



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 286 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI,  
MANDAMUS AND PROHIBITION.**

**AND**

**IN THE MATTER OF TENDER NO MOAL/SDCP/ICB/01/2017-2018**

**AND**

**IN THE MATTER OF A DECISION BY THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD IN RESPECT  
OF APPLICATION NO 79 OF 2018.**

**AND**

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

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF ARICLES 10, 47 AND 227 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD.....RESPONDENT**

**FINKEN HOLDING LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**THE MINISTRY OF AGRICULTURE & IRRIGATION**

**STATE DEPARTMENT OF LIVESTOCK**

**SMALL HOLDER DAIRY COMMERCIALISATION**

**PROGRAMME (SDCP).....2<sup>ND</sup> INTERESTED PARTY**

**EXPARTE:**

**JUDGMENT**

**The Application**

1. The ex-parte Applicant herein, Debpro Engineering Limited (hereinafter “the Applicant”), and the 1<sup>st</sup> Interested Party herein, Finken Holding Limited Limited, are companies carrying on business in the Republic of Kenya. They were both bidders in a tender advertised on 25<sup>th</sup> January 2018 by the State Department of Livestock in the Ministry of Agriculture & Irrigation (the 2<sup>nd</sup> Interested Party herein), being Tender No. MOAL/SDCP/ICB/01/2017-2018 for the Design, Supply, installation Testing and Commissioning of 2000 and 3000 Litres Refrigerated Bulk Milk Cooling Tanks and Associated Accessories. The Applicant was subsequently awarded the tender by the 2<sup>nd</sup> Interested Party by way of a Notification of Award dated 4<sup>th</sup> June 2018.

2. The 1<sup>st</sup> Interested Party thereupon challenged the decision of the 2<sup>nd</sup> Interested Party to award the tender to the Applicant by way of a Request for Review Application No. 79 of 2018, which was filed on 14<sup>th</sup> June 2018 with the Public Procurement Administrative Review Board, which is the Respondent herein. The Respondent is a statutory body created under section 27 of the Public Procurement and Assets Disposal Act of 2015, and mandated to review, hear and determine public tendering and asset disposal disputes.

3. On 3<sup>rd</sup> July 2018, the Respondent delivered its decision allowing the said Request for Review, and annulled the award to the Applicant. The Respondent further ordered the 2<sup>nd</sup> Interested Party to undertake a financial evaluation of the tenders of both the 1<sup>st</sup> Interested Party and the Applicant within 14 days from the date of the decision.

4. The Applicant, being aggrieved with the Respondent’s decision, filed judicial review proceedings herein by way of a Notice of Motion application dated 3<sup>rd</sup> August 2018, and is seeking the following orders therein:

**a) An order of certiorari be issued to remove into this honourable court for the purposes of its being quashed the decision of the Respondent un respect of PPARB Application No.79/2018 made in respect of Tender No. MOAL/SDCP/ICB/01/2017-2018 Design, Supply, Installation, Testing and Commissioning of 2000 and 3000 Litres Refrigerated Bulk Milk Cooling Tanks and Associated Accessories(the said tender), in the main, annulling the award of the said tender to the Applicant herein by the 2<sup>nd</sup> Interested Party**

**b) An order of certiorari be issued to remove in to this Honourable court for the purpose of its being quashed the decision of the Respondent reinstating the 1<sup>st</sup> Interested party back to the evaluation process in respect of the said Tender.**

**c) An order of prohibition be issued directed at the 2<sup>nd</sup> Interested Party prohibiting them from carrying out a financial evaluation of the tenders of 1<sup>st</sup> Interested Party and of the applicant in pursuit of the orders arising out of the decision of the Respondent made on 3.7.2018**

**d) An order of mandamus directed at the 2<sup>nd</sup> Interested Party compelling them to enter and sign a contract for the said tender with the Applicant as was recommended by the 2<sup>nd</sup> Interested Party’s Evaluation Committee.**

**e) That Cost of the application be awarded to the Applicant.**

5. The Application is supported by the grounds on its face ; the application for leave by way of Chamber Summons and accompanying statutory statement dated 16<sup>th</sup> July 2018; and a verifying affidavit sworn on the same date by Ashish Kumar Sennik, the Managing Director of the Applicant. The Applicant explained that Tender No. MOAL/SDCP/ICB/01/2017-2018 was subject to international competitive bidding as it was being funded from the International Fund for Agricultural Development (IFAD). It is the Applicant’s case that it only became aware of the proceedings in Request for Review No 79 of 2018 on 12<sup>th</sup> July 2018 when it received a Notification and Hearing Notice from the Respondent inviting it to attend the hearing of the said Request on 27<sup>th</sup> June 2018, which date had already passed.

6. That after making enquiries, the Applicant discovered that the Respondent had made its decision on 3<sup>rd</sup> July 2018 allowing the request for review. The Applicant contends that the Respondent acted illegally, unconstitutionally and in breach of the Public Procurement and Asset Disposal Act 2015 by annulling the 2<sup>nd</sup> Interested Party’s tender. It was in this respect alleged that the Respondent denied the Applicant a right of reply pursuant to section 170 of the Act, and did not allow the 14 days post decision right of appeal provided for under section 175 of the Act when it directed that the 2<sup>nd</sup> Interested Party complete the financial evaluation process within 14 days of its decision.

