



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**MISC APPLICATION NO. 302 OF 2016**

REPUBLIC.....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

TRANSCEND MEDIA GROUP.....1<sup>ST</sup> INTERESTED PARTY

SCANAD KENYA LIMITED.....2<sup>ND</sup> INTERESTED PARTY

EX PARTE:

KENYA POWER AND LIGHTING COMPANY LIMITED

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 18<sup>th</sup> July, 2016, the ex parte applicant herein, **Kenya Power and Lighting Company Limited**, (hereinafter referred to as KPLC) seeks the following orders:

1. An order of judicial review by way of certiorari to remove to this Court and quash the decision of the Respondent dated 4<sup>th</sup> July 2016 in Request for Review Application Number 40 of 2016 with regard to Tender No. KP1/9AA-2/OT/46-CS/15-16 for the provision of Media and Advertising Services.

2. The costs of this application be awarded to the applicant.

**Ex Parte Applicants' Case**

2. According to the applicant, it is a limited liability company incorporated under the *Companies Act* and is listed on the Nairobi Securities Exchange (NSE) with the majority shareholder therein being the Government of Kenya holding 50.1% of its shares while the remaining 49.4% of its shares are owned by private investors.

3. It was averred that the Applicant owns and operates most of the electricity transmission and

distribution system in the country and sells electricity to over 4.8 million customers and that its mandate includes the provision of high quality service by efficiently transmitting and distributing high quality electricity that is safe, adequate and reliable at cost effective tariffs. To the applicant, the use of communication agencies is key in ensuring it meets its mandate which is a key element in the Government's blue print, Vision 2030.

4. According to the applicant, on 8<sup>th</sup> March 2016, it invited bidders to submit bids through its e-procurement portal for the provision of Media and Advertising Services under Tender No. KP1/9AA-2/OT/46/CS/15-16 ("the Tender") which invitation to tender was advertised in the press and on the Applicant's website on the said date. It was disclosed that a pre-bid meeting was held on 17<sup>th</sup> March 2016 when the Applicant clarified to all bidders that the Applicant's method of procurement had changed to the e-procurement system from paper procurement hence there was no requirement for the submission of hard copy documents. The said tender, it was averred closed on 29<sup>th</sup> March 2016 after five firms, **Media Edge Interactive Limited**, **Frank Maina Communications**, **Transcend Media Group**, the 1<sup>st</sup> interested party herein (hereinafter referred to as "Transcend"), **Scanad Kenya Limited** the 2<sup>nd</sup> interested party herein (hereinafter referred to as "Scanad") and **Creative Edge Limited**, successfully submitted their bids. It was averred that following primary evaluation, in accordance with clause 3.35 of the tender document three firms were found to be non-responsive while **Transcend Media Group**, and **Scanad Kenya Limited** were found to be responsive and hence proceeded to the technical evaluation stage which was based on a score of 100% with only those bidders whose score was 70% and above eligible to proceed to the financial stage of evaluation. The said score of 100% was broken down into 70% in respect of evaluation documents while 30% was in respect of Agency Pitch. According to the applicant, **Scanad** and **Transcend's** documents were evaluated in accordance with the criteria outlined in the tender document and that while evaluating the bidders documents, the Applicant noted that Transcend submitted the tender as joint venture with **McCann WorldGroup South Africa (PTY)** of South Africa and that its contact person was **Mr. Thomas Omanga**, who was listed as one of the support staff members and who was to be the Client Service Director with his contact details being indicated vide his email address as [thomas.omanga@transcendmedia.co.ke](mailto:thomas.omanga@transcendmedia.co.ke). Further, Transcend submitted profiles for 4 key members of staff and 29 members of support staff. Transcend confirmed that the said **Mr Omanga** was expected to continue in employment. According to the applicant, out of the 29 profiles of support staff, Transcend submitted 4 profiles of **McCann WorldGroup** South Africa employees.

3. It was averred that Scanad is an advertising agency under the **WPP Scangroup Limited** (herein after referred to as "WPP Scangroup") and that there are many other agencies under the WPP Scangroup which all have common and/or related shareholding and are all wholly owned subsidiaries or controlled entities of WPP Scangroup. The said Scanad submitted profiles for 6 key members of staff 3 of whom were on contracts of employment with related agencies under the WPP Scangroup. Their contracts of employment provided that they may be required to work for WPP Scangroup or any of the related companies and that Scanad provided confirmation that at the time of the submission of the tender, all the 6 employees were working for Scanad and would be available for the duration of the contract.

4. Based on the documents provided, the Applicant was satisfied that both the bidders had the necessary qualifications to execute, complete and maintain the works in the contract and Transcend was assigned a score of 63.6 while Scanad was assigned a score of 69.2. However, as part of the technical evaluation stage, Scanad and Transcend were required to demonstrate, through a pitch, how their agencies would approach a creative project for the Applicant in line with Clause 6.2.2.2 of the tender document and by a letter dated 18<sup>th</sup> April 2016, the Applicant invited Scanad and Transcend to present their agency pitches. For the pitch, the Applicant required the tenderers to demonstrate that they could encompass a campaign that had the full mix of attributes that would address the scoring criteria, i.e. Creative, Media, PR, Internal Communication, Social Media and Activation and the scope of the pitch incorporated areas outside the scope of the tender, such as public relations, research, internal communications and social media.

5. According to the applicant, there was no requirement in the tender document that all those who

participated in the pitch had to be employees of the tenderer. On 19<sup>th</sup> April 2016, Scanad provided a list of the staff that would be in attendance during the pitch and on 25<sup>th</sup> April 2016, Scanad presented its pitch. As part of its pitch, Scanad presented a re-enactment of a Safaricom project that it had performed in the past. Based on the criteria in the aforesaid clause, it was averred that Transcend was assigned a score of 21.8 while Scanad was assigned a score of 25.6 for the pitch hence the overall technical evaluation scores were as follows: Scanad - 94.8 and Transcend - 85.4. As both firms scored over 70%, they both proceeded to the final financial stage where Scanad's tender price was Kshs 55,890,600 while Transcend's tender price was Kshs 66,995,000. To the applicant, at both the technical and financial evaluation, Scanad had the highest weighted score and it was found to be the successful bidder.

6. However, by a letter dated 29<sup>th</sup> April 2016, Transcend wrote to the Applicant complaining that the persons that attended the pitch were not employees of Scanad. Though it was not a requirement for a bidder to only present its employees during the pitch, the Applicant nonetheless reviewed Transcend's concerns and was satisfied that Scanad had not breached the tender document or the Act as Scanad provided a list of the pitch participants and this was the list that was used to allow entry into the auditorium. By a letter dated 10<sup>th</sup> May 2016, the Applicant wrote to Transcend addressing this concern and awarded the Tender for the Provision of Advertising and Media Services to Scanad by its letter of award dated 25<sup>th</sup> May 2016. The Applicant also notified the remaining tenderers that they were unsuccessful by letters dated 25<sup>th</sup> May 2016 which were sent via e-mail on 26<sup>th</sup> May 2016 and on 10<sup>th</sup> June 2016, a contract was entered into between the Applicant and Scanad.

7. It was averred that subsequent to the execution of the contract, Transcend filed Request for Review No 40 of 2016 on 13<sup>th</sup> June 2016 before the Respondent challenging the decision of the Applicant to award the Tender to Scanad which request for review was filed 18 days after Transcend received notification that it was unsuccessful.

