



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 525 OF 2016

IN THE MATTER OF THE LAW REFORM ACT CAP 26

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 40 OF 2015

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSALS ACT NO. 33 OF 2015

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI**

REPUBLIC.....APPLICANT

-VERSUS-

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

EX-PARTE

KENYA PORTS AUTHORITY LIMITED.....EX PARTE APPLICANT

AND

1. BROOMS LIMITED

2. ATLANTIC INTERTRADE LIMITED.....INTERESTED PARTIES

JUDGEMENT

Introduction

1. By a Motion on Notice dated 1st November, 2016, the ex parte applicant herein, **Kenya Ports Authority Limited**, seeks the following orders:
 1. **An order of Certiorari do issue to remove to this Honourable Court for purposes of quashing the decision of the Respondent made on 19th October, 2016 in Public Procurement Administrative Review Board Application No. 81 of 2016; Brooms Limited –v- Kenya Ports Authority concerning Tender No. KPA/149/2015- 16/MO.**
 2. **Pursuant to section 11(1) (f) of the Fair Administrative Action Act No. 4 of 2015, an order be issued compelling the Respondent to forthwith give reasons why the Award made on 19th October, 2016 in Public Procurement administrative Review Board application No. 81 of 2016 Brooms Limited –v- Kenya Ports Authority could not be made available to the ex parte Applicant or its advocates within a reasonable time.**
 3. **In any event, the ex parte Applicant’s costs of the application be borne by the Respondent.**

Ex Parte Applicant’s Case

2. According to the applicant, it is a body corporate created by virtue of section 3 of the **Kenya Ports Authority Act** Cap 391 Laws of Kenya discharging such functions as are bestowed on it under the statute while the Respondent, **the Public Procurement Administrative Review Board**, is a body corporate established under section 27 of the **Public Procurement and Asset Disposals Act** No. 33 of 2015 (hereinafter referred to as “the Act” or “the PP&AD Act”) to hear specified procurement disputes under the Act. The 1st interested party, **Brooms Limited**, and the 2nd interested party, **Atlantic Intertrade Limited**, on the other hand, are described as limited liability companies incorporated under the **Companies Act** Cap 486 (repealed).
3. The grounds upon which the application is based are as follows:
 - a. The Respondent orally read an award where it made orders re-evaluating the 1st Interested Party’s bid, upgraded its score and ordered the Applicant to continue with financial evaluation on the basis of the new score awarded to the 1st Interested Party.
 - b. The Respondent however did not release a copy of the Award within twenty one (21) days of the date of filing the request for review as mandated by section 171(1) of the Public Procurement and Assets Disposals Act 2015. In this case the request for review was filed on 29th September, 2016 meaning the twenty one (21) days lapsed on 19th October, 2016.
 - c. The Respondent despite delivering its orders on 19th October, 2016 only availed a copy of the Award on 27th October, 2016 at 4:30 p.m. The Respondent has to date not given any reasons in writing why it did not avail the Award within the twenty one (21) days period or within a reasonable period thereafter considering the statutory timeline regarding appeals from the Award.
 - d. The Respondent, after re-evaluating the 1st Interested Party’s bid, despite its lack of jurisdiction, proceeded to order the Applicant to re-open and re-evaluate the financial bids submitted by the bidders who had qualified to go to the financial evaluation.
 - e. Clause 24:2 of the Instructions to Tenderers require that the financial bids in a two stage tendering process like the current one will be “kept securely unopened until the technical evaluation has been completed”. Further, where a Tenderer fails at the Technical Evaluation stage, the financial bid remains unopened and will be returned unopened.
 - f. The **Public Procurement and Assets Disposals Act** in section 67(1) similarly prohibits disclosure of information relating to contents of tenders, evaluation, comparisons or information that inhibits fair competition.
 - g. By ordering a financial re-evaluation after dismissing the 1st Interested Party’s contention that its financial bid had been opened, the Respondent failed to appreciate that the 1st Interested Party had already become privy to information which could be used to inhibit fair competition and to undermine the theme of confidentiality running through the **Public Procurement and Assets Disposals Act 2015**.
 - h. In ordering the Applicant to re-evaluate the financial bids, the Respondent was unreasonable in not noticing that the 1st Interested Party’s financial bid had already been returned to it and receipt