7. Further, that the decision of the Respondent was irrational and unreasonable, and that the Respondent usurped the powers of the 2<sup>nd</sup> Interested Party’s tender committee by purporting to undertake technical and financial evaluation of the 1<sup>st</sup> Interested Party and comparing it with that of the Applicant.

8. The Applicant also alleged that the Respondent violated the principles of natural justice, the right to a fair hearing and the right to fair administrative action by failing to determine that the Applicant had a right to reply. In addition that the decision by the Respondent violates the legitimate expectation of the Applicant and members of the public that the tender will be in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

**The Responses**

### ***The Respondent's Response***

9. The Respondent opposed the application through a replying affidavit sworn on 18th September 2018 by its Principal Procurement Officer, Philip Okumu. The Respondent confirmed that the 1<sup>st</sup> Interested Party filed a request for review before it challenging the award of Tender No. MOAL/SDCP/ICB/01/2017-2018. That after receiving the Request, the Respondent served the 2<sup>nd</sup> Interested Party notifying it of the pending review, and requiring it to make an appearance for the hearing of the review in accordance with regulation 74(1) and (2) of the Public Procurement and Disposal Regulations of 2006.

10. It was the Respondent's case that pursuant to section 170 of the Act it invited all the interested parties including the Applicant, to the pending appeal and hearing thereof that was scheduled for 27<sup>th</sup> June 2018 to the pending appeal and hearing thereof that was scheduled for 27<sup>th</sup> June 2018 vide letters dated 20<sup>th</sup> June 2018 . Further, that the hearing notice was despatched to its agent, Postal Corporation of Kenya who collected the same on 20<sup>th</sup> June 2018, and it provided evidence of postage of the same on 22<sup>nd</sup> June 2018.

11. That the hearing was held on the 27<sup>th</sup> June, 2018 at 2:30 pm, however the Applicant did not show up despite being served, and that the Respondent proceeded to make the determination and delivered its ruling on the 3<sup>rd</sup> July 2018. The Respondent averred that it took into consideration the facts that were presented before it, the relevant law, the documents of evidentiary value, and submissions made by the parties. Further, that its decision was made within its mandate as provided for in Section 173 of the Act.

12. The Respondent urged that the Applicant has not demonstrated how it's decision is unreasonable, irrational or illegal, or that the Respondent in arriving in its decision was guilty of any illegality or impropriety of procedure to warrant variance of its orders. Therefore, that the application is made in bad faith, has no merit and is only calculated to discredit the credibility of the Respondent mandate and function, and it urged the Court to dismiss it.

### ***The 1<sup>st</sup> Interested Party's Response***

13. The 1<sup>st</sup> Interested Party's response was in a replying affidavit sworn on the 7<sup>th</sup> September 2018 by John Wanjohi Muchemi, its Managing Director. The 1<sup>st</sup> Interested Party acknowledged having participated in Tender No. MOAL/SDCP/ICB/01/2017-2018, and averred that it provided all the relevant information requested in the bid and met the evaluation and qualification criteria. Further, that it returned the most responsive bid with a price for Kshs 169,676,800/=.

14. The 1<sup>st</sup> Interested Party contended that the criteria for technical evaluation by the Technical Committee was flawed and biased against it, and provided room for wide discretion which was whimsically exercised in favour of its competitor; including that the tender was opened on the 12<sup>th</sup> March 2018 and an award granted to the Applicant on the on 4<sup>th</sup> June 2018, more than 2 months later contrary to Section 80 of the Public Procurement and Asset Disposal Act. The 1<sup>st</sup> Interested Party gave particulars of various requirements of the bid documents and evaluation criteria which he alleged were not met, and also a chronology of the events after the tender award that led to the proceedings before the Respondent.

15. The 1<sup>st</sup> Interested Party refuted the assertion that the Applicant knew of the proceedings before the Respondent on 12<sup>th</sup> July 2018, and urged that on the 20<sup>th</sup> June 2018, the Respondent through the Applicant's email dully informed them of the filling of the review. In addition, that the Applicant expected to sign the contract on the 18<sup>th</sup> June 2018, and there is no plausible explanation why they waited until 12<sup>th</sup> July 2018 to approach the Court.

16. It is also the 1<sup>st</sup> Interested Party's case that the Respondent is mandated to complete the review within twenty one days after receipt of the request for review as provided for under section 171 of the Public Procurement and Asset Disposal Act. They also pointed to section 173 of the Act as to the powers of the Respondent and stated that it can either annul procurement proceedings, give directions to the accounting officer on anything to be done or redone, or substitute its decision for any decision of the accounting officer.

17. According to the 1<sup>st</sup> Interested Party, the Respondent did not award the 1<sup>st</sup> Interested Party any contract, but it annulled the procurement proceedings and directed financial evaluation of the bidders whose due diligence was carried out to by the Tender Committee. They added the directions were reasonable and lawful, as the country stood to lose Kshs 16,928,300/=, which would have been contrary Article 227 of the Constitution that obligates public entities to procure public goods in a fair equitable, transparent, competitive and cost effective manner. Lastly, that the overriding public interest to obtain milk cooling tanks at conservative prices outweighs the financial gains by the Applicant.

