REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 37 OF 2018

REPUBLIC.....APPLICANT

-VERSUS-

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

EX-PARTE

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION

AND

SURESTEP SYSTEMS AND

SOLUTIONS LIMITED.....INTERESTED PARTY

JUDGEMENT

Introduction

1. By its Motion on Notice dated 2nd February, 2018 the ex parte applicant herein, **Industrial & Commercial Development Corporation** (hereinafter "ICDC")**,** seeks the following orders:

> **1. An order of Certiorari to remove into the High Court and quash the decision made by the Public Procurement Administrative Review Board on 26th May 2017 in *Request for Review Number 7 of 2018 between Surestep Systems and Solutions Limited and Industrial & Commercial Development Corporation* by which it held and directed as follows:**
>
> > ***a) The Request for Review filed by Surestep Systems & Solutions Limited against Industrial & Commercial Development Corporation in respect of Tender No. RFP/ICDC/34/2016-2017 for the supply, implementation, configuration, testing, commissioning and support of an integrated management information system is allowed and the decision of the Procuring Entity as contained in the purported letter of termination dated 27th December, 2017 is annulled and the same is set aside.***
> >
> > ***b) The Procuring Entity is directed to conclude the Procurement Process by entering into a contract with the Applicant herein in accordance with the orders of the Board in PPARB NO 42/2017 made on 26th May, 2017 within seven (7) days from the date hereof.***
> >
> > ***c) The Procuring Entity shall lodge a copy of the signed contract/agreement with the Board by 2.30 p.m. on 2nd February, 2018 when this matter shall be mentioned before the Board to confirm compliance or for further orders and directions.***
> >
> > ***d) The Applicant is awarded the costs of this review which are assessed at Kshs. 150,000 plus the filing fees. The Procuring Entity shall pay the said costs and filing fees to the Applicant on or before 2nd February, 2018 a fact which will be confirmed on that day.***

2. An order of Mandamus directed at the Public Procurement Administrative Review Board, to uphold the decision of the Procuring Entity in not awarding Tender RFP/ICDC/34/2016-2017 for the supply, implementation, configuration, testing, commissioning and support of an integrated management information system for Industrial & Commercial Development Corporation to the Interested Party as communicated in the letter from the Procuring Entity dated 27th December, 2017.

3. An order of Prohibition directed at the Public Procurement Administrative Review Board restraining it from visiting any sanction upon the *Ex-parte* Applicant on account of its decision delivered on 25th January, 2018 in *Request for Review Number 7 of 2018 between Surestep Systems and Solutions Limited and Industrial & Commercial Development Corporation.*

4. An Order that the costs of this Application be in awarded to the *Ex-parte* Applicant.

Applicant's Case

2. It was the applicant's case that it is a state Corporation established by the ***Industrial and Commercial Development Corporation Act*** Chapter 445 of the Laws of Kenya and is essentially a Development Finance Institution *inter alia* providing financial services to industrial and commercial sectors of the Kenyan Economy through loans, guarantees and investments in a wide range of ventures.

3. Recognising critical role that Information and Communications Technology plays in the delivery of services to customers and improvement of internal efficiencies, the applicant seeks to acquire and implement a Management Information System that will enable integrated management of core-business processes in real-time. To this end ICDC being a public body in the context of ***Public Procurement and Assets Disposal Act*** commenced the process of procurement of the aforementioned Management Information System and given that the services to be procured are advisory services or otherwise of a predominantly intellectual nature, ICDC settled for procurement of the same by way of Request for Proposal (hereinafter "RFP").

4. Accordingly, it was averred that in February 2017, ICDC advertised the RFP for the Supply, implementation, configuration, testing, commissioning and support of an integrated management information system. It issued the Requisite RFP tender documents setting out *inter alia* the scope of its requirements and the criteria it would use to select the winning bidder.

5. It was deposed that the RFP Tender document provided at Clause 2.11.7 that:

"the tender will be awarded to the bidder with the highest combined technical and financial score"

6. The RFP provided at *Appendix to Section II - Instructions to Consultants* on the subject of "*Evaluation Criteria*" that the Evaluation of Technical Proposals would comprise 80% and the Financial Proposals would comprise 20%. To the applicant, it was therefore clear that in making its decisions on the award of the tender ICDC would take into account "*the quality of the proposal*" and the "*cost of the services*" in the selection of the successful firm hence the selection method applicable in the subject procurement was the Quality and Cost Based Selection ("QCBS") contemplated at section 124 of the ***Public Procurement and Assets Disposal Act***. As required in a Procurement by RFP the respective bids comprised a "Technical Proposal" and a "Financial Proposal" and only those bidders whose "Technical Proposal" mustered the threshold set out in the RFP documents proceeded to have their "Financial Proposal" evaluated.

7. It was disclosed that the following bidders' "Technical Proposal" surmounted the minimum threshold set by ICDC and progressed to the opening and evaluation of their respective financial proposals.

a. Surestep System & Solution Ltd.

b. Attain Enterprises Solution Ltd.

c. IAN Soft Technologies Ltd.

d. System Re-Engineering Ltd.

8. It was averred that the Technical Proposals were weighted against the 80% component and resulted in the following scores being awarded to the aforesaid bidders:

			Out of 80 points	**Out of 100%**
Weighting	80	Surestep System Solution	63.6	79.5
		Attain Enterprises Solution Limited	71.8	89.8
		IAN Soft Technologies Limited	63.5	79.3
		System Re-Engineering Limited	61.6	77.0

9. According to the applicant, clause **2.9.2** of the RFP provided as follows:

> ***"The Financial Proposals shall be opened publicly in the presence of the consultants representatives who choose to attend. The name of the consultant, the technical scores and the proposed prices shall be read aloud and recorded when the Financial Proposals are opened. The Industrial & Commercial Development Corporation (ICDC) shall prepare minutes of the public opening."***

10. It was averred that ICDC duly complied with the aforesaid clause 2.9.2 and the following "proposed prices" were read out in respect of the bids that were opened.

a. Sure Step System & Solution Ltd- Kshs. 19,105,936.36.

b. Attain Enterprise Solutions Ltd- Kshs. 34,166,398.13

11. In this respect the applicant relide on clause 2.9.3 of the RFP documents, Appendix to section II- *Instructions to Consultants* under the sub-heading *Evaluation Criteria on Financial Evaluation and* section IV- *Financial Proposal.*

12. I was averred that at the opening of the Financial Proposal, all the bidders were therefore informed that the evaluation committee would determine whether the financial proposals were complete by costing all the items of the corresponding technical proposal and correcting any computational errors, a fact which was confirmed by the Review Board in its ruling. According to the applicant, the Financial Proposals by **Surestep** and **Attain** were both broken down but on reviewing the same the Evaluation Committee sought a clarification from either bidder.

