



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

JUDICIAL REVIEW & HUMAN RIGHTS DIVISION

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO. 313 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF TENDER NUMBER KEMSA-OIT3-2016-018-

SUPPLY OF PHARMACEUTICALS-AMOXICILLIN TABLET 250MG (DISPERSIBLE, SCORED)

AND

IN THE MATTER OF THE DECISION AND RULING MADE

BY THE PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD ON 31ST MAY 2017

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND

ASSET DISPOSAL ACT, 2013, PUBLIC PROCUREMENT

**AND DISPOSAL REGULATIONS, 2006, THE PUBLIC FINANCE MANAGEMENT ACT CAP 412C AND THE PUBLIC
MANAGEMENT REGULATIONS (2012), FAIR ADMINISTRATIVE**

**ACTION ACT, No. 4 of 2015, THE LAW REFORM ACT, CAP 26, ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010, THE
CONSTITUTION OF KENYA, 2010 AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE LAW**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. KENYA MEDICAL SUPPLIES AUTHORITY

2. THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

3. THE CHIEF REGISTRAR PHARMACY & POISONS BOARD.....RESPONDENTS

AND

MEDOX PHARMACEUTICALS LIMITED. INTERESTED PARTY

EX PARTE

NAIROBI ENTERPRISES LIMITED.....EX PARTE APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 16th June, 2017, the *ex parte* applicant herein, **Nairobi Enterprises Limited**, seeks the following orders:

1) An order of Declaration that the 1st Respondent's Stage 2-Technical Evaluation (Documents) of the tender evaluation process in respect of Tender No. KeMSA/OIT3/2016-2018 for supply of pharmaceutical product known as Amoxicillin Tablet 250 mg (dispersible, scored); consequential decision in a letter ref KeMSA/PROC/OIT3/2016-2017 dated 28th April 2017 by the 1st Respondent to the Applicant that the latter's bid for the said tender was unsuccessful or unresponsive and any consequential actions or decisions executing the said decisions arising therefrom were irrational, unreasonable, procedurally and substantially unfair and flawed, ultra vires the law and illegal.

2) An order of Declaration that the decision of the 2nd Respondent delivered on 31st May 2017 in the Public Procurement Review Board, Application No. 45/2017 and any consequential actions or decisions executing the said decisions arising therefrom were unreasonable, irrational, procedurally unfair and flawed, failed to take into consideration relevant factors and was unlawful.

3) An order of Declaration that the decision in the Letter ref No. PPB/Misc/ Vol.1 /017/041 dated 11th May 2017 by the 3rd Respondent to the 2nd Respondent in respect of the Tender Number KEMSA/OIT3/2016-2018 in respect of the Supply of Pharmaceuticals and or consequential actions or decisions executing the said decisions arising therefrom were ultra vires the law, irrational, unreasonable, procedurally unfair, marred with improper motives, failed to take into consideration of relevant factors as well as natural justice hence illegal.

4) An order of Certiorari to call, remove, deliver up to this Honourable Court and quash;

a) The proceedings of the 1st Respondent's Stage 2-Technical Evaluation (Documents) of the bidders documents in respect of Tender No. KeMSA/OIT3/2016-2018 for supply of pharmaceutical product known as Amoxicillin Tablet 250 mg (dispersible, scored).

b) The decision in Letter ref KeMSA/PROC/OIT3/2016-2017 dated 28th April 2017 by the 1st Respondent to the Applicant that the Applicant's bid for the Tender Number KEMSA/OIT3/2016-2018 in respect of the Supply of Pharmaceutical Product Amoxicillin Tablet 250mg (Dispersible, Scored) was unsuccessful or unresponsive.

c) The award of Tender Number KEMSA/OIT3/2016-2018 vide Letter dated 28th April 2017 by the 1st Respondent to the Interested Party in respect of the Supply of Pharmaceutical Product Amoxicillin Tablet 250mg (Dispersible, Scored) to the Interested Party at a total price of USD\$ 1,740,000/-.

d) The Letter ref No. PPB/ Misc / Vol.1 /017/041 dated 11th May 2017 by the 3rd Respondent to the 2nd Respondent in respect of the 1st Respondent's Tender Number KEMSA/OIT3/2016-2018 in respect of the Supply of Pharmaceutical Product Amoxicillin Tablet 250mg (Dispersible, Scored).

e) The entire decision and ruling of the 2nd Respondent in its decision delivered on 31st May 2017 in the Public Procurements Administrative Review Board Application Number 45 of 2017 between Nairobi Enterprises Limited and Kenya Medical Supplies Authority & 2 Others and or all further consequential actions or decisions executing the decision hereof and or the 1st Respondent Letters ref KeMSA/PROC/OIT3/2016-2017 dated 28th April 2017 to the Applicant and Interested Party respectively.

5) An order of Mandamus to compel the 1st Respondent to carry out Stage 2 –Technical Evaluation (Documents) of the tender evaluation process of the prequalified bids, including the Applicant's bid, subsequent stage 3- Technical Evaluation (Products) and award of the Tender Number KEMSA/OIT3/2016-2018 in respect of the supply of pharmaceuticals in compliance with the requirements of its Open International Tender Document for Supply of Pharmaceuticals- IFT No. KEMSA/OIT 3/2016-2018, the Public Procurement and Asset Disposal Act, the Constitution and the relevant laws.

6) An order of Mandamus to compel the 3rd Respondent to comply with the law and the Constitution in giving any opinion, clarification and or decision in respect to the Applicant's Retention Certificate No. 12134 for the year 2017 for the product known as Amoxicillin Tablet 250mg(Dispersible, Scored).

7) Costs.

Ex Parte Applicant's Case

2. According to the ex parte applicant, on or about 15th and 20th February 2017, the 1st Respondent herein, **Kenya Medical Supplies Authority** (hereinafter referred to as “KEMSA”) advertised in the local daily newspapers for a Tender No. KEMSA/OIT 3/2016-2018 for supply of various pharmaceutical products. KEMSA’s advert advised interested parties to purchase bidding documents upon written request and payment thereof, tender and submit the bids on or before the closing date for submission of bids on 9th March 2017 at 10:00 a.m.

3. Pursuant thereto, the Applicant applied, made the requisite payments and collected the bidding documents particularly KEMSA’s Invitation for Tender (IFT) Number KEMSA / OIT 3/2016-2018 Open International Tender Document for supply of pharmaceuticals providing the framework and requirements for bidding, evaluation of bids and award of the contract (hereafter Tender Document). It was averred that of particular importance to this proceedings, the Tender Document provided as follows in respect of the products bid:-

i. *Clause GCC 6.1 of the Special Conditions of the Contract (SCC) for pharmaceuticals and Clause 5.1 (b) of the General Technical Specifications at pages 55 of 115 and 69 of 115 of the Tender Document provided that drugs shall be registered and retained with the 3rd Respondent at the time of bid submission and the Retention Certificate must be current.*

ii. *Section VIII at pages 109 of 115 of the Tender Document provided that sequential stages of evaluation of the bids as preliminary, technical and financial evaluation.*

iii. *Clause 2 (a)(ii)–Bidders who are Distributors-of section VIII –Technical Evaluation - at page 111 of 115 of the Tender Document provided the Bidders who are distributors, like the Applicant, will be required in support of their bids as mandatory to submit Current Product Registration and Retention Certificates with QR Codes from the 3rd Respondent*

4. According to the applicant, clause 2(a)(ii)–Bidders who are Distributors- of section VIII –Technical Evaluation - at page 111 of 115 of the Tender Document also provided that KEMSA shall during the technical evaluation subject documents submitted by bidders to a detailed examination to confirm inter-alia whether the Bidders copies of the Bidders Product Registration and Retention Certificate with QR Codes thereon from the Registrar are current.

5. It was averred that on 8th March 2017, the Applicant submitted its bid for item No. 2 being Amoxicillin tablet 250 mg (dispersible, scored) (hereafter bid item) listed at page 83 of 115 of the Tender Document hereof and attached a copy of the Current Product Registration and Retention Certificate No. 12134 as per the requirements of the Tender Document.

