



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 543 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PUBLIC PROCUREMENT**

**ADMINISTRATIVE REVIEW BOARD.....1<sup>ST</sup> RESPONDENT**

**MINISTRY OF INTERIOR AND COORDINATION**

**OF THE NATIONAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**WOODWORLD MONGER.....INTERESTED PARTY**

***EXPARTE APPLICANT***

**KEMAX TRADING COMPANY LIMITED**

**JUDGMENT**

1. By a notice of motion dated 8<sup>th</sup> September, 2017, the exparte applicant Kemax Trading Company, a limited liability company duly incorporated in Kenya under the Companies Act sought from this court the following orders:

*1) An order of certiorari to remove and bring to this Honourable court for purposes of quashing the 1<sup>st</sup> respondent's decision dated 25<sup>th</sup> August 2017 dismissing the applicant's request for review in Public Procurement Administrative Review Board No. 74 of 2017; Kemax Trading Company Ltd vs Ministry of Interior and Co-ordination of National Government;*

*2) An order of prohibition to prohibit the 2<sup>nd</sup> respondent from executing contracts with bidders awarded tenders of item numbers 53, 54, 64, 73, 77 and 103 or placing orders for purchase of papers in respect of the said tender items;*

*3) An order of mandamus compelling/directing the 2<sup>nd</sup> respondent to award the exparte applicant the tender in respect of tender item numbers 53,54,64,73,77 and 103.*

*4) An order that costs of this application be borne by the respondents.*

2. The application is predicated on the grounds on the face of the motion and supported by the statutory statement and verifying affidavit sworn by **Stephen Mburu** on 30<sup>th</sup> August 2017 accompanying the chamber summons for leave.

3. The motion which was initially found to have been filed out of the stipulated period as directed by Mativo J on 31<sup>st</sup> August 2017 to be filed within 7 days of the order for leave, was struck out on 6<sup>th</sup> November 2017 for being filed out of time. However, on application by the exparte applicant, this court did on 21<sup>st</sup> November 2017 set aside the order of 6<sup>th</sup> November 2017 striking out the motion and substituting it with an order enlarging time within which the main application ought to have been filed.

4. The first respondent the Public Procurement Administrative Review Board filed a replying affidavit sworn on 18<sup>th</sup> October 2017 by Henock K. Kirungu, its Secretary.

**The Exparte Applicant's Case**

5. The exparte applicant's case is that the 2<sup>nd</sup> respondent Ministry of Interior and Coordination of National Government issued tender No. GP/4/2016-2018 for the supply and delivery of paper and boards for Government Press, in November 2016.
6. The applicant claims that it participated in the tender and submitted bids for various tender items, **Nos 53,54,64, 73,77, 85, 103 and 109** but that it was awarded the tender in respect of item **No.85** only.
7. However, it is alleged that the 2<sup>nd</sup> respondent (Procuring Entity) did not notify the applicant whether or not the applicant's bids for tender items **53,54,64,73,77,103 and 109** were successful.
8. The applicant claims that it only came to know that it was an unsuccessful tenderer of the listed items on 1<sup>st</sup> August 2017 when it obtained pleadings and sought to be enjoined as an interested party in Public Procurement Administrative Review Board case No. 68 of 2017 **Somwet Ltd vs Ministry of Interior and Coordination of National Government**.
9. It is averred that although the applicant was enjoined as an interested party in the said review matter, the Review Board held that it would not make a substantive decision in respect of the applicant's concerns as the applicant had not filed a substantive request for review before the Review Board.
10. Subsequently, the applicant filed a request for review at the Review Board on 11<sup>th</sup> August 2017 being **Public Procurement Administrative Review Board case No. 74/2017** upon which the 2<sup>nd</sup> respondent filed a preliminary objection on 22<sup>nd</sup> August 2017 on the ground that the request for review was filed out of time in contravention of Section 167(1) of the Public Procurement and Asset Disposal Act, 2015.
11. It is alleged that the Review Board rendered its decision on 25<sup>th</sup> August 2015 dismissing the applicant's request for review.
12. The applicant laments that the documents relied on by the 2<sup>nd</sup> respondent Procuring Entity and filed on 24<sup>th</sup> August 2017 were irregularly filed as they were filed without leave of the Review Board and that they were filed and served after the applicant had filed and served its submissions on the parties.
13. The exparte applicant further claims that the Review Board's decision took into account extraneous, irrelevant facts and documents not pleaded in rendering its decision hence its decision was unfair, biased, irrational and unreasonable.
14. Further, that the Review Board's decision on framework contracts for the period between 2014 and 2016 and the corresponding Local Purchase Orders were relied on yet the same were not served on the applicant to enable the applicant make representations and or submissions on the same before a decision could be made.
15. The applicant further complains that the 1<sup>st</sup> respondent Review Board in arriving at its decision made errors of fact by ignoring the prevailing market prices submitted by the applicant and relying on framework contracts for the periods between 2014 and 2016 and the corresponding local purchase orders.
16. The 1<sup>st</sup> respondent was also faulted for relying on Section 54(2) of the 2015 Public Procurement and Asset Disposal Act (the Act) and disregarding Articles 201(d) 232(1) (b) and 227 (1) of the Constitution and Section 3(e),(f) and (h), 45(3) (c ), 46(4) (e) of the Act.
17. It was alleged that the applicant and the Kenyan tax payer will suffer substantial loss if the application is not heard forthwith as the 2<sup>nd</sup> respondent will proceed to execute contracts and place orders for the said papers with bidders who submitted prices higher than those submitted by the applicant.
18. Further, that if the decision of the Review Board is not quashed, then the 2<sup>nd</sup> respondent would proceed to place orders for purchase of paper to the detriment of the applicant and the Kenyan tax payer who will lose Kshs 93 million being the difference between the prices submitted by the applicant in respect of tender items 53,54,64,73,77 and 103 and those submitted by the bidders who were awarded the tender to supply the said items.
19. According to the exparte applicant, unless its application is allowed, the culture of imprudent use and or mismanagement of public finances will continue to go unchallenged to the detriment of Kenyans hence, these Judicial Review proceedings.
20. The applicant annexed to the sworn affidavit 10 documents which include the tender documents, copy of the applicant's price schedule; award letter dated 30<sup>th</sup> June 2017; acceptance letter; request for review; preliminary objection; supplementary affidavit and submissions; copy of the document allegedly filed by the 2<sup>nd</sup> respondent on the same day of hearing of the request for review; response to request for review by the interested party **Wood World Paper Monger** and copy of the Review Board's decision made on 24<sup>th</sup> August 2017.