8. As a result the applicant and Scanad both filed Notices of Preliminary Objection on *inter alia* the grounds that the Respondent had no jurisdiction to hear the Interested Party's request for review as it had been filed out of time and that the Applicant and Scanad had already entered into a written contract which meant no request for review could be entertained in view of section 167(4)(c) of the **Public Procurement and Asset Disposal Act 2015** (hereinafter referred to as "the Act"). In addition and without prejudice to the preliminary objection Scanad filed a substantive response to the request for review. While the Applicant, Scanad and Transcend filed written submissions to the preliminary objection, Scanad and Transcend also filed written submissions on the request for review. However, the Preliminary Objections and substantive response were heard simultaneously on 30<sup>th</sup> June 2016 due to time constraints as the Respondent had to render its decision by 4<sup>th</sup> July 2016 on which date it delivered its decision and held *inter alia* as follows:

***a) Preliminary Objections raised by the Applicant and Scanad failed and were dismissed.***

***b) The Request for Review filed by Transcend Media with the Respondent on 13<sup>th</sup> June 2016 was allowed.***

***c) The award of the tender to Scanad was annulled.***

***d) The Respondent directed the decision of the Applicant awarding the tender to Scanad be substituted with a decision awarding the tender to Transcend.***

9. It was however averred that the Respondent's decision was not made available to the Applicant until 6<sup>th</sup> July 2016. It was the applicant's case that the Respondent:

a) Acted *ultra vires* and outside its mandate in entertaining the Request for Review that was filed out of time.

- b) Acted unreasonably, irrationally and illegally.
- c) Failed to consider relevant issues and considered extraneous and irrelevant issues.
- d) Abused its power.
- e) Frustrated its legislative purpose as it failed to give effect to Section 3 of the Act and Article 227 of the Constitution.

10. In effect, it was contended the Respondent failed to exercise its mandate, abdicated its responsibility and refused to discharge its statutory duty as set out in the Act. By substituting the decision of the Applicant to award the tender to Scanad with a decision awarding the tender to Transcend, the Respondent was accused of frustrating the legislative purpose for which it was created as it failed to give effect to section 3 of the 2015 Act and Article 227 of the Constitution since Scanad's tender price was Kshs 55,890,600 while Transcend's tender price was Kshs 66,995,000.

11. It was further disclosed that the hearing of Request for Review No 40 of 2016 on 30<sup>th</sup> June 2016, the Chairman of the Public Procurement and Administrative Review Board indicated that they would review all the documents submitted by the Applicant including those not shared with bidders such as the tender documents and that one of the documents submitted to the Respondent was the Transcend's tender document which included a confidential business questionnaire form that identified **Thomas Omanga** as the Transcend's contact person. However the Respondent in its decision of 4<sup>th</sup> July 2016 expressed dismay as to why the letter of notification was not directly emailed to the company rather than being e-mailed to a third party. To the applicant, the person referred to as a third party, **Thomas Omanga**, was the one designated as the Transcend's contact person in its bid.

12. It was asserted that included in the Scanad's tender was a detailed write up on the company which demonstrated its capability including what resources it could access in order to deliver yet the Respondent did not consider this document.

13. It was submitted by on behalf of the applicant that Transcend knew of the matters complained of as early as 29<sup>th</sup> April 2016. Time therefore started running on 29<sup>th</sup> April 2016 and the 14 days elapsed on 13<sup>th</sup> May 2016. Transcend filed the request for review on 13<sup>th</sup> June 2016, 30 days later. If it is argued that time should not to be computed from 29<sup>th</sup> April 2016 (which is not accepted), time should be counted from 10<sup>th</sup> May 2016 when the Transcend informed KPLC of the alleged breach. According to the Applicant, as Transcend was aware of the breach before notification of the award, the 14 days have to be computed from 29<sup>th</sup> April 2016 which was the date of the alleged breach. The Board exceeded its jurisdiction in entertaining the request for review and ignored section 167 of the Act.

14. It was further submitted that KPLC notified Scanad of the award by a letter dated 25<sup>th</sup> May 2016. The other tenderers were also notified that they were unsuccessful by letters dated 25<sup>th</sup> May 2016 advance copies of which were sent via email on 26<sup>th</sup> May 2016. Transcend filed the request for review 18 days after the notification was sent to it. Even assuming that Transcend was not aware of the alleged breach by Scanad before the award, time would start running from 26<sup>th</sup> May 2016 hence Transcend's request for review was time barred. The applicant relied on **Republic vs. Public Procurement Administrative Review Board & 2 Others [2015] eKLR** in which **Korir, J** stated as follows when dealing with a similar issue:

**“The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. [Emphasis added]...The timelines in the PP&DA were set for a purpose. Proceedings touching on procurement matters ought to be heard and determined without undue delay. Once a party fails to move the Board within the time set by Regulations, the jurisdiction of**

**the Board is extinguished in so far the particular procurement is concerned.”**

15. It was submitted that KPLC and Scanad entered into a contract on 10<sup>th</sup> June 2016 in accordance with section 135 of the Act which was 16 days after notification of award. The Board exceeded its jurisdiction in view of the bar under section 1674(c) of the Act to a request for review being entertained by the Board once a contract has been signed.

16. It was contended that through judicial craft and innovation, the Board assumed jurisdiction it did not have by finding that the emails sent by KPLC on 26<sup>th</sup> May 2016 did not amount to notifications and that time started running upon a bidder collecting a hard copy of the notification letter from KPLC. The Board failed to consider that the hard copy of the letter contained the same information as what was contained in the e-mail notification. In this respect the applicant relied on **Samuel Kamau Macharia vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR** and urged the Court to follow the foregoing cases and find that the Board did not have jurisdiction to hear and determine the request for review.

17. According to the applicant, the Board acted unreasonably and irrationally in the following ways:

- a) Assumption of jurisdiction when none existed amounted to an unreasonable exercise of power.
- b) In finding that the emails sent by KPLC on 26<sup>th</sup> May 2016 did not amount to notifications given that the tender was an e-procurement with there being no mandatory requirement in the tender document for sending hard copy notifications. See page 49 of Imelda Bore’s affidavit sworn on 15<sup>th</sup> July 2016.
- c) In finding that time started running upon a bidder collecting a hard copy of the notification letter from KPLC. This is arbitrary and illogical.
- d) It was unreasonable and irrational for the Board to fail to consider that such a finding would open a pandora’s box as any bidder could intentionally delay collecting the hard copy of the notification letter to delay the signing of the contract and completion of the procurement process.
- e) Its decision ran contrary to previous decisions in which it held that procuring entities cannot await confirmation that all recipients have read their notification letters.
- f) In annulling the award of the tender to Scanad on *inter alia*, the basis that Scanad’s bid included persons who were not its employees.
- g) **Thomas Omanga** was not only Transcend’s contact person but also one of the key personnel indicated in its bid. Awarding the tender to Transcend when its key personnel no longer works for it is inconsistent with the basis of the Board’s decision. This is irrational and unreasonable as is the insistence of collection of the hard copy of the notification letters in an e-procurement process.
- h) A finding that a newspaper notice on 16<sup>th</sup> June 2016 ought to have informed a decision taken more than a fortnight earlier is illogical and incomprehensible.
- i) The Board accorded manifestly excessive weight to irrelevant considerations in the process of arriving at its decision.

18. According to the applicant, the above also show that the Board’s decision should be declared a nullity as was stated by **Lord Reid** in **Animistic -vs- Foreign Compensation Commission [1969] 1 All ER 20** where it was held that:

**“It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the**

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

19. It was submitted that the powers vested in any public body or authority must be exercised in good faith and that the Board cannot be said to have acted in good faith having regard to the matters set out above.