6. By a letter ref No. KeMSA/PROC/OIT3/2016-2017 dated 28th April 2017 to the Applicant the 1st Respondent advised the Applicant that its bid for the tender no. KEMSA/OIT3/2016-2018 for supply of pharmaceuticals was unsuccessful for reasons *inter-alia* that the Applicant’s said Retention Certificate No. 12134 for the bid item provided in its bid was invalid as per the Registrar’s online database. KEMSA also advised the Applicant that the tender for the bid item was awarded to the Interested Party.

7. Apparently aggrieved by the said decision, on 3rd and 4th May 2017, the Applicant objected to the reasons given by the Respondent for the Applicant’s disqualification, noted above, noting that the subject item was duly registered by PBB in October 2016 and a Certificate thereof issued on 13th December 2016. In the said objection letter, the Applicant noted that:

i. On 19th October 2016, the Applicant obtained registration of the subject item from the Registrar and was duly issued with a registration certificate on 13th December 2017.

ii. On 27th February 2017, the Applicant applied and paid for a retention certificate for the subject item, subsequently printed a Retention Certificate No. 12134 from PPB’s website.

iii. On 8th March 2017, the Applicant submitted its bid for the bid item and attached a copy Current Product Registration and Retention Certificate No. 12134 hereof to the bid for the above mentioned tender and submitted the to the Respondent as required. The deadline for submission of the bid was 9th March 2017 at 10:00 a.m.

8. Accordingly, on 3rd May 2017, the Applicant also wrote to the Registrar and copied the letter to KEMSA reiterating the matters above in respect to its Produce Certificates and more particularly that the Applicant’s application and payment for retention certificate (renewal of bid product certificate) for the bid item was duly received by the 3rd Respondent herein, **the Chief Registrar Pharmacy & Poisons Board**, (hereinafter referred to as “the Registrar”) on 27th February 2017 and the Applicant printed the Product Retention Certificate from the Registrar’s online portal on or about 5th March 2017.

9. It was averred that on the date of the said letter to Registrar, the Registrar had clarified that due to the Registrar’s website system error at the material time, the Applicant’s retention certificate, though valid, could not be reflected and or shown on the said website thus the basis for the invalidity and as such the Applicant ought not to be penalised for the internal errors and inadequacies of the Pharmacy and Poisons Board.

10. The applicant disclosed that it was aware that *Clause 2(b) (ii) of part B (Technical Evaluation) of Section VIII (Stages of Tender and Tender Evaluation Criteria) of the Tender Document* for the above mentioned Tender at page 115 provided inter-alia that Bidders who are distributors, like the Applicant, will be required to submit in support of their bids as a mandatory- *a Current Product Registration and Retention Certificate with QR code from the Registrar*. Therefore by attaching a copy of the current Product Registration and Retention Certificate Number 12134 with the QR code from Registrar’s to its bid, the Applicant herein had complied with the 1st Respondent’s mandatory requirement in the Respondent’s Tender Document as set out above and particularly clause 2(b) (ii) of part B (Technical Evaluation) of Section VIII (Stages of Tender and Tender Evaluation Criteria) at page 111 of 115 of the Tender Document. Further, the

Retention Certificate with QR Code is only obtainable and printable from the Registrar's online portal and it is not possible for any bidder to have obtained a Current Retention Certificate with the QR code without having duly applied, paid for and the subject product having been retained by Registrar.

11. According to the applicant, in the meeting of 3rd May 2017, the 1st Respondent admitted that the only basis of its disqualification of the Applicant and or determination that the Applicant's alleged Retention Certificate Number 12134 was invalid was information obtained by the 1st Respondent's tendering committee from the Registrars website. However, the 1st Respondent neither sought and nor obtained verification and or clarification from the Registrar or the Applicant on the validity of the Retention Certificate 12134 even though it knew and or ought to have known that it was not possible to print out a current retention certificate with QR Code from the Registrar's website unless the same is retained hence the need to seek clarification from the Registrar or Applicant on the copy of Retention Certificate attached on the Applicant's bid.

12. During the hearing of the Applicant's PPRB Application for Review No. 45/2017 before the 2nd Respondent herein, **the Public Procurement Administrative Review Board**, (hereinafter referred to as "the Board") Board on 23rd May 2017, the applicant averred that one of the bidders and party to the said proceedings, *Laboratory & Allied Limited*, acknowledged that KEMSA had during the evaluation of the bids process contacted, sought and received clarification on the validity of its Product Registration and Retention Certificate yet conspicuously, deliberately and intentionally failed, ignored and or neglected to seek for clarification from the Applicant or even the from Registrar when the latter's alleged online portal check indicated that the Applicant's Retention Certificate 12134 was invalid.

13. It was the applicant's case that the exclusive reliance on online portal for verification of the Applicant's Retention Certificate and or failure by KEMSA to seek clarification from the Applicant and or the Registrar on the status of the copy of the Applicant's Retention Certificate No. 12134 in respect of the bid product is a breach of *Clause 2(b) (ii) of part B (Technical Evaluation) of Section VIII (Stages of Tender and Tender Evaluation Criteria)* of the Tender Document which obligated the 1st Respondent to subject the bidders document to detailed examination.

14. It was its case that the decision to disqualify the Applicant's bid was also in breach of *clause 27.1 –clarification of Tenders-Part E of Section 1 on Instructions to Tenderers* at page 22 of 115 of the Tender Document which obligates KEMSA to ask the bidders in writing for clarification of the bidders Tender. Accordingly, it was averred that the decision to disqualify the Applicant's bid without carrying out a detailed examination and or seeking clarification from the Applicant or Registrar also breached *clause 29.4 of Part E of Section 1 on Instructions to Tenderers* at page 24 of 115 of the Tender Document in so far as the determination of the Applicant's alleged bid unresponsiveness was devoid of any clarification from the Applicant or the Registrar. Further, that failure to seek clarification from the Applicant on its retention certificate but seeking the same from other bidders was discriminatory and partisan.

15. Subsequent to disqualification of the Applicant, it was contended that the 1st Respondent advised the Applicant on 8th May 2017 that it had written to the Registrar seeking clarification on whether the Applicant's retention certificate number 12134 was valid but failed, ignored and or neglected to rescind its decision dated 28th April 2017 allegedly awarding the said tender to the Interested Party. It was the applicant's case that the failure by the 1st Respondent to rescind its letter dated 28th April 2017 pending the amicable resolution of the validity or otherwise of the Applicant's Retention Certificate is also clear demonstration of bad faith, ill motive, unreasonableness, irrationality, unlawfulness on the part of KEMSA as the Applicant herein stands to be locked out of the bidding process unfairly, unreasonably and irrationally by awarding the tender to an entity that was not the lowest responsive bidder as per the facts and the public procurement laws and principles.

16. By reason of the foregoing, the Applicant on 12th May 2017 filed an Application for review against KEMSA's decision dated 28th April 2017 awarding the Tender to the Interested Party and disqualifying the Applicant in PPRB, Application No. 45/2017 as neither the Applicant nor the 3rd Respondent's were taking any reasonable steps to resolve the dispute yet the Applicant's remedy in law was about to lapse. To the said request, KEMSA as well as Interested Party also filed Replying Affidavits and the Applicant also filed a further Affidavit thereto after which the parties canvassed the Application by written and oral submissions on 23rd May 2017. It was disclosed that on 19th May 2017, KEMSA filed and served a Replying Affidavit wherein it produced a letter dated 11th May 2017 by the Registrar to it wherein the Registrar purported to give a clarification that the Applicants product was allegedly retained on 3rd May 2017. The said letter was a purported response to KEMSA's request on even date for clarification of the status of the Applicant's Retention Certificate. However, the Registrar's said letter dated 11th May 2017 was never copied to the Applicant and the Applicant was also never heard or given opportunity to be heard before the decision in the said letter was issued.