13. It was stated that the Evaluation Committee noted that the bid by **Surestep** provided in mandatory terms that there would be an Annual BREP cost of **9%** payable annually to Microsoft and that **Surestep** would offer free Support and Maintenance for 1 year, which is the warranty period of the system, and thereafter annual maintenance and support cost will be **10%** of the initial cost exclusive of VAT.

14. On the other hand the Evaluation Committee also noted that in its bid **Attain** had summarized its costs as follows:

Pricing Summary	**Currency**	**Cost**
Software Licenses	Kshs.	10,051,926.24
Software Modules	Kshs.	2,500,000.00
Professional Services	Kshs.	12,725,000.00
Annual Support Fees	Kshs.	4,176,865.25
Sub-Total Cost	Kshs.	29,453,791.49
VAT	Kshs.	4,712,606.64
Total Cost	Kshs.	34,166,398.13

15. According to the applicant, in weighing the respective proposals against the provisions of the RFP, the issue of BREP costs and Annual support fees quoted by **Surestep** came into focus as the same would have a bearing on the computation of the proposal if they were to be payable together with all the other costs quoted. In respect of **Attain** it was important to ascertain when the annual costs were to be paid as this would have ramifications on ICDC's considerations in the RFP. The applicant emphasised that for the avoidance of doubt the subject tender is for the *Implementation, Configuration, Testing, Commissioning and Support of and Integrated Management Information System*. Therefore the "SUPPORT" component of each bid was very material in the evaluation of the financial proposals although any support costs were by their very nature "post implementation" costs.

16. It was contended by the applicant that on an examination of the respective bids and computation thereof, it became clear that in respect of **Surestep**, the BREP costs stated as Mandatory and Payable Annually, were indeed post implementation costs as was the 10% annual maintenance fee. On the other hand, in respect of **Attain** the costs stated as "Annual Costs" being Kshs. 4,176,865.25 were indeed post implementation costs. As the post-implementation costs were optional pursuant to Clause 11.18 f of the RFP, it was clear to the evaluation committee, that in respect of **Surestep** the quoted fee taking into account the "Post-Implementation Costs" would be the sum of Kshs. 19,108,936.36 plus the annual costs cited above while in respect of **Attain,** the quoted costs of Kshs. 34,166,398.13 were inclusive of post-implementation costs of Kshs. 4,176,865.25 and VAT thereon. Without these post-implementation costs the costs would amount to Kshs. 29,321,234.53. Therefore in its evaluation the committee therefore took into account the costs less the post-implementation costs which are at all material times "post-implementation costs" as had been clarified by the bidders and as a result the cumulative technical and financial scores attributed to **Surestep** and **Attain** were as follows:

a. SureStep Systems & Solutions Ltd……**83.6%**

b. Attain Enterprise Solutions Ltd…….**84.8%**

c. Systems Re-Engineering Ltd……...…70.9%

d. Ian Soft Technologies Ltd……..……..67.4%

17. It was further deposed that the Evaluation Committee also carried on a due-diligence on all the aforementioned bidders pursuant to section 83(1) (2) of the ***Public Procurement and Assets Disposal Act***, and filed a comprehensive due-diligence report and proceeded upon conclusion of its mandate to submit an Evaluation Report. Accordingly a professional opinion was rendered in accordance with section 84 of the ***Public Procurement and Assets Disposal Act*** recommending the award of the tender to **M/s Attain** at the sum of Kshs. 29,321,234,53. Pursuant thereto, ICDC dispatched a letter of regret dated 25th April 2017 to the three unsuccessful bidders, and in the context of these proceedings to **M/s Surestep**.

18. However the applicant averred that it came to its attention that the letter sent to **M/s Surestep** was erroneous to the extent that it made mention of a combined technical and financial score of **79.5%** and not **83.6%.** It explained that 7**9.5%** was the technical score awarded to **Attain** and this was a manifest error on the face of the letter of regret. Upon realising this error ICDC immediately issued a corrected letter of regret and dispatched the same to **Surestep**. To the applicant, the aforesaid error did not prejudice **Surestep** in any manner whatsoever as they filed a Request for Review before the Public Procurement Administrative Review Board on 5th May 2017 within the period provided by law.

19. It its Request for Review, it was revealed, **Surestep** impugned the procurement process on the grounds that:

a. The Respondent (hereinafter referred to as "the Procuring Entity") acted illegally and ultra vires section 3(a) of the ***Public Procurement and Disposal Act, 2015*** and its decision is to that extend null and void;

b. The Procuring Entity acted illegally and *ultra vires* section 58(2) of the ***Public Procurement and Disposal Act, 2015*** and its decision is to that extent null and void;

c. The Procuring Entity acted illegally and *in disregard of* section 76(2) of the ***Public Procurement and Disposal Act, 2015*** and its decision is to the extent null and void;

d. The Procuring Entity acted illegally and *ultra vires* section 78(6) of the ***Public Procurement and Disposal Act, 2015*** and its decision is to that extent null and void;

e. The Procuring Entity acted illegally and *ultra vires* section 80(2) of the ***Public procurement and Disposal Act, 2015*** an its decision is to that extend null and void;

f. The Procuring Entity acted illegally and *ultra vires* section 81(2) of the ***Public procurement and Disposal Act, 2015*** an its decision is to that extend null and void;

g. The Procuring Entity acted illegally and *ultra vires* section 82 of the ***Public Procurement and Disposal Act, 2015*** an its decision is to that extend null and void;

h. As a result of the conduct of the Procuring Entity aforesaid, the Applicant has suffered and stands to suffer monumental financial loss and damage unless the decision of the Procuring Entity is annulled by this Board.