20. With respect to illegality, the applicant relied on Civil Service Unions and Others v Minister for the Civil Service [1984]3 ALL ER 935 and contended that the decision of the Board is illegal in that:

- a) Section 167 of the Act limits the time within which a request for review can be filed.
- b) The Board assumed jurisdiction where it had none and ought to have rejected the request for review summarily.
- c) The Board acted illegally by failing to give effect to Section 3 of the Act and Article 277 of the Constitution.
- d) The Board “amended” the law as follows:
  - i. Section 87(3) of the Act required KPLC to “**notify in writing all other persons submitting tenders that their tenders were unsuccessful.**” The Board amended this to include that KPLC had to serve the unsuccessful tenderers with the notification.
  - ii. Section 167 (1) of the Act is clear that where a bidder complains of a breach of a duty which occurs before notification of the award, they must seek administrative review within 14 days of the date of the occurrence of the breach. The Board acted illegally in determining that this section permitted the Transcend to await notification of the award before seeking administrative review. The section allows no such leeway.

21. The applicant submitted that the Board failed to take into account relevant facts and considerations brought before it and thereby failed to exercise the jurisdiction conferred upon it by the Act. Relying on paragraph 5-110 of *De Smith’s Judicial Review*, Sixth Edition, the applicant submitted that in its decision, the Board disregarded and failed to consider the following relevant facts and considerations:

- a) That this was an e-procurement process and that there was no requirement in the tender document for a letter of notification to be sent to a bidder through registered mail.
- b) That Transcend’s contact details provided that **Thomas Omanga** was Transcend’s contact person and included his work e-mail address as the contact address.
- c) The Board failed to consider **Thomas Omanga** was also one of the key personnel for purposes of the tender. The Board’s finding that **Thomas Omanga** was a third party amounts to a fundamental error.

d) The Board failed to consider that KPLC adopted the same approach when notifying the other bidders and used the e-mail addresses provided by the contact persons. For instance, when notifying **Frank Maina Communications**, KPLC used the email address of the contact person. KPLC should therefore not have been faulted for sending the notification to **Thomas Omanga's** work email address.

e) The Board failed to consider that KPLC would not have known of **Thomas Omanga's** resignation on 4<sup>th</sup> April 2016 unless it was directly informed by Transcend. In any event, the newspaper advertisement of 16<sup>th</sup> June 2016 (and not 6<sup>th</sup> June 2016 as set out in the Board's ruling at page 269 of Imelda Bore's affidavit sworn on 15<sup>th</sup> July 2016) that notified the general public that **Mr. Omanga** was an employee of Saracen OMD Company Limited was published 10 days after KPLC sent out the email notifications on 26<sup>th</sup> May 2016.

f) The Board failed to consider that Scanad's employees' contracts required them to work for any of the related companies.

g) The Board failed to consider that the object of clause 3.20 (2) (b) (ii) of the tender document was to confirm the qualifications and experience of a bidder as opposed to the employment status of employees.

22. In this respect the applicant relied on **Secretary of State for Education and Science vs. Tameside Metropolitan Borough Council [1977] AC 1014 at 1064**, where it was held that the failure to consider relevant matters is a ground for granting judicial review orders as well as **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, **Zachariah Wagunza & another vs. Office of the Registrar Academic Kenyatta University & 2 Others[2013] eKLR**, **Republic vs. Public Procurement Administrative Review Board & 3 Others ex- parte Olive Telecommunication PVT Limited [2014] eKLR** and submitted that the shortcomings set out in paragraph 29 above render the Board's decision grossly unreasonable and irrational.

23. It was submitted that a public body has a basic duty to take reasonable steps to acquaint itself with the relevant material based on paragraph 51.1 of the *Judicial Review Handbook*, 6<sup>th</sup> Edition, **Secretary of State for Education and Science vs. Tameside Metropolitan Borough Council [1977] AC 1014**, and **R vs. Secretary of State for the Home Department, ex p Iyadurai [1998] Imm AR 470**. In this case it was submitted that the Board failed to take reasonable steps to acquaint itself with the relevant material. The Board also failed to ask itself the correct questions with regard to the notification to Transcend that its bid was unsuccessful. To the applicant, the Board failed to properly consider the information availed to it regarding the employment details of Scanad's employees and as a result came to conclusions that were unreasonable and inconsistent with the information. The Board asked itself incorrect questions with regard to this issue.

24. In addition, the Board failed to reasonably acquaint itself with the requirements of the tender documents and particularly clause 3.20. 2 (b) (ii) as a result of which it made an unreasonable and irrational determination. The factors taken into account by the Board on the way to making its decision and the disregard of or failure to consider relevant evidence render the decision unreasonable and therefore unlawful.

25. In the applicant's view, discretionary power is never absolute in the literal sense of being entirely unencumbered and uncontrolled. Statutory powers can only be exercised validly if they are exercised reasonably, rationally and properly and reliance was placed on **Doody vs. the Home Secretary of State [1993] 1All ER 151**, as well as **Republic vs. Commissioner of Co-operatives ex-parte Kirinyaga Tea Growers Co-operative Savings and Credit Society Ltd [1999] 1EA 245 (CAK)** and **Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Limited [2004] 2 KLR 530** .

26. The applicant submitted that it had a legitimate expectation that the Board would not entertain a request for review filed late consistent with its previous decisions. The Respondent however abused its

powers in the following manner:

- a) By assuming jurisdiction when none existed as explained above.
- b) The Board in effect constituted itself an evaluation committee by substituting the Ex-Parte Applicant's decision to award the tender to Scanad with a decision awarding the tender to Transcend. This amounted to abuse of power considering the circumstances of the case.
- c) By failing to consider relevant matters and considering extraneous matters.
- d) The Board otherwise abused its power within the meaning of section 7 (2) (o) of the *Fair Administration Action Act*.

27. According to the applicant, statutes are interpreted by reference to their purpose, and statutory powers must be exercised for the purpose for which they were conferred. Public authorities are required to promote, and not to frustrate, the legislative purpose as opined in paragraph 53.1 of the *Judicial Review Handbook*, 6<sup>th</sup> Edition. In this respect the applicant relied on **R (Lumba) vs. Secretary of State for the Home Department [2012] AC 245**, where **Baroness Hale** stated as follows:

**“the long established principle of United Kingdom public law is that statutory powers must be used for the purpose for which they were conferred and not for some other purpose.”**

28. The applicant also relied on the case of **R (Haworth) vs. Northumbria Police Authority [2012] EWHC 1125** in which the Court stated:

**“to be lawful, the discretion had to be exercised in accordance with the statutory purpose for which the discretion was given which it is to be presumed must be as a mechanism to promote the overall policy and objects of the statute.”**

29. Additionally, **Padfield vs. Minister of Agriculture Fisheries & Food [1968] AC 997**, was cited for the holding that:

**“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act. The policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court.”**

**“If the Minister, by reason of his having misconstrued the Act or for some reason, so uses his discretion as to thwart or run counter to the policy and the objects of the Act, then....persons aggrieved are entitled to the protection of the court.”**

30. In this case, it was submitted that Scanad's tender price was Kshs 55,890,600 while Transcend's tender price was Kshs 66,995,000. By substituting the decision of the Applicant to award the Tender to Scanad with a decision awarding the Tender to Transcend, the Board is frustrating the legislative purpose for which it was created as it has failed to give effect to Section 3 of the 2015 Act and Article 227 of the Constitution. Section 3 of the Act provides that public entities should be guided by the principle of **“maximization of value of money”** while Article 227 of the Constitution provides that public entities should contract for services in a **competitive** and **cost effective** manner. The Board's decision is in the circumstances contrary to Article 10 of the Constitution.

31. It was therefore contended that compelling KPLC to enter into the tender with Transcend when its bid was not the least evaluated will cause loss to the Applicant's shareholders and the public in general. This will be contrary to the objectives of procurement and disproportionate within the meaning of section 7(2) (l) of the *Fair Administration Action Act*.