17. The Registrar was accused of having maliciously interpreted the date indicated on the top left of the copy of the Applicant's Retention Certificate No. 12134 appearing as 3/5/2017 as 5th May 2017 instead of 3rd March 2017 when the Applicant's product was retained, the certificate printed, attached on Applicant's bid and submitted to KEMSA on 8th March 2017 with collateral intents to protect KEMSA's breaches against review. It was revealed that by a Further Affidavit dated 22nd May 2017, written submissions dated 22nd May 2017 and oral submissions by its counsel on 23rd May 2017 at the hearing hereof, the Applicant objected to the Registrar's letter dated 11th May 2017 as being irrational, malicious and contrary to the law and the Constitution. The Applicant's advocates on record also applied to the Registrar to summon the Registrar for cross examination on the matters in the letter dated 11th May 2017 by the Registrar to KEMSA. The Registrar however overruled the Applicant's counsel and declined the request.

18. It was averred that on 31st May 2017, the Registrar delivered a ruling disallowing the Applicants Application for review and upheld the 1st and 2nd Respondents actions set out above to the effect that KEMSA complied with the Tender Document and the law in exclusively relying on the Registrar's online portal results in respect of the Applicant's retention certificate.

19. To the applicant, the Registrar's decision is irrational, unreasonable, failed to take into consideration the Applicant's submissions on the facts and the law on the issues before it hence unlawful, illegal and the same should be set aside as set out in the statement hereof. Further, it was averred that the Registrar failed to take into account the following:-

i) That KEMSA and the Registrar admitted by pleadings and submissions before it that the purported clarifications regarding Applicant's Retention Certificate was post disqualification of the Applicant hence an afterthought and admission of breach of the Tender Document and the law.

ii) That KEMSA and Interested Party acknowledged in their oral submissions that a current Retention Certificate with a QR Code is only obtainable by printing from the Registrar's online portal upon payment and retention of the same. The circumstances of the case therefore called for proper and thorough investigations of the Applicant's copy of the Retention Certificate.

iii) The Registrar also failed to take into account the oral submissions by the Lab & Allied Limited, an interested party during the hearings hereof submission the Registrar's online portal had problems as it would a valid certificate as invalid at times.

iv) Despite the Applicant's objection to the Registrar's letter dated 11th May 2017 alleging that the Applicant's product was retained on 3rd May 2017, the Board ruled that the Registrar's letter was not objected or challenged by the Applicant.

v) The Board failed to find that the circumstances of the case, the provisions of the tender document, **Public Procurement and Asset Disposal Act** and the Constitution required KEMSA to seek clarification from the Applicant and the Registrar on the status of the Retention Certificates submitted.

20. Based on information received from its advocates, the ex parte applicant averred that it requested for the certified copy of proceedings in PPRB, App. No. 45/2017 from the Board and the Board's officer promised to advise the Applicant's advocates whether the same can be given but no proceedings have been availed to date.

21. The applicant asserted that the impugned decisions by the 1st Respondent herein dated 28th April 2017 to the Applicant and or the Interested Party, is a result of the Respondent's breach of the *Tender Document, Public Procurement and Disposal Act, Fair Administration Actions Act and the Constitution* as set out in the Applicant's Application for review attached hereto as RD-8. It was also unreasonable and irrational on the part of KEMSA to make a decision to award the tender to Interested Party on 28th April 2017 and then purport to seek clarification and verification on 8th May 2017 from the Registrar post disqualification of the Applicant. The Applicant therefore verily believes that the said purported letter of 8th May 2017 purporting to seek clarification was irrelevant and an afterthought.

22. It was contended that the said ruling was entirely based on the irrational and unreasonable assumption that the online verification of the Applicant's Retention Certificate Number 12134 by KEMSA was sufficient and that KEMSA needed not do any other additional ascertainment apart from checking on the website. The said ruling is unreasonable, irrational, marred with illegalities and contrary to the Tender Document, **Public Procurement and Asset Disposal Act**, the **Fair Administration Actions Act** and the Constitution. Further, the Respondent's actions are contrary to Article 227 of the Constitution which requires that the tender process be transparent, fair, equitable, competitive and cost effective. KEMSA's breaches set out above and countenanced by the Board and the Registrar expose KEMSA, the purported award to the Interested Party is overpriced beyond the fair market value thereby exposing KEMSA and the public on whose behalf the Respondents are acting to lose over USD. 100,000,000.00 which is the price difference between the Applicant's bid, lower bidder, which quoted USD 0.4per item and the Interested Party's awarded bid which quoted USD. 1.45 per item

23. The applicant therefore believed that the Respondents herein should respect, comply and appreciate the statutory ideals of procurement laws, regulations and practise in awarding the said tender. To it, the Respondents' actions were inequitable, oppressive, irrational, unreasonable, actuated with malice and designed to rig out the Applicant herein.

24. In a rejoinder to the responses by the Respondents and the interested party, the ex parte applicant's position was that the instant Application was not overtaken by events as the law provides that a party aggrieved by the decision of the Public Procurement Review Board has fourteen (14) days within which to challenge the said decision at the High Court by way of Judicial Review proceedings. In its view, the decision of the Review Board only becomes final and binding upon the parties to the review process in the event that the aggrieved party does not challenge the said decision at the High Court within the 14-days timeline from the date of the decision by the Board. The applicant was of the view that upon the commencement of the review proceedings at the Review Board, the statute provides that there is an automatic suspension of the procurement process in question pending the final determination of the issues in dispute.

25. The applicant asserted that since it was not in dispute that the ruling of the Review Board was delivered on 31st May 2017 and that the proceedings herein were filed on 13th June 2017 within the statutory timelines, the surreptitious and rushed execution of the purported supply contract herein as clearly admitted by the Respondents and interested party at paragraph 13 of the interested party's Replying Affidavit herein despite having known the statutory provisions on the right to appeal to this Court was malicious and otherwise contemptuous of this Court herein as it's intent was to undermine, defeat and or render the authority of this Court otiose. The applicant reiterated that it is trite law that the Board's decision is not final and binding in law as long as the period for preference of an Appeal in this Court has lapsed without filing of an Appeal against the decision.

26. It was further contended that the Court directed on 21st June 2017 that the *status quo* order that had earlier on been issued meant that the party that was previously supplying the said product was the one to continue the supply and at no time was the interested party given the go ahead to supply the said product to the KEMSA as it is not the interested party that was previously supplying the product in question. As such the interested party's arguments that there was no stay orders granted on the said date are self-defeating, are baseless and without any merits and do not allow and or justify the interested party to supply the said product to KEMSA.

27. Accordingly, the applicant averred that any contractual arrangement where the interested party is purporting to supply the medical product in question herein is contrary to the *status quo* order in place and the interested party cannot justify its violation of the *status quo* orders by arguing that there are no stay orders in place.

28. According to the ex parte applicant, it tendered for item number 2 and 3 of the Tender being Amoxicillin tablet 250mg (dispersible, scored) and Amoxicillin + clavulanic acid tablet 1g respectively as set out in the Tender Document (83 of 155 thereof) and the KEMSA's letter ref KeMSA/PROC/OIT3/2016-2017 to the Ex-parte Applicant dated 28th April 2017. The subject of this proceedings is however item No. 2 being Amoxicillin tablet 250mg (dispersible, scored) which was retained as product Retention No. 12134 on 5th March 2017 and not 3rd May 2017 as alleged by the 3rd Respondent. The Ex-Applicant paid for the retention certificate on 27th February 2017, printed the Retention Certificate with a QR Code from the 3rd Respondent's website and submitted the same together with the bid for item No. 2 to the KEMSA before close of the Tender. The applicant reiterated that it bid for the Amoxicillin 250mg (dispersible, scored) (item No. 2) as opposed to the Amoxicillin 250mg (tablets for oral suspension) as purported by the Registrar in its Replying Affidavit. Notwithstanding the foregoing, the United States Pharmacopeia (USP)- a compendium of drug information for United States of America published annually by the United States Pharmacopeia Convention – has classified Amoxicillin 250mg (dispersible, scored) (item No. 2) and Amoxicillin 250mg (tablets for oral suspension) as same items/drugs, with similar prescriptions and strength.