#### **The Respondent's Case**

21. The 1st respondent Review Board filed a replying affidavit sworn by Henock K. Kirungu opposing the notice of motion.
22. According to the 1<sup>st</sup> respondent, the request for review filed by the applicant on 11<sup>th</sup> August 2017 was heard on 22<sup>nd</sup> August 2017 and that the decision made on 25<sup>th</sup> August 2017 considered all the pleadings before the Review Board as well as the oral and written

submissions of the parties and original tender documents, evaluation reports and other documents supplied to it by the 2<sup>nd</sup> respondent.

23. It was further contended in deposition by the 1<sup>st</sup> respondent that in determining the request for review filed by the applicant, the Review Board framed only one issue for determination namely, ***whether or not the Procuring Entity breached the provisions of the Constitution and the Public Procurement and Asset Disposal Act by awarding tenders for the disputed items to bidders who were not the lowest evaluated bidders in each category.***

24. On the allegations that the Review Board allowed a document which the applicant had not been served with to be used at the hearing, ***it was contended that the applicant never raised the issue of not being served at the hearing of the request for review and that therefore it cannot purport to raise that issue now. Further, that the 1<sup>st</sup> respondent was obliged to look at all documents filed by the 2<sup>nd</sup> respondent as provided for in the regulations.***

25. It was contended that the applicant having failed to seek for an opportunity to submit on the document, it cannot raise objections now before the court.

26. The 1<sup>st</sup> respondent further contended that it was not bound to consider the prevailing market prices as submitted by the applicant and that it noted that it was not up to each individual bidder to carry out its own independent market survey. It was contended that the applicant had not demonstrated how the 1<sup>st</sup> respondent's decision is irrational or how it considered extraneous and irrelevant facts, or existence of any ground to warrant the grant of judicial review remedies as sought.

27. It was further deposed further that the applicant was challenging the merits of the decision of the 1<sup>st</sup> respondent albeit disguised as a Judicial Review application which ought to challenge the procedure of arriving at a decision.

28. Accordingly, the 1<sup>st</sup> respondent urged the court to dismiss the notice of motion for lack of merit.

### **Parties' Submissions**

29. The parties' advocates filed written submissions which they adopted as canvassing their respective client's positions.

30. The exparte applicant's counsel Messers A.E. Kiprono & Associates filed their submissions dated 8<sup>th</sup> December 2017 on the same date whereas the 1<sup>st</sup> respondent's submissions dated 7<sup>th</sup> December 2017 were filed on 8<sup>th</sup> December 2017 by Emmanuel Bitta, Deputy Chief State Counsel for the Attorney General, representing both respondents, the Review Board and the Procuring Entity.

31. In its submissions, the exparte applicant maintained that this court should take into account, in making its decision, the fact that this matter arose from a tender which is also the subject matter in JR 515/2017 and in JR 514/2017 (consolidated) hence the authorities relied on in both cases are the same.

32. The exparte applicant maintained that the Review Board took into account extraneous, irrelevant facts and documents not pleaded, thereby rendering its decision unfair, biased, irrational and unreasonable.

33. The rest of the submissions reiterate the grounds in support of the application as reproduced herein above.

34. On the applicable principles and law, reliance was placed on the case of **Council of Civil Service Unions v Minister for the Civil Service [1984] 3 ALL ER 935** where the court set out the three principles upon which administrative action is subject to control by judicial review namely: -illegality, irrationality and procedural impropriety.

35. The applicant's counsel submitted that the Review Board erred in law by failing to grant the applicant an opportunity to make representations or submissions on the framework contract prices for the periods 2014-2016 and corresponding local purchase orders (LPOs), which documents were allegedly not part of the pleadings filed by the Procuring Entity at the Review Board, yet the 2<sup>nd</sup> respondent makes no reference to framework contract prices for the said period or local purchase orders.

36. It was therefore submitted that the Review Board committed an illegality in the process by arriving at findings that were not pleaded by parties and in relying on documents that were not filed before the Review Board to enable the applicant make representation on the same hence the applicant was condemned unheard contrary to Section 7(2) (a) (v) of the Fair Administrative Action Act. Reliance was placed on the case of **Pashito Holdings Ltd & Another v Paul Ndungu & Others** where it was emphasized that in the performance of any judicial or quasi-judicial function, the decision makers must observe the principles of natural justice otherwise the decision will be declared to be no decision. Further reliance was placed on the case of **Suchan Investment Ltd vs Ministry of National Heritage & Culture & 3 Others** where the court emphasized the importance of adherence to the principles of natural justice which are now anchored in the Constitution.