### ***The 2<sup>nd</sup> Interested Party's Response***

18. The application was opposed by the 2<sup>nd</sup> Interested Party, through an affidavit sworn on 24<sup>th</sup> September 2018 by Harry K. Kimtai, the Principal Secretary in the Ministry of Agriculture, Livestock, Fisheries & Irrigation, State Department of Livestock and who was the Accounting Officer for the Procuring Entity.

19. The 2<sup>nd</sup> Interested Party explained that the Government of Kenya received a loan from the International Fund for Agricultural Development towards boosting the Small holder Dairy Commercialisation Programme whose objective is to improve the capacity of Dairy groups to market milk and Milk products. Further, that it advertised for Tender No. MOAL/SDCP/ICB/01/2017-8 as a project under the said Programme. The 2<sup>nd</sup> Interested Party averred that the procurement was done in accordance with the World Bank Procurement Guidelines and the Public Procurement and Asset Disposal Act of 2015, and that the tender was initially awarded to the lowest evaluated responsive bidder who was the Applicant. Further, that the outcome of the tender process was communicated to both the successful and unsuccessful bidders as required by law.

20. That through a letter dated 14<sup>th</sup> June 2018, the 2<sup>nd</sup> Interested Party received notification of appeal by the 1<sup>st</sup> Interested Party. The 2<sup>nd</sup> Interested Party thereupon filed its response together with the background to the tender and evaluation report, and subsequently received notification that the hearing was scheduled for the 27<sup>th</sup> June 2018 at the Respondent's premises. The matter was heard and the Respondent made a decision in accord with section 173 of the Act. Further, that in effect, the decision annulled the tender to the applicant and allowed the request for review, and the 2<sup>nd</sup> Interested Party was directed to carry out a financial evaluation of the 1<sup>st</sup> Interested Party and successful bidder and make an award within 14 days from the decision.

21. The 2<sup>nd</sup> Interested Party averred that it complied with Respondent's decision and that on 10<sup>th</sup> July 2018, its Tender Committee conducted a post qualification verification of the lowest evaluated and substantially responsive bid and recommended the award to the 1<sup>st</sup> Interested Party. Thereafter on the 17<sup>th</sup> July 2018, its head of supply chain management prepared a professional opinion and recommended the award of the tender to the 1<sup>st</sup> Interested Party, and after 2<sup>nd</sup> Interested Party's Accounting Officer considered the opinion, he awarded the tender to 1<sup>st</sup> Interested Party which was communicated by a letter dated 18<sup>th</sup> July 2018 which was annexed. The 2<sup>nd</sup> Interested Party stated that it thereafter received the Applicant's judicial review application on the 20<sup>th</sup> July 2018 challenging the tender award.

22. It was the 2<sup>nd</sup> Interested Party's case that it only acted on the orders of the Respondent which were made pursuant to section 173(c) of the Act and which has powers to substitute the decision of the accounting officer. Further, that following the financial evaluation process as directed by the Respondent. The 1<sup>st</sup> Interested Party was the lowest evaluated and responsive tenderer who submitted the bid with the lowest evaluated price pursuant to section 86 (1) (a) of the Public Procurement and Asset Disposal Act.

23. Lastly, the 2<sup>nd</sup> Interested Party pointed out that while section 175 of the Act provides for the aggrieved party to file judicial review within fourteen days of the Respondent's decision, the Applicant commenced the proceedings on the 17<sup>th</sup> July 2018 which within the said period, whereas its Accounting Officer approved the award to the 1<sup>st</sup> Interested Party on the 18<sup>th</sup> July 2018 in compliance with the Respondent's directives. Therefore that the application is unmeritorious and should be dismissed.

### **The Determination**

24. The Application was canvassed by way of written submissions which were wholly adopted by the parties during a hearing held on 24<sup>th</sup> October 2018. Lilan and Koech Associates, LLP Advocates, filed submissions on 3<sup>rd</sup> October 2018 on behalf of the Applicant. The Respondent's submissions were dated 14<sup>th</sup> October 2018 and were filed by Mr. K. Odhiambo, Litigation Counsel at the Attorney General's Chambers, who also filed submissions of the same date for the 2<sup>nd</sup> Interested Party. Muturi S.K. Company Advocates filed submissions dated 22<sup>nd</sup> October 2018 for the 1<sup>st</sup> Interested Party.

25. I have considered the pleadings, submissions and arguments made by the parties and find that the issues arising for determination are as follows:

- a) Whether the Respondent was procedurally unfair in arriving at its decision of 3<sup>rd</sup> July 2018.
- b) Whether the Respondents decision of 3<sup>rd</sup> July 2018 on the 1<sup>st</sup> Interested Party's Request for Review was unreasonable.
- c) Whether the Respondent acted in error of law in arriving in its decision on the Request for Review by the 2<sup>nd</sup> Interested Party.
- d) Whether the Applicant merits the prayers sought .