29. The Registrar was accused of having failed to disclose to this Court that a Retention Certificate with QR code is not accessible or printable from the Registrar's website unless the subject product has been retained. The Registrar has not explained how a product was approved and a Retention Certificate available or printable by 5th March 2017 with a QR code yet allege that the same product was retained in May 2017. The applicant averred that the letter ref: PPB/Misc/Vol. VI/017/041 by Registrar to KEMSA is a subject of the instant proceedings whose information is false, ultra vires the law and given with attempt to ratify the illegalities by KEMSA.

30. The applicant disclosed that its product listed as Nesmos 250 tablets was retained on 5th March 2017 but the 3rd Respondent's said letter deliberately misrepresents that the same product was retained on 3rd May 2017 with intent to mislead the Court that the product was retained after the closing date for the Tender. The applicant however explained that the alleged Nesmos 20 retained under Retention No. 1536 with product strength of 250mg/5 ml is different from the subject product (Amoxicillin 250mg) retained as 12134 hence the allegations of product strength of the subject item is irrational and unreasonable.

31. In the ex parte applicant's view, the letter dated 11th May 2017 as authored by the Registrar was both challenged by the Ex-parte Applicant in its Further Affidavit of 22nd May 2017 and subsequent submissions. Further, the Ex-parte Applicant had made an oral application to summon the Registrar into the proceedings at the Review Board but the Board herein declined consequently fettering the Ex-parte Applicant's opportunity to cross examine the Registrar on the contents of its letter of 11th May 2017 clearly been authored to the detriment and prejudice of the Ex-parte Applicant contrary to the law.

32. The applicant insisted that it had at all times provided evidence that it had applied for the registration of the drug in question, issued with a certificate of registration, paid for the retention certificate on 27th February 2017 and duly printed from the 3rd Respondent's website, the retention certificate number 12134 for the said product on 5th March 2017.

33. The applicant insisted that it was not challenging the merits of the decision making process by the Respondents but rather, the manner in which the said decisions were made and arrived at in the tender process and specifically the disqualification of the Ex-parte Applicant from the tender process solely on the basis of a system error that was prevailing at the time of the online verification of the retention certificate number 12134 as submitted by the Ex-parte Applicant. The decision making process was unreasonable, irrational, actuated with malice, bad faith and involved a lot of procedural improprieties.

34. In the applicant's view, the issues surrounding the letters of 3rd May and 11th May 2017 go to the root of the decision making process herein as the said letters were authored after the decision making had been done on which bidder was to be awarded the tender herein on 28th April 2017. Accordingly, the ex parte applicant contended that the said clarifications were supposed to have been done before the said decision of awarding the tender on 28th April 2017 hence attempting to seek clarification after the decision had been made was an afterthought and an effort to cover and remedy the flawed process in the tender process.

35. The Court was therefore urged to find that it is therefore in the best interests of justice, is fair and equitable that this Court exercises its discretion by finding that the rejection of the Ex-parte Applicant's retention certificate number 12134 that was printed from the 3rd Respondent's online portal on 5th March 2017 simply because of a system error was unfair, unreasonable and irrational under the circumstances of the case. Further, the failure to consult the Ex-parte Applicant about its retention certificate number 12134 before a decision was made and further attempting to seek clarification vide letters dated 3rd May 2017 and 11th May 2017 was unreasonable, irrational, a breach of the rules of natural justice and was actuated with malice and bad faith and as such this Honourable Court should allow the Application dated 16th June 2017 in terms of the prayers therein.

36. In support of its case the applicant relied on **ABN Amro Bank NV vs. Kenya Revenue Authority [2017] eKLR**, where the Court of Appeal quoted from the English case of **Associated Provincial Picture House Ltd v Wednesbury Corporation (1947) 2 All ER 680** where **Greene MR** and submitted that it was unreasonable to punish and penalize the ex parte applicant herein by holding that the simple search done at the Pharmacy and Poisons Board's website was sufficient and that the 1st Respondent needed not do anything more considering that the express provisions of clause 2 of part B (Technical Evaluation) of Section VIII (Stages of Tender and Tender Evaluation Criteria) of the 1st Respondent's Open International Tender(OIT) Document required and demanded the 1st Respondent's Tender Evaluation Committee to ensure that a detailed examination of the bid documents to confirm veracity and validity thereof. To the applicant, a quick search on an online website portal cannot be said to be detailed in any way and thus the quick online search was supposed to be followed up by an immediate letter to the Pharmacy and Poisons Board.

37. It was submitted that at the hearing of the review proceedings against the 1st Respondent's decision in the letter dated 28th April 2017 before the Board in PPRB App. No. 45/2017, it was evident and clear that KEMSA discriminatively sought and obtained clarifications from other bidders in the tender on the status of their Retention Certificates but the same clarification was not sought against the ex parte applicant herein. There is no explanation for this preferential treatment and or discriminatory actions by the 1st Respondent.

38. The applicant submitted that it was unreasonable and irrational on the part of KEMSA to disqualify the ex parte applicant's Retention Certificate 12134 and thus disqualify it from the tendering process based on the Registrar's online portal search results when it was clear that it was a system error that had nothing to do with the ex parte applicant herein. The same was unreasonable and in bad faith.

39. Further, it was also unreasonable for KEMSA to make the said decision of awarding the tender to the Interested Party herein vide its letter of 28th April 2017 and subsequently purport to seek clarification and more details from the Registrar on 3rd May 2017, after making its decision of disqualifying the ex parte applicant and awarding the said tender to the interested party. In the applicant's view, the purported attempt by KEMSA to clarify from the Registrar herein on 3rd May 2017 was merely an afterthought, inconsequential and of no effect as the decision had already been made way back on 28th April 2017. It also amounted to a breach of the rules of natural justice as to a fair process.

40. The applicant contended that it was as well unreasonable and malicious for the Board to decline the ex parte applicant's oral application to summon the Registrar on matters relating to the Registrar's letter dated 11th May 2017 to the Board on the status of the ex parte applicant's Retention Certificate Number 12134 yet the said letter had been written to the prejudice of the ex parte applicant without affording the ex parte applicant an opportunity to be heard and or even without notice.

41. Based on **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 others [2015] eKLR** it was submitted that the impugned decisions by the 1st Respondent herein dated 28th April 2017 is a result of the Respondent's breach and failure to comply with express provisions of Clause 2 of part B (Technical Evaluation) of Section VIII (Stages of Tender and Tender Evaluation Criteria) of the Respondent's Open International Tender (OIT) Document (Tender Document) which required the 1st Respondent's Tender Evaluation Committee to ensure a detailed examination of the bid documents to confirm validity and veracity of the documents submitted by the responsive bidders. Further, the decision to disqualify the ex parte applicant's bid was also in breach of *clause 27.1 –clarification of Tenders-Part E of Section 1 on Instructions to Tenderers* at page 22 of 115 of the Tender Document which obligates the 1st Respondent to ask the bidders in writing for clarification of the bidders Tender. In addition the decision to disqualify the ex parte applicant's bid without carrying out a detailed examination and or seeking clarification from the ex parte applicant or the 3rd Respondent also breached *clause 29.4 of Part E of Section I on Instructions to Tenderers* at page 24 of 115 of the Tender Document in so far as the determination of the ex parte applicant's alleged bid being unresponsive was devoid of any clarification from the ex parte applicant or the Registrar.