- acknowledged. It would be not only unreasonable but also illegal for the Applicant to readmit a financial bid from the 1st Interested Party outside the period allowed for the submission of tenders.
- i. In directing the Applicant to re-evaluate the financial bids, the Respondent violated Article 227 of the Constitution, section 67 of the PP&AD Act 2015 and the common thread in all procurement requiring that no bidder should know the details of the bids submitted by other bidders unless it is a disclosure permitted by law.
 - j. In requiring a re-evaluation of the financial bids, the Respondent was expressly or by implication allowing the readmission of the 1st Interested Party's financial bid. This would be a violation of section 77(3) of the PP&AD Act 2015 which prohibits the admission of any documents after the deadline for submissions of tenders.
 - k. In reopening and re-evaluating the technical evaluation stage and awarding the 1st Interested Party additional marks, the Respondent took upon itself the role the Applicant in the evaluation process but then proceeded and applied an evaluation criteria not supported in law or by the Tender Document as follows;
 - i. In finding that the use of the words "respective field" in the Tender Document was ambiguous but then proceeding to evaluate the 1st Interested Party on the basis of that ambiguous provision by interpreting the ambiguity in favour of the 1st Interested Party.
 - ii. In finding that the "tender did not specify what exactly that Schedule of Works would entail" but proceeding to find that the 1st Interested Party should not have been awarded a zero score because it "complied with part of the requirement".
 - iii. In finding that despite the 1st Interested Party's failure to provide an inspection certificate for all the equipment it was still entitled to get the maximum score of three because the Tender Document was ambiguous as to what the inspection certificate would be.
 - iv. In finding that the Applicant did not provide calculations on how it arrived at the scores awarded to the Tenderers under the "Liquidity Ratio and Gearing Ratio" and then deciding for itself that the calculations must have been wrong and then awarding the 1st Interested Party the full scores without giving its own calculations.
 - v. In disregarding the three sub-sections under the "Financial Strength" section and instead deciding that any bidder who submitted "audited accounts" was entitled to the full marks.
 - vi. The Respondent having identified ambiguities, vagueness or lack of specificity in the various areas of the technical evaluation of the tender, it lacked jurisdiction to amend the tender document or to impose its opinion of what may have been intended by the Applicant.
 - l. If the evaluation process applied by the Applicant was wrong, which is not an admission that it was, then it must have been wrong across the board for all bidders and not just the 1st Interested Party. The Respondent therefore acted in excess of jurisdiction to re-evaluate the technical scores for the 1st Interested Party only and then let the Applicant evaluate the other three bidders.
 - m. The Respondent in considering and granting prayers not sought by the 1st Interested Party acted in excess of its jurisdiction.
4. According to the applicant, it is the Procuring Entity in Tender No. KPA/149/2015-16/MO for provision of mobile/portable toilet services. It was averred that the Applicant after a thorough evaluation of the received bids declared the 2nd Interested Party (**Antlantic Intertrade Limited**) as the lowest evaluated bidder and consequently awarded the tender to it. Aggrieved by the said decision, the 1st Interested Party (**Brooms Limited**) filed a Request for Review with the Respondent pursuant to section 176 of the *Public Procurement and Disposal Act 2015* being **Public Procurement administrative Review Board Application No.81 of 2016 - Brooms Limited -v- Kenya Ports Authority**. To that request, the Applicant responded by filing a comprehensive response setting out the procurement process in addition to sending to the respondent the usual confidential documents required under section 67(3) (c) of the *Public Procurement and Disposal Act 2015* .
 5. Based on legal advice the applicant averred that the Respondent after hearing both parties read its decision to the parties on 19th October, 2016 where the gist of the direction was as follows:

- a. The Respondent revisited the technical evaluation stage and awarded the 1st Interested Party marks that made it qualify for the financial evaluation stage.
 - b. The Respondent ordered the Applicant to, within fourteen (14) days, reevaluate the 1st Interested Party's financial bid together with those of the other bidders that had qualified for the financial stage and to subsequently award the tender.
6. The applicant lamented that the Respondent never released a copy of the Award, whether handwritten or typed and certified, despite a written reminder and numerous follow ups by the Applicant and its advocates. It was however averred that the Applicant, together with its advocates on record, have perused the Award and notwithstanding the very short time available to it, has noted that the Respondent acted in excess of jurisdiction, irrationally, illegally and considered irrelevant factors in reaching the decision it did as particularized in the Statutory Statement.
 7. It was submitted on behalf of the applicant that that section 175(3) & (5) of the PP&AD Act 2015 are unconstitutional. The basis for the claim of unconstitutionality is Article 48 and 50(1) of the Constitution. Section 175(3) & (5) additionally intrudes on the judicial independence guaranteed by Article 160 of the Constitution.
 8. It was noted that section 175(3) & (5) is an exact replica of the provisions of section 100(4) of the ***Public Procurement and Disposals Act of 2005*** (now repealed) save for substituting forty five days in the 2015 Act with thirty days in the repealed Act. The High Court presided over by three different learned judges all found section 100(4) to be unconstitutional and in this regard reference was made to **Republic vs. Public Procurement Administrative Review Board & Another ex parte Selex Sistemi Integrati [2008] eKLR**, **Republic vs. The Public Procurement & Administrative Review Board ex parte Zhongman Petroleum & Natural Gas Group Company Limited [2010] eKLR** and **Republic vs. Public Procurement & Another Ex-Parte Hyosung Ebara Company Limited [2011] eKLR**.
 9. The applicant also relied on **Joseph Nyamamba & 4 Others vs. Kenya Railways Corporation [2015] eKLR** where it was held that:

“Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized. Article 48 therefore invites the Court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law.”

10. In the present case, the right of access to justice will only be realized by declaring sections 175(3) & (5) of the PP&AD Act 2015 unconstitutional in their effect. Once they are struck down, the court will then be free to dispense justice, as it is empowered to, without unnecessary constraints.
11. It was submitted that by ordering a re-evaluation of the tendering process at the financial stage after finding that the 1st Interested Party's financial bid had already been returned, the Board had failed to take into account that the procurement legislation envisages privacy as the basis for fair competition. In ordering a re-evaluation of the financial bids, the Board was ordering the ex parte Applicant to receive a financial bid that had already been sent back to the bidder. This would be contrary to section 77(3) of the PP&AD Act 2015.
12. To the applicant, the Board revisited the technical valuation and carried out its own valuation of the 1st Interested Party's technical bid. The Board then in no less than five areas found the tender document to be unclear, unspecific, vague or ambiguous but proceeded to award the 1st Interested Party marks on the basis of that Tender Document. The Board therefore in effect amended the Tender Document or applied an evaluation criteria that only it understood.
13. With respect to the failure to supply the applicant with the reasons for the decision the applicant relied on **Republic v Public Procurement Administrative Review Board & another Ex parte Wajir County Government [2016] eKLR**.
14. The applicant relied on section 67(1) of the PP&AD Act 2015 which provides that:

During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee

of the procuring entity shall disclose the following—

- a. *information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;*
- b. *information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;*
- c. *information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or*
- d. *the contents of tenders, proposals or quotations.*