26. It is prudent to establish at the outset the purpose and reach of judicial review. In the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** the Court of Appeal stated that in judicial review:

**“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”**

27. The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. As was held in **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited, (2008) eKLR**, the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

28. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that while *Article 47 of the Constitution* as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, , the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

29. Lastly, the circumstances under which orders of judicial review can issue were elaborated in the case of **Pastoli vs Kabale District Local Government Council & Others**, (supra) at pages 303 to 304 thus:

**“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**

**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.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”**

#### ***Whether the Respondent was Procedurally Unfair***

30. The Applicant submitted in this regard that the Respondent’s decision required the 2<sup>nd</sup> Interested Party to carry out a technical and financial evaluation within 14 days of the date of the decision, yet section 175(1) of the Public Procurement and Asset Disposal Act (hereinafter “the Act”) reserved 14 days for it to appeal the Respondent’s decision as a matter of right. That the implementation of this decision was therefore was prejudicial to the Applicant’s right to natural justice.

31. Further, that the Applicant was condemned unheard as the notice of review was served on the Applicant on the 12<sup>th</sup> July 2018, nine days after the decision of the Respondent had been handed down on 3<sup>rd</sup> July 2018, and reliance was placed on the case of **Republic vs Public Procurement Administrative Review Board ex-parte Geothermal Development Company Limited & Another** [2017]eKLR for the holding that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice. The Applicant also relied on the case of **Geothermal Development Company limited vs Attorney General & 3 others**, [2013] eKLR for the holding that as a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it.

32. The Respondent on its part submitted that it invited all the parties to a hearing of the 1<sup>st</sup> Interested Party’s request for review on the 27<sup>th</sup> June 2018 and that therefore all parties were notified. Further, that the Applicant acknowledges receiving notification of the request for review and the hearing notice in a letter dated 20<sup>th</sup> June 2018 on 12 July 2018, calling into question the Respondent’s role. Therefore that it was not in dispute that the Applicant was served with notice.

33. Section 3 of the Kenya Information and Communication Act and section 3(5) of the Interpretation and General Provision Act were cited by the Respondent for the position that the notice of the hearing was duly served, and reliance was placed on the case of **Ali Yislam Hariz v Kenya Railways Corporation**, (2012) eKLR where the court observed that section 3(5) of the Interpretation and General Provisions Act makes provision for service by post. The Respondent thus submitted that the Applicant was duly notified and accordingly served, and that it had discharged its burden of proof.

34. According to the Respondent, a fair hearing does not and cannot be construed to mean that the Respondent did not give the Applicant a chance to be heard in the circumstances as alluded to. Further, that there is nothing before court to suggest that the Respondent was not impartial or was unfair in the manner it conducted the proceedings, as the same are conducted in public and there was no breach to Article 47 of the constitution. Lastly, that under section 171 of the Act, the review proceedings must be conducted within twenty one days after the request for review.

35. The 1<sup>st</sup> Interested Party submitted that the Respondent allowed the extension of the tender validity period for thirty days and that the evaluation was to be done within 14 days. Therefore the argument that the right to appeal was infringed is moot. Further, that within the context of 21 days the Respondent must receive request for review and that the certificate of postage in the Respondent’s affidavit is sufficient proof of service of the hearing notice and request for review on 22<sup>nd</sup> June 2018.

36. The 1<sup>st</sup> Interested Party relied on section 3(5) of the Interpretation and General provision Act for the effecting of service, and submitted that the Applicant has not denied the address used was theirs and that service was therefore proper. The case of **Union Insurance Company of Kenya Ltd vs Ramzam Abdul Dhanji**, Civil Application No Nai 179 of 1998 was also cited for the holding that the law is not that a party must be heard in every litigation, but that parties be given a reasonable opportunity to be heard and once given and not utilised, the only point on which the party not utilising the opportunity can be heard is why he did not utilise it. Therefore, that the Applicant was given a reasonable opportunity to be heard and chose to squander it and to stall the process through judicial review.

37. The 2<sup>nd</sup> Interested Party’s position on this issue was that prior to the hearing of the request for review, the Respondent’s secretary notified the interested parties including the Applicant of the hearing of the review as required by regulation 74 of the Public Procurement and

Disposal Regulations 2006, who filed their response together with all the documentation, minutes, and reports on the tender as required by Regulation 74(3) .

38. I have considered the arguments made on the issue at hand, and note that Article 47 of the Constitution, and the provisions of the Fair Administrative Act import and imply a duty to act fairly by a decision maker in any administrative action. In addition it was held in **Lloyd vs McMahan, (1987) AC 625** that where a statutory procedure is insufficient to ensure that the requirements of fairness are satisfied, courts will imply procedural steps to ensure the said requirements are met.