42. It was therefore submitted that the 1st Respondent further breached section 80(2), 83 of the ***Public Procurement and Asset Disposal Act (PPAD Act)*** as well as Regulation 52(1) of the ***Public Procurement and Asset Disposal Act***. Section 80(2) of the ***PPAD Act*** requires the 1st Respondent to strictly comply with the criteria set out in the Tender Document and the Act. Section 82(3) of ***PPAD Act*** provides that the criteria in section 80(2) of the Act hereof shall be objective and quantifiable hence the ex parte applicant submitted that exclusive reliance on the online portal results without written confirmation from the Registrar is not objective or quantifiable. It was incumbent upon KEMSA to adopt a certificate verification process that is in the circumstances quantifiable, illustrable and objective as per the requirements of the ***PPAD Act***. The 1st Respondent failed to do so hence breach of statutory duty. It is not clear when and or whether KEMSA logged onto the online portal as alleged hence the requirement to request for written clarification on the matter in order to illustrate evidence of compliance with section 80 of the ***PPAD Act***.

43. The applicant submitted that section 81 (1) of the ***PPAD Act*** requires the 1st Respondent to make a request for clarification in writing from the tenderers to assist in evaluation. None was requested to assist the Respondent to confirm the validity of the Retention Certificate Number 12134 as submitted by the ex parte applicant. Section 83 of the ***PPAD Act*** further requires KEMSA to conduct due diligence and present a written report to confirm and verify the tenderers' qualifications prior to the award of the tender. It was submitted that KEMSA failed to conduct due diligence in verifying the ex parte applicant's qualifications and in particular its retention certificate number 12134 as is required under section 83 of the ***PPAD Act***.

44. The ex parte applicant submitted that KEMSA's actions also breached Rule 52(1) of the ***Public Procurement and Disposal Regulations, 2006*** which requires that KEMSA, prior to the award of the tender, must confirm the qualifications of the tenderer who submitted the lowest evaluated responsive bid, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with section 31(1) of the said Act.

45. It was further submitted that KEMSA's actions were a breach of section 86 of ***Public Procurement and Asset Disposal Act, 2013*** and Regulation 62(1) of the ***Public Procurement and Disposal Regulations, 2006*** which requires that a successful bidder shall be the one with the lowest evaluated price for the product item. The applicant submitted that the failure to seek clarification from the ex parte applicant on its retention certificate number 12134 but on the other hand seeking clarification from other bidders was discriminatory, partisan and contrary to Articles 27, 47, 50(1) and 227 of the Constitution and principles of natural justice contrary to Article 47 and 50(1) of the Constitution. In this respect the applicant relied on **Republic vs. Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR** where the Honourable Court rightly held that:-

“Matters of fair trial and administrative action under Article 47 and 50 of the Constitution are proper grounds for judicial review and are a codification of what is generally known as principles of natural justice...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be a judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.”

46. The upshot of the foregoing, it was submitted is that the Respondents are under an obligation under the Constitution and the ***Public***

Procurement and Asset Disposal Act, 2015 and the regulations thereunder to oversee, ensure and facilitate the ex parte applicant's rights to a fair, credible, reasonable, transparent and competitive procurement process but they have blatantly failed, ignored and abdicated on their statutory responsibilities which has resulted in the ex parte applicant herein being rigged out of the said process.

1st Respondent's Case

47. The application was opposed by KEMSA in the following grounds:

- 1. The application dated 13th June 2017 is overtaken by events**
- 2. The application dated 13th June 2017 and the orders sought cannot be granted to the applicant in the circumstances.**
- 3. The court exercising its judicial review jurisdiction lacks powers to grant the prayers sought**
- 4. The Public Procurement Administrative Review Board's decision was within the law.**
- 5. The application amounts to an abusive of the court process for asking to litigate issues that were not conversed before the Public Procurement Administrative Review Board**
- 6. The application is brought in bad faith, lacks merit and ought to be dismissed.**

2nd Respondent's Case

48. The 2nd Respondent, the Public Procurement Administrative Review Board ("the Board") opposed the application.

49. In its replying affidavit, the Board averred that the board received the applicant's request for review in the matter of tender no. kemsait3-2016-2018- supply of pharmaceuticals filed on 12th may, 2017 and assigned the request for review the applicant number 45 of 2017.

50. It then notified and invited the ex-parte applicant, the 1st respondent, the interested party and other parties interested in the matter to a hearing on 23rd may, 2017 and heard all parties who attended the hearing, considered their submissions, determined the application for review and delivered its ruling on 31st May, 2017, in which it disallowed the request for review by the ex-parte applicant herein, ordered that the 1st respondent was at liberty to proceed with the procurement process therein, and that each party was to bear its own costs of the request for review.

51. It was the Board's case that in arriving at the above decision, it was alive of all facts raised by all the parties and was well informed of all the provisions of the law applicable to the raised facts and issues, including the provisions of the constitution of Kenya, 2010, the **Public Procurement and Asset Disposal Act, 2015** ("the Act") and the **Public Procurement and Disposal Regulations, 2006**, and other legislation.

52. The Board further contended that it observed the rules of natural justice and acted lawfully, fairly and reasonably in exercise of its statutory mandate under the Act, and in its decision, made the observation that the request for review raised one issue for determination and that issue was whether the applicant was rightfully declared unsuccessful at the technical evaluation stage for providing an invalid retention certificate for the amoxicillin tablet 250mg (dispersible).

53. It was its position that in the said decision, it made the findings that the applicant was rightfully declared unsuccessful by KEMSA on the basis of the search using the Registrar's portal for the authenticity of the retention certificate which the applicant submitted as part of its tender document to KEMSA.

54. Accordingly, the Board insisted that it considered all the relevant factors in arriving at its decision, which decision was reasonable, rational and lawful. In its view the applicant's application is made in bad faith, has no merit and is only calculated to harass the credibility of the Board's mandate and functions, while ultimately eroding the public's confidence in procurement procedures and processes. However, the Board 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.

55. The foregoing issues were reiterated in the submissions in which the Board stated that:

- a. That due process was followed throughout the procurement process.
- b. That the Board heard the parties and considered all relevant factors in reaching its determination.
- c. That the Board made its decision within its mandate as set out in the under the Public Procurement and Asset Disposal Act 2015.
- d. That the present application does not impugne the decision making process of the PPARB.
- e. That it was fatal for the Ex-parte Applicant not to have joined the Chief Registrar Pharmacy & Poisons Board at the PPARB Stage.

f. That this entire application is wrongly before the Court since it seeks to interrogate the merits of the decision of the PPARB and yet a critical party was not joined in the proceedings in question.

g. THAT the Court exercising its judicial review jurisdiction lacks powers to grant the prayers sought.

h. That the application seeks to re-litigate matters that were or ought to have been argued at the PPARB and is hence an abuse of the Court process.

i. That the application ought to be dismissed with costs.

56. The Board's submission was to the effect that the issues raised by the applicant went to the merit rather than the process hence not proper issues for judicial review.

3rd Respondent's Case

57. The 3rd Respondent herein, the Chief Registrar also opposed the application.

58. In its submissions, the Registrar summed up that the Application is unmerited and ought to be dismissed with costs for the following two (2) reasons:

a) The Applicant claim relates to a contested issue which is outside the purview of the Judicial Review jurisdiction; and

b) In any event, the claim on the "system error" in the 3rd Respondent's Portal is attributable to the mistake by the Applicant on the Retention Number 12134 that it supplied to the 1st Respondent which resulted to the confusion when the 1st Respondent conducted a search on the 3rd Respondent's portal.

Interested Party's Case

59. In opposition to the application the Interested Party herein, **Medox Pharmaceuticals Limited**, relied on the following grounds:

1. That the application is incompetent, mischievous and an abuse of this honourable court.

2. That the application has no merits in law and fact.

3. That the Public procurement Administrative Review Board dismissed the ex parte applicant's application for review the subject of this judicial review cause on merit.

4. That the applicant did not provide a valid retention certificate for item 2 of the tender as per the mandatory requirement under tender document.

5. That there being no orders staying the procurement proceedings, the 1st Interested party entered into a framework agreement for the supply of the product tendered for.

