



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION JUDICIAL

REVIEW APPLICATION NO. 90 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL

REVIEW ORDERS OF CERTIORARI

AND PROHIBITION.

AND .

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

AND

THE PUBLIC PROCUREMENT REGULATIONS, 2006

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD

AND

IN THE MATTER OF APPLICATION NO. 21 OF 2018 OF 29TH JANUARY 2018

CONCERNING TENDER NO.KRC/PLM/005/2017-18 CONCERNING

THE PROVISION OF COMMERCIAL ADVERTISING SERVICES

REPUBLIC.....APPLICANT

AND

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....1STRESPONDENT

KENYA RAILWAYS

CORPORATION AUTHORITY.....2NDRESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

PRIMEDIA PTY LIMITED.....INTERESTED PARTY

JUDGMENT

The Ex Parte Applicant's Case

1. Pursuant to the leave of this court granted on 5th March 2018, the ex parte applicant seeks the following orders:-

a. An order of Certiorari removing to this Honorable Court for the purpose being quashed the decision of the Public Procurement Administrative Review Board made on the 16th February 2018 in Application No. 21/2018 of 29th January 2018.

b. An order of prohibition to prohibit and restrain the second Respondent from acting upon the decision made by the first Respondent made on the 16 February 2018 or and/or signing any contract with any persons or entity in respect to the tender in question.

c. That the costs of this application be provided for.

2. The application is premised on the grounds on the face of the application, the statutory statement and the verifying affidavit of **Sammy Thuo** sworn on 1st March 2018. The grounds can be summarized as follows:-

a. that the impugned decision was made ultra vires in light of the salient provisions of the Public Procurement and Asset Disposal Act and the Regulations there under.

b. that the impugned decision is tainted with illegality, is unlawful, made in bad faith, malicious, biasness, partiality, whimsical and ulterior and improper motive.

c. that the first Respondent acted irresponsibly, arbitrary, capriciously, unreasonably, un-procedurally and its conduct was aimed at frustrating the ex parte applicant's legitimate expectation that due process and the law will be followed.

d. that the decision was made against the principles of public interest and legitimate expectation.

3. Briefly, on 16th February 2018, the first Respondent disallowed the ex parte applicant's Request for Review relating to tender number KRC/PLM/005/2017-18 for Provision of Commercial Advertising Services in KR Stations. The ex parte applicant states that the typed ruling containing the decision was released to it on 27th February 2018, only two days to expiry of the 14 days allowed by law.

4. In the Request for Review, the ex parte applicant challenged reasons for its disqualification arguing that they were considered at the preliminary stage as opposed to technical stage of evaluation, and that that the Board proceeded to entertain a preliminary objection by the Interested Party filed out of time contrary to the Public Procurement and Disposal Regulations, 2006. Also, the ex parte argued that the Board disregarded the reasons stated in the letter of regret dated 15th January 2018 which stated that the ex parte applicant and its consortium had been disqualified at the Technical Stage of Evaluation. As a consequence, the ex parte applicant argues that the impugned decision is tainted with illegality, and, that the Board did not address the germane issues raised by the parties. Hence, it argues that the decision is ultra vires in light of the salient provision of the Public Procurement and Asset Disposal Act^[1](herein after referred to as the Act) and relevant Regulations.

First Respondent's Replying Affidavit.

5. **Hennock Kirungu**, the first Respondent's Board Secretary swore the Replying Affidavit dated 3rd April 2018. He avers that:- (i) the Board identified two issues, namely, whether or not the applicants Request for Review was competent in view of the provisions of Regulation 73 (2) (b) of the Public Procurement and Disposal Regulations, 2006 and whether the applicants were disqualified at the technical stage or at the preliminary stage; (ii) the Board was within its powers under Section 173 of the Act; (iii) the applicant has not demonstrated that the first Respondent was guilty of unreasonable exercise of power or was unreasonable in arriving at the decision; (iv) the decision was made within the confines of the law; (v) the ex parte applicant has not demonstrated illegality, procedural impropriety or irrationality, but is challenging the merits of the decision; (vi) the applicant has not paid any percentage of the contract value as security fee as required by Section 175 (2) of the Act.

First Respondent's Replying Affidavit.

6. **David Njogu**, the Second Respondent's Legal Services Manager in his Replying Affidavit averred that:- (i) this application contains material misrepresentation of facts, non-disclosure of facts and bare allegations which cannot provide a basis for grant of Judicial Review Orders; (ii) that the ex parte applicant's application for Review before the Board was fatally defective and incompetent for want of a statement or affidavit in support thereof contrary to the express requirements of Regulation 73 (2) (b) of the Public Procurement and Disposal Regulations, (iii) that it was unsigned contrary to Regulation 73 (2) (b); (iv) that the decision was lawful; (v) that the applicant has not pleaded or established illegality, unreasonableness or impropriety.

Interested Party's Replying Affidavit.

7. **Jacqueline Wanjiru Ndong'o**, the Interested Party's General Manager and County Representative swore the Replying Affidavit dated

23rd March 2018 averring that:- (i) under clause 31.1 of the Tender Documents, only bids which substantially conformed to the criteria therein would proceed to the technical and then financial evaluation; (ii) the ex parte applicant did not meet the mandatory criteria to be eligible for further evaluation; (iii) the Board properly dismissed the Request for Review; (iv) the Request for Review offended Regulation 73 rendering it incompetent; (v) that the Board did not exceed its mandate but acted as authorized by Section 172 of the Act.

Issues for determination.

8. The core issue for determination is whether or not the ex parte applicant has established grounds to warrant this Court to grant the Judicial Review orders sought.

Guiding principles.

9. There is a long-established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in judicial review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

10. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

11. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*[2]:-

“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines 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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant.....”

12. The grant of the orders or Certiorari, Mandamus and Prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

Relevant Statutory Provisions.

13. Section 173 of the Act provides for the powers of the Review Board. It provides that upon completing a review, the Review Board may do any of the following- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety; (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings; (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings; (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and (d) order termination of the procurement process and commencement of a new procurement process.

14. The above section has been the subject of determination in numerous case in this Country. Discussing a similar provisions in The Public Procurement and Disposal Act,[3] which was repealed by the current act, the Court of Appeal in *Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd*. [4]

“The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”

15. Lord Reid in *Animistic -vs- Foreign Compensation Commission*[5] where it was held that:-

“It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in questions. But there are

many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

16. Section 79 (1) of the Act defines Responsiveness of tenders. It reads that "A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."

17. Section 80 of the Act on evaluation of Tenders provides:-

80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to [section 46](#) of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under [section 82\(3\)](#).

(2) 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.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations

(6) The evaluation shall be carried out within a maximum period of thirty days.

(7) The evaluation report shall be signed by each member of evaluation committee.

Determination.

18. The ex parte applicant's counsel argued that Board entertained a preliminary objection filed out of time against the salient provisions of the Act, and, that the Board disregarded the reasons stated in the letter of regret. As a consequence, he argued that the decision is tainted with illegality. He further argued that the Board acted contrary to Sections 79 (1) & 80 of the Act cited above as well as Regulations 73 (2) (b) and 77(1) of the Public Procurement and Regulations Disposal Regulations, 2006.[\[6\]](#)

19. Regulation 73 (2) provides that :- (2) The request referred to in paragraph (1) shall- (a) state the reasons for the complaint, including any alleged breach of the Act or these Regulations; (b) be accompanied by such statements as the applicant considers necessary in support of its request; (c) be made within fourteen days of- (i) the occurrence of the breach complained of where the request is made before the making of an award; or (ii) the notification under sections 67 or 83 of Act; (d) be submitted in fifteen bound copies and a soft copy, pages of which shall be consecutively numbered;

(e) be accompanied by the fees set out in Part II of the Fourth Schedule which shall not be refundable.

20. Regulation 77 (1) provides that "A party notified under Regulation 74 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within five days from the date of notification."

21. The ex parte applicant's counsel argued that the Request for Review was competent, and by holding that the ex parte applicant was disqualified at the Technical Evaluation Stage, the Board entered into the arena of the litigation by assisting the Respondent. He cited violation of the right to legitimate expectation[\[7\]](#) and further argued that the board mis-applied precedents and stare decisis, and it also considered irrelevant facts and failed to consider relevant facts.[\[8\]](#)

22. Mr. Munene, counsel for the first and Second Respondents argued that the Board's decision was within its powers under Section 173 of the Act, and that all the parties were afforded an opportunity to be heard. He argued that the Board acted impartially and that the decision was made based on the material presented before it. He also argued that the applicant is challenging the merits of the decision, and in any event it did not comply with Section 175 (2) of the Act. He also argued that Judicial Review is concerned with the process not the merits of a

decision,^[9] and that the applicant is not entitled to the orders sought.

23. Section 175 (2) of the Act provides that "The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations."

24. The second Respondent' counsel argued that:- (i) the ex parte applicant's Review was not signed, and it did not comply with the prescribed form under the fourth schedule to the Regulations contrary to the express requirements of Section 167 (1) of the Act; (ii) that it was not supported by a statement as required under Regulation 73 (2) (b), (iii) that all the parties were afforded an opportunity, (iv) the Board took into account section 79 (1), 80 (2), (v) the reasons why the ex parte applicants tender was unsuccessful, (vi) the Board took into account the ex parte applicant's mistaken belief that the tender had been disqualified at the technical evaluation stage using preliminary evaluation criteria and made a determination thereof.

25. He also submitted that the Board took into account the fact that the applicant did not dispute the grounds on non-compliance, and generally the Board considered the Review on merits and that the decision was made lawfully. He also noted that the ex parte applicant does not challenge the manner in which the hearing was conducted. He argued that the tender process was lawful and procedural and that when there is substantial compliance with the relevant procurement laws, the court has discretion not to grant the Judicial Review orders sought^[10] and in any event Judicial Review does not deal with merits of a decision.^[11] Lastly, he argued that the ex parte applicant has not demonstrated grounds for the orders sought^[12] and in any event grant of the orders sought is discretionary.

26. Counsel for the Interested Party cited the powers of the Review Board under Section 172 of the Act and argued that so long as the proceedings before the board were regular and the Board had jurisdiction to adjudicate upon the matters raised in the Request for review, it was as much entitled to decide those matters.^[13] He also argued that Judicial Review is not an appeal and is confined to illegality, irrationality and procedural impropriety.^[14]

27. The record shows that the Interested Party raised a preliminary objection on the competence of the Request for Review. The Board considered Regulation 73 reproduced above and held that where no statement is filed as per the Regulations, the Request for Review is incompetent. The ex parte Applicant's counsel argued that by so holding, the Board descended into the arena of the litigation. My understanding is that the ex parte applicant is imputing bias or ulterior motive. Fairness must be decided on the circumstances of each case. Regulation 73 provides for mode of filing Requests for Review. It is my view that, this being a requirement under the Regulations, the Board was perfectly entitled to consider whether the Request for Review complied with the said provision. In any event, this is a finding and not an irregularity or an illegality and by inviting the Court to Review the said finding, the ex parte applicant is inviting this Court to exercise appellate jurisdiction which is outside the purview of Judicial Review.

28. The ex parte applicant argued that the preliminary objection was filed out of time. Again, the Board considered this argument, and made a finding. This Court is not required to examine the merits of the decision. The ex parte applicant is in my view advancing grounds of appeal as opposed to the grounds of Review.

29. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter. As stated above, the Board found that the Request for Review did not conform to Regulation 73 which to me goes to the merit of its finding, hence it is not a ground for Review.

30. Further, the Board examined the issue whether the ex parte applicants were disqualified at the technical stage or at the preliminary evaluation stage. The Board examined the mandatory requirements at the preliminary stage and the relevant Regulations and concluded that the ex parte applicant failed at the preliminary stage. Section 79 cited above defines responsive tender.

31. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.^[15] This general principle is subject to certain recognized exceptions. However, the danger always exists that organs of state may apply this rule in a rigid and mechanical fashion or worse, as a means to manipulate the outcome of a tender process. As stated by Hoexter: "[A]n otherwise unimpeachable tender may easily be disqualified at an early stage on a technicality, or organs of state may use defects 'opportunistically' to renege from otherwise unimpeachable contracts".^[16]

32. Judicial oversight is necessary to ensure that such decisions are taken in a manner which is lawful, reasonable, rational and procedurally fair.^[17] Indeed, our courts have exercised such oversight on numerous occasions. The administration of justice is highly contextual and fact sensitive. Consequently, what may amount to a fair minded exclusion of a bidder on grounds of non-responsiveness in one context may not be regarded as fair in a different context. Judicial utterances on the issue of bid responsiveness must therefore be understood within the factual matrix of each decided case. What matters is to establish whether the decision was taken in a manner which is lawful, reasonable, rational and procedurally fair.

33. Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.^[18] Bid formalities usually require timely submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.^[19] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a *sine qua non* for further consideration in the evaluation process.^[20] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process

regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

34. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

35. *No illegality, irrationality or procedural impropriety has been established in the manner in which the Board approached and determined the question of responsiveness of the ex parte applicants bid.*

36. An administrative decision can only be challenged for **illegality, irrationality and procedural impropriety**. A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the first Respondent. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

37. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. In the present case, I find no basis to compel the first Respondent as prayed.

38. The applicant also seeks an order of prohibition. The writ of prohibition arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

39. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

40. Section 175 (2) of the Act provides that "The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations. It was submitted that the ex parte applicant did not comply with subsection (2) above. On this ground, I find that the applicant is not entitled to the exercise of this Courts discretion.

41. I find useful guidance in Court of Appeal decision in *Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd*^[21] that "*The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. From the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.*"

42. An administrative functionary that is vested by statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.

43. It is not disputed that the first Respondent is vested with powers to make the decision in question. No abuse of such powers has been alleged or proved. It has not been shown that this power was not exercised as provided for under the law. It has not been proved or even alleged that the first Respondent acted outside its powers or the decision was arrived at after taking into account irrelevant or extraneous matters. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural.

44. The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality or procedural impropriety** has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.^[22]

45. It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.^[23] It has not been established that the Board took into account irrelevant considerations.

46. In view of my analysis and conclusions herein above, I find that the *ex parte* applicant has not satisfied the threshold for this court to grant the orders sought. Accordingly, I dismiss the *ex parte* Applicant's Application dated 7th March 2018 with costs to the Respondents and the Interested Party.

47. Orders accordingly.

Signed, Delivered and Dated at Nairobi this 25th day of June 2018

John M. Mativo

Judge

[1] Act No.33 of 2015.

[2] {2014} eKLR.

[3] Act [No. 3 of 2005](#).

[4]{2012} eKLR.

[5] {1969} 1 All ER 20

[6]To buttress his argument, counsel cited a paragraph from Halsbury's Laws of England at Paragraph 77 page 170.

[7] Counsel cited R vs City Council of Nairobi ex parte Kenya Taxi Cabs Association {2010}eKLR.

[8] Counsel cited Zachariah Wangunza & Another vs Office of the Registrar Academic Kenyatta University & 2 Others {213}eKLR

[9] Counsel cited Municipal Council of Mombasa vs R & Umoja Consultants Ltd Civil Appeal No. 185 of 2001.

[10] Counsel cited R vs Public Procurement Administrative Review Board {2008} eKLR.

[11] Counsel cited Municipal Council of Mombasa vs Republic & Another {202} eKLR.

[12] Counsel cited Kenya National Examinations Council vs Republic ex parte Geoffrey Njoroge & 9 Others {1997}eKLR.

[13] To buttress his argument, counsel cited R vs Public Procurement Administrative Review Board & Another ex parte Uto Creations Studio Ltd HCMSC App No. 89 of 2012 & Kenya Pipeline Company Ltd & Hysoung Ebara Company Ltd and 2 Others Civil appeal No. 1465 OF 2011.

[14]Counsel cited several cases among them Cheif Constable vs Evans {1982}3ALL ER 141, Council of Civil Service Unions vs Minister for Civil Service {1984}3ALL ER 935, Anisminic Ltd vs Foreign Compensation Commission {1969}1 ALL ER 208

[15] Peter Volmink, *Legal Consequences of Non Compliance with BID Requirements*, (2014) 1 APPLJ 41.

[16] Hoexter 2012: 295.

[17] See VDZ Construction (Pty) Ltd v Makana Municipality & Others [2011] JOL 28061 (ECG) para 11

[18] The concept of bid responsiveness is used most often in relation to compliance with bid formalities.

[19] Hoexter 2012: 295.

[20] Xantium Trading 42 (Pty) Ltd v South African Diamond and Precious Metals Regulator and another [2013] JOL 30148 (GSJ) para 25

[21] Supra.

[22] See *Gauteng Gambling Board vs Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29

[23] See *Patel vs Witbank Town Council* 1931 TPD 284 Tindall J said (at 290);