39. I will first address the arguments raised about the Applicant's right to appeal have being prejudiced by the Respondent's decision. The Respondent made the following orders after allowing the 1<sup>st</sup> Interested Party's Request for Review: **"In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Sections 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders on this Request for Review.**

**a) The Applicant's Request for Review dated 14<sup>th</sup> June 2018 in respect of tender No. Tender No: MOAL/SDCP/ICB/01/2017-2018 for Design, Supply, Installation, Testing and Commissioning of 2000 and 3000 Litres Refrigerated Bulk Milk Cooling Tanks and Associated Accessories succeeds and is allowed.**

**b) The award of the said tender to the successful bidder herein M/s Desbro Engineering Limited be and is hereby annulled.**

**c) The Board hereby finds and declares that the Applicant met all the preliminary and the technical requirements of this tender and is hereby reinstated back to the evaluation process.**

**d) The Procuring Entity is consequently directed to carry out a financial evaluation of the Applicant's and the successful bidder's tenders in strict compliance with the provisions of Section 82 of the Act and award the tender to the bidder with the lowest price of the two.**

**e) The Procuring Entity if further directed to complete the financial evaluation process herein and make an award of the tender within fourteen (14) days from today's date.**

**f) The tender validity and the tender security validity periods for this tender are hereby extended by a further period of thirty (30) days from the date of this decision to enable the Procuring Entity complete the process.**

**g) In view of the nature of the orders made above, each party shall bear its own costs of this Request for Review. "**

40. Section 175(1) of the Act in this respect provides that a person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Respondent's decision, failure to which the decision of the Review Board shall be final and binding to both parties. The decision of the Respondent was to be implemented within 14 days, which is the same window given by the law to the Applicant to appeal, and I do not find that the Applicant's right to review was curtailed in any way, as he had the time and opportunity to move the Court, which he did, before the implementation of the Respondent's decision as completed.

41. On the argument by the Applicant that his rights to natural justice were prejudiced, the ingredients of fairness incorporate the requirements of natural justice which are that firstly, a person must be allowed an adequate opportunity to present their case where his or her interests and rights may be adversely affected by a decision-maker; and secondly, that no one ought to be judge in his or her case which is the requirement that the deciding authority must be unbiased when according the hearing or making the decision.

42. These principles are restated in **Halsbury's Laws of England Fourth Edition Vol. 1** at paragraph 74 as follows:

**"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations."**

43. Article 47 of the Constitution also now provides as follows in this regard:

**"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."**

44. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

**“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

**(b) an opportunity to be heard and to make representations in that regard;**

**(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**

**(d) a statement of reasons pursuant to section 6;**

**(e) notice of the right to legal representation, where applicable;**

**(f) notice of the right to cross-examine or where applicable; or**

**(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**

**(a) attend proceedings, in person or in the company of an expert of his choice;**

**(b) be heard;**

**(c) cross-examine persons who give adverse evidence against him; and**

**(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”**

45. In the case of **David Oloo Onyango v Attorney-General [1987] eKLR** Court of Appeal observed as follows:

**“There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore that in applying the material sub-section the Commissioner is required to act fairly and so to apply the principle of natural justice.”**

46. The Applicant’s main complaint in this regard was the late service of the hearing notice of the hearing of the 1<sup>st</sup> Interested Party’s Request for Review, which he claimed was served upon it on 12<sup>th</sup> July 2018. The Respondent on the other hand brought evidence that the hearing notice was dated 20<sup>th</sup> June 2018 was served by postage on 22<sup>nd</sup> June 2018.

47. The requirement of notice is to give an adequate opportunity to an affected party to make representations as regards a prospective decision, and notice will only afford an effective opportunity if the affected person receives it in sufficient time to enable him or her to prepare the representations as was held in **Local Government Board vs Arlidge, (1915) AC 120**. There is however no generally applicable period of notice, and the adequacy of the time of notice that is afforded will be dependent on the circumstances of each case, and in particular the reasons for a decision maker in adopting a particular timescale, and the disadvantage that is caused to the affected person by the period of notice given.

48. In the present application, section 171 of the Act provides that the Respondent is required to complete its review within twenty one days after receiving the request for the review.. The Request for Review was dated 14<sup>th</sup> June 2018, and the notice of the hearing was dated 20<sup>th</sup> June 2018, 6 days later, which was not a late notice in light of the preparations needed for a hearing. If the said notice once posted on 22<sup>nd</sup> June 2018 as contended by the Respondent, it effectively gave the Applicant 5 days to prepare for the hearing of 27<sup>th</sup> June 2018. Given the timelines set by law as regards the completion of the review process by the Respondent, it is also my view that in the circumstances that would have been adequate notice.

49. The Applicant however alleges that he did not receive the said notice. No evidence was brought to show the cause of the failure to receive the notice in good time, or to attribute the delay or any fault on the part of the Respondent in this regard, who brought evidence to show postage of the hearing notice on 22<sup>nd</sup> June 2018. In addition, the main test in establishing a breach of the duty to act fairly is that the claimant must in addition to establishing that there is a defect in the decision making process, also show that the said defect rendered the procedure as a whole unfair.

50. The main question then to be answered in is what disadvantage and prejudice was suffered by the Applicant as a result of his failure to attend the hearing of 27<sup>th</sup> June 2018. It is notable in this regard that the 2<sup>nd</sup> Interested Party which was the Procuring Entity, did attend the said hearing and presented the evidence on the procurement process. The Applicant has not shown what further information or evidence was not availed to the Respondent as a result of his failure to attend the hearing, which would have materially influenced the Respondent’s decision.