15. The 1st Interested Party resorted to the Board after it had been notified that its tender had not succeeded because it did not meet the technical specifications. Its financial bid was therefore returned unopened. Therefore, as at the time that the 1st Interested Party was approaching the Board, it had in its possession its financial bid, which was only known to it, as well as information on the amount that the 2nd Interested Party had bid. This much was apparent or ought to have been apparent to the Board.
16. When the Board carried out its technical re-evaluation, awarded the 1st Interested Party the amorphous marks it did and referred the matter back for financial evaluation, there was effectively nothing to be evaluated. The Tender Document provided that the tender would be awarded to the lowest evaluated bidder. There can therefore be no doubt that the 1st Interested Party with the alleged financial bid of Kshs. 1,498,720.00 will be the lowest evaluated bidder.
17. It was therefore submitted that the Board therefore simply assisted the 1st Interested Party in ensuring that its financial bid is evaluated after it has had knowledge of its competitor's financial bids. The confidentiality and fair competition envisaged by section 67 of the PP&AD Act 2015 as well as Article 227 of the Constitution do not contemplate a scenario where the Board abuses its power in that manner. It was therefore contended that the Board acted inconsistently with the purpose and aim of the Act and the Constitution.
18. With respect to the effect of ordering the ex parte Applicant to readmit the 1st Interested Party's financial bid and then subject it to financial evaluation, the applicant relied on section 77(3) of the **PP&AD Act 2015** which provides that:

A tender shall be submitted before the deadline for submitting tenders and any tender submitted after the deadline shall not be accepted by the procuring entity.

19. According to the applicant, a tender invariably includes the financial bid. The law outlaws the acceptance of a tender after the deadline for submission of tenders. It is plain that the deadline in this case had already passed. The Board however required that the financial bid, which was now in the 1st Interested Party's possession, be returned to the ex parte Applicant for evaluation. Such a directive by the Board, it was submitted requires the ex parte Applicant to accept a bid submitted in contravention of the law. To the applicant, even though the Board has expansive powers on a review application, those powers do not extend to issuing directions to the ex parte Applicant to commit or participate in illegalities.
20. It was contended that the Board in conducting the technical evaluation of the 1st Interested Party's bid, found that some provisions of the Tender Document were either unclear, unspecific, vague or ambiguous but proceeded to award marks to the 1st Interested Party so that its technical score moved from the 66% awarded to some undisclosed figure beyond the 75% required in the tender document. It was averred that the Board simply failed to understand that if "relevant field" had not been defined it could not create a definition to include each and every other field. One would ask why the Board found that since the Managing Director had a Bachelor of Commerce in Marketing, such qualification would be read to fit in to the phrase "respective field". The Board in that case read into the Tender Document in an impermissible manner. The applicant also referred to page 476 second paragraph and contended that the Board at this part again found a provision of the Tender Document to be unspecific and ambiguous. The Board then confounded issues further by just saying that the score of zero was unfair without then saying what would be the fair score.
21. The third instance of the excess of jurisdiction, according to the applicant, is at page 476 the third

paragraph and in this respect the applicant submitted that here again the Board exceeded its jurisdiction by taking the Procuring Entity's counsel's admission that he did not know the Government Agency with the mandate of inspecting portable toilets to mean the tender document was ambiguous and unclear. Interestingly, the Board still awarded the 1st Interested Party the full points despite the clear finding that it had provided certificates for some equipment but not for others. To the applicant the Board simply rendered that provision in the Tender Document a cosmetic provision.

22. The fourth scenario of excess of jurisdiction, according to the applicant is at page 477 where the Board dealt with the requirement for audited accounts in a manner that the applicant deemed the Board as saying that it mattered not what the Tender Document said but as long as any bidder supplied audited accounts, they ought to have been awarded the full 10 marks simply because the Board felt the formula for awarding the marks was unclear to the Board. This was notwithstanding that the Financial Strength section had three subsections under it and each subsection placing distinct requirements on the bidders.

23. To the applicant, the fifth instance of excess of jurisdiction is when the Board at page 479 says that:

The cumulative effect of the Board's finding above place the Applicant technical bid score well over the 75 point threshold.