20. According to the applicant, the crux of the Request for Review was that applying the figures read out at the opening of the Financial Proposals by the bidders, **Surestep** contended that it would emerge with the "*highest combined technical and financial score"*. In its response to the foregoing, ICDC explained in detail the manner of its evaluation of the bids and the emergent scores insisting that the same was in accordance with the procedure and criteria set out in the tender documents. Besides its explanation to the Review Board regarding how it had conducted the evaluation of the bids, ICDC also brought to the attention of the Review Board, the possible breach of section 65 of the ***Public Procurement and Assets Disposal Act*** which had been brought to the attention of the management of ICDC and was the subject of an on-going review**.**

21. It was averred that in this regard, ICDC placed evidence before the Review Board, that in the course of the evaluation process, officers acting for and on behalf of **Surestep** made unsolicited communications to ICDC's officers **Mr. Joseph Waka** (Head of Procurement) and **Ms Leah Mumbi** (Evaluation Committee Member) vide their personal telephone numbers O7**-7**212 and 07**-9****** and urged the Review Board to dismiss the Request for Review. However in its Ruling delivered on 26th May 2017, the Review Board held and directed as follows:

a. The Request for Review filed by **Surestep Systems & Solutions Limited** on 5th May, 2017 against the decision of the Procuring Entity in the matter of Tender RFP/ICDC/34/2016-2017 for the supply, implementation, configuration, testing, commissions and support of an integrated management information system for Industrial & Commercial Development Corporation succeeds and is allowed.

b. The decision by the Industrial & Commercial Development Corporation to award Tender No. RFP/ICDC/34/2016-2017 for

provision of above services is hereby nullified.

c. The board is satisfied on the basis of the common position adopted by Counsel for the Applicant and Counsel for the procuring entity that the Applicant's bid was the lowest most responsive tender having attained the highest combined score and proceeds to substitute the award of the Procuring Entity by awarding the Tender to **M/s Surestep Systems and Solutions Limited** at its tender sum of Kshs. 19,108,936.36.

d. The Procuring Entity is ordered to complete the procurement process herein as ordered within seven (7) days from the date herein.

e. Each party shall bear its own costs of this Request for Review.

22. It was the applicant's case that in light of the foregoing, ICDC had only up to 2nd June 2017 to complete the procurement process with M/s Sure Step and was enjoined to enter into a contract with the firm for the sum of Kshs. 19,108,936.36.

23. Aggrieved by this decision, the Applicant moved this Court moved this Court vide ***J/R Misc. Application No. 281 of 2017*** and in a Judgment delivered on 6th December, 2017, the Court set aside the Orders of the PPARB and ordered that: -

"…that the order directing the ex-parte Applicant herein to complete the procurement process within seven (7) days is hereby set aside and the substituted with an order that the ex – parte Applicant does so within 21 days from today and in doing so be at liberty to enter into negotiations pursuant to Clause 2.10 of the RFP with the 1st interested party with a view to reaching an agreement on all points and to exercise its right under the Tender Document including the right if negotiations fail, to invite the firm whose proposal received the second highest score to negotiate a contract."

24. According to the applicant, on or about 15th December, 2017, in heeding to the Orders issued by this Court, ICDC invited M/s. Surestep in accordance with Clause 2.10 of the RFP and that the letter inviting M/s Surestep for negotiations indicated on its face that the negotiations that the parties would engage in may relate to: -

"Developing a clear roadmap on the work plan to determine the expected deliverables/outcome and the completion schedule.

a) The technical proposal, the proposed technology and work plan, staff and any suggestions to improve the Terms of reference.

b) Any other value adding aspect."

25. According to the Applicant, both ICDC (sic) engaged in negotiations with a view to reaching an agreement on all points since a reading of Clause 2.10 of the RFP is to the effect that the aim of negotiations is to reach agreement on all points and sign a contract. Though M/s. Surestep submitted itself for negotiations on 19th December, 2017, in the end both parties did not reach an agreement on all points as envisaged by Clause 2.10.

26. Given the nature of the services to be procured are advisory and/or principally intellectual in nature, the applicant averred that independent verification and confirmation from M/s. Surestep's existing or past Clients was the only credible manner of evaluating its proposed key professional staff prior to the anticipated signing of a contract. Accordingly, M/s. Surestep provided a list and contact of referrals to enable the Applicant herein to conduct due diligence on the whole procurement process which the applicant contacted with a view to obtaining independent verification and confirmation of the latter's capability to provide the requisite services but such inquiry did not elicit any response from the Referrals as at 27th December, 2017. Accordingly, ICDC informed M/s. Surestep of its findings upon such inquiry vide a letter dated 27th December, 2017 that none of the references listed by it had provided the requested information.

27. It was therefore contended that ICDC marked the negotiations as failed for failure to obtain independent verification and confirmation from M/s. Surestep's existing or past Clients.

28. Aggrieved by the said decision M/s. Surestep moved the Review Board once more based on the fact that negotiations failed and the crux of the 2nd Request for Review by M/s. Surestep was that ICDC allegedly illegally conducted due diligence after the award of the Tender *viz* that ICDC reintroduced the issue of Referrals during the negotiations in the meeting held on 19th December, 2017. In its response to the foregoing, ICDC explained in detail how the 2nd Request for Review purported to ignore the Orders of this Court in J/R Misc. Application No. 281 of 2017. It was averred that besides its explanation to the Review Board regarding how it conducted due diligence, ICDC made it clear that the results of the exercise of due diligence could not be wished away and the fact that M/s. Surestep had gone back to the Review Board on the outcome of the negotiations is itself evidence of the fact that the negotiations failed. Therefore ICDC urged the Review Board to dismiss the Request for Review.

29. Based on legal advice, the Applicant believed that:

a) that in making its determination as it did, the Review Board breached the Law in the manner set out in the Statement filed herewith and hence the filing of the Present Application for Prerogative Orders which raises weighty and compelling issues and is merited.

b) This Honourable Court has the Constitutional Mandate and Jurisdiction to grant the prerogative Orders sought in the Interests of Fairness and Justice.