32. It was therefore submitted that KPLC has demonstrated that the Board acted in excess of jurisdiction

in giving its decision. KPLC has also demonstrated that the decision of the Board is a nullity on account of *inter alia* unreasonableness, irrationality, illegality, insufficient inquiry, abuse of power and frustrating the legislative purpose.

33. The Court was therefore urged to allow the application with costs to KPLC

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

34. On its part the 2<sup>nd</sup> interested party, **Scanad Kenya Limited** supported the application.

35. It is however important to note that the 2<sup>nd</sup> interested party only filed the submissions in which it substantially aligned itself with the position adopted by the ex parte applicant.

### **Respondent's Case**

36. On the part of the Respondent, it was averred that on 13<sup>th</sup> June, 2016, the Transcend filed a Request for Review before the Respondent challenging the award of the Tender No. Tender No. KP1/9AA-2/OT/46-CS/15-16 for Provision of Advertising & Media Services. Immediately after receiving the Request for Review, from Transcend, the Respondent served a copy on the Applicant, notified it of the pending Review and the suspension of the procurement process in accordance with Regulation 74(1) and 74(2) of the **Public Procurement and Disposal Regulations, 2006**, (hereinafter referred to as "the Regulations") and on 28<sup>th</sup> June, 2016, proceeded to consider their pleadings and submissions, determined the application for review and delivered its ruling on 4<sup>th</sup> July, 2016.

37. It was averred that upon considering the submissions of the parties and the documents before it, the Respondent identified three issues for determination, namely:

***1. Whether or not the Applicant's Request for Review was filed out of time.***

***2. Whether or not the Board lacks the jurisdiction to hear and determine the Request for Review, a written contract having been entered into between the procuring entity and the successful bidder.***

***3. Grounds 1 & 2: Depending on the answer to issues No. 1(a) and (b) above whether the procuring entity breached the provisions of Sections 55(5) and 66(3) of the Public Procurement and Asset Disposal Act 2015, Section 2 of the Anti-Corruption and Economic Crimes Act 2003 and Article 227 of the Constitution of the Kenya 2010 by failing to disqualify Scanad Kenya Limited's bid for submitting false information that it submitted names of persons who were not its employees for purposes of the tender.***

38. The Respondent's case was that it only took into consideration facts that were presented before it and were relevant in deciding the above issues and that its decision was based on its findings that:

a) That where an issue of jurisdiction is raised before a court or a tribunal, it has to determine the issue of jurisdiction first before it can delve into the merits of the case;

b) That the procuring entity did not send a letter of notification directly to the company but rather to an individual **M/s Joyce Ochieng**, who swore the Replying affidavit dated 30<sup>th</sup> June, 2016 stating she was a representative of the Company;

c) That the procuring entity was in possession of the company's address, physical location, telephone number, mobile numbers and email that could have been used to send letter of notification to directly rather than being emailed to a third party;

d) That the letter of notification was not forwarded to the company through registered mail when

the physical location and the company's postal address were all known to the procuring entity;

e) That **Mr. Thomas Omanga** to whom the letter of notification was allegedly sent resigned from the Applicant Company on 4<sup>th</sup> April, 2016 and he was not an employee of the Applicant as at 25<sup>th</sup> May, 2016 when the email notification was allegedly sent to him;

f) That the Applicant having received its letter on 30<sup>th</sup> May, 2016 and having filed the Request for Review on 13<sup>th</sup> June, 2016, the Request for Review was therefore filed within time;

g) That under the provisions of Section 167 of the **Public Procurement and Asset Disposal Act, 2015** a bidder is at liberty to approach the Board either upon becoming aware of a breach giving rise to a cause of action or upon the notification of an award that its tender has been unsuccessful;

h) That counting the number of days starting from the next day after 30<sup>th</sup> May, 2016 shows that the contract agreement was signed after a period of eleven (11) days from the date of notification upon the unsuccessful bidder as no date of service on the successful bidder was disclosed;

i) That the contract was therefore signed prematurely and contrary to the law and cannot therefore deprive the Board of the requisite jurisdiction to hear and determine the Request for Review;

j) That the preliminary objections raised by the procuring entity and the successful bidder failed and were dismissed and the Board proceeded to consider the Applicant's Request for Review on its merits;

k) That it is clear from the successful bidder's own admission that the names of three people whose documents of employment the successful bidder included in the Tender document were of persons other than its employees;

l) That this was false information which contravened the provisions of Clause 30.20.2(b)(ii) of the instructions to tenderers which required bidders to establish to the satisfaction of the procuring entity that the tenderer has the technical and management capability necessary to perform the contract.

m) That the said information also contravened the provisions of Section 55(5) of the Act;

n) That having provided information that was false the procuring entity ought to have declared the successful bidder as ineligible and non-responsive;

o) That Scanad Kenya Limited did not submit its bid as a consortium or a joint venture with WPP Scan Group Limited or any of the other companies said to be its subsidiaries;

p) That the successful bidder which was under the legal burden to show that all the other companies were subsidiaries of WPP Scan Group Limited did not produce any evidentiary proof to establish that it or the other companies were subsidiaries of the said company;

q) That the procuring entity should have therefore been more careful and carried out due diligence on the successful bidder once the Applicant raised the possibility that the successful bidder had presented names of persons who were not its employees at the pitch presentation and also in the tender document;

r) That the Board has no option but to enforce the legal requirement under section 55(5) of the Act which stipulates that a bidder who furnishes inaccurate information to a procuring entity is rendered ineligible to participate in a tender process;

s) That the successful bidder attained a weighted score of 1.038 at a tender price of Kshs.

55,890,600.00 per annum while the Applicant attained a weighted score of 0.988 at a tender price of Kshs. 66,995,000 per annum;

t) That the two were ranked as number 1 and 2 at the end of the process and the Board having declared the successful bidder ineligible, the Applicant remains the only tenderer who was evaluated until the end of the process;

u) That the Board finds that this is a proper case for substitution of the award made by the procuring entity with an order that the Applicant be awarded the subject tender.

39. According to the Respondent, it accordingly made the impugned decision on 4<sup>th</sup> July, 2016 and that in making its decision, it considered considering all documents of evidentiary value placed before it by the parties and the submissions of the parties on each of the issues raised in the Request for Review. The Respondent asserted that its was a decision made within its mandate, and the specific sections of the law in particular section 98 of the Act, on which the Board's decision was pegged have been expressly pronounced in the Board's decision.

40. The Respondent was of the view that the Applicant had not demonstrated in any way that the decision of the Board was outside the scope of the law governing the Board and further that the Board took into account irrelevant consideration, or failed to accord the Applicant a right to be heard in breach of Article 50 of the Constitution. To the contrary, the Board expressly considered all the documents and submissions filed by the Applicant and all other parties to the Review in arriving at its decision in upholding the principle of natural justice. Its case was that the Applicant had not demonstrated by an iota of truth that the Board was unreasonable in arriving at its decision or that the Board was guilty of unreasonable exercise of power and irrationality in arriving at its decision. In its contention, its decision was grounded in law after review of all material conditions placed before it and importantly in line with its mandate to uphold public procurement process. Accordingly, the Applicant has not demonstrated that the Board in arriving at its decision was guilty of any illegality, impropriety of procedure and irrationality to warrant the variance of the order of the Board.

41. The Respondent insisted that in arriving at its decision complied with the requirements of section 173 of the Act. The Respondent therefore averred that the Applicant's application is made in bad faith, has no merit and is only calculated to discredit the credibility of the Respondent's mandate and function, while ultimately eroding the public's confidence in procurement procedures and processes.