37. The applicant further submitted that its rights under Articles 47 and 50 of the Constitution on fair hearing were violated. It was also submitted that the Review Board failed to exercise jurisdiction conferred upon it by the Public Procurement and Asset Disposal Act, thereby acting illegally and unfairly. Reliance was placed on the decision in **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** where the court opined that procedural impropriety is when the decision maker fails to act fairly in the process of taking a decision or for non-observance of the rules of natural justice or failure to act with procedural fairness toward one to be affected by the decision; or 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.

38. It was further submitted that the Review Board based its decision solely on previous framework contracts and local purchase orders for the years 2014-2016 and indicative market prices which did not form part of the response by the procuring entity and on which the applicant was never accorded an opportunity to make representation or submissions on the same.
39. It was also submitted that the basis of the letters of award of the tender is the **“lowest evaluated bidder”** and not the indicative prices, prevailing market prices or previous framework contracts.
40. On the argument that the Review Board acted on irrelevant considerations, reliance was placed on **Zachariah Wagunza & Another vs Office of the Registrar, Academic Kenyatta University & 2 Others [2013] e KLR** where the court held that where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful.
41. Relying on **Republic vs Public Procurement Administrative Review Board exparte KEMSA, Crown Agents, Deutsche Gesellschaft Fur Technishe Zusammenarbeit & John Snow Inc [2010] e KLR** it was submitted that the respondent’s dealing with issues that were not pleaded before it reached a wrong conclusion and thus exceeded its mandate. Further reliance was placed on **Republic vs Kenya Revenue Authority exparte Aberdare Freight Services Ltd Miscellaneous Application No. 946/2004** where it was held 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.
42. The applicant also relied on other decisions in **Machaja v Khutwalo [1983] KLR 553; Onyango Oloo vs Attorney General [1986-1989] EA 456; Kanda vs Government of Federation of Malaysia [1962] A.C 322** and submitted that the 1<sup>st</sup> respondent’s consideration of matters that were not properly raised before it was against the exparte applicant’s legitimate expectation of procedural fairness and that violated the duty to act fairly.
43. It was therefore submitted that the Review Board’s findings that prices submitted by the applicant were far less than the prices which were prevailing three years earlier on was ultra vires.
44. On the allegation of errors of fact, it was submitted that the Review Board subordinated the requirement that a 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, contrary to Clause 2: 27 /2:24:4 of the tender documents.
45. Further submission was that even if the prevailing market prices were to be taken into account, the Review Board made an error of fact by purporting to equate indicative market prices and framework contracted prices for the period between 2014 to 2016 to the prevailing market prices hence the Review Board introduced a criteria which was not set out in the tender document. Reliance was placed on **Republic vs Public Procurement Administrative Review Board & 3 Others Exparte Olive Telecommunication PVT Ltd [2014]e KLR** where the court found that the Review Board’s introduction of the definition not contained in the tender document amounted to an alteration of the bid document. A similar holding was imported in **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refinery & Chemical Engineering Company Ltd/ Pride Enterprises vs Public Procurement Administrative Review Board & 2 Others [2015] e KLR**.
46. It was further submitted that the Review Board further made an error of fact by assuming that prices prevailing in 2014-2016 would be the same as market prices in 2017. It was submitted that the Review Board’s finding that the **“applicant would not be able to supply the same goods currently at prices which are far lesser than prices which were prevailing three years ago”** is also an error of fact because the Review Board ignored the prevailing market prices that had been presented before it.
47. It was further submitted that the Review Board erred in fact in holding that **“some bidders understated the prices with the prospect of seeking possible variation once they secure an award”**, yet no evidence was tendered to support the holding and that the price for item no. 109 being Kshs 2050 by the successful bidder was much lower than the award price in 2014/2016 of kshs 3,500. It was submitted that the rider that the market prices would be used to determine the responsiveness was meant to guard against exorbitant prices and not to vary the award criteria that the successful tenderer to be the one with the lowest evaluated price per item.
48. according to the applicant, the Review Board made a further error of fact by holding that the **“applicant deliberately offered low prices so as to be awarded the tenders in the hope of a future price variation.”**
49. In the view of the applicant, the above conclusion was not based on facts because the Clauses 3.7 3.13 and 3:17 of the General Conditions of contract protected the Procuring Entity against what the Review Board termed bidders **bidding low prices** hence no tenderer would risk losing 5% of the tender sum if it knew that it would not be in a position to supply at the bid prices.
50. On errors of law, it was submitted that the Review Board made an error when it relied on Section 54(2) of the Public Procurement and Asset Disposal Act and disregarding Articles 201(d), 232(1) (b) and 227 (1) of the Constitution and Sections 3(e), (f) and (h); 45(3) (c), 46(4) (e) of the Public Procurement and Asset Disposal Act.
51. It was submitted 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 market prices, the said provision cannot override the express provisions of the Constitution and in particular, where the Procuring Entity could not establish the prevailing market prices. Further, that in any case, the above Section does not prohibit a public entity from procuring goods and services at prices that are below the prevailing market prices but is intended to guard procuring entities against exorbitant prices hence the Review Board erred in subordinating constitutional provisions cited to provisions of the statute, as a result of which the prices increased by 93,400,000 which is a loss to the public. Relying on the case of **Public Procurement Administrative Review Board and Kenya Revenue Authority Miscellaneous Application 540/2008** 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, it was submitted that the Review Board cannot disregard Mandatory provisions of the Act otherwise that would amount to a fundamental

misdirection or failure to address the applicable law or a fundamental error of law which renders the decision reached void of legality and therefore void.