30. During the pendency of this judgement the ex parte applicant moved this Court vide a Notice of Motion dated 12th March, 2018 seeking the an order that this Court enlarges the time within which the substantive Notice of Motion Application already filed in this Court on 6th February, 2018 ought to have been filed and that the same Notice be deemed as duly filed.

31. In support of this application, the Applicant averred it was granted leave to file the substantive Notice of Motion Application on 1st February, 2018 and the order was issued on 2nd February, 2018. In the meantime the matter had been directed to come for directions on 13th February, 2018.

32. It was averred that on the very 2nd Day of February, 2018, the applicant's advocate embarked on preparations of the substantive Notice of Motion Application which was drafted on 2nd February, 2018 which was on a Friday. According to the applicant there was a one-day lapse in the filing and serving of the Application as the same was filed and served on 6th February, 2018.

33. While appreciating that compliance with a Court Order cannot be ignored on the ground of technicalities and *legal business cannot be handled in a sloppy and careless manner, the applicant's advocate disclosed that t*he one-day lapse in the filing of substantive Notice of Motion Application was an error on his part and should not be visited upon the Ex-parte Applicant who impugns the decision of the Respondent on well-founded grounds. In his view, the Respondent's decision has ramifications on the attainment of the Constitutional ideal in the context of Article 227 of the Constitution of Kenya, 2010.

34. It was averred that this matter came up for hearing on 9th March, 2018 when it came to the said advocate's attention that the Motion was filed out of time. By that time the Office of the Attorney General, the Respondent and the Interested Party had all filed their respective responses and Written Submissions to the Notice of Motion Application filed on 6th February, 2018. According to the Applicant, at the heart of the Application filed in this Court on 6th February, 2018 is the interpretation of its Judgment delivered on 6th December, 2017 and compliance with the said Judgment should not be wished away.

35. The Applicant contended that the denial of the Application for enlargement of time will prejudice the Ex-parte Applicant's expeditious pursuit of a Judicial Review of his Constitutional rights. On the other hand, no prejudice whatsoever shall be occasioned upon the Applicant, Respondent and the Interested Party in allowing this Application as prayed.

36. In support of the application for enlargement of time the applicant relied on the holding of the Supreme Court in Presidential Petition No. 1 of 2017 - **Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR** and the High Court decision in **Athanas Obala Obango vs. Football Kenya Federation & 3 Others [2016] eKLR** and submitted that a Court of Law has the inherent powers to control its processes so as to meet the ends of justice.

37. The applicant urged the Court to note that the matter before it is in fact a constitutional matter in the context of Article 227 and that the impugned decision of the 1st Respondent has ramifications on the attainment of this constitutional ideal. In its view, it is therefore in the interests of Justice the same be determined as opposed to being disregarded. Furthermore, at the heart of the Application already filed in Court is the interpretation of its Judgment delivered on 6th December, 2018 and compliance with the same should not be wished away. In this respect the applicant relied on **Republic vs. Kenya Revenue Authority ex parte Tom Odhiambo Ojienda SC t/a Prof. Tom Ojienda & Associates [2016] eKLR.**

38. In its submissions on the substantive Motion, the Applicant relied on Clause 2.10 of the Tender Document which provides as hereunder:

"2.10 Negotiations

> ***2.10.1 Negotiations will be held at the same address as "address to send information to the Industrial & Commercial Development Corporation (ICDC)" indicated in the Appendix "ITC". The aim is to reach agreement on all points and sign a contract.***
>
> ***2.10.2 Negotiations will include a discussion of the Technical Proposal, the proposed methodology (work plan), staffing and any suggestions made by the firm to improve the Terms of Reference. The Industrial & Commercial Development Corporation (ICDC) and firm; will then work out final Terms of Reference, staffing and bar charts indicating activities, staff periods in the field and in the head office, staff-months, logistics and reporting. The agreed work plan and final Terms of Reference will then be incorporated in the "Description of Services" and form part of the Contract. Special attention will be paid to getting the most the firm can offer within the available budget and to clearly defining the inputs required from the Industrial and Commercial Development Corporation (ICDC) to ensure satisfactory implementation of the assignment.***
>
> ***2.10.3 Unless there are exceptional reasons, the financial negotiations will not involve the remuneration rates for staff (no breakdown of fees).***
>
> ***2.10.4 Having selected the firm on the basis of, among other things, an evaluation of proposed key professional staff, the Industrial & Commercial Development Corporation (ICDC) expects to negotiate a contract on the basis of the experts named in the proposal. Before contract negotiations, the Industrial & Commercial Development Corporation (ICDC) will require assurances that the experts will be actually available. The Industrial & Commercial Development Corporation (ICDC) will not consider substitutions during contract negotiations unless both parties agree that undue delay in the selection process makes such substitution unavoidable or that such changes are critical to meet the objectives of the assignment. If this is not the case and if it is established that key staff were offered in the proposal without confirming their availability, the firm may be disqualified.***

2.10.5 The negotiations will conclude with a review of the draft form of the Contract. To complete negotiations the Industrial & Commercial Development Corporation (ICDC) and the selected firm will initial the agreed Contract. If negotiations fail, the Industrial & Commercial Development Corporation (ICDC) will invite the firm whose proposal received the second highest score to negotiate a contract.

2.10.6 The Industrial & Commercial Development Corporation (ICDC) shall appoint a team for the purpose of the negotiations."

39. According to the applicant, there can be no doubt therefore what matters were to be discussed during negotiations including the Technical proposal, the proposed methodology (work plan), staffing and any suggestions made by the Firm to improve the Terms of Reference.

40. It was its case that the Interested Party evidently complied with the instructions to the negotiations and in the course of the said meeting it emerged that the *Ex-Parte* Applicant with a view to addressing the Interested Party's Technical Proposal and improving the Terms of Reference sought some client references from the said Interested Party, which references the Interested Party willingly provided. Though the interested party stated that it could not confidently comment on the tenderer's ability to handle ERP Implementation and Support, as at 27th December 2017, none of the references provided had responded.