42. In its submissions the Respondent reiterated the foregoing and contended that this Court in the exercise of its judicial review jurisdiction does not deal with the merits of the questioned decision. In this respect the Respondent relied on **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR**, **Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR** and **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited, Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012[2012] eKLR**, **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others (2012) eKLR**.

43. It was submitted that this Application is an appeal disguised as a Judicial Review Application and should therefore not be entertained since there is a clear distinction between an appeal and judicial review proceedings. In Judicial review the court is only concerned with the fairness of the process under which the impugned decision or action was reached. Once a judicial review court gives a clean bill of health to the process, it must down its tools without considering the merits of the decision for to do so would amount to usurping the power of the body that was mandated by the law giver to make the decision and reliance was placed on **Municipal Council of Mombasa vs. Republic & Another (2002) eKLR** and **Republic vs. Kenya Power & Lighting Company Limited & Another [2013]e KLR**.

44. It was therefore submitted that application does not raise any issue that warrants issuance of the order from the limited judicial review jurisdiction as the applicant merely alleged grounds without any proof.

The Respondent therefore sought that the application be dismissed with costs.

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

45. The application was opposed by the 1<sup>st</sup> interested party, **Transcend Media Group**.

46. Dealing with the Respondent's jurisdiction under section 167(1) of the Act, it was averred that the 1<sup>st</sup> Interested Party filed the Request for Review within 14 days as per Regulation 73(1)&(2)(c)(ii) of **the Regulations** after notice that the Ex Parte Applicant had refused to comply with the duty imposed on it by Section 55(5) and 66(3)(a) of the Act and failed to disqualify the 2<sup>nd</sup> Interested Party's tender for submitting false information. In Transcend's view, the 14 days prescribed under section 167(1) of the Act and Regulation 73(1)&(2)(c) aforesaid did not crystallise on 29<sup>th</sup> April, 2016 as submitted by the Ex Parte Applicant. It was contended that the Ex Parte Applicant's letter removed the 1<sup>st</sup> Interested Party's obligation to file a request for review under Regulations 73(1)&(2)(c)(i) and 73(1)&(2)(c)(ii) of **the Regulations** automatically kicked in.

47. To Transcend, the Ex Parte Applicant's letter dated 10<sup>th</sup> May, 2016 was not the notification contemplated by section 87 of the Act and Regulation 73(1)&(2)(c)(ii) of **the Regulations**. Therefore filing a request for review at this stage would have been premature as the Ex Parte Applicant was still evaluating the tenders received and was yet to award and or give notice of award. In this respect Transcend relied on **Republic vs. Kenya Revenue Authority Ex Parte Webb Fontaine Group FZ-LLC & 3 Others [2015] eKLR**.

48. It was contended that since the Ex Parte Applicant had promised that it would evaluate the bids submitted in accordance with its tender, Transcend's legitimately expected that the Ex Parte Applicant to evaluate the Scanad's bid in strict compliance with Clause 3.9 and 3.20.2(b)(ii) of the Tender Document and disqualify it on account of false information in accordance with section 55(5) and 66(3)(a) of the Act. In this respect Transcend relied on **Republic vs. Pharmacy and Poisons Board & 2 Others Ex-parte Juliet Lihemo Agufa [2015] eKLR** and averred that the 14 days contemplated under section 167(1) of the Act and Regulation 73(1) & (2)(c)(ii) of **the Regulations** crystallised on 30<sup>th</sup> May, 2016 when the 1<sup>st</sup> Interested Party received from the Ex Parte Applicant the notice of award dated 25<sup>th</sup> May, 2016. Therefore time began to run on 31<sup>st</sup> May, 2016 and the 14 days ended on 13<sup>th</sup> June, 2016.

49. According to Transcend, it has not been disputed that the notice sent on 26<sup>th</sup> May, 2016 was not sent to Transcend as it was sent to **Thomas Omanga** who was not an employee of Transcend on 26<sup>th</sup> May, 2016 and or authorised to receive the same. It was averred that at page 284 of the Ex Parte Applicant's annexure Transcend's contact persons for purposes of the tender notices were **Antony Gatheca** [tony@transcendmedia.co.ke](mailto:tony@transcendmedia.co.ke) and **Fraser Lamb** [Fraser.Lamb@mccann.com](mailto:Fraser.Lamb@mccann.com). To Transcend, Scanad's annexures clearly demonstrated that the Ex Parte Applicant was aware that the notice it had sent to **Thomas Omanga** did not reach Transcend hence the reason why it forwarded the email sent on 26<sup>th</sup> May, 2016 to the correct email address on 30<sup>th</sup> May, 2016. The Ex Parte Applicant did not explain it changed its communication channel from **Antony Gatheca** to **Thomas Omanga** when it came to communication of the all-important notice of award.

50. It was contended that the Ex Parte Applicant did not adduce any evidence to demonstrate that Transcend or even **Thomas Omanga** received the notice of award on 26<sup>th</sup> May, 2016 and not on 30<sup>th</sup> May, 2016 which remains the date of notification. In this respect Transcend relied on **Procurement and Administrative Review Board Ex-Parte Zhongman Petroleum & Natural Gas Group Company** where it was held that:

**“In light of the earlier decisions of the Board which I find to represent the correct position, the time started to run on 29/12/2009 when the Applicant's office in Shanghai received with the notification on 28/12/09. The Board found in the alternative that if they were to accept 28<sup>th</sup> as date of notification, the time for the window of appeal started to run on 29/12/2009**

**and ended on 11/1/2010. This court agrees with that computation.”**

51. Further reliance was placed on **Republic vs. Public Procurement Administrative Review Board & 2 Others [2015] eKLR** where it was held that:

**“The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded...”**

52. It was submitted that the Respondent had jurisdiction to hear and determine the request for review filed on 13<sup>th</sup> June, 2016 as the same was filed within 14 days of receipt of notice of award and that the Respondent assumed jurisdiction after considering the evidence before it and concluded that the 1<sup>st</sup> Interested Party received notification of award on 30<sup>th</sup> May, 2016 and the request for review was filed on 13<sup>th</sup> June, 2016 was filed within 14 days thereof. To Trascend, the Respondent was not shown any evidence by the Ex Parte Applicant to demonstrate that Trascend received notification of award on 26<sup>th</sup> May, 2016. Further, the Respondent was not shown any evidence by the Ex Parte Applicant to demonstrate that **Thomas Omanga** was as at 26<sup>th</sup> May, 2016 an employee of Trascend or was authorised to receive notification of award and or that he indeed received the said notification sent to his email on 26<sup>th</sup> May, 2016. In addition, the Respondent was not shown any evidence by the Ex Parte Applicant to justify to give reasons why it chose to send the notification of award to **Thomas Omanga** in blatant change of the established communication channel through **Antony Gatheca**. The Ex Parte Applicant did not explain to the Respondent why it, without any request, forwarded the said notification of award to **Antony Gatheca** on 30<sup>th</sup> May, 2016.

53. It was therefore contended that in the foregoing circumstances, the Respondent’s decision that the request for review was filed within 14 days and that it had jurisdiction to hear and determine the same was not arbitrary, unreasonable and irrational and Trascend relied on **Henry Asava Mudamba vs. Institute of Certified Public Accountants of Kenya [2015] eKLR** and **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR** and submitted that the Ex Parte Applicant has not demonstrated that the Respondent’s decision was tainted with unreasonableness and irrationality and the same does not lend itself for quashing.