51. I therefore find that for the foregoing reasons, there was no breach of the duty to act fairly or of the statutory procedure by the Respondent in its decision and proceedings during the hearing of the 1<sup>st</sup> Interested Party’s Request for Review, despite the Applicant’s non-appearance at the said hearing.

***Whether the Respondent acted In Error of Law.***

52. The Applicant argued that the Respondent acted in error in ordering that the 1<sup>st</sup> Interested Party met all the preliminary and technical requirements of the tender and reinstating it back into the evaluation process, and in directing that the Procuring Entity carry out a financial evaluation of its tender and award the tender to the bidder with the lowest price. That this meant that the technical criteria for assessment of the bids and the labour painstakingly applied by the 2<sup>nd</sup> Interested Party's technical committee was substituted and replaced by the Respondent. Further, that the Respondent by confirming the subsequent evaluation and financial considerations, practically awarded the Tender to the 1<sup>st</sup> Interested Party.

53. The Respondent on its part submitted that under section 173 of the Act, it has powers to annul anything the accounting officer of a procuring entity has done, give directions to the accounting officer, and substitute the decision of the review Board for any decision of the accounting officer among others. The Respondent contended that its decision was made within the parameters of the law, and it did not usurp the powers of the tender evaluation committee but directed it in accordance with the tender document and section 80(2) of the Act.

54. The 1<sup>st</sup> Interested Party's position was that section 173 gives the Respondent jurisdiction to correct an alleged breach of the Act at any stage of the procurement process. Further, that the readmission of the 1<sup>st</sup> Interested Party into the evaluation process was within the powers of the Respondent as per section 173(a) and (b) as read with section 167 of the Act, and the purpose and effect was to remedy irrelevant considerations by the 2<sup>nd</sup> Interested Party and uphold the rule of law as contained in section 3, 80 and 83 of the Act and Articles 227,201 and 10 of the Constitution.

55. The 2<sup>nd</sup> Interested Party submitted that all it did was to comply with the decision of the Respondent as required by section 176(1)(m) of the Act.

56. I have considered the rival arguments made on the issue at hand, and I am reminded of the circumstances when a public body shall be deemed to have made an error of law as expounded in **Halsbury's Laws of England, 4<sup>th</sup> Edition** at paragraph 77 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.”**

57. In this respect, Section 167 of the Act gives powers to the Respondent to review any alleged breach of a duty imposed on a procuring entity by the Act or the Regulations made thereunder, subject to the exceptions of choice of procurement method, termination of a tender in accordance with the Act, and award of a contract in accordance with the Act. The powers of the Respondent upon review are provided for in section 173 of the Act, wherein it is provided that it may do any one or more of the following upon completion of a review—

**“ (a) Annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;**

**(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;**

**(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;**

**(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and**

**(e) order termination of the procurement process and commencement of a new procurement process.”**

58. The Court of Appeal in **Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others** [2012] eKLR observed as follows with regard to the jurisdiction and powers of the Respondent:

**“...The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. It has power to engage an expert to assist in the proceedings in which it feels it lacks the necessary experience. The Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously**

better equipped than the High Court to handle disputes relating to breach of duty by the procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.

Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1<sup>st</sup> Respondent's tender had met the mandatory conditions. The issue whether or not the 1<sup>st</sup> Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it."

59. The procedure for evaluation of tenders that is imposed upon a procuring entity by the Act is provided for in section 80 as follows:

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

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

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

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

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

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

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

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

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

60. As regards a successful tender, section 86 of the Act provides as follows:

**"(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—**

**(a) the tender with the lowest evaluated price;**

**(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals,**

**the scores assigned to the technical and financial proposals where Request for Proposals method is used;**

**(c) the tender with the lowest evaluated total cost of ownership; or**

**(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional**

**charges."**

61. The Respondent in its decision of 3<sup>rd</sup> July 2018 gave the following reasons for its orders :

**"In order to determine this issue, the Board has considered the provisions of Section 80 (2) of the Act and clauses 35.2 under the technical evaluation criteria and Sections III of the tender document relating to the economic evaluation criteria for the said tender....**

**The Board has perused the Request for review and the Procuring Entity's response, the blank tender documents, the original bid documents for the bidders, the evaluation report and the professional opinion submitted to the Board and notes as follows:**

**1. Bidders were subjected to preliminary evaluation and that at the preliminary evaluation stage, nine bidders were disqualified at this stage of evaluation and could not proceed any further and that only four bidders proceeded to the technical evaluation stage. At the Technical Evaluation, only two bidders were deemed to be responsive namely the**

firms at his Desbro Engineering and supreme Developers Limited.

2. The Applicant herein was disqualified at the technical evaluation stage for failure to provide proof/evidence of workshop and secondly that it did not comply with the time schedule (work schedule) as it did not provide any.

The Board has however looked at clauses 35.2, clause 36 of the instructions to bidders and the requirements of Section III of the tender document and notes that the provisions of Section III (1) (1.2) (a) and (b) expressly excluded the provisions of a work schedule as part of the evaluation criteria for this tender.