41. As a result, the *Ex-Parte* Applicant was led to the decision that the Interested Party could not satisfactorily abide by the matters that had arisen in the negotiations and deemed the said negotiations futile and having failed and proceeded to notify the Interested Party of its decision by a letter dated 27th December, 2017.

42. In the applicant's view, Clause 2.10 sets broad parameters for the parties' negotiations and its intention is to ensure the realization of an agreement, based on full disclosure and discussions and in particular, clause 2.10.2 provides that:

"the aim is to reach agreement on all parties and sign a contract."

43. It was therefore the applicant's position that in essence the negotiation between the *Ex-Parte* Applicant and the Interested Party failed and no contract can be awarded to the Interested Party.

44. However, the interested party moved the PPARB on the ostensible ground that the *Ex-Parte* had failed to enter into contract with it contrary to the decision of the Board of 26th May, 2017. The Applicant challenged the jurisdiction of the Board to purport to adjudicate over the process following the decision of the High Court on 6th December, 2017 and the failure of negotiations. However, in its decision delivered on 25th January, 2018, the PPARB deemed the failed negotiations as an attempted "*due diligence*" during the negotiations and made the following orders:

" b) the Procuring Entity is directed to conclude the Procurement process by entering into a contract with the Applicant herein in accordance with the orders of the Board in PPARB No. 42 /2017 made on 26th May, 2017 within seven (7) days from the date hereof.

c) The Procuring Entity shall lodge a copy of the signed contract/agreement with the Board by 2.30 p.m on 2nd February, 2018 when this matter shall be mentioned before the Board to confirm compliance or for further orders and directions.

d) the Applicant is awarded the costs of this review which are assessed at Kshs. 150,000 plus the filing fee. The Procuring Entity shall pay the said costs and filing fees to the Applicant on or before 2nd February, 2018 a fact which will be confirmed on that day."

45. It was submitted that the PPARB countermanded the order of this Court by insisting that the procurement process could only proceed on the basis of its orders of 26th May, 2017. According to the applicant, by purporting to countermand the Orders of this Court made on 6th December, 2017 the PPARB exceeded its jurisdiction and fell into jurisdictional error.

46. It was the applicant's position that the net effect of the PPARB's decision shall be to shackle the *Ex-Parte* Applicant to the Interested Party and that effectively this shall take away the *Ex-Parte* Applicant's right to attain an "*agreeable contract*" which satisfied the imperative of Article 227 of the Constitution of Kenya. The applicant therefore submitted that the decision is therefore not only a fatal jurisdiction error, but is also;

a) Ultra-vires section 3 (h) of the ***Public Procurement and Assets Disposal Act*** (the Act) as it deprives the *Ex-Parte* Applicant the benefit of its Tender Document to attain maximum value for money for itself and the public at large.

b) Ultra vires section 80(2) of the ***Public Procurement and Asset Disposal Act*** (the Act) as it deprives the *Ex-Parte* Applicant the right to negotiation as contemplated at Clause 2.10 of the Tender Document and further purports to award a contract without the benefit of negotiations which flies in the face of Clause 2.11.1 of the Tender Document which provides unequivocally that;

"the contract will be awarded following negotiations".

c) Further ultra-vires **section 80(2)** of the Public Procurement and Asset Disposal Act as it purports to order the *Ex-Parte* Applicant to contract with a party which negotiations have revealed, does not have or has not demonstrated the capability experience to carry out the envisaged contract, contrary to Clause 2.11.6 of the Tender Document.

d) Therefore, effectively compelling the *Ex-Parte* Applicant to bury its head in the sand and contract with a party it knows or has established does not have the ability to deliver on its needs and hence enter into a contract that is doomed to raise discord and liabilities. This is without more *Wednesbury* unreasonable and irrational.

e) Irrational and unreasonable in that it seeks to compel the *Ex-Parte* Applicant to enter into a contract with a party it can clearly not reach an agreement with and with whom there is no consensus *ad idem*.

47. The Applicant's case was that the PPARB is clearly determined to compel the *Ex-Parte* Applicant to contract with the 1st Interested Party yet an agreement cannot be negotiated by the parties. To the applicant, it is trite that Court's cannot draw contract for parties and hence where no agreement can be reached as has been shown, the matter is at an end. To direct otherwise would be tantamount to contracting with failure in mind and in disregard of the obvious pitfalls.

48. The Court was therefore urged to quash the decision of PPARB made on 25th January, 2018 and re-affirm its decision of 6th December, 2017 permitting the *Ex-Parte* Applicant to conduct the subject procurement in accordance with its own tender documents especially Clause 2.10 thereof.

Respondent's Case

49. In opposition to the application the Respondent averred hat the Notice of motion dated 2nd February, 2018 was defective as it is at variance with the chamber summons and the statement of facts as the respondent's decision it seeks to quash had been dealt with in JR No. 281 of 2017 in which judgement was delivered on 6th December, 2017. In this respect the Respondent relied on **Joseph Kiarie Watenga T/A Front Bench Auctioneers vs. Chief Magistrate Court Kiambu & Another [2016] eKLR** and **Republic vs. Chuka University exp Kennedy Omondi Waringa & 35 Others [2016] eKLR**.

50. It was the Respondent's understanding that this Court did not vacate its earlier orders but simply varied the same by enlarging the time within which the Procuring Entity was to conclude negotiations and enter into a contract with the applicant. Its position was that since under the provisions of section 175(1) and (6) of the Act, its decision is final and binding in respect of the whole or such portion of it as have not been successfully challenged , the Procuring Entity must obey all the lawful orders issued by the Board.

51. Its view was therefore that having there been no other order vacating its decision it had the jurisdiction to hear the matter seeking to have the Procuring Entity comply with its decision.

52. The Respondent was of the view that since the process of carrying out due diligence is an evaluation process which must come to an end upon an award being made to a bidder, the attempted due diligence process by the Procuring Entity during the negotiations process and post award was in itself an illegality and an attempt on the part of the Procuring Entity to circumvent the law to suit its goals of terminating the procuring process through the back-door.