52. Further reliance was placed on the case of **Alghurair Printing and Publishing LLC vs Coalition for Reform and Democracy & 2 Others [2017] e KLR; Republic vs IEBC & Another exparte NASA K & 6 Others[2017] e KLR** and a submission made that by ignoring express provisions of the Constitution on Public Procurement, the Review Board's decision must be quashed.

53. On irrationality, the case of **Council of Civil Service Unions vs Minister for Civil Service [1984] 3 ALL ER 935** was relied on, in the definition of what irrationality is all about and the applicant submitted that it was grossly unreasonable and irrational for the Review Board to introduce extraneous evaluation requirements outside the Act without expressly and clearly faulting the tender document itself. It was therefore submitted that in **EA Railways Corporation vs Antony Sefu, Dar HCC 19/1971 [1973] EA 327**, 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 a tribunal did not adhere to the procedure laid down by a statute in arriving at its decision.

54. In this case, it was submitted that by upholding an award which was contrary to the criteria set out in the tender document, which all bidders had relied on, the Review Board abdicated its responsibilities of ensuring that the procuring entities adopted procedures that promote competition in the process; ensures that competitors are treated fairly; promote competition in the process; ensures that competitors are treated fairly; promote integrity and fairness and increase public confidence in procurement procedures.

55. In the instant case, it was submitted that the successful bidders' quotations for the disputed tender items were much higher than the applicant's quotations for the same items which is a loss for the Kenyan tax payer.

56. on public interest, it was submitted that the Kenyan tax payer stands to lose kshs 93,400,000 being the differences between the prices submitted by the applicant and those submitted by the bidders who were awarded the tender which is in violation of principles of public procurement espoused in Article 227 (1) and 232(1) (d) of the Constitution on efficient, effective and economic use of public resources and Article 201(d) on management of public finances and which emphasizes the prudent and responsible use of public money.

57. Further submission was that in awarding tenders for items 53,54,64,73,77 and 103 to the bidders with the highest prices, the Review Board violated the constitutional principles set out above. Further reliance was placed on **Republic vs Public Procurement Administrative Review Board & Another exparte Selex Sistemi Integrati Nairobi HCMA 1260/2007** on the importance of public interest concerns in the enactment of the Public Procurement and Asset Disposal Act(repealed).

58. It was therefore submitted that failure to observe the evaluation criteria set out in the tender document; the principles set out in Public Procurement and Asset Disposal Act; and the Constitution on the principle of value for money when dealing with public funds, the Review Board turned a blind eye on the acts of the 2<sup>nd</sup> respondent hence this motion should be allowed with costs.

59. The 1<sup>st</sup> respondent's submissions filed on 8<sup>th</sup> December 2017 adopt the replying affidavit sworn by Heneck K. Kirungu and submits on:

- a) Jurisdiction;
- b) Procedural impropriety
- c) Merits review

60. On jurisdiction, it was submitted by the Respondent that this court has no jurisdiction to direct or issue mandamus to compel the 2<sup>nd</sup> respondent to award the applicant the tender in respect of the disputed items as prayed because the award was the decision made by the procuring entity. Further, that Section 11 of the Fair Administrative Action Act contemplates remittance of the matter back to the Review Board for reconsideration.

61. Relying on the case of **Judith Onyango Elizabeth Oyugi v IEBC & 3 Others [2017] e KLR**, it was submitted that the Court of Appeal was clear that past decisions must be read with the developments following enactment of Article 47 of the Constitution and Sections 7 & 11 of the Fair Administrative Action Act in mind; which the courts have interpreted with an expanded scope of Judicial Review to include a limited consideration of the merit of the decision, as was equally observed by the Court of Appeal in **Suchan Investments Ltd vs Ministry of National Heritage & Culture & 3 Others [2016] e KLR** where the new paradigm was explained.

62. However, it was submitted that the Court of Appeal still emphasized in **Rento Company EA Ltd Lantech Africa Ltd, Toshiba Corporation Consortium v Public Procurement Administrative Review Board & Another [2017] e KLR** that from the language of Sections 4 to 6 of the Fair Administrative Action Act, the remedy of Judicial Review *must be concerned more with the decision making process and that remains a critical requirement in Judicial Review applications.*

63. Further, that the Court of Appeal in the above *Rento Company* case stated that the court ought not to substitute its opinion for that of the public body constituted by law to decide the matter in question; and that the court will interfere with the decision of a public body if it is outside the band of reasonableness as provided for in Section 7(2) of the Fair Administrative Action Act.

64. On procedural impropriety, it was submitted that the Review Board observed procedural propriety and that the exparte applicant was accorded a fair hearing as set out in the affidavit of Henock Kirungu and that the record of proceedings and decision of the 1<sup>st</sup> respondent bear out this, in that the issue of price of paper was in issue before the 1<sup>st</sup> respondent Review Board.