54. To Trascend, the Respondent is established by section 29 and 182(4) of the ***Public Procurement and Asset Disposal Act, 2015*** read with Regulation 69(1) of the ***Public Procurement and Disposal Regulations, 2006*** and its jurisdiction was invoked by Trascend’s request for review filed pursuant to section 167(1) of the Act and Regulation 73(1) & (2)(c)(ii) of the ***Regulations***. From its decisions on the preliminary objections by the Ex Parte Applicant and the 2<sup>nd</sup> Interested Party it is clear that the Respondent understood that for a request for review to be said to be filed outside the 14 days prescribed by 167(1) of the Act, the Ex Parte Applicant needed to demonstrate that it had notified the 1<sup>st</sup> Interested Party on 26<sup>th</sup> May, 2016. It was contended that the Respondent demonstrated its understanding of the law when it held that for its jurisdiction to be ousted, the Ex Parte Applicant needed to demonstrate that it had notified Trascend in the manner prescribed by section 87(3) of the Act and cited **Republic vs. Public Procurement Administrative Review Board & 2 Others Team Engineering Spa ex Parte [2014] eKLR** where it was held that:

**“It is therefore important to determine whether the contract in question was signed in accordance with section 68 as the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In other words before the Respondents makes a determination that it has no jurisdiction to entertain the request by virtue of section 93(2)(c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section 68 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my view improper deprivation of jurisdiction is as bad as action without or in excess of**

**jurisdiction...A plain reading of the said provision clearly shows that the only notification that is required for the purposes of the application of section 68(2)(c) of the Act is that to the successful tenderer. However, this interpretation is objected on the ground that it would frustrate legislative purpose since the procuring entities would simply fail to notify the unsuccessful tenderers and enter into contracts after the fourteen days of notification to the successful tenderer and hence deprive the Board of the jurisdiction to entertain the review.”**

55. It was therefore submitted that the Respondent’s decision is not tainted with illegality and does not lend itself for quashing.

56. According to Trascend, the Respondent considered all facts before it to wit:

(a) that the 1<sup>st</sup> Interested Party received notification of award on 30<sup>th</sup> May, 2016;

(b) that there was no evidence that the 1<sup>st</sup> Interested Party or **Thomas Omanga** received the notification on 26<sup>th</sup> May, 2016;

(c) that the contact person for purposes of the tender notifications was **Antony Gatheca** and not **Thomas Omanga**;

(d) that **Thomas Omanga** left employment of the 1<sup>st</sup> Interested Party on 4<sup>th</sup> April, 2016;

(e) that the Ex Parte Applicant had at all times material to the tender process only communicated with Antony Gatheca and not **Thomas Omanga**; and

(f) that **Thomas Omanga** was a contact person for purposes of contract implementation only.

57. It was further contended that the Respondent considered the fact that in compliance with Clause 3.9 of the Tender Document Scanad submitted a bid individually and not as a partner in a joint venture. The Respondent considered that the fact that Scanad submitted details of persons who were not its employees for purposes of Clause 3.20.2(b)(ii) of the Tender Document which required “*employment records including contracts of employment for all key personnel.*” Trascend relied on section 2 of the provisions of the **Employment Act, 2007** and **Income Tax Act** as to what constitutes “employment” and “employee”.

58. Trascend also cited **Stanley Mungai Muchai vs. National Oil Corporation of Kenya [2012] eKLR, Fred Mudave Gogo vs. G4S Security Services (K) Ltd [2014] eKLR.**

59. According to Trascend the Respondent asked the relevant questions in respect of the employment status of the personnel in question were employees or contractors. It enquired whether the Ex Parte Applicant had annexed any evidence to demonstrate that it was related to purported sister companies; whether each of the purported sister companies were separate entities from the Ex Parte Applicant; whether the Ex Parte Applicant had any evidence to prove that the notification sent to **Thomas Omanga** was delivered to Trascend; why the Ex Parte Applicant had changed its communication channel through **Anthony Gatheca** and opted to communicate through **Thomas Omanga**; why the Ex Parte Applicant re-sent the email to the 1<sup>st</sup> Interested Party on 30<sup>th</sup> May, 2016 if it had been successfully sent on 26<sup>th</sup> May, 2016; and whether the Ex Parte Applicant had any evidence to demonstrate that the email notice had been delivered to **Thomas Omanga** on 26<sup>th</sup> May, 2016 or at all in view of Trascend’s submission that he had left its employment on 4<sup>th</sup> April, 2016 and that it had deleted his email account on 15<sup>th</sup> April, 2016. With no satisfactory answers to its enquiries, the Respondent was entitled to conclude rightly that the 1<sup>st</sup> Interested Party was duly notified on 30<sup>th</sup> May, 2016.

60. It was contended that the Respondent acted in accordance and within the confines of section 28(1)(a) and 173 of the Public Procurement and Disposal Act, 2015 and that in exercising its mandate aforesaid, the Respondent acted within the confines of Article 47 of the Constitution and the **Fair Administrative Action Act, 2015** by treating all parties fairly, by following the procedure as prescribed under Regulation

73 to 88 of the Act; by arriving at a rational decision based on the law and in an efficient manner.

61. On the allegation that the Respondent frustrated the legislative purpose it was contended that the Act purports to be an Act of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes. Section 3 of the Act provides the guiding principles to public procurement and asset disposal by public entities which principles apply through the entire process. Maximisation of value for money principle neither operates in isolation nor does it negate the duty imposed on the public entities to strictly follow the procurement cycle.

62. To Transcend, section 80 to 83 of the Act and Regulation 16(5), 46 to 52 of the **Regulations** prescribe the tender evaluation procedure. That is to say, preliminary evaluation, technical evaluation and financial evaluation. Thus, the Ex Parte Applicant breached section 3 and 80 to 83 of the Act by purporting that Scanad had submitted the lowest evaluated priced tender without conducting a fair and objective technical evaluation of its bid. Further, by finding that the Ex Parte Applicant had breached Regulation 49 and 50(1) of the **Regulations** by failing to disqualify the tender to Scanad's technical solution which did not comply with Clause 3.9 and Clause 3.20.2(b)(ii) of the Tender Document, the Respondent exercised its mandate to ensure strict compliance with the law. It was therefore contended that it was preposterous for the Ex Parte Applicant to allege that the Respondent frustrated the legislative purpose by railroading it to comply with the prescribed evaluation procedure and award criteria. In this respect reliance was placed on **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 others** (supra).

63. In Transcend's view, the application is not well founded as the Ex Parte Applicant did not demonstrate that the Respondent's decision making process was tainted by want of jurisdiction; unreasonableness and irrationality; illegality; failure to consider relevant facts; insufficient inquiry, abused power and frustration of the legislative purposes. Further, the application is incompetent and lacks merit as it challenges the Respondent's decision rather than the decision making process and ought to be dismissed with costs.

### **Determinations**

64. Having considered the application, the affidavits in support of and in opposition to the application as well as the submissions filed, this is the view I form of this matter.

65. In my view these proceedings are based on three substantive grounds. The first issue is whether the request for review was filed before the Respondent Board outside the prescribed period. Secondly, whether the review was filed after the execution of the contract hence the Board had no jurisdiction to entertain the same. Thirdly whether the Board considered irrelevant factors or failed to consider relevant ones hence frustrated the statutory purpose.

66. Article 167(1) of the Act, provides as hereunder:

***Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.***

67. It is therefore clear that the 14 days period starts running from the date of the notification of the award or the date of the alleged breach. That position was upheld in **Republic vs. Public Procurement Administrative Review Board & 2 Others [2015] eKLR** where it was held that:

**“The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded...”**

68. In this case, the Applicant awarded the subject Tender for the Provision of Advertising and Media Services to Scanad by its letter of award dated 25<sup>th</sup> May 2016. It however contended that it also notified the remaining tenderers that they were unsuccessful by letters dated 25<sup>th</sup> May 2016 which were sent via e-mail on 26<sup>th</sup> May 2016 and on 10<sup>th</sup> June 2016, a contract was entered into between the Applicant and Scanad. However the notification to Transcend was allegedly sent to the email of one **Mr. Thomas Omanga** who according to the applicant, Transcend had indicated as its point man in respect of the contract.

