens and the efforts the 2nd Interested Party has put in place to carry out the procurement process strictly in accordance with the law and the fact that the Applicant's main intention and objective is to delay the project which it has succeeded to do since October 2015 by making endless frivolous applications. The Court was further invited to consider and appreciate the fact that the Applicant herein has demonstrated that they will not accept any result other than an award of the project to it and is using the legal process to achieve the above having realized that it is not the best in the market. It was the Procuring Entity's contention that as the Applicant is busy delaying this project for its own perceived financial gains, the people of Oloitokitok and its environs continue to lack water and proper sewer services on a day to day basis, a situation the Government is seeking to change by implementing the project herein. In the Procuring Entity contention, the subject tender is for the provision of water and sewerage services, which services are necessary and guaranteed by the Constitution and the provision of the same should not be curtailed purely on the selfish interest of the Interested Party who believes that it must be the one to carry out the subject project despite lacking the requisite capacity and its tender not being the lowest evaluated bid.

69. It was therefore urged that this Court ought to safeguard its integrity and the due process by dismissing the application herein with costs to the Respondents.

70. It was submitted that the ex-parte Applicant ought to have appealed against the decision of the Respondent as provided under Section 100(2) of the Act if it were to be genuinely aggrieved by the decision of the Board as alleged herein. Judicial Review proceedings do not allow this Honourable Court to investigate the decision of the Board on its merit as sought herein. From the foregoing, the Interested Party submitted that the two applications for judicial review are without merit and should be dismissed with costs.

Determinations

71. I have considered the Notice of Motion, affidavits, the written submissions and judicial authorities herein and this is the view I form of the matter.

72. It was the 1st Interested Party's case that an order of *mandamus* can only issue against a respondent if

a public body, whose decision or action is subject of the judicial review application and that such an order cannot be issued to an interested party more so a private body to the application or any other party who is not a respondent. Also, it is issued against public bodies which are creatures of statute where their duties are clearly outlined such that failure to perform such a duty accrues a right for an order of *mandamus*. It was therefore submitted that the 2nd interested party does not fall within this category and an Order of *Mandamus* cannot issue against it. Accordingly, the prayer for *mandamus* as sought is incompetent as it is being sought against an interested party rather than the respondent.

73. That argument with respect is not entirely correct. Whereas it is my view that judicial review orders ought only to be issued against the Respondent(s), it is nolonger good law that such orders can only be issued against public bodies. Our constitutional provision that specifically deals with judicial review of administrative action is to be found in Article 47 of the Constitution. Pursuant to the said Article, Parliament enacted the ***Fair Administrative Action Act, 2015***. Section 2 thereof defines "administrative action" to include:

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

74. The same section defines 'administrator" as "a person who takes administrative action or who makes an administrative decision." Section 3 on the other hand provides:

> ***(1) This Act applies to all state and non-state agencies, including any person***
>
> ***(a) exercising administrative authority;***
>
> ***(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or***
>
> ***(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates***

75. It is therefore clear that the orders of judicial review are not restricted only to state actors as the same may properly apply to non-state actors as long as the authority or person concerned falls within section 3 of the said Act.

76. In any case my view is that the definition of public bodies ought to include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quasi-non-governmental organisations, judicial bodies, and private bodies which carry out public functions.

77. In this case, it is my view that the application revolves around two issues. The first issue is the import of clause 5.5 of the Tender Document to these proceedings. The second issue is whether the Respondent failed to deal with all the issues placed before it and if so the impact of that omission.

78. It is clear that what provoked the proceedings before the Respondent Board was the decision by the Procuring Entity to seek clarification of a number of errors that had been identified in the ex parte applicant's bid during financial evaluation. That a procuring entity is entitled to seek such clarification is not in doubt. This Court has had occasion to deal with the scope of that power in **Republic vs. Public Procurement Administrative Review Board & Another Ex parte: Athi Water Service Board & Another [2017] eKLR** where it was held thus:

> **"Such clarification is however not a passport for the tenderer to change the terms of the tender. In my view a clarification cannot be equated to a confirmation of the procuring entity's view of the tenderer's bid. Where the procurement entity can ascertain the bid, there would be no need for the procuring entity to seek a clarification. However the mere fact that**

the procuring entity seeks a clarification and a response is given does not bind the procuring entity to the purported clarification if the so-called clarification in fact amounted to change of the terms of the tender."