6. That the 1st Interested Party has already began supplying the 1st respondent with the product under procurement.

7. That the application dated 13th June 2017 is therefore overtaken by events and the orders sought cannot be granted under the circumstances

8. That the ex parte applicant indeed did not have a valid retention certificate at the time of procurement and did not provide any evidence to the contrary at the hearing of the application for review before the 2nd respondent.

9. That the status quo being the decision of the 2nd respondent was maintained and the procurement process proceeded.

10. That the ex parte applicant will not suffer any loss since the 1st, 2nd and 3rd respondents made a determination that the ex parte applicant failed to provide a valid retention certificate for its product at the time of the procurement proceedings herein.

11. That the procurement process proceeded as ordered by the 2nd respondent and the application before this court by the ex parte applicant only seeks to delay a legal process.

12. That the application is against the spirit and purpose of the Kenya Constitution, the Public Procurement and Assets Disposal Act 2015 and the Public Procurement Regulations, the Fair Administrative Act, the Law Reform Act, the wider interest of justice and is therefore devoid of merit and ought to be dismissed with costs.

60. Apart from the said grounds of opposition the interested party filed an affidavit in which it was deposed that pursuant to an invitation to

tender for Tender No. KEMSA/OIT3/2016-2018 advertised in the local Newspapers the interested party prepared all necessary documentation for the tender herein and submitted a bid on item 2 [Amoxicillin tablet 250mg (dispersible, scored)] of the tender which bid was by a notification dated 28th April 2017 found responsive and therefore successful.

61. According to the interested party, it was an express term in the tender document at section IV clause 5.1(c) that the product under procurement be registered and retained by the Kenya Pharmacy & Poison's Board and the retention status be current. Further, under clause 2(b) of part B (Technical Specifications) of the Respondent's tender document in the Evaluation Criteria, it was a mandatory term that bidders who are distributors were required to provide copies of the product registration certificates and retention certificates from the Kenya Pharmacy and Poisons Board concerning the offered pharmaceuticals.

62. It was averred that the *ex-parte* Applicant on 12th May 2017 applied for review of the tender proceedings and award TENDER NUMBER: KEMSA-OIT3-2016-2018- SUPPLY OF PHARMACEUTICALS- AMOXICILIN TABLET 250mg (DISPERSIBLE, SCORED) to the Public Procurement Administrative Review Board through Application 45 of 2017 where it contended that it had complied with the mandatory requirements set out above. On 22nd of May 2017 and 23rd of May 2017, the Interested Party filed grounds of opposition and a replying affidavit respectively before the Board in which it was contended that the Review, as filed lacked merit since the *ex-parte* applicant was found non responsive for failing to comply with the mandatory requirement in the tender document for provision of a valid drug retention certificate of the product.

63. According to the interested party, the Board heard all the parties considered the submissions and delivered a ruling on the 31st day of May 2017 where it determined that the *ex-parte* applicant was rightfully disqualified for not providing a valid drug retention certificate for its product. Based on legal counsel, the interested party believed that:

i. the Board stated the following in its ruling:

“The Board therefore holds that the only way the procuring entity could verify the validity or otherwise of the said document was by using the means set out in the certificate for verifying its validity. The certificate included by the Applicant in the tender document provided the following means of verifying its authenticity in the last paragraph of the document.

‘NOTE: this certificate can only be verified online http://products.pharmacyboardkenya.org/ppb_admin using the QR code below.

The Respondent confirmed that it did this by searching the portal using the Quick Response (QR) Code reader which returned the verdict that the certificate was invalid.”

ii. The Board considered all the relevant facts in arriving at its decision which was within its mandate under the **Public Procurement and Asset Disposal Act 2015**.

iii. The Board dismissed the *ex-parte* application for review on merit after taking all relevant factors into consideration.

iv. Accordingly, the Board found that the *ex-parte* applicant's application for review lacked merit, was dismissed and KEMSA herein ordered to proceed with the procurement process to its logical conclusion.

64. The applicant disclosed that it therefore executed a framework contract Agreement with Kenya Medical Supplies Authority KEMSA herein. However, the *ex-parte* applicant served them on the 14th of June 2017 with an application for leave to commence judicial review filed on the same day without any Order staying the procurement proceedings. However, the Order stated that the issue of stay was to be heard and determined inter parties on the 21st of June 2017 and the *status quo* be maintained. When the matter came up on the 21st of June 2017 the court declined to grant an order of stay but instead ordered that the *status quo* be maintained.

65. Based on legal counsel the interested party believed that:

i. KEMSA is a State Corporation under the Ministry of Health mandated, *inter-alia*, to procure and supply pharmaceuticals and non pharmaceutical products to offset any deficit in public medical facilities within the Republic of Kenya.

ii. The tender subject to this proceeding was in the circumstances intended to offset any deficiencies in public medical facilities all over Kenya.

iii. Since there are no orders staying the process herein and due to the urgency the interested party proceeded to execute the framework contract with KEMSA.

66. It was the interested party's position that the *ex-parte* applicant is challenging the decision of the Board that determined that KEMSA had breached no duty as provided by the **Public Procurement and Asset Disposal Act 2015** and the **Public Procurement Regulations (2006)**. The Board found that at the time of the tender herein the *ex-parte* applicant did not have a valid drug registration retention certificate for the drug under procurement herein and that KEMSA indeed conducted a search on the drug retention certificate provided by the *ex-parte* applicant through the means available in law.

67. It was disclosed that KEMSA at the hearing before the Board produced a letter drawn by the Registrar which confirmed that as at the time of evaluation of the bids herein the *ex-parte* applicant's drug did not have a valid drug registration retention certificate and that at the said hearing before the Board the *ex-parte* applicant did not provide any evidence to show that as at the time of the procurement proceedings

herein it had a valid drug retention certificate for its product. To the contrary, the letter by the Registrar dated 11th May 2017 confirming that the *ex-parte* applicant's drug supplied for this tender was not retained as at the time of evaluation was never disputed at the hearing. It was contended that the applicant had all the opportunity at the hearing before the Board to provide any evidence to show that it had a valid retention certificate including having the Registrar enjoined at the hearing before the Board or even writing to the Registrar seeking clarification on the same.

68. It was however contended that the letter of 11th May 2017 was not the reason that the *ex-parte* applicant was disqualified but it was disqualified after the search conducted on the *ex-parte* applicant's certificate by KEMSA on the Registrar's portal.

69. Based on counsel's advice, the interested party believed that:

a. A party aggrieved by the decision of the Board can elect to challenge the Board's decision through Judicial Review among other available legal remedy.

a) The *ex-parte* applicant herein opted to use Judicial Review

b) Judicial review proceedings challenge decision making process and do not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case

c) The current application does not challenge the decision making process by the Board but rather the merits of the decision of the Board.

d) The issue of validity or lack thereof of the drug retention certificate was heard and all parties given equal opportunity to present evidence in support of their respective position before the Board.

e) Therefore, to interfere with the decision of the Board would invite this Honourable Court to consider the merits of the decision made by the Board through a Judicial Review process.

f) The issue of validity of the drug retention certificate is a contested matter of fact which determined PPARB application 45 of 2017 and is therefore not open for challenge by way of Judicial Review but an appeal.

g) This Court therefore, does not have jurisdiction to determine the merits of the decision of the Board but only to address itself to any procedural impropriety thereof.

70. It was averred that since the Registrar was never a party to the proceedings in PPARB application 45 of 2017 before the Board, the *ex-parte* applicant cannot enjoin a party who was never involved in the dispute before the Board in PPARB 45 of 2017 to give new evidence in this Judicial Review Cause that was previously not available for consideration at the hearing before the Board; yet from the onset, the *ex-parte* applicant was well aware that the issue in dispute in PPARB 45 of 2017 was the validity or lack thereof of the drug retention certificate issued by it and had all the opportunity in law to join the Registrar in the dispute before the Board which it failed to do. By now enjoining them for whatever purpose is irregular, unprocedural and against principles of fair administration of justice.