69. What is intriguing however is that the Ex Parte Applicant, without any request, forwarded the said notification of award to **Anthony Gatheca** on 30<sup>th</sup> May, 2016. Transcend's position was that its point man was in fact **Anthony Gatheca** and that that was the reason the notification was subsequently set to him on 30<sup>th</sup> May, 2016. The Respondent in fact agreed that this was the position. I further agree that the Applicant did not satisfactorily explain why it chose to send the notification of award to **Thomas Omanga** in blatant change of the established communication channel through **Antony Gatheca**.

70. I associate myself with the position of **Majanja, J** in **Republic vs. Kenya Revenue Authority & Another Ex-Parte Bear Africa (K) Limited** where the learned Judge cited with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR** as follows:

**“It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.”**

71. The Court of Appeal in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR** similarly expressed itself as follows:

**“...it is manifest that the application for Judicial Review was not well founded. The 1<sup>st</sup> Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of natural justice of that the decision was irrational. The Judicial review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly. The High Court erred in essence in treating the Judicial Review Application as an appeal and in granting review orders on the grounds which were outside the scope of Judicial Review jurisdiction”.**

72. In **Municipal Council of Mombasa vs. Republic & Another [2002] eKLR** the Court of Appeal expressed itself as follows:

**“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 the 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, is not the province of judicial review”.

73. The rationale for exercising restraint in decisions of the Respondent Board as explained in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others** (supra) as hereunder:

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

74. I have considered the decision of the Respondent on this finding of fact and it is clear that the Tribunal extensively dealt with the same before arriving at its decision. Whereas it may well be that the decision could be faulted on merits, it is not for this Court to find that the Respondent could not legally arrive at that decision. It is only an appellate Tribunal that is entitled to reverse a Tribunal on its findings on merits and substitute its findings for those of the Tribunal. This was the position adopted in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013]e KLR** where it was held that:

**“The Board considering all the arguments of the Applicant and made findings on each of these issues. The Board may have been wrong in its decision but this Court would be usurping the statutory function of the Board were it to substitute its own views for those of the Board”**

75. It is therefore my view that the finding by the Respondent that the request for review was made within the prescribed time cannot be faulted.

76. The next issue which is connected with the first is whether the Respondent entertained the Request for Review after the contract had been signed hence it lacked jurisdiction and its decision was unlawful. Section 167(4) of the Act provides as hereunder:

***The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***

***(a) the choice of a procurement method;***

***(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and***

***(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis added].***

77. Section 135(4) of the Act provides as hereunder:

***The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.***

78. The predecessor to this provision in the repealed ***Public Procurement and Disposal Act*** was dealt

with in Republic vs. Public Procurement Administrative Review Board & 2 Others ex Parte Team Engineering Spa [2014] eKLR where it was held that:

**“It is therefore important to determine whether the contract in question was signed in accordance with section 68 as the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In other words before the Respondent makes a determination that it has no jurisdiction to entertain the request by virtue of section 93(2)(c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section 68 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my view improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction...Therefore a contract can only be entered into within the period provided for in the notification under section 67(1) of the Act. However, whatever period of notification specified, the same can only be valid if the period stipulated is at least fourteen days from the date of giving of that notification. That notification necessarily refers to the notification in section 67(1) of the Act.”**

79. In the present state of law the notification must be the notification in section 135(4) of the Act. That a notification would only be valid if given to both the successful party and the unsuccessful parties to the tender was recognised in Republic vs. Kenya Revenue Authority Ex Parte Webb Fontaine Group FZ-LLC & 3 Others [2015] eKLR where it was held that:

**“The applicant therefore ought to have satisfactorily shown that the letter dated 8<sup>th</sup> June, 2015 was the notification contemplated under section 83(2) of the Act and that it met all the ingredients under Regulation 73(2)(c)(ii) of the Regulations with respect to notification to both the successful and unsuccessful parties at the same time. As this Court held in R vs. Public Procurement Administrative Review Board ex parte Noble Gases International Limited & 2 Others (supra):**

**“It is not in dispute that the letter dated 22<sup>nd</sup> August 2013 did not expressly notify any of the parties that its bid in respect of any items were unsuccessful. It is noteworthy that each of the bidders was notified via a separate letter. The letters did not mention which bids had been given to the opposite party in order for the particular bidder to deduce that its bid in respect of the other items were unsuccessful. Could the 2<sup>nd</sup> interested party reading the letter dated 22<sup>nd</sup> August 2013 necessarily deduce that its bid in respect of the other items was unsuccessful? I am not prepared to say so. It may be that the other items were still under consideration and had the 2<sup>nd</sup> interested party made a request for review without getting a clear picture of the fate of the other items, its request for review may well have been found to be premature if it turned out that no decision had as yet been made with respect to the other items. It was therefore only reasonable that the 2<sup>nd</sup> interested party seeks clarification as what was the fate of the other items for which there was no express indication that it had succeeded in bidding. Therefore the failure to expressly notify the parties that their bids were unsuccessful was an error on the part of the 1<sup>st</sup> interested party. That error in my view did not take away the bidders’ right to request for review. In my view with respect to the unsuccessful bids, the 2<sup>nd</sup> respondent’s time for making a request to the Respondent started running from the date that it was communicated to it either impliedly or expressly that its bid was unsuccessful. I have already held that there was no implied notification in the letter dated 22<sup>nd</sup> August 2013 that the 2<sup>nd</sup> interested party’s bids in respect of the other 8 items were unsuccessful since the letter did not indicate that the applicant was the successful bidder in respect thereof. May be if there had been such an indication or if the letters to the bidders were copied to the other bidder, the situation might have been different.”**

80. It follows that the notification having been validly given on 30<sup>th</sup> May, 2016, no contract could be entered into as the applicant purported to do on 10<sup>th</sup> June, 2016 before the expiry of the prescribed 14

days. It follows that the Respondent was not stripped of jurisdiction by the entry into the alleged contract.

81. It was contended that the Respondent took into account irrelevant factors and failed to take into account irrelevant ones. That these are grounds for grant of judicial review relief is not in doubt. As was held in Minister for Aboriginal Affairs vs. Peko-Wallsend Ltd [1986] 162 CLR 24 at 39-40 and 55:

**“A decision-maker will err by failing to take into account a relevant consideration or taking an irrelevant consideration into account. These grounds will only be made out if a decision-maker fails to take into account a consideration which the decision-maker is bound to take into account in making the decision or takes into account a consideration which the decision-maker is bound to ignore. The considerations that a decision-maker is bound to consider or bound to ignore in making the decision are determined by construction of the statute conferring the discretion. Statutes might expressly state the considerations that need to be taken into account or ignored. Otherwise, they must be determined by implication from the subject matter, scope and purpose of the statute”**

82. In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 was held:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...”**

83. In Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR this Court held that:

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

84. The holding in the *locus classicus* of Associated Provincial Picture Limited vs. Wednesbury Corporation [1947] 2 All ER 680; [1948] 1 KB 223 best deals with the ground in the following manner:

**“If, in the statute conferring discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question; they must disregard these matters...Unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that has all been referred to as being matters which are relevant for consideration...For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from consideration matters which are irrelevant to the matter that he has to consider. If does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”...Similarly, you may have something so absurd that no sensible person could ever dream that it would lay within the powers of the authority...”**

85. In this case, the facts in question related to the status of the persons who represented Scanad in the pitch. According to the applicant, though there was no requirement in the tender document that all those who participated in the pitch had to be employees of the tenderer, the Applicant nonetheless reviewed Transcend’s concerns and was satisfied that Scanad had not breached the tender document or the Act as Scanad provided a list of the pitch participants and this was the list that was used to allow entry into the

auditorium.