79. Similarly in this Court expressed itself as hereunder:

"It is therefore my view that in determining whether the action taken by the procuring entity was a clarification of the tender or was a change or alteration of the terms of the tender, one must look at the terms of the tender document and determine whether the action taken by the procuring entity was substantially in accord with the tender documents and whether the parties to the tender substantially complied with the terms of the tender document. This must be so because where there is no substantial compliance, the procuring entity cannot under the guise of seeking clarification afford the tenderers an opportunity of panel-beating their tenders in order to comply with the terms of the tender document. In my view the examples of clarifications contemplated would be such as those alluded to in section 79(2) and (3) of the Act and *these include minor deviations that do not materially depart from the requirements set out in the tender documents and errors or oversights that can be corrected without affecting the substance of the tender though such deviations are required to be quantified to the extent possible; and to be taken into account in the evaluation and comparison of tenders*."

80. As to whether such clarification did in fact amount to a change in the terms of the tender, being a factual matter ought to be dealt with by the Procuring Entity itself and by way of review to the Respondent Board. Whereas such an issue may properly form the subject of an appeal to the High Court pursuant to section 100(2) of the Act, suffice it to say that an error that increases a party's bid price by 47% cannot, without any satisfactory explanation by any stretch of imagination be deemed as constituting "***minor deviations that do not materially depart from the requirements set out in the tender documents and errors or oversights that can be corrected without affecting the substance of the tender".*** As to what constitutes minor errors , that is a factual issue which goes to the merit of the decision rather than the process and unless such a decision is so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law before it, would have arrived thereat, there would be no justification for interference. I find no such evidence in this case. Otherwise this Court would be sitting on appeal against the decision of the Respondent. However as was held by **Aganyanya, J** (as he was then was) in **Amirji Singh vs. The Board of Post Graduate Studies Kenyatta University Civil Application Number 1400 of 1995,**:

"…an application by way of judicial review before the High Court is not intended to {turn} it (this Court) into an appellate one to deal with the merits of the issue before the inferior tribunal…Professor Mumma for the 2nd Respondent rightly pointed out to this court that a party who has chosen judicial review must play within the rules of judicial review. A party should not be allowed to argue an appeal through a judicial review application. The path to the sublime orders of judicial review is narrow and those who opt to take this road must be ready to operate within its limited space."

81. Clause 5.5, referred to states that:

If the corrected tender sum is higher than the Total Tender Sum, then the original Total Tender Sum shall be deemed to the Total Tender Sum upon which the contract agreement shall be based.

82. However the question is what amounts to the total tender sum? It would seem that the applicant is of the view that the total tender sum is the sum quoted by the tenderer before valuation by the Procuring Entity. However the 1st interested party was of the view that the provisions of clause 5.5 of the tender document only come into play after evaluation and determination of the lowest evaluated bid and that it is at that point the procuring entity is required to compare the evaluated price of the successful bidder against the tender sum as entered by the bidder. If the tender sum is lower, then the contract would be based on the tender sum and if higher the contract is based on the evaluated price.

83. Section 66(4) provides that:

> ***The successful tender shall be the tender with the lowest evaluated price***.

84. In the same vein Regulation 50(3) provides that:

> ***Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with section 66(4) of the Act.***

85. In this Court's decision in JR Application No. 240 of 2016 which was consolidated with Miscellaneous Application No. 235 of 2016 between **Republic vs. Public Procurement Administrative Review Board and Another ex parte Athi Water Services Board and Machiri Limited** the Court expressly directed that should the Procuring Entity be minded to proceed with the tender it had to subject the Interested Party's tender to Financial Evaluation alongside those of three bidders who made it to the financial evaluation stage. In other words the Court was clear in its mind that the evaluation was to be undertaken.

86. The Respondent found that the process of evaluation was properly undertaken. Whereas I agree with the applicant that the Respondent's understanding of the said clause 5.5 of the Tender Document was incorrect, it is however my view that the Board ultimately arrived at a correct decision.

87. Based on the relevant legal provisions and this Court's own directions in JR Application No. 240 of 2016 which was consolidated with Miscellaneous Application No. 235 of 2016 between **Republic vs. Public Procurement Administrative Review Board and Another ex parte Athi Water Services Board and Machiri Limited**, it is my view that the Procuring Entity was duty bound to carry out the evaluations of the bids presented before it and opt for the lowest evaluated bid. That is a decision which can only be upset on appeal since I do not have material on the basis of which I can find, in light of the Respondent's findings, that the said decision was irrational. This position is further supported by clause 9 .1 of the tender document which provides that:

> ***"Subject to clause 9.2, the Employer will award the contract to the tender whose tender has been determined to be substantially responsive to the tender documents and who has offered the lowest evaluated tender price, provided that such tenderer has been determined to be eligible and qualified in accordance with provisions of Clause 9.5***.