71. In the interested party's view, the Board procedurally conducted itself in a fair and just manner as it heard all the parties to the review, considered all documents of evidentiary value and the submissions placed before it and as such the decision was rationale, reasonable, logical, lawful and within the mandate and jurisdiction as provided by the **Public Procurement and Asset Disposal Act 2015** and the **Public Procurement and Disposal regulations 2006**.

72. It was therefore contended that the prayer that this Court do issue a declaration that the Board's decision was unlawful is unfounded in fact and law since the Board based its decision solely on the evidence provided by the parties to PPARB 45 of 2017. Similarly, the prayer that this Court do issue a declaration that the letter of 11th May 2017 issued by the Registrar in respect to the tender herein is *ultra vires*, irrational, unreasonable and hence illegal since the said letter was not the reason why the *ex-parte* applicant was found to be non-responsive. It was therefore contended that the applicant has not shown any unreasonableness, irrationality, *ultra vires* in law that may require the intervention of this Court through an order of certiorari. It was therefore sought that this Judicial Review proceeding be struck out with costs for lacking merit as they have failed to identify any procedural impropriety occasioned to the *ex-parte* applicant. Further, the *ex-parte* applicant has invoked this Court to consider matters that do not lie within its jurisdiction and as such, the orders sought cannot issue.

73. It was submitted on behalf of the interested party that judicial review is governed by the Constitution of Kenya, the **Law Reform Act**, **The Civil Procedure Rules 2010** and the **Fair administrative Actions Act 2015**. To the interested party, the scope and nature of judicial review proceedings has severally been adjudicated on with a singular resounding voice on the jurisdiction of judicial review Courts and consequently the factors that must be satisfied for the Orders to issue and in this respect reference was made to **Republic vs. National Transport and Safety Authority & 2 Others Ex-Parte Metrotrans East Africa Ltd [2016] eKLR**, **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR**, and **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR**.

74. As regards the allegation of irrationality, the interested party relied on **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others** (supra) and averred that the proceedings from the respondent are regular and the decision followed the proceedings as the respondent applied the legal provisions within its jurisdiction after considering the facts, evidence and the applicable law. According to the interested party, the *ex-parte* applicant wants this Court to make a determination on a contested matter of fact that was determined by the Respondent on merit yet this Court cannot be seen to depart from the Constitution, the **Law reform Act**, the **Fair Administrative Actions Act** and the litany of authorities that establish the jurisdictional limits of the Judicial Review Court. It was contended

that the use of the QR code was the legally provided method in the circumstances which the applicant could verify the validity of the applicant's retention certificate. The use of the QR code by the 1st Respondent as determined by the instructions in the retention certificate issued by the 3rd respondent was the legally accepted method that was available for conducting verification of the certificates issued by all bidders inclusive of the *ex-parte* applicant.

75. It was therefore submitted that this ground for the application for Judicial Review is unmerited and consequently should fail.

76. In the interested party's view, once it is established that the 1st Respondent followed the law, all parties were accorded fair hearing in opposition and/or support of the facts by the Board, the Board respondent considered the matter before it within the relevant law then there can exist no illegality. In this respect the interested party relied on **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another** .

77. In the interested party's view, KEMSA is granted sole responsibility for drawing the tender document and the criteria set out therein. Once it has discharged this duty and bids submitted thereon it evaluates all tenders according to the criteria set out in the tender document. In doing so, KEMSA will have complied with section 80(2) of the **Public Procurement and Asset Disposal Act**. Section 83 of the **Public Procurement and Asset Disposal Act** addresses itself to a bid that has been declared lowest responsive after successfully passing through the three stages of evaluation. Therefore section 83 cannot come to the applicant's aid since it was not the lowest responsive tender having been found non responsive at the technical evaluation stage. It was averred that section 79 of the **Public Procurement and Asset Disposal Act** defines a responsive tender to be one that conforms to all mandatory and eligibility criteria set out in the tender document. To the interested party, KEMSA discharged its mandate according to the Constitution and the Laws of Kenya.

78. It was submitted that a court of Judicial Review is mandated to safeguard any procedural improprieties that a party which has moved it suffered at any stage of a judicial or administrative process and that where it is shown that a party who moved the judicial review court was provided with due process and all opportunity to adduce evidence in support of their claim which they did not, the court cannot allow such a party to adduce more or new evidence at this stage. In this case the *ex-parte* applicant simply did not prove its claim at the hearing before the 2nd Respondent and it cannot now bring in new parties or evidence in support of its claim.

79. In support of the contention that the applicant was seeking to appeal against the decision but disguised the same as judicial review, the interested party relied on **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** and **M/S Master Power Systems Limited vs. Public Procurement Administrative Review Board & 2 Others [2015] eKLR**. It also relied on the Court of Appeal decision in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 others [2012] eKLR** where the Court cited with approval the decision in **Chief Constable vs. Evans [1982] 3 ALL. ER 141**.

80. According to the interested party, the application as drafted indicates that the *ex-parte* applicant should not have come to a Judicial Review Court but an appellate Court. Consequently the applicant has failed to satisfy the minimum threshold for the grant of judicial review orders. It was reiterated that the application has not identified any procedural impropriety on the part of the Respondents, it is only a feeble attempt by the applicant to introduce evidence that they failed to produce at the hearing of the review and therefore the orders sought in the circumstances cannot issue.

81. The Court was therefore urged to dismiss the present application with costs as it lacks jurisdiction to entertain the application and that the application is equally unmerited and an abuse of this Honourable Court's process.

Determinations

82. 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.

83. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

84. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285 and **Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60**.

85. Similarly, the Court of Appeal in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR** cited with approval the decision in **Chief Constable vs. Evans [1982] 3 ALL. ER 141**, in which Lord Brightman said:

“...where proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (*certiorari*) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong on matters of fact or that it misdirects itself in some matter...The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of the rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly.”

86. According to the applicant, in the meeting of 3rd May 2017, the 1st Respondent admitted that the only basis of its disqualification and or determination that its alleged Retention Certificate Number 12134 was invalid, was information obtained by the 1st Respondent’s tendering committee from the Registrars website. However, the 1st Respondent neither sought nor obtained verification and or clarification from the Registrar or the Applicant on the validity of the Retention Certificate 12134 even though it knew and or ought to have known that it was not possible to print out a current retention certificate with QR Code from the Registrar’s website unless the same is retained hence the need to seek clarification from the Registrar or Applicant on the copy of Retention Certificate attached on the Applicant’s bid.

87. However, the Board in its decision made the following finding:

“The Board therefore holds that the only way the procuring entity could verify the validity or otherwise of the said document was by using the means set out in the certificate for verifying its validity. The certificate included by the Applicant in the tender document provided the following means of verifying its authenticity in the last paragraph of the document.

‘NOTE: this certificate can only be verified online http://products.pharmacyboardkenya.org/ppb_admin using the QR code below.

The Respondent confirmed that it did this by searching the portal using the Quick Response (QR) Code reader which returned the verdict that the certificate was invalid.”

88. It is not disputed that the Tender document provided that the Bidders who are distributors, like the Applicant, were required in support of their bids as mandatory to submit Current Product Registration and Retention Certificates with QR Codes from KEMSA and that KEMSA was required, during the technical evaluation, to subject documents submitted by bidders to a detailed examination to confirm *inter-alia* whether the Bidders copies of the Bidders Product Registration and Retention Certificate with QR Codes thereon from the Registrar were current.

89. How was the confirmation of Current Product Registration and Retention Certificates with QR Codes from KEMSA to be done? The same document provided that the certificate could only be verified online vide: http://products.pharmacyboardkenya.org/ppb_admin using the QR code provided.

90. Section 80(2) of the *Public Procurement and Asset Disposal Act 2015* states that:

The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

91. It follows that KEMSA was bound to conduct the subject procurement in accordance with the tender document which provided *inter alia* that the confirmation of Current Product Registration and Retention Certificates which was a mandatory requirement was to be done vide the QR Codes from KEMSA obtainable from the portal provided being http://products.pharmacyboardkenya.org/ppb_admin.