The Board therefore finds that it was not a requirement of this tender that a bidder produces a work schedule as part of its tender document for purposes of tender evaluation.

The form of the proposed contract attached to the tender document in fact stated that a work or time schedule would be a post award requirement but not a requirement at the evaluation stage of the tenders submitted to the Procuring Entity.

Further to the above and even assuming for arguments sake that a work schedule was a requirement of this tender for the purposes of evaluation, the Procuring Entity could not disqualify the Applicant or any other bidder at the technical evaluation stage based on the absence of a work schedule and the only option open to it would have been to deny it a technical score.

As the board has often stated, it is only the absence of a mandatory requirement or a bidders failure to attain the minimum technical score that can render a bidder's tender as non-responsive.

Where a tender requirement is not mandatory or where no minimum technical passmark is set out, a bidder cannot be declared as non-responsive at the technical evaluation stage.

On the issue of the lack of evidence of the existence of a workshop, the Board finds that this issue arose long after the tender evaluation committee had carried out the preliminary, technical and the financial of the tenders submitted to it.

It is the board's view that once the tender evaluation committee has fully evaluated a tender, Procuring Entity can only undertake due diligence under the provisions of Section 83 of the Act on the bidder who has been determined to be the lowest evaluated bidder. The Procuring Entity cannot therefore re-evaluate the technical qualifications of a bidder under the guise of undertaking due diligence after the technical evaluation process has long been concluded.

The Board also notes and this was not disputed by the Procuring Entity that the Applicant had been rendering the same services to the Procuring Entity before the award of the tender in issue to the successful bidder. It naturally follows that before previously awarding the subject tender to the Applicant, the Procuring Entity must have been satisfied of the Applicant's technical qualification to carry out the works. The Procuring Entity did not place any material before the Board to show that this position had changed.

From all the above, it is clear that the Procuring Entity therefore used an extrinsic criteria and irrelevant considerations in declaring the Applicant's bid as non-responsive at the technical evaluation stage."

62. There was thus no error of law made by the Respondent in annulling the award of the tender to the Applicant by the 2<sup>nd</sup> Interested Party's accounting officer and ordering a fresh evaluation of the tenders in accordance with the applicable provisions of the law, as this is a power that is specifically granted to the Respondent under section 173 of the Act. In addition, it did not err in relying on the tender documents in its decision, and in directing that the lowest price be considered, as these are evaluation criteria specifically provided for under section 80 and 86 of the Act.

63. Lastly, the Respondent did not err in its interpretation and application of the law as it is clear from the requirements of section 83 of the Act that due diligence is part and parcel of an ongoing evaluation, and cannot be conducted after the technical evaluation process has been concluded, and even then only of the tenderer who has submitted the lowest evaluated responsive tender, not any other tenderer. This was also the holding of this Court in **Republic vs Public Procurement Administrative Review Board and Two Others ex parte Krohne (Pty) Ltd**, Nrb H.C. JR Misc. Appl. No 147 of 2018.

***Whether the Respondent's Decision was Unreasonable.***

64. It was the Applicant's submission the Respondent in its decision found that the 2<sup>nd</sup> Interested Party's evaluation committee used extrinsic criteria and irrelevant considerations in declaring the 1<sup>st</sup> Interested Party's bid as non-responsive at the technical evaluation stage. They submitted the extrinsic and irrelevant criteria that the Respondent referred to was the due diligence conducted by the evaluation committee after the said committee had fully evaluated the tender and which it was enjoined to conduct under the provisions of section 83(1) of the Act.

65. Further, that section 46 provides for the establishment of the evaluation committee which shall deal with the technical and financial aspects of procurement as well as the negotiation process including the evaluation of bids, proposals for prequalification, registration lists, expression of interests and any other roles assigned to it. Therefore, that the Evaluation Committee has the power to deal with technical aspects and to conduct verification due diligence.

66. The Applicant contended that the Respondent largely quoted the tender document on instruction to bidders and made an arbitrary and unreasonable decision. Reliance was placed on the case of **Republic v Public Procurement Administrative review Board & 4 Others ex-**

**parte Britam Life Assurance Company (K) Limited & Another, Nairobi Misc Civil Application 52 of 2018** for the proposition that the it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders that comply with the invitation to tender.

67. It was also the Applicant's submission that tender evaluation committee was allowed to carry out its evaluation with reference to guidelines outside our domestic law namely the International Fund for Agricultural Development Procurement Guidelines, which at section 39 and 40 provide for value for money. Therefore, that the best value does not necessarily mean the lowest initial price option but represents the best return on investment. In addition, that the evaluation committee in carrying out due diligence was abiding by the one of the conditions stipulated by the governing laws to the procurement, and did not therefore consider an irrelevant factor in awarding the tender to the Applicant.

68. Lastly, that it was an agreed fact by the Respondent that the 1<sup>st</sup> Interested Party had previously rendered services to the procuring entity, and that the Respondent observed that the procuring entity must have been satisfied of the Applicant's technical specifications to carry out the works, and did not place any material before it to show that the position had not changed. According to the Applicant, this decision diminished the concept of competition in public tendering and was irrational.