53. Based on legal authorities the Respondent submitted that the order of mandamus could not be granted as prayed. The Court was therefore urged to dismiss the application with costs.

Interested Party's Case

54. According to the interested party the applicant has not provide the details or particulars of the purported mistake that led to its filing the Motion out of time. Accordingly the bare allegation does not warrant the enlargement of time.

55. According to the interested party there was inordinate delay in not only filing the substantive motion but also in filing the application for enlargement of time. The Court was therefore urged, based on a number of legal authorities to disallow the application for enlargement of time.

56. According to the interested party, the Respondent had jurisdiction to deal with the matter pursuant to section 167 of the ***Public Procurement and Asset Disposal Act*** (herein referred to as "the Act") since everything that happens within the public procurement process (including negotiations) up to the point the contract is signed can be the subject of review before the Board save for matters listed under section 167(4) thereof. In this respect the interested party relied on **Republic vs. Public Procurement Administrative Review Bard & 3 Others [2014] eKLR**.

57. It was averred that similarly, in this case the ex parte applicant was on 6th December, 2017, ordered to undertake negotiations and if it proceeded to undertake the same in a manner that is inconsistent with the law and or the tender documents, the proper and only recourse that the interested party had was to make a request for review to the Board.

58. It was the interested party's case that the negotiations did not present the Procuring Entity with a blank cheque to do whatever it wills in the process of negotiation and if the same were conducted improperly, the Respondent could intervene.

59. It was submitted that pursuant to section 83 of the Act, due diligence includes obtaining confidential references. However in this case the due diligence was purportedly conducted by a negotiation team after the tender was awarded to the interested party which was contrary to Regulation 52 of the ***Public Procurement Regulations, 2016***.

60. It was averred that the Tender document itself placed reference checking at stage 2 of the evaluation which was prior to technical evaluation. In support of this position the interested party relied on **H Young & Co. (EA) Limited & Yantai Jereh Petroleum Equipment**

and Technologies Company Limited vs. Public Procurement Administrative Review Board & Others Misc. Appl. No. 551 of 2017.

Determinations

61. I have considered the two Motions, affidavits, the written submissions and judicial authorities cited herein and this is the view I form of the matter.

62. The first issue to deal with is whether this Court should enlarge the time for the filing of the substantive motion.

63. It is not in doubt that the provisions of the ***Law Reform Act*** do not prescribe the time within which substantive application is to be made. That power is donated to the Court by rule 3(1) of Order 53 of the ***Civil Procedure Rules*** which provides:

> ***When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.***

64. It is therefore clear that the time for the filing of the Motion is prescribed not by the substantive statute but by the ***Civil Procedure Rules*** which is a delegated legislation made by the Rules Committee pursuant to the powers donated to the Committee vide the aegis of section 81 of the ***Civil Procedure Act***. It is in this regard that I agree with the decision in **Miscellaneous Civil Application 12 of 2014 - Republic vs. General Manager, Moi International Airport & Another Ex parte Jared Adimo Odhiambo & Another** that:

> **"Although power to extend time is not expressly granted in Order 53 rule 3 on the period for the filing of the Notice of Motion, there must be, consistently with the Article 159 principle of justice without undue regard to technicalities of procedure, inherent jurisdiction to extend the time in the interests of substantial justice. This must be so especially where the time is prescribed not by Statute but by the rules of Court…In Wanguhu vs Kania (1987) KLR 51, Nakuru Court of Appeal, Civil Appeal No. 101 of 1984 (Hancox, Nyarangi, JJA & Platt Ag JA), it was held that the court has inherent power in it to control its process for the ends of justice and that section 3A of the Civil Procedure Act preserves the inherent powers when there are no rules."**

65. Order 50 rule 6 of the ***Civil Procedure Rules*** provides:

> ***Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:***
>
> ***Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.*** [Emphasis mine].

66. There is no doubt that judicial review proceedings are special proceedings guided by sections 8 and 9 of the ***Law Reform Act*** and Order 53 of the ***Civil Procedure Rules***. However the framers of the said Rules deemed fit to provide for enlargement of time in instances where the said framers had themselves prescribed the timelines without making a distinction between judicial review and other proceedings prescribed by the said Rules. In **Sukwinder Singh Jutley vs. Prudential Association Co. of Kenya Ltd & Another Civil Appeal (Application) No. 62 of 2004**, the Court of Appeal held that in procedural rules that lack clarity, the Court is at liberty to lean on constructions which aid the course of justice. Since there is no express rule barring the enlargement of time to file the substantive motion as opposed to enlargement of time to apply for leave, in my view the Court ought to adopt an interpretation of Order 53 rule 3(1) as read with Order 50 rule 6 of the ***Civil Procedure Rules*** which aid the course of justice. I therefore associate myself with the opinion of **Githua J**. in **R vs. National Environmental Management Authority and Anor. ex parte Elizabeth Njeri Hinga and Anor. (2012) eKLR** that:

> **"…since Order 53 Rule 3 (1) is not part of the substantive law governing the conduct of judicial review proceedings, this court can exercise its discretion to extend time within which to file a substantive motion for judicial review even after expiry of the 21 days prescribed under Order 53 Rule 3 (1) under its inherent powers, if it is satisfied that it is fair and just to do so**."

67. This position has been affirmed by the Court of Appeal in **Wilson Osolo vs. John Ojiambo Ochola & Another Civil Appeal No. 6 of 1995** where the Court of Appeal while appreciating that section 9(3) of the ***Law Reform Act***, Cap 26 Laws of Kenya, quite clearly shows that an application for leave to apply for an order of certiorari cannot be made six months after the date of the order sought to be quashed and that there is no provision for extending the time prescribed thereunder, was nevertheless of the view that:

> **"It was a mandatory requirement of Order 53 Rule 3(1) of the Civil Procedure Rules then (and it is now again so) that the notice of Motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days of 15th February, 1982 there was no proper application before the Superior Court. *This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules*. There was no such application save the one dated 28th April 1994. That came too late in the day in any event and the learned Judge erred in even considering the extension of time some 12 years after the event."** [Emphasis added].