92. In Nairobi JR No. 513 of 2015 - **Republic –vs. The Public Procurement and Administrative Review Board & 2 Others ex parte Akamai Creative Limited** this Court held the view that:

“It is therefore clear that apart from the lowest tender, *the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document* and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest.” [Emphasis added]

93. That evaluation and comparison of bids is to be undertaken using procedures and criteria set out in the Tender document was emphasized in the **Republic vs. Public Procurement Administrative Review Board & 2 Others ex-parte Numerical Machining Complex Limited [2016] eKLR**.

94. It is however contended that the Registrar failed to disclose to the Court that a Retention Certificate with QR code was not accessible or printable from the Registrar’s website unless the subject product had been retained. In this case, it is alleged that the Registrar did not explain how a product was approved and a Retention Certificate available or printable by 5th March 2017 with a QR code yet alleged that the same product was retained in May 2017. Whereas it may well be true that the Retention Certificate with QR code was not accessible or printable from the Registrar’s website that is not an issue which this Court can make a determination on being a factual matter and considering that the Registrar was not a party to the proceedings before the Board.

95. The applicant however contended that during the hearing of the Applicant's PPRB Application for Review No. 45/2017 before the Board on 23rd May 2017, the applicant averred that one of the bidders and party to the said proceedings, **Laboratory & Allied Limited**, acknowledged that KEMSA had during the evaluation of the bids process contacted, sought and received clarification on the validity of its Product Registration and Retention Certificate yet conspicuously, deliberately and intentionally failed, ignored and or neglected to seek for clarification from the Applicant or even the from Registrar when the latter's alleged online portal check indicated that the Applicant's Retention Certificate 12134 was invalid.

96. Section 81(1) of the **Public Procurement and Asset Disposal Act 2015** states that:

A procuring entity may, in writing request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders.

97. It is therefore clear that the decision to seek a clarification of a tender from a tenderer is meant to assist in the evaluation and comparison of tenders and the decision to do so and from whom to seek a clarification and the nature of the clarification is a preserve of the procuring entity. There is however no obligation placed on a procuring entity that if it seeks a clarification from one bidder it must seek the same from all the bidders. In this case, apart from a bare allegation that KEMSA sought and received clarification on the validity of the Product Registration and Retention Certificate from **Laboratory & Allied Limited**, the exact nature of that clarification is not disclosed. In the foregoing premises this Court cannot find that failure to seek clarification from the Applicant on its retention certificate but seeking the same from other bidders was discriminatory and partisan.

98. In this case the Board's decision was based on the provisions of the Tender Document. Whereas it may well be that an appellate Tribunal could re-evaluate the evidence placed before the Board and re-assess the same in arriving at its decision, this Court sitting as a judicial review Tribunal has no such liberty. As was held in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR**:

"In this case, it is clear that the 1st respondent exercised its power within the law in hearing and reaching its decision. There has been no complaint on the procedures used by the 1st respondent. The annexures to the pleadings before this court show that the applicants, as well as all other parties who had an interest in the procurement proceedings, were represented during the review before the 1st respondent. The 1st respondent cannot therefore be accused of having acted outside its jurisdiction or of having breached the rules of natural justice. Judicial review cannot therefore come to the aid of the applicants on the grounds of illegality or procedural impropriety."

99. In this respect I associate myself with the decision in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** where the court held as follows:

"From the foregoing it is clear that the 1st Respondent considered all the issues raised by the applicants before proceeding to dismiss their request for review. In my view the applicants are asking me to look at the 1st Respondents said decision and reach a conclusion that the 1st Respondent erred both in fact and in law when it reached that decision. The question would then be whether this court acting as a judicial review court has powers to interfere with the decision...This court is being asked to determine whether the 1st respondent misapprehended the law as relates to the technical evaluation and award of scores thereunder. In my view, such an enquiry would amount to sitting on appeal over the decision of the 1st respondent. Indeed Parliament was alive to the distinction between judicial review and appeal in procurement proceedings when it provided in Section 100 of the Act that:-

(1) A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision.

(2) Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court, and the decision of the High Court shall be final

(3).....

100. I also agree with the decision of **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**, in which he stated that:

"...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."

101. The applicant's case seems to have been largely based on the irrationality of the impugned decision. The House of Lords in the case of **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935**, rationalized the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting *ultra vires*, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of

natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. See also **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**

102. Irrationality as fashioned by **Lord Diplock** in the **Council of Civil Service Unions Case** takes the form of *Wednesbury* unreasonableness explicated by **Lord Green** and applies to a decision which is so outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

103. What the applicant calls irrationality in my view may amount to mere unreasonableness. However, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas the Court is entitled to consider the decision in question with a view to finding whether or not the *Wednesbury* test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of *Wednesbury* unreasonableness.

104. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on *Administrative Law*, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”

105. Having considered the issues raised herein and in particular the fact that the Board’s decision was, according to it, based on the terms of the Tender Document, it is my view that the grounds of illegality and procedural impropriety are inapplicable. I am also not satisfied that the Respondent’s decision is so grossly unreasonable that that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. This must be so because the Board relied on the Tender Document in arriving at its decision. The law obliges the Board to do so since it is barred from making a finding that is contrary to the prescription in the Tender Document.

106. As was appreciated by this Court in **Republic vs. Business Premises Rent Tribunal & 3 Others Ex-Parte Christine Wangari Gachege [2014] eKLR**:

“...In this case it is not in doubt that the decision which is being challenged in these proceedings was the subject of an application for setting aside which decision was disallowed by the Respondent. Whether that decision was right or not the Applicant ought to have appealed against the same instead of challenging the decision in respect of which attempt to set aside had failed. In judicial review proceedings the mere fact that the Tribunal’s decision was based on insufficient evidence, or misconstruing of the evidence which is what the applicant seems to be raising here or that in the course of the proceedings the Tribunal committed an error are not grounds for granting judicial review remedies. In reaching its determination, it must however, be recognized that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327, it was held:

“It has been recognized for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal’s decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgment for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly...And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court’s to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise...Even if it were alleged that the Commission or authorized officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction...Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of certiorari on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a

matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction.”

In *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others*, Civil Application No. 307/2003, Omolo JA stated as follows;

“The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way.”

107. Whereas in some quarters it may be construed that the Court of Appeal by employing such a flamboyant language was encouraging impunity on the part of judicial officers, what I understand the Court of Appeal to be saying is that the mere fact that a Tribunal errs in his or her judgement it does not necessarily follow that the said officer acted without or in excess of jurisdiction. In other words, the issue for judicial review is not whether the decision is right or wrong, nor whether the Court agrees with it, but whether it was a decision which the authority concerned was lawfully entitled to make since a decision can be lawful without being correct. The Courts must be careful not to invade the field of policy entrusted to administrative and specialized organs by substituting their own judgement for that of the administrative authority. They should judge the lawfulness and not the wisdom of the decision. If the decision was wrong, it should be remedied by an appeal which allows the appellate court to engage in an intrusive analysis of evidence by the trial tribunal and review the merit of the decision in question. See **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd** (supra).

108. I do not see how a decision based on the Tender Document can be termed as illegal or irrational simply because no clarification was sought after the prescribed procedure invalidated the applicant’s certificate when there was no such requirement in the Tender Document. Whereas the Tender Document may well have had challenges, and may well be contested in certain forums, it is not for the Board to correct such challenges when hearing a request for review.

109. It is therefore my view and I hold that the manner in which this application was presented before me does not meet the threshold of judicial review proceedings as opposed to an appeal.

110. In the result I find no merit in the Notice of Motion dated 16th June, 2017 which I hereby dismiss with costs to the Respondents and the Interested Party.

111. It is so ordered.

Dated at Nairobi this 19th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mwangi for Mr. Litoro for the ex parte applicant

Miss Bojera for Mr. Akide for the 1st Respondent and holds brief for the 2nd Respondent

Mr. Onganda Jnr for the interested party and holds brief for Mr. Kubai for the 3rd Respondent

CA Ooko.