69. The Respondent on the other hand submitted that its decision was reasonable as they demonstrated the reasons for it. They relied on the case of **Republic vs Kenya Power & Lighting Company Ltd, (2013) eKLR** on what would constitute unreasonable decision. Further, that the onus of showing that the decision was unreasonable lies on the Applicant, and reliance was placed on the case of **Republic vs Public Procurement Administrative Review Board & Another ex-parte Gibb Africa Ltd & Another, (2012) eKLR** for this proposition.

70. According to the Respondent, its reason for the decision are guided by section 80(2) of the Act and clauses 35.2 and 36 of the instructions to bidders, and the requirements of the tender documents. Further, that what the Applicant is seeking is a merit review.

71. The 1<sup>st</sup> Interested Party on its part submitted that the Respondent in its decision observed that it perused the Request for Review and all the relevant documents and gave reasons for its decision. It was also its submission that it had demonstrated that it had carried out similar projects with much success, and that the consideration of this fact by the Respondent was not arbitrary, as cost effectiveness, fairness and competition is a constitutional imperative. Reliance was placed in this regard on Articles 201 and 227 of the Constitution.

72. My findings on this issue are as follows. Unreasonableness is an established ground for judicial review, and This court has power to set aside a decision on the ground that the decision 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. This principle was settled by the decisions in **Associated Provincial Picture Houses vs Wednesbury Corporation (1948)1KB 223** and **Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374**. This ground was also explained in **Pastoli vs Kabale District Local Government Council & Others, (supra)** as follows:

**“...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...”**

73. As shown in the extract of the Respondent's decision reproduced earlier on in this judgment, the Respondent gave its reasons for its decision, and in particular looked at the tender document and noted the provisions expressly excluded the provision of work schedule as part of the evaluation criteria. It also explained that the work time schedule was a post award requirement but not a requirement at the evaluation stage in accordance with the tender document. Therefore, that the failure to provide a work schedule at a technical stage was not a ground as per the tender document to disqualify any bidders and was not a mandatory requirement in the tender document.

74. In addition, the Respondent observed that in conducting due diligence to the 1<sup>st</sup> Interested Party who according to the 2<sup>nd</sup> Interested Party had not submitted the lowest evaluated price, was equal to evaluating the technical qualifications of a bidder under the disguise of undertaking due diligence after the technical evaluation process had long been concluded.

75. As found in the foregoing, these reasons were supported by the tender documents and applicable law, and were therefore rational and reasonable. The arguments by the Applicant that the tender evaluation committee also acted according to the law are overtaken by events, as the decisions of the tender committee in this respect were found to be wanting by the Respondent in its decision, which decision this Court has found to be lawful and reasonable.

#### ***Whether the Applicant Merits the Prayers Sought .***

76. The Respondent and Interested Parties submitted at great length on this issue, and contended that that application is not merited, as it has not been demonstrated that the Respondent acted *ultra vires* and without jurisdiction. Further, that the decision the Applicant seeks to prohibit has been overtaken by events, as the 2<sup>nd</sup> Interested Party has implemented the decision to carry out financial evaluation of the 1<sup>st</sup> Interested Party and communicated its decision, which culminated into an award of the tender to the 1<sup>st</sup> Interested Party. Therefore, that a prohibition order would not be efficacious.

77. Similarly, that an order of mandamus compelling the 2<sup>nd</sup> Interested Party to sign the contract with the Applicant would defeat the legality of the Respondent's findings ,which were purely guided by section 80(2) of the Act. They relied on the case of **Republic vs Kenya National Commission On Human Rights Ex-parte Uhuru Kenyatta, (2010) eKLR . for the position that the application does not meet the threshold to grant the orders; on the case of Republic vs Kenya National Examinations Council ex-parte Gathenji & others, Civil Appeal No 266 of 1996** on the scope of judicial review orders; and on the case of **R vs Public Procurement Administrative Review Board and 3 Others Ex-parte Saracen Media Limited, (2018) eKLR** for the holding that the order of prohibition acts prospectively

78. The Court of Appeal held in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996 *inter alia* as follows as regards judicial review orders:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

79. The Applicant has sought orders of certiorari, mandamus and prohibition. This Court has found that the Respondent acted within its jurisdiction and powers and did not act unfairly or illegally in arriving at its decision and orders of 3<sup>rd</sup> July 2018, and the orders sought by the Applicant of certiorari cannot therefore issue in the circumstances of this present application. The orders sought of prohibition and mandamus cannot also issue as the consequent actions by the 2<sup>nd</sup> Interested Party are also lawful. In addition, this Court cannot direct the 2<sup>nd</sup> Interested Party to undertake its duties in any particular manner as sought in the terms of the prayer for mandamus.

80. In the premises, I find that the Applicant’s Notice of Motion dated 3<sup>rd</sup> August 2018 is not merited, and it accordingly fails. However, bearing in mind that the Applicant did not participate at the hearing of the 1<sup>st</sup> Interested Party’s Request for Review, I order that each party shall bear its own costs.

81. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF NOVEMBER 2018

P. NYAMWEYA

JUDGE