24. What the Board did was to approximate figures without any sort of specificity yet the ex parte Applicant is required by law to give specific marks scored by a bidder, there is no opportunity for second guessing. The Board however, in purporting to substitute its decision for that of the ex parte Applicant left the parties without knowing the score that the 1st Interested Party was awarded at the technical evaluation. All the board said was that the score was "well over the 75 point threshold". How many marks is well over the "75 point threshold"? If the procuring entity had adopted such an approach in scoring the bidders, the Board would have taken issue with that as being a violation of the law. If that be the case, then the Board similarly acted in excess of jurisdiction when it left the parties with amorphous scores.

25. According to the applicant, it has been held severally that the Board exceeds its jurisdiction any time it finds ambiguities in a tender document but then decides to give an interpretation to that Tender Document and reference was made to ***JGH Marine case (supra)*** and **Republic vs. Public Procurement Administrative Review Board & 2 Others Ex- Parte Akamai Creative Limited [2016] eKLR.**

26. It was the applicant's belief that it had demonstrated numerous instances of illegality and excess of jurisdiction also known as *ultra vires*. It is now settled that the order of certiorari issues to quash a decision that is *ultra vires* or illegal. That should be the order issued in this case.

27. It also contended that it had also shown that despite the ex parte Applicant's numerous follows ups to obtain a copy of the Board's award, the award was only made available on 27th October, 2016 and then only at 4:30 p.m. Since the present judicial review application was not based solely on the ***Law Reform Act*** but also on the ***Fair Administrative Action Act 2015***, the remedies that the court can grant therefore are more than the three orders of judicial review known under the ***Law Reform Act***. The powers of a court faced with an application under the ***Fair Administrative Action Act*** are provided in an expanded manner in section 11 of the Act. Among the orders that may be issued is an order compelling the administrator to give reasons for the decision. It was the applicant's belief that this was an appropriate time to get that order issued against the Respondent in order to ensure that prior judgements made by the court where the Respondent was being reminded of its duty to avail copies of its decision are not shelved and treated as gratuitous advice. The Respondent is a statutory body funded by public funds and it must be held to account for its acts and omissions. The courts and litigants cannot be at its whims and mercy to obtain copies of awards at its convenience without sanction.

28. The Court was therefore urged to grant the prayers sought in the Notice of Motion dated 1st November, 2016 and 16th November, 2016 save for the prayer of costs which section 175(7) of the PP&AD Act 2015 direct should not be awarded against any party.

2nd Interested Party's Case

29. The application was supported by the 2nd interested party.

30. According to them, the Respondent acted without any jurisdiction and/or in excess of its jurisdiction and contrary to section 173 of the ***Public Procurement and Asset Disposal Act No 33 of 2015*** (hereinafter the Act) when it purported to re-evaluate the 1st Interested Party's technical bid, cancel the technical score of 66% awarded to the Ex parte Applicant and substitute that technical score with its own unknown and/or unspecified score.

31. It was contended that:

i. The Respondent acted without any jurisdiction and/or in excess of its jurisdiction and contrary to section 173 the Act when it purported to interpret, amend and/or otherwise re-write each and every instance of ambiguity found in the Tender Document and to thereafter re-evaluate the 1st Interested Party's technical bid based upon its own interpretation and amendments to the said Tender Document.

ii. The Respondent's finding that the Ex Parte Applicant failed to provide the 1st Interested Party with reasons for its non-success and/or disqualification from the tender process was unfair, unreasonable, irrational and contrary to the well known Wednesday's principal of reasonableness as it deliberately failed to consider the Ex Parte Applicant's letter to the 1st Interested Party dated 16th September 2016 expressly stating the said reasons for its non-success and/or disqualification from the tender process.