65. Further submission by the 1<sup>st</sup> respondent was that the applicant was represented before the Review Board when the 2<sup>nd</sup> respondent applied to expunge the documents it had annexed to the preliminary objection and for it to file a new document; and that the applicant's counsel never raised any issue of the 2<sup>nd</sup> respondent's documents being irregular before the Review Board hence it cannot raise such issue in these proceedings. Reliance was placed on the case of **Union Insurance Company of Kenya Ltd vs Ramzan Abdul Dhanji (Application No. Nairobi 179/1998** where the Court of Appeal made it clear that where parties are given a reasonable opportunity of being heard and once that opportunity is given and not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it.

66. On the merits review, it was submitted that essentially, the applicant is seeking for review of the correctness of the Review Board's decision to uphold the Procuring Entity's decision hence it is seeking out this court to substitute its decision with that of the 1<sup>st</sup> respondent Review Board. It was submitted that the facts and circumstances of this case do not permit for a merits review of the decision of the 1<sup>st</sup> respondent. Reliance was placed on **Republic vs Permanent Secretary Ministry of Mining Exparte Airbus Helicopters South Africa (PTY) Ltd [2017] e KLR** on the special jurisdiction exercised by Judicial Review Courts which is not an appeal or ordinary adversarial litigation between private parties.

67. Further, it was submitted that Judicial Review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision and that it does not allow the court to examine the evidence with a view of forming its own view about the substantial merits of the case. Reliance was placed on **Republic vs Permanent Secretary Ministry of Mining exparte Airbus Helicopters Southern Africa (PTY) Ltd [2017] e KLR**.

68. Further reliance was placed on **Mohamed Omar Bayor v Commissioner of Investigation and Enforcement & Another [2015] e KLR** where the learned judge cautioned against usurpation of power; and reemphasized that Judicial Review is concerned, not with the decision, but with the decision making process.

69. It was submitted that the Review Board correctly considered provisions of Section 80 of the Public Procurement and Asset Disposal Act, 2015 which sets out the requirements for the tender evaluation committees to take into consideration when evaluating tender.

70. It was further submitted that the 1<sup>st</sup> respondent correctly appreciated that Section 54(2) of the PPAD Act directs in mandatory terms that standard goods, services and works with known market prices shall be procured at prevailing market prices, which, according to the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent correctly included in its tender document a provision which made any award of any item of the tender subject to prevailing market price.

71. It was submitted, finally, that since all the other prayers sought are predicated on the issuance of an order of certiorari, which is not merited, the entire application should be dismissed with costs to the respondents.

## **DETERMINATION**

72. Before determining the merits of this matter, I observe that upon leave being granted by Honourable Mativo J on 31<sup>st</sup> August 2017 to the applicant to apply for judicial review orders, there was and is no order of this court in this matter staying the execution of contracts, placement of purchase orders in respect of tender items numbers 53,54,64,73,77 and 103 by the second respondent pending the hearing and determination of these Judicial Review proceedings.

73. What the court notes is that prayer No. 5 of the chamber summons for leave was clear that the applicant also sought for an order that the leave so granted do operate as stay of execution of contracts and or placement of orders in respect of the disputed tender items. However, no such order of stay was granted and neither did the exparte applicant even pursue the issue of stay of execution of contracts in respect of the disputed tender items. It follows that as this court proceeds to determine the merits and or demerits of the motion herein, it has to bear in mind the above circumstances of this matter which is closely related to JR 514 and 515 of 2017.

74. Public procurement is a very important process in the public sector. The process of procurement and disposal of public goods and services in Kenya is governed by not only statutory provisions but also constitutional provisions. Article 227 of the Constitution provides that:

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

75. To achieve the above stated constitutional objective of public procurement and disposal of public goods and or services, Parliament reenacted the Public Procurement and Asset Disposal Act, 2016 which Act is intended to, among others, maximize economy and efficiency as well as to increase public confidence in those procedures. It is also intended to increase transparency and accountability and fairness, which are core values and principles of good governance espoused in Article 10 of the Constitution. It is for that reason that the courts, in public procurement matters, must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant. (See **Republic vs Public Procurement Administrative Review Board & Another Exparte Selex Sistemi, Integrati [2008] KLR 728**).

76. The court must, therefore, in determining any issue raised in the proceedings of this nature, bear in mind the above settled principles.

77. Therefore, taking into account all the pleadings responses, submissions, constitutional and statutory provisions and case law cited by both participating parties in these proceedings, this court is of the view that the following key issues emerge for determination, together with ancillary questions that may arise and which the court will endeavor to answer, to the best of its ability:

1) Whether the application herein challenges the merits of the decision of the Review Board made 25<sup>th</sup> August 2017 it attacks the process by which that decision was arrived at;

2) and therefore whether this court can, in the exercise of its Judicial Review jurisdiction entertain a merit review of the impugned decision.

3) Whether the *ex parte* applicant's right to be heard on the documents filed on the date of hearing of the application for review was violated by the Review Board.

4) Whether the 1<sup>st</sup> respondent exceeded its jurisdiction, acted *ultra vires* or took into account extraneous, irrelevant matters/facts not pleaded/documents in arriving at the decision which is impugned herein as being unfair, biased, irrational and unreasonable.

5) Whether the 1<sup>st</sup> respondent made errors of fact and law in arriving at the decision that it did.

6) What orders should the court make?

78. On the first and second issues of whether the application herein challenges the merits of the decision of the Review Board and therefore whether this court has jurisdiction to entertain merit review of the impugned decision, it is important, first and foremost, to appreciate the law regarding Judicial Review matters.

79. First and foremost is that Judicial Review is no longer confined to the old traditional targeted prerogative orders and grounds of illegality, irrationality and procedural impropriety. This was recognized even well before the promulgation of the 2010 Constitution in Kenya. See *Republic vs Panel on Take over and Mergers Ex parte Detafin* [1987] QB 815.