86. Clause 3.20.2 of the Tender Document stipulated as one of the tender's eligibility and qualification, the establishment to the Applicant's satisfaction that the Tenderer had the technical and management capability necessary to perform the contract which included employment records including contracts of employment for all key personnel proposed for the contract. According to the Applicant, it was satisfied that Scanad had not breached the tender document. The question is therefore whether the Respondent could in the exercise of its power of review overrule the Applicant on the discretion given to the Applicant under the aforesaid clause.

87. This issue calls for an interrogation of the role and powers of the Review Board when determining a request for review. The powers of the Board when exercising its jurisdiction are prescribed in section 173 of the Act which provides as hereunder:

*Upon completing a review, the Review Board may do any one or more of the following—*

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

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

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

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

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

88. Under the repealed *Public Procurement and Disposal Act*, section 98 conferred wide powers to the Respondent including annulling anything done by the Procuring Entity in the procurement proceedings, or indeed annulling the procurement proceedings in their entirety; giving directions to the Procuring Entity with respect to anything to be done or redone; or substituting its decision for any decision of the Procuring Entity. It is however clear that under the current legislative framework, the powers of the Review Board with respect to substitution of the decision arising from a procurement process is restricted to decisions of the Accounting Officers of the Procuring Entity as opposed to the decisions of the Procuring Entity itself or the Evaluation Committee. The powers of the Accounting Officer in terms of entry into a contract are to be found in section 135 which provides inter alia as hereunder:

*1)The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.*

*(2)An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.*

*(3)The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.*

*(4)No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.*

***(5)An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.***

89. The powers to deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it are however reserved to the Evaluation Committee set under section 46(4)(a).

90. In fact section 85 of the Act expressly provides that:

***Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers.***

91. In my view this demarcation of the roles between the Evaluation Committee and the Accounting Officer is important for the purposes of achieving transparency as decreed in Article 227 of the Constitution. It is however clear that the role of the Accounting Officer is to implement the decision of the Evaluation Committee since section 135(5) of the Act expressly bars the Accounting Officer from entering into a contract ***with any person or firm unless an award has been made.***

92. It is therefore clear that the powers of substitution given to the Review Board are now restricted to the decision of the Accounting Officer. Since Parliament saw it fit to restrict the powers of the Review Board, the Review Board can only exercise such powers as restricted by Parliament. This Court in **Republic vs. Public Procurement Administrative Review Board & 2 Others Team Engineering Spa [2014] eKLR** expressed itself as hereunder:

**“The general law of interpretation is that where the words of statute are plain there can be no more than one construction. With respect to past enactments it has always been a principle of interpretation that considerations stemming from legislative history must not override the plain words of a statute. Therefore where it is evident that a different and wider intention inspired a later Act, the intention of the Legislature as manifested in an earlier one will be of little assistance. The law as I understand it is that for the Court to find that a literal interpretation of an enactment would lead to absurdity, the absurdity must be so plain as not to require detailed analysis in arriving thereat. For the Court to engage in an extensive analysis of the enactment in order to find whether or not the same is absurd would amount to the Court usurping the legislative powers of the authority entrusted therewith and that is not the role of the Courts. The law in my view is that a law must not be interpreted in a manner that would render it meaningless or scandalous and that it must be interpreted to give meaning to the intention of the Legislature. However where the words clearly express the intention of the Legislature there is no room for any other interpretation.”**

93. It is trite that a judicial or quasi-judicial tribunal, such as the Board herein has no inherent powers. See **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734.** In **Choitram vs. Mystery Model Hair Salon [1972] EA 525, Madan, J** (as he then was) was of the view that powers must be expressly conferred and cannot be a matter of implication.

94. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive

their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon (supra); Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461.

95. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530 it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

96. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. See Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.

97. It is therefore my view the powers which the Review Board hitherto possessed of substituting the decision of the Procuring Entity were taken away by the Legislature under the current Legislation. The Review Board is however empowered to annul the decision of the Procuring Entity since its powers under section 173(a) of the Act encompass ***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.*** Similarly the Board may ***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.*** With respect to 173(c) however it can only ***substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings.*** In my view if Parliament intended that the Review Board has the power to substitute the entire award made by the Evaluation Committee nothing would have been easier than for it to have including the said Committee or imported the phrase ***procurement or disposal proceedings in their entirety*** in section 173(a) to section 173(c) as well.

98. It is therefore my view that the Review Board was properly entitled to review the whole procurement process, annul the same and give directions on how to proceed; it however had no powers to substitute the decision of the applicant with that of its own with respect to whom to award the tender. I, however, am unable to interfere with the factual findings of the Review Board.

99. considered this application it is my view and I hereby find that the Respondent had no power to substitute the award of the tender by the Applicant to Scanad by one awarding the tender to Transcend. Long before the enactment of the ***Public Procurement and Asset Disposal Act***, this Court had expressed itself in Republic vs. Public Procurement Review Board & 2 Others ex-parte MIG International Ltd & Another [2016] eKLR as hereunder:

**“Whereas this court cannot fault the reasoning of the Board on this issue, the Court however finds the Board's decision to award the said tender to the interested party irrational. Having found that there were other bids which ought to have been considered, the Board ought not to have stepped into the shoes of the procuring entity and made a decision awarding the**

tender to the interested party without considering the bids of the other bidders. The primary duty of considering the bids in order to determine whether they are in accordance with the tender documents rests on the procuring entity and therefore where the entity has not made a decision thereon, the board cannot step in and make that decision. This, in my view is the spirit of the holdings in *JGH Marine A/S Western Marine Service LTD CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises Vs. Public Procurement Administrative Review Board & 2 others (2015) eKLR* and *Republic vs. Public Procurement Administrative Review Board & 3 Others Ex parte Olive Telecommunication PVT Limited (2014) eKLR* in which it was variously held that the board has no power to ignore the express provisions of a tender document and go ahead to award the tender to another bidder, otherwise it crosses its statutory boundaries acts outside jurisdiction. Further, whereas the Board's latitude in applications for review is wide, such latitude ought not to be expanded to such an extent that it renders the idea conceived by the procuring entity totally useless. In other words where the procuring entity has, in the Board's view, unlawfully or unreasonably declined to exercise its statutory mandate as was alleged in this case, the only option is for the Board to direct the entity to carry out the same in accordance with the directions of the Board. It follows that the award to the interested party of the tender NO. KPS/ICB/T/11/2015- 2017 for supply and delivery of motorized vehicle hot stamping foils size 220 X 305m cannot stand."

100. I therefore find that to the extent that the Respondent substituted the decision of the Applicant, the former's decision was tainted with illegality. Under Section 11(1)(e) of the *Fair Administrative Action Act, 2015*, it is provided that in proceedings for judicial review, the court may grant any order that is just and equitable, including an order setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions.

### **Order**

101. In the premises I hereby set aside the Respondent's decision awarding the tender for the provision of Media and Advertising Services under Tender No. KP1/9AA-2/OT/46/CS/15-16 to the 1<sup>st</sup> interested party herein, **Transcend Media Group**, and remit the matter back to the Respondent to give appropriate directions to the Applicant on how to proceed with the tender.

102. There will be no order as to costs.

103. Orders accordingly.

**Dated at Nairobi this 29<sup>th</sup> day of May, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Miss Aluvale for Mr Kiragu for the Applicant***

***Miss Ngelechei for the Respondent***

***Miss Chichi for Mr Gachuba for the 1<sup>st</sup> interested party***

***Mr Mwangi for the 2<sup>nd</sup> interested party***

**CA Mwangi**