iii. The Respondent acted unfairly, unreasonably and irrationally by giving undue preferential treatment to the 1st Interested Party and effectively and unfairly locked out all other bidders who were subject to the same ambiguities in the standard technical evaluations conducted by the Ex Parte Applicant when it ordered the Ex Parte Applicant to consider only the 1st Interested Party for financial evaluations, having re-evaluated its technical bid.

iv. The Respondent's decision is in violation of Article 47 (1) of the Constitution which affirms the right of every person to administrative action that is efficient, lawful, reasonable and procedurally fair.

v. That there is no provision under Act which confers upon the Respondent with jurisdiction to disregard the tender documents and award a tender to an unsuccessful bidder based on criteria not contained in the tender document. Such conduct by the Respondent constitutes unreasonableness and irrationality.

vi. The Respondent acted in excess of its powers and considered irrelevant factors in arriving at its impugned decision as a result of which the said decision is irrational, unreasonable, illegal and bad in law.

vii. The Respondent's actions and delay in supplying all parties to the Review with a typed copy of its decision was illegal and contrary to sections 4(2) and 6(1) of the ***Fair Administrative Action Act, 2015*** and section 58 of the ***Interpretation and General Provisions Act, CAP 2***.

32. For the reasons afore stated, it was argued that the orders sought in the Ex Parte Applicant's Notice of Motion are merited and ought to be granted as prayed.

33. It was submitted on behalf of the 2nd interested party that the Respondent's entire decision of 19th October 2016 is illegal and bad in law in that the Respondent acted *ultra vires* and considered irrelevant factors in arriving at its decision and the impugned decision is therefore illegal, irrational, unreasonable.

According to the 2nd interested party, the Respondent acted without any jurisdiction and/or in excess of its jurisdiction and contrary to section 173 of the **Public Procurement and Asset Disposal Act No. 33 of 2015** when it purported to re-evaluate the 1st Interested Party's technical bid, cancel the technical score of 66% awarded by the Ex Parte Applicant and substitute that technical score with its own unknown and/or unspecified score.

34. It was submitted that section 173 of the Act lists the powers available to the Respondent Board upon hearing a review as follows:

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

35. However, the Respondent acted without any jurisdiction and/or in excess of its jurisdiction and contrary to section 173 the Act when it purported to interpret, amend and/or otherwise re-write each and every instance of ambiguity found in the Tender Document and to thereafter re-evaluate the 1st Interested Party's technical bid based upon its own interpretation and amendments to the said Tender Document. In support of its submission the 2nd Interested Party relied on the judgment delivered on 10th July 2015 in **Nairobi JR No. 137 of 2015 Republic vs. The Public Procurement and Administrative Review Board & 2 Others Ex Parte CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises (the Civicon Case).**

36. The 2nd Interested Party submitted that having found the tender to have been vague, then the only reasonable and lawful action for the Respondent was to refer the tender back to the Ex Parte Applicant with directions to amend the tender documents to cure such ambiguities. It was submitted that the cumulative effect of the Respondent's actions to act *ultra vires* the powers granted under section 173 of the Act and to otherwise purport to interpret each and every instance of ambiguity found in the Tender Document, and to amend and/or otherwise re-write the Tender Document and re-evaluate the 1st Interested Party's technical bid based upon its (the Respondent) own interpretation and amendments amounted to an illegality and a gross miscarriage of justice.

37. It was therefore submitted that the Respondent acted in an irrational and grossly unreasonable manner by its failure to refer tender back to the Ex Parte Applicant to amend and/or otherwise cure the ambiguities found in the tender document but instead purporting to interpret the tender. Further, that the Respondent's action to award points in certain categories of the technical evaluation stage and not to award points at other categories is of its self grossly unreasonable and irrational.