80. In other words, the grounds upon which judicial review jurisdiction is predicated are incapable of exhaustive listing. (see Nyamu J in *Republic vs The Commissioner of Lands ex parte Lake Flowers Ltd Nairobi HC Miscellaneous Application 1238/1998* wherein the Learned Nyamu (as he then was) stated:

*“Availability of other remedies is no bar to the granting of the Judicial review relief but can however be an important factor in exercising the discretion whether or not to grant relief.....”*

*The courts must resist the temptation to try and contain Judicial Review in a straight jacket....Although Judicial Review has been bequeathed to us with defined interventions namely, illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....*

*The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse of power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations....Even on the important principle of standing for the purpose of judicial review the courts must resist being rigidly chaired to the past defined situations of standing and look at the nature of the matter before them.....Judicial Review is a tool of Justice, which can be made to serve the needs of a growing society on a case to case basis....The court envisions a future growth of Judicial Review in the human rights arena where it is becoming crystal clear that human rights will involve and grow with the society.”*

81. Earlier on in the case of *Bahaji Holdings Ltd vs Abdo Mohammed Bahaji & Company Ltd & Another Civil Application No. Nairobi 97/98*, the Court of Appeal made it clear that the limits of Judicial Review continue expanding so as to meet the changing conditions and demands affecting administrative decisions. Similarly in *Re National Insurance Company Act and COTU (K) Nairobi HC MA 1747/2004* Nyamu J (as he then was) observed that while it is true that so far the jurisdiction of a Judicial Review court has been principally based on the “3 I s” namely Illegality, Irrationality and Impropriety of procedure, categories of intervention by the court are likely to be expanded in future on a case to case basis.

82. The 2010 Constitution clearly espouses Judicial Review as a constitutional remedy, with a basis in the court's exercise of supervisory jurisdiction over tribunals, bodies or authorities exercising judicial or quasi-judicial authority (Article 165(6) of the Constitution).

83. This power, as vested is to ensure that subordinate courts, tribunals, bodies, persons or authorities exercise their functions within the boundaries of the law.

84. Judicial Review is specifically listed in Article 23(3) of the Constitution as one of the remedies that a court may grant in constitutional petitions where it is alleged that there is violation or threatened violation of rights or fundamental freedoms. Article 47 of the Constitution espouses the right to fair administrative action. To implement this right, Parliament enacted the Fair Administrative Action Act, 2015 which sets out circumstances under which a court will interfere with an administrative action, and the specific remedies or reliefs that the court may make including judicial review orders of certiorari, prohibition, mandamus, injunctions, directions, declarations among other reliefs.

85. The Court of Appeal in *Suchan Investment Ltd vs Ministry of National Heritage & Culture & 3 Others* (supra) Koome' Sichale & Otieno Odek JJA made it clear that even if undertaken pursuant to the grounds in Section 7(2) of the Fair Administrative Action Act, 2015, *the reviewing court has no mandate to substitute its own decision for that of the administrator*. The Court of Appeal further stated that from the language of Sections 4 and 6 of the Fair Administrative Action Act, it is clear that in addition to this new thinking, *the traditional rule that the remedy of judicial review must be concerned more with the decision making process remains a critical*

*requirement in judicial review applications. This is because the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected. In doing so, it must be remembered that the court ought not to substitute its opinion for that the public body constituted by law to decide the matter in question (see Republic v Kenya Revenue Authority ex parte Yaya Towers Ltd [2008] e KLR.*

86. It is now clear that albeit judicial review is a constitutional supervision of public bodies involving a legal and procedural validity of the impugned decision, it does not permit the court to examine the evidence with a view to forming its own view about the substantial merits of the case. This is because a court exercising judicial review jurisdiction does not exercise appellate jurisdiction hence it cannot form its own preferred view of the evidence-see **Reid vs Secretary of State for Scotland[1999] 2 AC 512).**

87. Accordingly, this court would have no power to entertain a merits review of the decision of the Review Board. The 1<sup>st</sup> respondent has maintained that what the ex parte applicant is seeking before this court is a merits review of the decision of the Review Board. The applicant has denied this contention.

88. However, examining the grounds upon which the applicant relies which grounds include:

***Whether the Review Board made an error of fact by subordinating the requirement that the successful tenderer be the lowest bidder with the highest score per item to the guiding requirement that the prevailing market prices will be used to determine the responsiveness and that even if the prevailing market prices were to be taken into consideration; that the Review Board made an error of fact by purporting to equate indicative market prices and framework contract prices for the periods between 2014 to 2016 to the prevailing market prices; that the Review Board also made errors of fact by making an assumption that prices prevailing in the years 2014-2016 would be the same as the market prices in the year 2017; that the Review Board ignored the prevailing marketing prices that had been presented before the Review Board by the applicant; that the Review Board also made an error of fact in holding at page 233 of the chamber summons that some bidders understated the prices with the prospect of seeking a possible variation once they secure an award”***

***Yet:***

***a) No evidence was presented before the Review Board to support the same; and***

***b) The price of kshs 2050 submitted by the successful bidder for item No. 109 is much lower than the award, price in 2014/2016 of kshs 3500.***

89. All the above detailed and alleged errors of fact on the part of the Review Board invite this court to examine the totality of the evidence presented before the Review Board and therefore to review the merits of the decision of the Review Board and not the process by which the impugned decision was arrived at.