68. It is therefore clear that the decisions of the High Court that hold to the contrary are *per in curium* the decision of the Court of Appeal and are with due respect inconsequential. That the Court has the power to enlarge time is in fact appreciated by the Respondent when they submitted that had the applicant filed its application first, the Respondent ordinarily would not have opposed the application.

69. The question is whether the applicant merits the enlargement of time. In **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

70. With respect to the explanation for the delay, the applicant contends that the delay in filing the Motion was as a result of the mistake of counsel. The said counsel has readily admitted the said mistake.

71. **Madan, J** (as he then was) in **Gulamhussein Noormohamed Cassam & Another vs. Shashikant Ramji Sachania & Another 1 KAR 24** held that:

> **"An error of judgement on the part of a legal adviser may help to build up sufficient reason under rule 4 of the Court of Appeal Rules to induce the court to exercise its discretion to extend time for doing of any act under the Rules of the Court…"**

72. The same Judge in **Murai vs. Wainaina (No 4) [1982] KLR 38** expressed himself as follows:

> **"The mistake here should not be so narrowly construed as to mean only error with fault. It is not possible to say legitimately that a fact completely within physical apprehension can neither be *bona fide:* a mental fact may be either. But there may be a *bona fide* act, belief, intention, claim, objection or mistake or a person's conduct may be *bona fide.* Each of these is, so to speak a mental fact having its origin in the individual…A *bona fide* mistake includes a mistake of law as well as of fact. If he has made a blunder on a point of law, a blunder is a mistake. In nine cases out of ten if there is a mistake in substance, it will be found that there is a mistake in law. Ignorance of the law can constitute a mistake of law…The former advocate's belief was a mistake on a point of law however wrong he might have been in his belief. No one has said that it was a deliberate act. On the contrary, his obstinate adherence to his wrong belief shows that he genuinely, though mistakenly, believed his view was correct. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake."**

73. It has therefore been held that mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. In my view the explanation for not filing the Motion though not warranted on the first ground, is excusable on the second ground.

74. The next issue is the length of the delay. In this case the delay is only 1 day and the Motion itself was duly filed and argued. In **Republic vs. General Manager, Moi International Airport & Another Ex parte Jared Adimo Odhiambo & Another** (supra) the Court expressed itself as follows:

> **"In exercising the discretion to enlarge time in this case, I have taken into account the fact that the delay was a short one, seven days by my calculation, and that the Notice of Motion has already been filed and no further delay will arise. From the explanation by counsel for the ex parte applicant, I am not prepared to hold that there were no good reasons given for the delay. I have further considered that declining the Notice of Motion dated 30th April 2014 which is already filed and thereby compelling the ex parte applicants to file a civil suit or to repeat the judicial review process from the beginning, will only escalate the cost in time and money for the parties, contrary to the overriding objective of the civil process under section 1A of the Civil Procedure Act and the substantial justice principle of Article 159. I will, therefore, grant the enlargement of time sought by seven days so that the Notice of Motion dated and filed on 30th April 2014 is deemed to have been filed within time and properly on record."**

75. In the circumstances of this case, it cannot be said that the delay was inordinate.

76. With respect to the merits of the application, the dispute herein revolves around the jurisdiction of the Respondent to entertain the Request for Review. The matter revolves around a procurement process which is a constitutionally guided process pursuant to Article 227 of the Constitution. In my view an allegation of the failure to adhere to constitutionally mandated principles is such a fundamental issue that ought not to be wished away lightly. In **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009** the Court of Appeal appreciated that:

> **"…the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out."**

77. Similarly, in **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the said court held that t*he applicant's submissions that the omission to include primary documents rendered the appeal incurably defective would have had no answer to them if they were made before the enactment of section 3A and 3B of the* ***Appellate Jurisdiction Act****. To the Court t*he advantage of the current ***Civil Procedure Rules*** over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out and i*n applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the* ***Appellate Jurisdiction Act****. The Court still retains an unqualified discretion to strike out a record of*

appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives. In this case the court declined to strike out the appeal on the ground that if the record of appeal was struck out, it was certain that the appellant would return to the court with an application for extension of time, which would result in further delay of the final disposal of the case and would inevitably result in further increase in costs. The court then allowed a supplementary record to be filed to incorporate the omitted hitherto primary documents.

78. This is however not to say that procedural rules ought not to be followed. As was held in **Chelashaw vs. Attorney General & Another [2005] 1 EA 33,** without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law. The purpose of adhering to the rules of procedure was emphasised in **Bayusuf & Sons Ltd vs. Attorney General [2002] 2 KLR 279** where it was held that the obligation to obey the Civil Procedure Rules is for the purpose of establishing and maintaining orderliness in the process of deciding, establishing and protection of citizens' constitutional basic rights.

79. With respect to costs, I did not hear the Respondent or the interested party contend if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See **Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

80. In the instant case, I am satisfied that the failure by the applicant to comply with the Court's directions is excusable and further that there is no prejudice likely to be occasioned to the Respondent or the interested party by the grant of the orders sought by the applicant herein. In the premises I find the Notice of Motion dated 12th March, 2018 merited and I allow the same with the result that time is hereby enlarged for the filing and service of the substantive with such period as would validate the already filed Motion. In effect the said Motion is now deemed to have been filed and served within time.

81. In this application the main issue for determination is whether the Respondent had the jurisdiction to entertain the Request for Review the subject of this application.

82. It is not in doubt that by its judgement in ***J/R Misc. Application No. 281 of 2017*** delivered on 6th December, 2017, the Court ordered that: -

> **"…the order directing the ex-parte Applicant herein to complete the procurement process within seven (7) days is hereby set aside and the substituted with an order that the ex – parte Applicant does so within 21 days from today and in doing so be at liberty to enter into negotiations pursuant to Clause 2.10 of the RFP with the 1st interested party with a view to reaching an agreement on all points and to exercise its right under the Tender Document including the right if negotiations fail, to invite the firm whose proposal received the second highest score to negotiate a contract."**

83. Although the Respondent took the view that this Court did not vacate its earlier orders but simply varied the same by enlarging the time within which the Procuring Entity was to conclude negotiations and enter into a contract with the applicant, that is not entirely correct. In the earlier decision, the Respondent had directed the ex parte applicant to enter into a contract with the interested party. By the Court opening an avenue for negotiations and in the event of their failure to invite the firm whose proposal received the second highest score to negotiate a contract, the decision of the Respondent cannot be said to have remained intact in all respects.