88. With respect to the issues which were allegedly not considered, the same were reproduced as hereunder:

> **a. Whether there were intentional sustained efforts of the 2nd interested party to ensure that the applicant's tender would not be successful despite clear orders of the honourable court and demonstration of capacity by the applicant to undertake the works;**
>
> **b. Whether the Procuring Entity took into consideration extraneous issues in dealing with the applicant's tender during evaluation**
>
> **c. Whether there was failure on the part of the 2nd interested party to achieve the constitutional threshold set under Article 227 with regard to public procurement in undertaking evaluation of this tender**
>
> **d. Whether the 2nd interested party possessed the adequate objectively, integrity, fairness and transparency to continue undertaking evaluation of the subject tender; and**
>
> **e. Whether the accounting officer of the 2nd interested party had breached any law with regard to integrity in handling of the subject tender.**

89. In my view once the Respondent made a decision with respect to clause 5.5, the determination of these issues which in my view were collateral to the main issue was inconsequential. Whereas the Respondent ought to have expressly dealt with the same, from the only issue identified by the Respondent for determination, it is clear that a determination of the same either way substantially resolved these issues.

90. It is therefore my view and I hold that nothing turns on the failure by the Respondent Board to expressly deal with these issues.

91. Before concluding this matter, the Court was urged to consider the fact that numerous litigation have been centered around the subject tender which tender is for implementation of the rehabilitation of water supply and sewerage for Oloitokitok town. The Court was therefore urged to consider and weigh the prejudice if any to be suffered by the applicant against the prejudice to be suffered by the 1st interested party against whom no allegation of impropriety has been made; the public for whom the public funds have been expended and whom will repay the loan to BADEA, and the public to whom benefit the project is being undertaken among other stake holders.

92. My view is that in public procurement and disposal, the starting point is Article 227(1) of the Constitution which provides the minimum threshold that any public procurement must meet when it states that:

> ***When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***

93. A procurement must therefore, before any other consideration is taken into account whether in the parent legislation or the rules and regulations made thereunder or even in the Tender document, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words any other consideration which does not espouse these ingredients can only be secondary to the said Constitutional dictates.

94. My view is reinforced by the decision in **PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR** in which the Court held that:

> **"To my mind, failure by the Respondents to have regard to mandatory provisions of the Act concerning procurement procedures…violated the purpose of the Act which is clearly stated in Section 2…I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives…Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent's counsel. The job in my view was not complete or done by just coming up with the mathematically lowest tenderer on top of the pile. The integrity of reaching there is equally important to this court. In many cases it is procedural propriety which is the stamp of fairness."**

95. It is now trite that contravention of the Constitution or a statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and statute. This was the position in **Republic vs. County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR** where the Court held thus:-

> **"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an**

opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."

96. In my view, whereas public interest is a factor to be considered by the Court in arriving at its decision, where the alleged public interest is not founded on any legal provision or principle and runs contrary to the Constitution and the law, such perceived public interest will not be upheld by the Court. Under Article 10 of the Constitution, all State organs, State officers and all persons tasked with *inter alia* the making and implementation of public policy decisions are bound by the national values and principles of governance one of which is the rule of law. Consequently, any alleged public policy or interest that is contrary to the rule of law cannot be upheld.

97. As was held in **Resley vs. The City Council of Nairobi [2006] 2 EA 311,** to the effect that:

"In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid…The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed…If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place."

98. With specific reference to public procurement, **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**, recognised the public interest in the enactment of the Act when he stated as follows:

"…the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant. Adjudication of disputes is a constitutional mandate of the Courts and the Court cannot abdicate from it."

99. It is therefore by view that the rule of law cannot and ought not to be sacrificed at the altar of bringing litigation to an end. A genuinely aggrieved person ought not to be sent away from the seat of justice simply because he has brought several challenges in respect of the same subject matter unless it is shown that his conduct amounts to an abuse of the Court process. The fact that a person is a zealot in pursuing what he thinks are his legal rights does not make him a vexatious litigant. As was held by **Madan, J** (as he then was) in **Official Receiver vs. Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243**:

"In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It

would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties."

100. Similarly as was appreciated in **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000**:

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved..."

101. However in this case, I have said enough to show that this application is unmerited.

Order

102. In the result, the Notice of Motion dated 23rd March, 2017 fails and is dismissed with costs to the Respondent and the interested parties.

103. It is so ordered.

Dated at Nairobi this 15th day of January, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kamau for the Applicant

Miss Mubangi for Mr Njuguna for the 1st interested party

Mr Agwara for the 2nd interested party

CA Ooko