90. To do so, honestly speaking, this court will be exercising appellate jurisdiction to arriving at its own independent decision as stipulated in Section 78 of the Civil Procedure Act, and not exercising Judicial Review jurisdiction over the Review Board.

91. Equally, from the pleadings and detailed submissions filed by the ex parte applicant and which I have endeavoured to reproduce in this judgment, it is apparent that the ex parte applicant attacked the merits of the impugned decision by setting out instances where it considers the Review Board committed errors of law including claims that the Review Board made an error of law by subordinating the provisions of the Constitution to that of the Statute, in particular, Section 201(d) 232(1)(b) and 227(1) of the Constitution, ***leading to increase in prices in excess of kshs 93,400,000.[emphasis added].***

92. Whereas an error of law in itself would be a ground for judicial review of administrative action, what the applicant wished this court to do with the above submission is to call upon the court to determine by way of a submission, whether Section 54(2) of the Act is inconsistent with Articles 201 and 277 of the Constitution, an issue that was never raised before the Review Board. And albeit a point of law can be raised at any stage in the proceedings, I find that the applicant has focused on the merits of the decision of the Review Board and not the process of decision making by the Review Board.

93. Albeit the applicant bitterly complained that the Procuring Entity awarded a tender to the highest bidder thereby occasioning the public loses in that over 93,000,000 was to be paid over and above what the applicant would have paid for the items complained of, this court's view is that whether or not the Review Board was wrong or right on the comparisons made can only be dealt with by the Appellate Court as that was an issue raised by Procuring Entity and the Review Board only made an inference of the effect of deflating of prices. The issue complained of was a merits review and not of procedural impropriety.

94. To review the merits of the Review Board's decision will be to usurp powers of the appellate court and therefore to substitute the decision of the Review Board with the court's own decision.

95. On the third issue of whether the applicant was denied the right to be heard on the documents filed on the date of hearing of the request for review, the applicant submitted at length claiming that the procuring entity was allowed to file and rely on a document which was filed on the hearing date and that the applicant was not accorded an opportunity to challenge the said document hence its right to be heard was violated.

96. On the part of the 1<sup>st</sup> respondent, it was contended that the procuring entity applied for leave to have its documents filed annexed to its preliminary objection expunged and for it to file a new document and that the ex parte applicant's counsel never raised the issue of the Procuring Entity's documents being irregular before the 1<sup>st</sup> respondent Review Board and that it cannot therefore purport to raise it in

these proceedings.

97. In addition, it was contended by the 1<sup>st</sup> respondent that the ex parte applicant cannot claim that it never had sufficient time to prepare and make representations and or submissions on that document when it did not raise such issue before the 1<sup>st</sup> respondent.

98. My finding is that the ex parte applicant has not demonstrated before this court that it was denied an opportunity to be heard to challenge the document which was filed by the procuring entity in the place of the expunged documents. I have perused the record and nowhere did the ex parte applicant challenge the filing or reliance on the filed document by the procuring entity. Neither did it urge the Review Board to ignore the said document.

99. Accordingly I find that the ex parte applicant's complaint which is belated has no factual or legal basis since the applicant was served with the impugned document and had the opportunity to make oral submissions through its counsel at the hearing of the request for review. The applicant did not seek any additional time allocation to prepare itself. It never objected to any document being filed and which document was served upon its counsel on record. Having sat back and left it to the determination by the Review Board, the applicant cannot raise such an issue by way of Judicial Review.

100. In the end, I find that the applicant's complaint that it was denied an opportunity to be heard on the document filed by the procuring entity on the hearing date of the Request for Review is an afterthought which cannot be entertained at this stage.

101. On the issue of whether the 1<sup>st</sup> respondent exceeded its jurisdiction, acted ultra vires or took into account extraneous, irrelevant matters/facts/document not pleaded in arriving at its decision which is impugned as being unfair, biased, irrational and unreasonable, the basis upon which the above issue was pleaded and framed is that the Review Board based its decision solely on previous framework contracts and local purchase orders [LPOs] for the years 2014-2016, and indicative market prices which did not form part of its response and that the applicant was therefore not given an opportunity to make representations or submissions on the same.

102. Further, the ex parte applicant alleges that the Review Board in doing so, took into consideration extraneous and irrelevant facts not pleaded rendering rendering its decision unfair, biased, irrational and unreasonable.

103. As already stated in ground 3 above, the document which the applicant alleges that it was not given an opportunity to make representations or submissions on the same, the record is clear that the impugned document was filed in the place of the expunged document annexed to the preliminary objection raised by the Procuring Entity and the applicant never objected to it being filed or relied upon. Neither did the applicant seek more time to peruse it and submit on it later.

104. Accordingly, I find and hold that the applicant has no basis for claiming that the 1<sup>st</sup> respondent Review Board exceeded its jurisdiction or that it acted ultra vires by relying on the document in question or that the matters in the document were not pleaded. In **Odd Jobs vs Mubia [1970] EA 47** the court held that where it appears from the course followed at trial that an unpleaded issue has been left to the court for determination, **the court or tribunal has to make a finding on it. Equally, in Justus Mongumbu Omiti v Walter Osebe & 2 Others EL P 1/2008**, the court made it clear that it could not lock out evidence which would help it determine whether a process was free, fair and transparent on the technical grounds that the issues addressed by such evidence were not pleaded.