84. It follows that the Respondent was in error when it held that the contract be entered into as per its earlier decision.

85. It is however clear that in its judgement the Court was clear that what the Procuring Entity was required to do was to enter into negotiations pursuant to Clause 2.10 of the RFP with the 1st interested party with a view to reaching an agreement on all points and to exercise its right under the Tender Document. That however did not imply that the ex parte applicant was at liberty to re-open the procurement process under the guise of negotiations. If it did that the Respondent was at liberty to entertain a subsequent request for review arising from the implementation of this Court's order. That was the view expressed by this Court in **Republic vs. Public Procurement Administrative Review Bard & 3 Others ex parte Fursys Kenya Limited [2014] eKLR** where the Court held that:

> **"The defendant opposed the application on the grounds that the issue was *res judicata* and that the application was incompetent. Ringera, J (as he then was) held as follows:**
>
> **"The question is whether in those circumstances the plaintiffs could institute a fresh application for interlocutory relief. In the Court's judgement provided the fresh application is grounded on new facts, which could not have been relied on in the earlier application, it would not be precluded by the doctrine of *res judicata*. That is precisely the case here. The consent order allowed the defendant to serve fresh statutory notices…A new factual situation was created. It could not have been the intention of the parties when they recorded the consent and the law itself could not possibly contemplate that those fresh notices and other consequential steps taken pursuant to them could not be challenged on proper legal grounds. If the opposite were the case, the defendant would have in effect been given *carte blanche* to realise its security without necessarily complying with all the necessary and pertinent legal requirements provided it had issued fresh notices. It would have been permissible for it, for example, to issue defective notices or flout with impunity the provisions of the Auctioneers Rules, 1997. No court of equity would countenance that. A fundamental assumption of the consent order was that competent statutory notices would be served and the defendant would comply with the law. In the circumstances of this case, the doctrine of *res judicata* does not preclude the application now before the court".**
>
> **What comes out from the foregoing is that where a Court or Tribunal has nullified the first process and ordered that either a**

fresh process be undertaken or that the process be undertaken in accordance with specified directions, the body or authority to which the directions are directed is not entitled to ignore the law or directions in its fresh undertaking. If it does so a party aggrieved would still be properly entitled to move the body which made the directions or gave the orders for the nullification of a process not undertaken in compliance with the directions or orders and would not by that mere fact fall foul of the doctrine of *res judicata*. See also Kibundi vs. Mukobwa & Another Meru HCCC No. 390 of 1992 [1993] KLR 777. Therefore, if in the first decision made by the Review Board, the decision of the 1st interested party was nullified and directions given on how to carry out the Tender and the 1st interested party in purporting to comply therewith fell foul of the said directions, the 2nd interested party would not be barred from moving the Respondent once again to have the second decision by the 1st interested party nullified since the second challenge arose out of the changed circumstances given rise to by the decision of the Board which circumstances arose after the first decision of the 1st interested party. To contend therefore that the 2nd interested party ought to have appealed against the second decision of the 1st interested party is to miss the point. It is therefore my view that taking into account the contentions made by the 2nd interested party the Respondent was properly entitled to and had jurisdiction to entertain the second challenge."

86. Therefore if the ex parte applicant, in purporting to carry out the procurement process in a manner that was not directed by this Court, the interested party was properly entitled to move the Respondent Board via request for review as prescribed under section 167 of the Act. Accordingly the Respondent had the jurisdiction to entertain the second request.

87. It is clear that the only reason why the ex parte applicant arrived at the decision that negotiations had failed was due to the fact that here were no responses forthcoming from the references provided by the interested party. Section 83(1) and (2) of the Act however provides that:

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

88. It is therefore clear that the due diligence which may include obtaining confidential references is supposed to take place after tender evaluation, but prior to the award of the tender. In this case the tender had already been awarded to the interested party and the only issue pending was the negotiations of the terms of the contract. In those circumstances it was not permissible for the ex parte applicant to start the process of due process afresh as it purported to have done. In other words the orders of this Court did not permit the ex parte applicant to re-invent the wheel of the procurement process. In so doing it fell into error.

89. As this Court held in **H Young & Co. (EA) Limited & Yantai Jereh Petroleum Equipment and Technologies Company Limited vs. Public Procurement Administrative Review Board & Others Misc. Appl. No. 551 of 2017** at paragraphs 66 and 67:

"Based on the findings of the Board which I am unable to fault the determination that the decision of the interested party was discriminatory as against the 2nd Respondent cannot be faulted. It was further a finding of fact by the Board that the due diligence was conducted during the tender evaluation process and not after as required by the law. As I held hereinabove, the conduct of due diligence pursuant to the section 83 of the Act can only be undertaken after tender evaluation, but before the award of the tender. Therefore the Board was correct in its decision that the conduct of due diligence in respect of the 2nd Respondent during the tender evaluation process was not in accordance with the law. To make matters worse, as regards the ex parte applicant, interested party reportedly intended to conduct the same process after the award of the tender which was further evidence of discrimination."

90. It is therefore clear that by subjecting the interested party to due diligence process at the negotiating stage the interested party was being subjected to unjustifiable differential treatment.

91. It is also clear that the Tender Document itself placed reference checking prior to technical evaluation.

92. Therefore whether one looks at the matter from the legal perspective or from the perspective of the Tender Document, the action which the ex parte applicant relied upon to arrive at a decision that the negotiations failed cannot be sustained.

93. In the premises the decision of the Respondent cannot be faulted.

Order

94. In the result the Notice of Motion dated 2nd February, 2018 fails and is dismissed. However just as in the earlier decision, there will be no order as to costs.

95. It is so ordered.

G V ODUNGA

JUDGE

Delivered at Nairobi this 18th day of April, 2018

P NYAMWEYA

JUDGE

In the presence of: