REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO.514 &515 OF 2017 (CONSOLIDATED)

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

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTIONS 8 & 9 OF THE LAW REFORM ACT, AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF: ARTICLE 47, 201 (D), 227 (1) & 232 (1) (B) OF THE CONSTITUTION OF KENYA AND THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

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

AND

IN THE MATTER OF: PPARB NO. 68 OF 2016; SOMWET LIMITED –VS- MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT

REPUBLIC...APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD...1ST RESPONDENT

MINISTRY OF INTERIOR AND CO-ORDINATION OF

NATIONAL GOVERNMENT..2ND RESPONDENT

KEMAX TRADING COMPANY LIMITED.............1ST INTERESTED PARTY

PAPER FURNITURE...2ND INTERESTED PARTY

PAPER PLUS TRADING

COMPANY LTD..1ST EXPARTE APPLICANT

SOMWET LIMITED..EX-PARTE APPLICANT

JUDGMENT

1. By a Notice of Motion dated 28th August 2017 brought under Article 47 of the Constitution 2010, Sections 8 and 9 of the Law Reform Act, Cap 26, Order 53 Rule 3 of the Civil Procedure Rules and all enabling provisions of the law, the exparte applicant **SOMWET LIMITED** seeks from this court orders of:

> ***a) Certiorari*** *to remove and bring to this Honorable Court for purposes of quashing the whole of the 1st Respondent's decision delivered on 10/08/2017 in* ***Application No. 68 of 2017; Somwet Ltd –vs- Ministry of Interior and Co-ordination of National Government;***
>
> ***b) Prohibition*** *to prohibit the 2nd Respondent from executing contracts with bidders awarded tenders in respect of item numbers* ***55, 62, 74, 75 and 97*** *or placing orders for the purchase of papers in respect of the said tender items;*
>
> ***c) Mandamus*** *compelling/directing the 2nd Respondent to award the Ex-parte Applicant the tender in respect of tender item numbers* ***55, 62, 74, 75 and 97;***
>
> ***d) Costs*** *of this application be borne by the Respondents*.

2. The application is predicated on the grounds stipulated on the face of the application and the statutory statement and verifying affidavit of. **BONIFACE G. KAIRU** sworn on 18th August 2017 together with the annexures thereto.

3. The exparte applicant's case is that The 2nd **Respondent MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT** (procuring entity) invited bids from eligible bidders in respect of **Tender Number GP/4/2016-2018**, ***for the supply and delivery of paper and boards for Government Press. That the award criteria provided that the successful tenderer would be the lowest evaluated bidder per item.***

4. It was averred that the Ex-parte Applicant participated in the tender and submitted its bid for tender item numbers **55, 62, 74, 75 and 97** and it was subsequently awarded the tender to supply item numbers **56, 57** and **90 only**.

5. That the 2nd Respondent declined to award the Applicant a tender for item numbers **55, 62, 74, 75 and 97** on the ground that the Applicant's prices were below the market prices and proceeded to award the same to bidders who submitted higher prices.

6. Being dissatisfied with the award by the procuring entity, the Applicant filed a request for review at the Public Procurement Administrative Review Board in **PPARB Case No. 68 of 2017; Somwet Limited –vs- Ministry of Interior and Co-ordination of National Government**.

7. After hearing the request for review, the Review Board delivered its decision on 10/08/2017 and dismissing the request for review on the ground that the prices submitted by the Applicant in its bid were far lesser than prices which were prevailing three years ago.

8. According to the exparte applicant, the Review Board's decision took into consideration extraneous, irrelevant facts and documents not pleaded rendering its decision unfair, biased, irrational and unreasonable.

9. It is further claimed that the 1st Respondent based its decision solely on previous framework contracts and local purchase orders for the years 2014, 2015, 2016 and 2017 together with a schedule of the market price index for the years 2014, 2015 and 2016, which documents were submitted to the 1st Respondent by the 2nd Respondent after the hearing of the request for review on 04/08/2017 and that the Applicant was neither served with nor given an opportunity to make representations or submissions on the same.

10. The exparte applicant claims that in arriving at its decision, the 1st Respondent made errors of fact by, among other things, ignoring the prevailing market prices submitted by the Applicant and relying on market price index for the years 2014, 2015 and 2016.

11. Further, that in arriving at its decision, the 1st Respondent made errors of law by relying on section 54 (2) of Public Procurement and Asset Disposal Act, 2015 (the Act) and disregarding articles 201 (d), 232 (1) (b) & 227 (1) of the Constitution and sections 3 (e), (f) & (h), 45 (3) (c), 46 (4) (e) of the Act.

12. That therefore as a result of the decision by the Review Board, the Kenyan tax payer will lose a total of Kenya Shillings One Hundred Sixty Five Million (Kshs.165, 000,000/-), being the difference between the prices submitted by the Applicant in respect of tender items **55, 62, 74, 75 and 97** and those submitted by bidders awarded the tender to supply same.

13. The 2nd exparte applicant is **PAPER PLUS TRADING COMPANY LTD and filed a notice of motion dated ….. seeking the following judicial review orders of:**

> ***a) Certiorari*** *to remove and bring to this Honorable Court for purposes of quashing the whole of the 1st Respondent's decision delivered on 10/08/2017 in* ***Application No. 67 of 2017; Paper Plus Trading Co. Ltd –vs- Ministry of Interior and Co-ordination of National Government;***
>
> ***b) Prohibition*** *to prohibit the 2nd Respondent from executing contracts with bidders awarded tenders in respect of item numbers* ***69, 70, 71, 72, 81, 83 and 104*** *or placing orders for the purchase of papers in respect of the said tender items;*

c) Mandamus** compelling/directing the 2nd Respondent to award the Ex-parte Applicant the tender in respect of tender item numbers **69, 70, 71, 72, 81, 83 and 104.

***d) Costs** of this application be borne by the Respondents*.

14. The application by the 2nd exparte applicant is based on the grounds stated on the face of the notice of motion, the statutory statement and the verifying affidavit sworn by **BONIFACE G. KAIRU** on 18th August 2017.

15. According to the second exparte applicant, the 2nd Respondent procuring entity invited bids from eligible bidders in respect of **Tender Number GP/4/2016-2018, for the supply and delivery of paper and boards for Government Press.** The award criteria provided that the successful tenderer would be the lowest evaluated bidder per item.

16. That the 2nd Ex-parte Applicant participated in the tender and submitted its bid for tender item numbers **69, 70, 71, 72, 81, 83, 98 and 104**. The 2nd Applicant was subsequently awarded the tender to supply item number **98.**

17. That the 2nd Respondent declined to award the Applicant tender for item numbers **69, 70, 71, 72, 81, 83 and 104** on the ground that the Applicant's prices ***were below the market prices and proceeded to award the same to bidders who submitted higher prices.***

18. Being dissatisfied with the award by the procuring entity, the 2nd exparte Applicant filed a request for review at the Public Procurement Administrative Review Board in **PPARB Case No. 67 of 2017; Paper Plus Trading Co. Ltd –vs- Ministry of Interior and Co-ordination of National Government.**

19. That the Review Board delivered its decision on 10/08/2017 and dismissed the request for review on the ground that the prices submitted by the Applicant in its bid were far lesser than prices which were prevailing three years ago.

20. The 2nd exparte applicant alleges that the Review Board's decision took into consideration extraneous, irrelevant facts and documents not pleaded rendering its decision unfair, biased, irrational and unreasonable.

21. Further, that the 1st Respondent based its decision solely on previous framework contracts and local purchase orders for the years 2014, 2015, 2016 and 2017 together with a schedule of the market price index for the years 2014, 2015 and 2016.

22. That the said documents were submitted to the 1st Respondent by the 2nd Respondent after the hearing of the request for review on 04/08/2017 and that the Applicant was neither served with nor given an opportunity to make representations or submissions on the same.

23. It was alleged that in arriving at its decision, the 1st Respondent made errors of fact by, among other things, ignoring the prevailing market prices submitted by the Applicant and relying on market price index for the years 2014, 2015 and 2016.

24. Further, that in arriving at its decision, the 1st Respondent made errors of law by relying on section 54 (2) of Public Procurement and Asset Disposal Act, 2015 (the Act) and disregarding articles 201 (d), 232 (1) (b) & 227 (1) of the Constitution and sections 3 (e), (f) & (h), 45 (3) (c), 46 (4) (e) of the Act and that the Kenyan tax payer will lose a total of Kenya Shillings One Hundred Sixty Two Million (Kshs.162,000,000/-), being the difference between the prices submitted by the Applicant in respect of tender items 69, 70, 71, 72, 81, 83 and 104 and those submitted by bidders awarded the tender to supply the same.

25. It was averred that the Review Board dismissed the Applicant's request for review on the ground that;

> ***"…the Applicants tender prices were grossly understated and the Board finds that the Procuring Entity's tender evaluation committee acted within the confines of the law and the Applicants contention lacks merit.***
>
> ***The Board further wishes to observe that there is no way that the Applicants would have been able to supply the same goods currently at the prices which are far lesser than prices which were prevailing three years ago. Such a proposition by the Applicants does not also make any economic sense and the Board is persuaded that the Applicants deliberately offered low prices so as to be awarded the tenders in the hope of a future price variation."***

26. Further, that the 1st Respondent made errors of fact by;

i. Ignoring the prevailing market prices submitted by the Applicant and relying on market price index for the years 2014, 2015 and 2016.

ii. Holding that the 2nd Respondent acted within the confines of the law by rejecting the Applicant's prices as below the market prices yet a large number of the successful prices were below the market price index for the years 2014, 2015 and 2016.

iii. Holding that there is no way that the Applicant would have been able to supply the same goods currently at the prices which are far lesser than the prices which were prevailing three years ago when there was no evidence placed before it to support such a finding.

iv. Holding that the Applicant deliberately offered low prices so as to be awarded the tenders in the hope of a future price variation when there was no evidence placed before it to support such a finding.

27. The 1st respondent Review Board filed a replying affidavit sworn by Henock Kirungu on 6th October, 2017 deposing that the request for review filed by the applicants on 21st July 2017 and on 31st July 2017 amended request for review were filed, the matter was heard and on 10th august 2017 the decision was made dismissing the application for review

28. It was deposed that the decision by the 1st respondent was made within its mandate after reviewing all the materials placed before it. Including the oral and written submissions of the parties and original tender documents, evaluation reports and other documents supplied to it by the 2nd respondent.

29. That the Review Board was conscious of the provisions of section 54(2) and section 80 of the PPADA when it made its decision

30. That all bidders were bound by the criteria set in the tender documents which included prevailing market prices being used to determine their responsiveness.

31. That no illegality or procedural impropriety had been demonstrated by the applicants to warrant the orders sought hence the applications were in bad faith and intended to discredit the review Board. The court was urged to dismiss the applications with costs.

<u>THE CASE FOR THE 1ST INTERESTED PARTY</u>

32. The 1st interested party Remington Agency Limited filed a replying affidavit sworn by **IMRAN HASSAN BASABRA** its General Manager deposing that **the** Interested Party participated in the tender under review and emerged as the successful tenderer having satisfied the Procuring entity (the 2nd Respondent herein) that it was the lowest evaluated bidder in tender **item 72** which is among the items disputed herein.

33. **THAT** dissatisfied with the award of the tender to the Interested Party, the Ex-Parte Applicant filed a Request For Review at the 1st Respondent on 31st July 2017. The Interested Party filed its response to the said Request for Review on 2nd August 2017 and a *Notice to Produce filed on 4th August 2017 for the production of the Local Purchasing Orders (LPOs) used for supply of the tender item number 72 to wit; 60 gsm White Printing Reels width $8^{1}/_{2}$” centre core 3” radius 14” for the years 2014, 2015 and 2016. The said documents are annexure to the Ex-parte Applicant’s Supporting Affidavit sworn on 18th August 2017 and are found on pages 120, 121, 122, 126 and 127 of its bundle of documents.*

34. **THAT the first interested party w**as represented throughout the proceedings for the disputed tender at the 1st Respondent and the deponent also attended all the appearances at the 1st Respondent.

35. **THAT** the substantive hearing of the Ex-parte Applicant’s Request for Review was held on 4th August 2017 and that during the said hearing, its advocates on record *made an application, in the presence of all parties to the review, for the production of the LPOs previously used in the supply of 60 gsm White Printing Reels width $8^{1}/_{2}$” centre core 3” radius 14” for the years 2014, 2015 and 2016.*

36. **THAT** upon considering the 1st interested party’s application, an order was made for the production of the said LPOs but that *the Ex-parte Applicant did not make any application for examination of the said documents or opportunity to make any representations on the same.*

37. **THAT** the Ex-parte Applicant has not provided any evidence that the previous LPOs did not represent the market prices for the said years.

38. **THAT** the Ex-Parte Applicant’s Application before this court presupposes that *there were no other grounds for the dismissal of its Request For Review other than the adduction of evidence on the prevailing market prices in 2014, 2015 and 2016*. That such a presupposition is erroneous as the 1st Respondent Review Board was guided by the law and the facts in making its determination and that it specifically made the following observations:

a. The tender document required the prices availed to the Procuring Entity do take into consideration the market prices;

b. The 2nd Respondent provided evidence that it had carried out independent market survey to determine the market prices for the said items;

c. The 2nd Respondent treated all the tenderers in the same way and carried out the market survey for all items in the same way and arrived at the decision to award the tender to the successful applicants for all items;

d. The market survey and the LPOs for the years 2014 to 2016 were part of the evidence that the 1st Interested Party had complied with the requirement for the tenders to quote the prevailing market prices;

e. That the requirement for supply of the goods within the market prices was a critical requirement of the tender document and the law hence failure to observe the same would have been in contravention of the law; and

f. The Ex-Parte Applicant was found to have grossly under stated its prices and there was no way it could have managed to supply the goods at prices that were much less than what was prevailing in the past three years.

39. **THAT** the Application before this Court is purely premised on the allegation that the 1st Respondent failed to accord the Ex-parte Applicant the opportunity to make representations on some documents but does not fault the Interested Party at all on anything and it does not dispute that market prices were part of the requirements in award of the tenders in contention.

40. **THAT** the Interested Party is a stranger to the allegations that the award of the tender to it would contribute to the loss of KShs. 162,000,000.00 or at all, and that . Such allegations are the province of the 1st Respondent as they tend to challenge the correctness of the decision.

41. **THAT** the Ex-parte Applicant has been providing the disputed items to the Procuring Entity for about twenty years now and it has acquired a false sense of proprietorship to the supply of goods and services and is not willing to accept fair trade competition as enshrined in the Constitution and the Public Procurement and Disposal Act.

42. The 1st interested party urged the court to dismiss the exparte applicant's application with costs for being frivolous and vexatious hence.

THE THIRD INTERESTED PARTY'S CASE

43 The 3rd interested party REMINGTON AGENCY LIMITED filed a replying affidavit sworn by **ANTHONY MWANGI** the General Manager **of Enterprise Supplies Limited contending that** the 3rd Interested Party participated in the tender under review and emerged as the successful tenderer having satisfied the Procuring Entity (the 2nd Respondent herein) that it was the lowest evaluated bidder for supply of items **62 and 77** of the tenders advertised for and disputed herein.

44. **THAT** dissatisfied with the award of the tender to the Interested Party, the Ex-Parte Applicant filed a Request For Review at the 1st Respondent on 31st July 2017.

45. **THAT** the substantive hearing of the Ex-parte Applicant's Request for Review was held on 4th August 2017 and that during the said hearing, its current advocates while acting for **Remington Agency Limited (the 1st Interested Party in J.R 514/17** consolidated with this matter) made an application in the presence of all parties to the review, for the production of the LPOs used previously in the supply of various items to itself for the years 2014, 2015 and 2016.

46. THAT that upon considering the said Application, an order was made for the production of the said LPOs but the Ex-parte Applicant did not make any application for examination of the said documents or opportunity to make any representations on the same.

47. **THAT** the Ex-parte Applicant has not provided any evidence that the previous LPOs did not reflect the market prices for the said years.

48. **THAT** the Ex-parte Applicant's Application before this Honourable court presupposes that there were no other grounds for the dismissal of its Request For Review other than the adduction of evidence on the prevailing market prices in 2014, 2015 and 2016. That the same is an erroneous presupposition as the 1st Respondent was guided by the law and the facts in making its determination and specifically made the following observations:

a. The tender document required the prices availed to the Procuring Entity do take into consideration the market prices;

b. The 2nd Respondent provided evidence that it had carried out independent market survey to determine the market prices for the said items;

c. The 2nd Respondent treated all the tenderers in the same way and carried out the market survey for all items in the same way and arrived at the decision to award the tender to the successful applicants for all items;

d. The market survey and the LPOs for the years 2014 to 2016 were part of clear evidence that the Interested Party had complied with the requirement that the lowest evaluated price shall be the one whose quote satisfies the prevailing market prices;

e. That the requirement for supply of the goods within the market prices was a critical requirement of the tender document and the law hence failure to observe the same would have been in contravention of the law; and

f. The Ex-Parte Applicant was found to have grossly under stated its prices and there was no way it could have managed to supply the goods at prices that were much less than what was the prevailing market price in the three years preceding the date of invitation for the disputed tenders.

49. **THAT** that the application before court is purely premised on the allegation that the 1st Respondent failed to accord the Ex-parte Applicant the opportunity to make representations on some documents but does not fault the 3rd Interested Party at all on anything and it does not dispute that market prices were part of the requirements in award of the tenders in contention.

50. **THAT** the 3rd Interested Party is a stranger to the allegations that the award of the tender to it would contribute to the loss of KShs. 165,000,000.00 or at all. Such allegations are the province of the 1st Respondent as they tend to challenge the correctness of the decision.

51. **THAT** the Ex-parte Applicant has been providing the disputed items to the Procuring Entity for about twenty years now and it has acquired a false sense of proprietorship to the supply of goods and services and is not willing to accept fair trade competition as enshrined in the Constitution and the Public Procurement and Disposal Act.

52. **THAT** the entire Application does not prove any violations or any matter that would invite the jurisdiction of this Honorable Court and is otherwise frivolous and vexatious hence it ought to be dismissed with costs.

SUBMISSIONS

53. In these consolidated applications JR 515 AND 515 OF 2017 dated 28th August 2017, the Ex parte Applicants (hereinafter the Applicants) herein, **Somwet Limited** (hereinafter the 1st Applicant) and **Paper Plus Trading Company Limited** (hereinafter the 2nd Applicant) also filed consolidated written submissions reiterating their grounds as reproduced herein.

54. On the principles of judicial review the decision by Lord Diplock in the **Council of Civil Service Unions v Minister For the Civil Service [1984] 3 ALL ER 935** was cited wherein it was stated:

> ***"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety…"***

55. The exparte applicants attacked the Review Board's decision wherein it was held:

> ***"…the Applicants tender prices were grossly understated and the Board finds that the Procuring Entity's tender evaluation committee acted within the confines of the law and the Applicants contention lacks merit.***
>
> ***The Board further wishes to observe that there is no way that the Applicants would have been able to supply the same goods currently at the prices which are far lesser than prices which were prevailing three years ago. Such a proposition by the Applicants does not also make any economic sense and the Board is persuaded that the Applicants deliberately offered low prices so as to be awarded the tenders in the hope of a future price variation."***

56. On Illegality it was submitted that Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Service [1984] 3 ALL ER 935** defines illegality:

> ***"….as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable…"***

57. Further reliance was placed on the decision by Justice Kasule in the Ugandan case of **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300 which** also defines illegality as follows;

> "...***Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality..."***

58. On what amounts to an error of law, reliance was placed on Halsbury's Laws of England at paragraph 77 page 170 of the 4th Edition where the learned authors discuss the issue and state as follows:

> ***"There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed. In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete. A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power."***

59. In the instant cases, it was submitted that the Review Board erred in law by failing to grant the Applicants an opportunity to make representations or submissions on the framework contract prices for the period 2014 – 2016. That the said documents were not part of the pleadings filed by 2nd Respondent at the Review Board; and that instead, they were submitted to the Board by the 2nd Respondent after the hearing of the request for review.

60. The court was urged to observe that from the 2nd Respondent's response to the request for review that the 2nd Respondent makes no reference to framework contract prices for the period 2014 – 2016 and that the only reason, according to the 2nd Respondent, why the Applicant's bid for the tender items under consideration were unsuccessful is contained at paragraph 5 (Review no. 5) of its response where it stated that

> ***"…This being an open tender, all eligible bidders were entitled to be considered for the bids and as such, the Applicant was not entitled to be awarded all the items he bidded for because this was a competitive tendering process and only the lowest evaluated bidders were to be awarded. This was done in accordance with section 3 (a) (b) (c) of the Public Procurements and assets Disposal Act and Article 27 of the Constitution."***

61. The exparte applicants submitted that the Review Board committed an illegality in the process by arriving at findings that were not pleaded by the parties and relying on documents that had not been properly filed before the Board to enable the Applicants make representation on the same hence the applicants were therefore condemned unheard. Reliance was placed on Section 7 (2) (a) (v) of the Fair Administrative Act, 2015 which grants this court the right to review an administrative decision if the person/entity that made the same denied the person to whom the administrative decision relates, a reasonable opportunity to state its case. Further reliance was placed on the case of **Pashito Holdings Ltd & Another vs. Paul Ndung'u & Others** where it was held that:

> ***"An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision."***

62. The Applicants submitted that the principles of natural justice are now well enshrined in the Constitution of Kenya, 2010. In **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others** the court stated as follows;

> ***"We have considered the rival submissions on the issue of an alternative remedy. The respondents' submission that constitutional issues cannot be raised in judicial review proceedings was law prior to the 2010 Constitution. The law has now changed and the provisions of Article 22 (3) and 22 (4) of the Constitution as read with Article 47 of the Constitution and Sections 5 (2) (b) and (c) and Section 7 (1) (a) and (2) of the Fair Administrative Action Act suggests that violation of fundamental rights and freedoms can be entertained by way of statutory judicial review in an action commenced by Petition under the Rules made pursuant to Article 22 (3) of the Constitution. of significance is Section 5 (2) of the Fair Administrative Action Act which stipulates that:***
>
> ***"(2) Nothing in this section shall limit the power of any person to –***
>
> ***(a)…..apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the Constitution or any written law or institute such legal proceedings for such remedies as may be available under any written law."***
>
> ***Article 47 of the Constitution as read with the provisions of Section 5 (2) of the Fair Administrative Action Act establishes a non-exclusive approach to challenge of administrative action. The section permits bifurcation or a split approach for remedies. One approach is by way of statutory judicial review under the Act; the other is through proceedings for any other remedies as may be available under the Constitution or any written law. Subject to Section 9 (2), and (4) of the Fair Administrative Action Act, the two approaches are not mutually exclusive. The bifurcated and nonexclusive nature of proceedings for remedies must be read in the context of Article 47 of the Constitution and Section 12 of the Fair Administrative Action Act. The common law principles of administrative review have now been subsumed under Article 47 Constitution and Section 7 of the Fair Administrative Action Act. In this regard, there are no two systems of law regulating administrative action - the common law and the Constitution - but only one system grounded in the Constitution. The courts' power to statutorily review administrative action no longer flows directly from the common law, but inter alia from the constitutionally mandated Fair Administrative Action Act and Article 47 of the Constitution. The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of Article 47 of Constitution as read with the Fair Administrative Action Act of 2015. The Act establishes statutory judicial review with jurisdictional error in Section 2 (a) as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision making process in Articles 47and 10 (2) (c) of the Constitution. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the Fair Administrative Action Act and the Constitution. As correctly stated by the High Court in Martin Nyaga Wambora v Speaker of the Senate [2014] eKLR it is clear that they -Articles 47 and 50(1) - have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi-judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases."***

63. It was further submitted that Article 25 of the Constitution prohibits any derogation from the right to fair trial and that this is reinforced by Article 50 of the Constitution on the right of parties to have their disputes resolved in a fair and public hearing before a court or tribunal., which new dimensions require a heightened judicial review scrutiny by the court when considering a decision by a tribunal.

64. In this case, it was submitted that The Review Board did not subject the Applicant to a fair process before it, contrary to Articles 47 and 50 of the Constitution. Thus the Review Board failed to exercise the jurisdiction conferred upon it by PPAD Act, thereby acting illegally. Reliance was placed on the case of **Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300** where it was opined that ***procedural impropriety is when the decision maker fails to act fairly in the process of taking a decision. The unfairness may be non-observance of the rules of natural justice or failure to act with procedural fairness towards one to be affected by the decision. It***

may also involve failure to comply with procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

65. The applicants submitted that the Review Board based its decision solely on previous framework contracts and local purchase orders for the years 2014, 2015 and 2016, which documents were allegedly submitted by the 2nd Respondent after hearing of the request for review on 4th August 2017. That the Applicants were neither served with the said documents nor given an opportunity to make representations or submissions on the same. It was submitted that the Review Board in so doing, took into consideration extraneous and irrelevant facts not pleaded rendering its decision unfair, biased, irrational and unreasonable.

66. The Court was further urged to note that the basis of all the awards as contained in the letters of award exhibited at pages 86, 88, 90, 92, 94, 96, 98, 100 and 102 of the chamber summons in J.R No. 514 of 2017 and pages 85, 88, 90, 92, 94 and 96 of the chamber summons in J.R No. 515 of 2017 is the lowest evaluated bidder and not the prevailing market prices or previous framework contracts. Reliance was placed on the case of **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR where it was held** as follows:

> ***"Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration."***

67. The applicants further relied on the case of **R vs. The Public Procurement Administrative Review Board Ex Parte Kenya Medical Supply Agency, Crown Agents, Deutsche Gesellschaft Fur TechnisheZusammenarbeit and John Snow Inc. [2010] eKLR**, where it was held that the Respondent overstepped its mandate by dealing with issues that were not pleaded before it, and by doing so, reaching the wrong conclusion and thus exceeded its mandate as provided in the Act and acted unreasonably by *inter alia* framing issues that were not before it. Further reliance was placed on **R vs. KRA Ex Parte Aberdare Freight Services Ltd. Misc. Application No. 946 of 2004** where it was opined that new issues raised at the hearing amounted to an ambush and that failure to afford a party an opportunity to be heard amounts to an error on the face of the record requiring correction by way of *certiorari*. Further, support was sought in **Mahaja vs. Khutwalo [1983] KLR 553** at pages 554 and 555, **Onyango Oloo vs. Attorney General [1986-1989] E.A 456,** as well as the decision by Lord Denning in **Kanda vs. Government of The Federation of Malaya [1962] AC 322** and a submission made that **t**he Respondent's consideration of matters that were not properly raised before it, it was asserted, was against the 1st Interested Party's legitimate expectation of procedural fairness yet the duty to act fairly lies upon everyone who decides anything. Hence, the Review Board's finding that the prices submitted by the Applicants are far lesser than the prices which were prevailing three years ago was *ultra vires*. Whereas natural justice demands impartiality and fairness and precludes bias the Review Board's conclusions shows that it selectively formed its opinion on issues not placed before it and on documents which it did not give all the parties an opportunity to make representations on. Its decision therefore, it is submitted offends the principles of natural justice, is outside its jurisdiction and should be quashed.

68. **Errors of fact it was submitted that t**he Review Board made an error of fact by subordinating the requirement that the successful tenderer be the lowest bidder with the highest combined score per item to the guiding requirement that the prevailing market prices will be used to determine the responsiveness. That the primary consideration in the tender document in so far as the award criteria is the lowest evaluated tender.

69. **Reference was made to** Clause 2.27 (b) of the tender document which refers to the award criteria. It states as follows;

> ***"The procuring entity will award the contract to the successful tenderer(s) whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided that the tenderer is determined to be qualified to perform the contract satisfactorily."***

70. Further, that the award criteria is aptly restated at clause 2.24.4 of the instructions to tenderers which states in clear terms that " **Award will be made to the lowest evaluated bidder per item**".

71. That even if the prevailing marketing prices were to be taken into consideration, the Review Board made an error of fact by purporting to equate price index and framework contracted prices for the periods between 2014 to 2016 to the prevailing market prices.

72. It was the Applicants' submission that a tender can only be awarded using the criteria set out in the tender document. To support this proposition, we rely on **Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR,** where the court found that the Review Board's introduction of a definition not contained in the tender document amounted to an alteration of the bid document. The Court stated:

> **"The Board further found that the ex parte applicant was not an Original Equipment Manufacturer. From the decision of the Board it is clear that this term which became so crucial in the Board's determination was defined by the PE in the Tender Document. However the Board in its decision adopted a definition other than the one in the bid document. The Board therefore provided its own definition based on the submissions of one of the parties. Whereas we appreciate that the Board's latitude in applications for review is wide, such latitude ought not to be expanded to such an extent that it renders the idea conceived by the PE totally useless. In providing its own definition of what an OEM is the Board in essence altered the bid documents which can only be done as provided by the Act and by the PE. The Board may have indeed found a shortcoming in the definition of an OEM provided by the PE. We are of the view, that in order to achieve a transparent system of procurement as required under Article 227 of the Constitution, it is important that procuring entities should set out to achieve a certain measure of precision in their language in the tender documents and not leave important matters for speculation and conjecture as was the case in this matter."**

73. Relying on **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 others [2015] Eklr,** it was submitted that the PP&DA and the Regulations bequeath the onus of amending a tender document on a procuring entity. When the Review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and in such circumstances it is said that it has acted outside jurisdiction. Those who approach the Review Board must be sure of its parameters. The power bestowed upon the Review Board does not include authority to act outside the law. Such power can only be valid if it is exercised for legitimate purposes. In the instant case, the Review Board exceeded its authority by purporting to read its own words in the Tender Document."

74. It was also submitted that the Review Board also made an error of fact by making an assumption that prices prevailing in the years 2014, 2015 and 2016 will be the same as the market prices in the year 2017. It was submitted that the applicants produced the prevailing market prices from reputable stockists hence the finding of the Review Board was in error.

75. It was further submitted that the Review Board ignored the prevailing marketing prices that had been presented before the Review Board by the Applicants

76. The Applicants submitted that the rider that the prevailing market prices will be used to determine the responsiveness was meant to guard against exorbitant prices and not to vary the award criteria. It did not take away the award criteria that required the successful tender to be the one with the lowest evaluated price per item.

77. In addition, it was submitted that the Review Board also made an error of fact at page 30 of its decision when it held as follows;

> ***"The Board further wishes to observe that there is no way that the Applicants would have been able to supply the same goods currently at prices which are far lesser than prices which were prevailing three years ago. Such a proposition by the Applicants does not also make any economic sense and the Board is persuaded that the Applicants deliberately offered low prices so as to be awarded the tenders in the hope of a future price variation.***

78. That had the Review Board taken into consideration clauses 3.7, 3.13 and 3.17 of the General Conditions of Contract (GCC), it would have come to the conclusion that the Procuring Entity was well protected against what the Review Board termed bidders bidding low prices. For instance, it was argued that under clause 3.7 of the GCC (page 23 of the tender document) read together with clause 3.7.1 of the Special Conditions of Contract (SCC) (page 27 of the tender document), the successful tenderer is required furnish the procuring entity with a performance security of 5% of the tender sum from a reputable bank or an insurance company. That therefore no tenderer would risk forfeiting 5% of the tender sum if it knows it will not be able to supply at the bid prices.

79. The Applicants submitted that had the Review Board not made the foregoing errors of fact, or not relied on irrelevant consideration it would have arrived at a different conclusion, that is, that the Applicants were entitled to the award as they had submitted the lowest prices for the tender items under consideration.

80. **On Errors of law it was argued that t**he Review Board made an error of law by relying on Section 54 (2) of the PPDA Act and disregarding Articles 201 (d), 232 (1) (b) & 227 (1) of the Constitution and Sections 3 (e) (f) & (h), 45 (3) (c), 46 (4) (e) of the Act, and by holding: ***"Under the provisions of section 54 (2) of the Act, the law directs in mandatory terms that standard goods, services and works with known market prices shall be procured at the prevailing market prices…By virtue of the provisions of the said section 54 (2) of the Act, a Procuring Entity is therefore bound by law and general good practice to establish the market prices for standard goods, services and works and take the said prices into consideration while evaluating the tenders.***

81. In addition to making an error of fact that the prevailing marketing prices was an award criteria, the Review Board was accused of making an error of law by subordinating the provisions of the Constitution to that of statute, in particular section 54 (2) of PPAD Act. Section 3 of the PPAD Act provides that in carrying public procurement and asset disposal, public entities shall be guided by certain values and principles of the Constitution and relevant legislation. Key among them are; Section 3 (e) of the PPAD Act which calls for adherence to the principles of public finance under Article 201 of the Constitution. Article 201 (d) provides that public money shall be used in a prudent and responsible way.

> a) Section 3 (f) of the PPAD Act enjoins public entities to adhere to the principles of public service as provided under Article 232 of the Constitution. Article 232 (1) (b) states that the values and principles of public service include – efficient, effective and economic use of resources.
>
> b) Article 227 (1) of the Constitution which enjoins public entities to contract for goods and services in accordance with a system that is fair, equitable, transparent competitive and cost-effective.
>
> c) Section 45 (3) (c) of the PPAD Act provides that all procurement processes shall be undertaken in strict adherence to Article 227 of the Constitution.
>
> d) Similarly, section 46 (4) (e) of the PPAD Act is explicit that the evaluation committee shall adopt a process that shall ensure the evaluation process utilized adheres to Articles 201 (d) and 227 (1) of the Constitution.

82. That Whereas section 54 (2) of the PPAD Act, permits a public entity to procure goods and services with known market prices at the prevailing marketing prices, the said provision cannot override the express provisions of the Constitution and in particular where, as in this case, the procuring entity could not establish the prevailing market prices. It was submitted that nonetheless, section 54 (2) of the PPAD Act does not prohibit a public entity from procuring goods and services at prices that are below the prevailing market prices.

83. The Applicants submitted that the Review Board made an error in law by subordinating constitutional provisions to the provisions of statute. The court will note that by applying section 54 (2) of the PPAD Act as opposed to Articles 201 (d), 232 (1) (b) & 227 (1) of the Constitution and sections 45 (3) (c), 46 (4) (e) of the PPAD Act leads to increase in prices in excess of Kshs.165,000,000 and Kshs.162,000,000 in respect of tender items submitted by 1st and 2nd Applicants respectively.

84. Reliance was placed on **PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR** where it was held that judicial review orders are available where the Review Board committed an error of law apparent on the face of its decision and that the Review Board cannot disregard mandatory provisions of the Act and where it does so, it amounts to a fundamental misdirection or failure to address the applicable law or a fundamental error of law thereby rendering the decision reached devoid of legality and therefore void. The Court further held:

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

85. Further reliance was placed on **Al Ghurair Printing and Publishing LLC –vs- Coalition for Reform and Democracy & 2 Others [2017] eKLR, where** Musinga JA held as follows;

> ***"Section 3 of the Act sets out the principles that guide public procurement and asset disposal by State organs and public entities. They include the national values and principles provided for under Article 10 of the Constitution; principles of integrity under the Leadership and Integrity Act, 2012; the principles of public finance under Article 201 of the Constitution, the values and principles of public service as provded for under Article 232; among*** **others."**

86. Similarly, in **Republic –vs- Independent Electoral and Boundaries Commission & Another Ex Parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR,** the court held as follows;

> **"It is therefore clear that one of the grounds for invoking judicial review jurisdiction under the current Constitution is the violation of or the threat of violation of the Constitution."**

87. That by ignoring the express provisions of Articles 201, 203 and 227 of the Constitution and upholding the provisions of section 54 (2) of the PPAD Act, the Review Board violated Article 2 (4) of the Constitution which emphasises the supremacy of the Constitution over provisions of statute. On this ground alone, the decision of the Review Board should be quashed.

88. **on Irrationality it was submitted relying on the decision by** Lord Diplock in C**ouncil of Civil Service Unions v Minister for the Civil Service [1984] 3 ALL ER 935 where he defines** irrationality as "…By **"irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system…."**

89. It was therefore argued that it was grossly unreasonable and irrational for the Review Board to introduce extraneous evaluation requirements outside the PPAD Act without expressly and clearly faulting the tender document itself.

90. Further reliance was placed on **East African Railways Corp. VS Antony Sefu, Dar-Es-Salaam HCCA No. 19 of 1971, [1973] EA 327,** where the court observed that it is empowered to look into the question whether a tribunal has stepped outside its field of operation and it may declare a tribunal's decision a nullity if the tribunal did not follow the procedure laid down by a statute in arriving at a decision.

91. That by upholding an award that was contrary to the criteria set out in the Tender Document which all the bidders had relied on to submit their bids, the Review Board abdicated its responsibilities of ensuring that procuring entities adopted procedures that (i) promote competition in the process, (ii) ensure that competitors are treated fairly, (iii) promote integrity and fairness and (iv) increase public confidence in procurement procedures.

92. The Applicants submitted that the Review Board's act of disregarding the award criteria in the tender document and thus upholding an award that commits the Kenya taxpayer to an unnecessary additional payments of Kshs.327,000,000/- constitutes unreasonableness and irrationality.

93. **On Public interest it was submitted that t**he Kenyan taxpayer stands to lose a total of Kenya Shillings One Hundred and Sixty Five Million (Kshs. 165,000,000) and Kenya Shillings One Hundred and Sixty Two Million (Kshs. 162,000,000) respectively being the difference between the prices submitted by the Applicants and those submitted by the bidders awarded the tender.

94. That Article 227 (1) of the Constitution directs public entities to procure goods or services in accordance with a system that is cost effective. Article 232 (1) (b) emphasizes efficient, effective and economic use of public resources and on the other hand, Article 201(d) on management of public finances lays emphasis on the prudent and responsible use of public money.

95. The Applicants submitted that the award criteria provided that the successful tender would be the lowest evaluated tender with the highest combined score per item. If the said criteria had been adhered to, the aspirations of Kenyans as captured under Articles 201(d), 227 (1) and 232 (1) (b) would have been given effect.

96. That this criteria was however not followed by the 2nd Respondent as it failed to award the tender for items number 55, 62, 74, 75 and 97 & 69,70,71,72, 81, 83, and 104 respectively to the Applicants with the lowest bid and proceeded to award the tender for the above items to bidders with higher price contrary to procurement principles set out under the law. Reliance was placed on Article 1 (1) of the Constitution which provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. Under Article 1(3) (c), sovereign power under the Constitution is delegated *inter* alia to the Judiciary and independent tribunals.

97. Relying on **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017]** it was submitted that judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It was argued that it follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya, as was done by the Review Board in this case, would be contrary to the said Constitutional provisions. Citing ***East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board and Another*** where the Court of Appeal set out the principle of public interest as follows:-

> ***"We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable"***

98. It was argued that it is in the public interest that goods and services be procured at the best price possible. The greatest happiness that this court can grant the Kenyan tax payer is to save them from paying an unnecessary sum of Kshs. Kshs.327,000,000/ reliance was placed on **Republic vs. Public Procurement Administrative Review Board &Another Ex Parte SelexSistemiIntegrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 w**here **Nyamu, J** (as he then was) recognized the public interest in the enactment of the Public Procurement and Disposal Act (repealed by PPAD Act) when he stated as follows:

> ***"Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public. Indeed, sections 36 (6) and 100 (4) of the Act which are ouster clauses, were tailored to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant. Adjudication of disputes is a constitutional mandate of the Courts and the Court cannot abdicate from it."***

99. The Applicants submitted that the 2nd Respondent thus failed to observe the evaluation criteria in the tender document, the principles enshrined under the PPDA Act as well as the Constitution of Kenya 2010 that emphasizes the principle of value for money when dealing with public funds. The Review Board turned a blind eye on the acts of the 2nd Respondent.

SUBMISSIONS BY THE 1ST AND 3RD INTERESTED PARTIES

100. The 1st and 3rd Interested Parties filed submisions framing the following issues for determination

> **i. Whether the 1st Respondent's judgment violates any grounds of Judicial Review or at all.**
>
> **ii. Do the Applicants deserve the orders sought herein?**
>
> **iii. Which party ought to bear the costs of the suit?**
>
> **iv. Whether the 1st Respondent's judgment violates any grounds of Judicial Review or at all.**

101. It was submitted that the suit herein is based on no other grounds than the issue of market prices. It was submitted that in setting out the Financial Evaluation of the successful tenderer, the Procuring Entity provided in its tender document that the "**Prevailing Market Prices will be used to determine the responsiveness**" as contained on page 39 of the Applicant's Chamber Summons.

102. It was submitted that Section 72 of the Public Procurement and Disposal Act (Act number 33 of 2015) (hereinafter referred to as 'the Act') requires that each public entity conducts its procurement process in accordance with the Act. That Section 54 (2) of the Act requires that the prices of any known goods be done in accordance with the known market prices.

103. That the Act requires that the procuring entity does conduct a market survey to ascertain the prevailing market prices but does not

prescribe the methodology to be used in making a determination of the prevailing market prices. That in this case, the 2nd Respondent used the same methods to conduct a market survey thus ended up awarding some tenders to the Applicants and they gladly accepted the awards.

104. It was further submitted that in making its determination about the pricing of the items in contention, the procuring entity submitted that it carried out market surveys and arrived at the conclusion that the prices submitted by the Applicants were lower than the market prices for the various items. And that therefore the findings by the 1st Respondent that there was no violation of the law in awarding the tenders as was done by the 2nd Respondent was correct in all respects.

105. On whether there was any violation of the tender documents, it was submitted that the law or regulations by the 1st Respondent's reliance on the LPOs for 2014, 2015 and 2016? The said LPOs were produced by order of the 1st Respondent after considering the Notice to produce filed with the 1st Respondent by Remington Agencies Limited on 4th August 2017 and upon evaluation of the need to get reliable information on the actual market prices for the disputed items. It was the finding of the 1st Respondent that any tenderer can present prices which are slanted in its favour for the sake of holding sway on the tender yet the price may not be reflective of the market price with the hope of renegotiating an increment in the price at a later date during the subsistence of the contract.

106. That having procured the goods in the past, the 2nd Respondent has possession of the records for the supplied made to it thus the same contain conclusive proof of the market prices over the years when the said items were supplied. The said LPOs and the market survey on one side matched against the prices presented by the Applicants are authority that the Applicants had under quoted just for the purpose of being the lowest bidder.

107. On what is the import of quoting for supplies based on the market price? It was argued that apart from meeting the statutory requirement in sections 54 (2) and 80 (3b) of the Act, the 1st Respondent sought to address that issue same on page 27 of its judgment as follows,

> ***'This requirement on prices is meant to enable the procuring entity avoid the mischief of bidders either quoting very low prices during tender submission so that they are awarded tenders with the aim or the hope of renegotiating the prices upwards when awarded the tenders or alternatively quoting prices which are clearly excessive'.***

108. That the place of market prices is well articulated in the law in that had the 2nd Respondent failed to consider the market price, it could not only have offended the Act but also failed to consider a relevant factor. Further, that the failure to observe Section 54 (3) would have amounted to an illegality. That market price was a critical component of the tender document and had to be observed no matter strictly.

109. That while rendering its decision, the 1st Respondent found that the after making a comparison of the prices provided by the Applicant versus the prices of the goods as supplied to the 2nd Respondent in the years 2014, 2015 and 2016, the price difference between them was so high that the 1st Respondent found that it could not have been possible for the Applicant to make any supplies.

110. On whether the words 'lowest bid' was synonymous with the word 'lowest evaluated bid' it was argued relying on the matter of **Republic v Public Procurement Administrative Review Board & 2 others Ex Parte MIG International Limited & another [2016] eKLR,** where the court stated,

> ***"In my view, cost-effectiveness for example does not infer that the Procuring Entity must go for the lowest tender no matter the results of the evaluation of the bid. Therefore apart from the lowest tender, the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest."***

111. It was contended in submission that there is no dispute that the LPOs were genuine documents for the supply of the contested items. The Applicant has not pleaded whether it sought for time to make any submissions on the said LPOs. At paragraph 7 of the Replying Affidavit sworn by Imran Hassan Basabra on 30th October 2017 on behalf of the Remington Agencies Limited, there is uncontroverted evidence that the Applicants did not seek to challenge the said documents or address themselves on the said documents and have not stated the import of the said submissions.

112. Further that the Applicants] assumptions that save for the reliance on the LPOs, the Appeal could have been allowed, which is a false assumption as the decision of the Board, the 1st Respondent was based on the 2nd Respondents award of tender in full reliance with the tender document and the relevant laws hence the decision of the 1st Respondent was based on sound legal reasons and ought not to be disturbed.

113. it was further argued that the Applicants have not proved any violations to the procurement laws or any rules of natural law or at all as they were all followed to the letter.

114. On whether the **Applicants deserve the orders sought herein, it was submitted relying on the case of Republic v Public Procurement Administrative Review Board & 2 others Ex Parte MIG International Limited & another [2016] eKLR (supra)**, where, this court when confronted with circumstances similar to the ones in this case, upheld the decision in **Peris Wambogo Nyaga vs. Kenyatta University [2014] eKLR** in which the Petitioner had complained of not having been accorded adequate notice to appear before a disciplinary committee. The court in addressing the issue stated,

> ***"That the applicant was heard is not in doubt. The applicant however contends that the notice she was given to appear before the Committee was short. Whereas under Article 47 the applicant was entitled to a fair administrative action which in my view would***

connote inter alia that the applicant be given adequate time to prepare for the case, in this case there is no evidence from the record that the applicant sought for time to do so."

115. It was submitted thta the applicants' case is predicated on the allegation that it was not accorded an opportunity to addres the 1st Responent on the contents of the LPOs as the same were filed after the hearing of the Appeal, but thta in the applications herein the Applicants do not disclose that the orders for the production of the said LPOs was made at the commencement of the substantive hearing and that they did not make any application for examination of the said documents. Instead, they chose to proceed with the hearing without the said documents and await for the decsion then bring the extant proceedings on the basis of the said documents, which claim should be disregarded by this court.

116. On the applicants' allegations that the 2nd Respondent based its decision SOLELY on the LPOs, it was urged thta a reading of the judgment shows that the 2nd Respondent considered a totality of all documents that were filed before it as well as the rival submissions before it.

117. On further allegations thta the reasons for dismissal of its Request for Review by the 1st Respondent are a digression to the arena of factual issues as if to question the correctness of the decision. Reliance was placed on the case of **Republic v Public Procurement Administrative Review Board & 2 others Ex Parte MIG International Limited & another [2016] eKLR (supra)** citing with approval the decision of Aganyanya J (as he then was) in the case of **Amirji Singh vs. The Board of Post Graduate Studies Kenyatta University Civil Application Number 1400 of 1995, (supra)** in which he stated that:

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

118. It was therefore argued thta the Applicants seek to have this Honourable Court sit on appeal of the decision of the 1st Respondentand therefore this court shuld dismiss the aplications. Reliance was placed on **Republic v Public Procurement Administrative Review Board & 2 others Ex Parte MIG International Limited & another [2016] eKLR (supra)**, where the court held that the documents which had not been presented before the Public Procurement Review Administrative Board be subjected to a hearing before that Board for all parties to make their representations on the matters that may not have been examined by the parties. Should this Court find that the Applicants may have been prejudiced by the consideration of the LPOs without a hearing on them, it should not quash the decision of the 1st Respondent but rather submit the said documents to a hearing where all the parties will be heard by the 1st Respondent to avoid prejudicing the other parties in the matter; and thta should the parties feel aggrieved thereafter, they will have an oportunity to approach the Honourable Court for determination of any issues that may arise.

119. Further reliance ws placed on the case of **Republic v Public Procurement Administrative Review Board & 3 others [2017] eKLR**, where the court held that powers of judicial review are discretionary in nature and the court may refuse to grant them as they must be based on the evidence of sound legal principles as well as considering whether the orders are the most effacious ones in the circumstances.

120. On Who ought to bear costs of the suit, it was urged that the exparte applicants should be condemned to bear costs of these applications which lack merit.

121. The 2nd and 4th Interested parties relied on their replying affidavit in their written submissions dated 16th November 2017 and urged the court to dismiss the applications with costs.

122. The 1st respondent reiterated the depositions by M r Henock Kirunguand urged the court to dismiss the applications with costs.

DETERMINATION

123. I have carefully considered the exparte applicant's notice of motion, the grounds, affidavits in support and the opposition by the Respondents and the interested parties participating in these proceedings. In my view, this matter raises the following issues for determination:

1. ***Did the review board take into account extraneous factors and irrelevant considerations?***

2. ***Did the ex parte applicant grossly understate its prices as to not allow for realistic competitive trade transactions?***

3. ***Was the applicant denied an opportunity to be heard on matters in issue?***

4. ***What orders should this court make and***

5. ***Who should bear costs of the applications***

124. To answer the issues it is first and foremost important to note that Judicial Review is not concerned with the merits of a case as is in the facts. I however take cognizance of the fact that the considerations of prevailing market prices is what has led to the Applicants seeking these Judicial Review Orders and therefore I am in agreement with the 1st and 2nd Interested Parties' contention that the main issue is as relates to

market prices.

125. On the question of market prices Vis a Vis the lowest bidder fact as pleaded by the Applicant, logic calls for competitive and workable market prices and in stating prices that were not comparable even to year 2014, it is arguably correct to state that the applicant's prices were grossly under stated and the 2nd Respondent's contention that it would have required further future evaluation of prices is thus correct. However, judicial review does not concern itself with merits of the case, but the propriety of the process and procedure. Therefore, If it is established that irrelevant factors were considered in arriving of the board's decision or that the Applicant was indeed not given an opportunity to be heard on the documents produced then recourse for Judicial Review Orders would be available as it would lead to an illegality.

126. The applicant in its submissions on the issue as regards prices quotes at paragraph 9 of the said submissions the authors of Halsbury's laws of England at paragraph 77 page 170 of the 4th edition which discusses the issue of irrelevant factors as follows:

> "a ***public body will err in law if it acts in breach of fundamental human rights; misinterprets statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant considerations into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfill express or implied duty to give reasons or otherwise abuse its power".***

127. The above is the common law position. However, statutory and constitutional provisions override common law. Nonetheless, Section 54 (2) of the PPAD Act espouses the rules of natural justice found in the Halsbury's Laws of England above.

128. On whether the applicant was denied an opportunity to be heard, which denial if any would be in violation of the rules of natural justice, the Applicants in their submissions relied on the cases of ***Pashito Holdings Ltd & another Vs Paul Ndung'u & another, Suchan Investments Limited Vs Ministry of National Heritage & Culture & 3 others and Pastoli V Kabale District Local Government Council and others [2008] EA.***

129. However, claim of failure to act according to the rules of natural justice must be tampered with the propriety of the claim, i.e. was the applicant given an opportunity to respond to or did not have sufficient time to make a response or did the applicant act aloof or rather sleep on his rights at the time and failed to defend itself appropriately.

130. The respondents and interested parties contend that the application for the production of the documents was made in the presence of all which application was allowed, and it is contended that upon the impugned documents being produced, the Ex parte Applicant however, did not make any application to examine the said documents or for an opportunity to make any representation on the same.

131. Albeit the Applicants in their submissions at paragraph 10 aver that the said documents were not pleaded by the 2nd Respondent, and that they were submitted to the Board by the 2nd Respondent after hearing of the Request for Review, however, there are two questions that arise from the statement by the applicant: if the documents were filed after the request for review had been heard how did the applicants get wind of there being such documents and upon realizing that that was the case what precluded them from making an application to seek to have the said documents expunged from the record or in the very least to seek that the applicants be allowed to put in a response to that effect or arguably oppose the application by the Interested Party's' advocates to bring in the documents whichever case it was.

132. In ***Republic V Public Procurement Administrative Review Board & 2 others Ex parte MIG International Limited & another [2016] eKLR*** it was held that the documents which had not been presented before the PPARB be subjected to a hearing before that Board for all parties to make their representations on the matters that may not have been examined by the parties.

133. What the above holding espouses is that should this court find that the applicants may have been prejudiced by the consideration of the LPO's without a hearing being accorded to them, then the impugned decision of the 1st respondent should not be quashed but rather that the said documents be resubmitted for a hearing where all parties will be heard by the 1st respondent to avoid prejudicing the other parties in the matter.

134. In this case, however, the applicants have failed to demonstrate that they were denied an opportunity to be heard on the documents or that the documents were sneaked in the proceedings after the hearing of the request for review.

135. This court finds and holds, as it has so found and held in JR 543 of 2017 and which judgment I wholly adopt in this case that the applicants focused on merit review of the Review Board's decision and not procedural impropriety or illegalities. The so called errors of law and errors of fact are all hinged on the question of market prices which I have exhaustively dealt with in JR 543 of 2017 and which I adopt in this case.

136. Accordingly, I find the consolidated applications not meritorious.

137. In the end, I find and hold that the applicants have not demonstrated that they are entitled to the judicial review orders sought. The applications as consolidated are hereby dismissed with an order that each party shall bear their own costs of these proceedings.

Dated, signed and delivered at Nairobi this 28th day of September, 2018.

R.E. ABURILI

JUDGE