105. It follows that the applicant herein having been served with the impugned document, it was afforded an opportunity to make oral submissions on it at the hearing of the request for review and therefore as the applicant did not object or seek more time to prepare itself to respond to the said document, it cannot be heard to complain at this stage that the Review Board acted ultra vires or that it exceeded its jurisdiction or that the Review Board acted on irrelevant considerations in arriving at the impugned decision. As was rightly held in **Republic vs Business Premises Rent Tribunal & 3 Others Ex parte Christine Wangare Gachege [2014] e KLR**, inter alia:

*“.....In Judicial Review proceedings, the mere fact that the tribunal's decision was based on insufficient evidence, or miscounting of evidence which is what the applicant seems to be raising here or that in the course of proceedings the tribunal committed an error are not grounds for granting Judicial Review remedies.*

*In reaching its determination, it must however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of Judicial Review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to reevaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for Judicial Review.”*

106. The Court of Appeal in **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others Civil Application No. Nairobi 307/2003** stated:

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

107. Citing the above decision, the 3 judge bench in **Republic vs Public Procurement Administrative Review Board & 3 Others ex parte Olive Telecom PVT Ltd [2014] e KLR** stated and I concur:

*“ Whereas in some quarters it may be construed that the Court of Appeal by employing such a flamboyant language was encouraging impunity on the part of Judicial Officers, what we understand the Court of Appeal to be saying is that the mere fact that a judicial officer errs in his or her judgment does not necessarily follow that the said officer acted without or in excess of jurisdiction. In other words, the issue for Judicial Review is not whether the decision is right or wrong, not whether the court agrees with it, but whether it was a decision which the authority concerned was lawfully entitled to make since a decision can be lawful without being correct. The courts must be careful not to invade the political field and substitute their own judgment for that of the administrative authority but they should judge the lawfulness and not the wisdom of the decision.*

*If the decision was wrong, it should be remedied by an appeal which allows the appellate court to engage in intrusive analysis of evidence by the trial tribunal and review the merit of the decision thereto. See Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd (supra).*

108. The court went further to state:

*“ 145. However, while we reiterate that this court in exercise of its supervisory jurisdiction by way of Judicial Review ought not to usurp the powers of the Board, where the Board fails to consider relevant evidence and considers irrelevant ones this court must intervene where the failure to do so renders the decision so grossly unreasonable as to render it irrational. In our view, this is the exparte applicant’s case.”*

109. Therefore, an error of law of fact does not necessarily amount to a procedural error, impropriety, illegality, irrationality or being proportionate/biased or a decision being made in bad faith.

110. As earlier stated, the applicant has focused on errors of fact and errors of law made by the Review Board in its decision and not on the illegality, irrationality or procedural impropriety of the decision making process.

111. For that reason, I find and hold that the applicant has not demonstrated that the Review Board acted in excess of jurisdiction, ultra vires, or that it was biased, or acted in bad faith in reaching the decision that it did and neither has it been demonstrated to the satisfaction of this court that the Review Board failed to take into consideration relevant matters or that it took into account irrelevant matters, considering that the document allegedly relied on at the hearing was not an extraneous document, the same having been filed and served on the applicant who had an opportunity to submit or object on the same.

112. The applicant did not allege that reliance on the impugned document by the Review Board was a discriminating act or that the Review Board did not use the same parameters in upholding the decision of the procuring entity. In other words, there is no allegation of differential or discriminatory treatment.

113. Therefore, on what orders this court should make, it is clear to me that the applicant is not entitled to the Judicial Review orders of certiorari, prohibition and mandamus for reasons given above and in addition, prohibition would not issue against the 2<sup>nd</sup> respondent to prohibit it from executing contracts with bidders that were awarded tenders in respect of items 53,54,64,73,77 and 103 or placing orders for the purchase of papers in respect of the said tender items for reasons that as there was no stay orders given at the leave stage, there is a high probability that the prayer for prohibition was overtaken by events and therefore granting prohibition would serve no purpose.

114. On whether mandamus should issue, I find that this remedy which was sought as against the 2<sup>nd</sup> respondent Procuring Entity to award the exparte applicant the tender in respect of the items complained of is not available as this court has not been shown that there is a legal duty owed by the Procuring Entity to award to the applicant a contract in respect of the items stated.

115. What this court would do, in the circumstances of this case, had it found that the 1<sup>st</sup> respondent Review Board had acted ultra vires or without jurisdiction or illegality, is to quash the decision but the quashing of the decision would in no way confer rights to the applicant to be awarded any contract by the Procuring Entity. The court has no power to direct the Procuring Entity to award a contract to any party or bidder, more so, where the decision which is impugned is the Review Board’s decision and not the Procuring Entity’s decision.

116. To bypass the Review Board and direct the Procuring Entity to award a contract to a bidder is to usurp powers of the Evaluation Committee and the Tender Committee of the Procuring Entity as well as powers of the Accounting Officer of the Procuring Entity.

117. In the end, I find and hold that the applicant has not demonstrated that it is entitled to any of the Judicial Review orders sought. Accordingly, the application dated 28th August 2017 be is hereby dismissed, with an order that each party shall bear their own costs of these judicial Review proceedings.

118. And as I pen off, I acknowledge the fact that my transfer to another station and the challenges encountered in that new station did contribute heavily to the delay in delivering this judgment in good time and an apology has been tendered to the exparte applicant’s counsel Mr Kiprono who was present in court.

**Dated, signed and delivered in open court at Nairobi this 28<sup>th</sup> day of September, 2018.**

**R.E. ABURILI**

**JUDGE**