38. It was the 2nd interested party's case that the Respondent violated Article 47 of the Constitution by failing to furnish the decisions for its decision expeditiously. The 2nd Interested Party relied on the finding in **Nairobi Miscellaneous Application No. 116 of 2016 (Consolidated With Miscellaneous Application No. 119 of 2016) Coast Water Services Board & China Henan International Cooperation (Chico) Group Limited vs. The Public Procurement Administrative Review Board And Toddy Civil Engineering Company Limited & Sinohydro Tianjin Engineering Company Limited J/V Machiri Limited (Interested Parties)** wherein this Honourable Court held that:

“In my view efficiency in procurement processes not only demands speedy determination of the disputes but also encompasses speedy and timely availability of the decisions to the parties so as to enable them decide on their next course of action. It is therefore my view that to unreasonably delay in furnishing proceedings and decisions to the parties amounts to unfair administrative action.”

39. Further, in ordering the Ex Parte Applicant to consider only the 1st Interested Party for financial evaluations, having re-evaluated its technical bid, the Respondent gave undue preferential treatment to the 1st Interested Party and effectively and unfairly locked out the 2nd Interested Party and all other bidders who were subject to the same ambiguities in the standard technical evaluations conducted by the Ex Parte Applicant.

40. It was submitted that the Respondent, in clear violation and disregard of the limits of its powers of review under section 173 of the Act, did in fact carry out a Technical Evaluation of the 1st Interested Party’s bid. At Page 16 of the impugned decision, the Respondent held that the **“Applicant scored well over the 75-point threshold in the technical bid.”** This is a clear pronouncement on the Technical Evaluation of the 1st Interested Party’s bid.

41. Further, that this unreasonable delay in availing its decision amounts to unfair administrative action by the Respondent.

42. It was submitted that it is unlawful and/or *ultra vires* and in breach of the principle of Separation of Powers for the legislature to purport to gag or otherwise impose limitations upon this Honourable Court’s jurisdiction to hear and determine a matter properly before it.

43. It is the 2nd Interested Party’s submission that section 175 (3) & (5) of the **Public Procurement and Asset Disposal Act, 2015**, so far as it seeks to dictate and/or limit the timeline within which this Honourable Court shall deliver its decision in this matter, and/or otherwise to declare that this Honourable Court’s decision, if delivered outside the timelines dictated by that statute, are null and void, is inconsistent with the Constitution.

44. It was the 2nd Interested Party’s submission that section 175 (3) & (5) of the Act is unlawful and unreasonable in that it (the Act) does not give any reason or justification for such limitation to the powers of this court to deliver its decision and/or the right of a litigant to hear and actualize a pronouncement from this court.

45. It was therefore submitted that for the reasons enumerated herein, the Respondent’s entire decision of 19th October 2016 is illegal and bad in law, and as has been previously observed by this Honourable Court, the Court ought not to rubber stamp such excessive misdirection by the Respondent.

Respondent’s Case

46. On its part, the Respondent opposed the application.

47. According to the Respondent, on 29th September, 2016, the 1st Interested Party filed a Request for Review before the Respondent challenging the award of the Tender No. KPA/149/2015-16 for the Provision of Mobile Toilet Services on or before 1000 hours. After receiving the Request for Review, from the 1st Interested Party, the Respondent served a copy on the, Ex Parte Applicant 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 74(2) of the **Public Procurement and Disposal Regulations, 2006**, hereinafter referred to as “the Regulations”.

48. It was averred the Respondent heard the parties on 17th October, 2016, considered their pleadings and submission, determined the application for review and delivered its ruling on 19th October, 2016 in which

it only took into consideration facts that were presented before it and were relevant in deciding the above issues.

49. According to the Respondent, its decision was based on its findings that:

a. On the requirement for over 5 years of experience, the Applicant demonstrated to the Board, by reference to its bid document that the management personnel had over 5 year's experience as required. The Board finds that the Applicant was entitled to three points on this category.

b. The tender required demonstration of minimum diploma requirement "in respective field". At the hearing the Procuring Entity argued that respective field was "environmental Science" and that the Applicant's undisputed managing Director's Bachelor of Commerce in marketing did not count. The Board finds that the requirement was ambiguous because the "respective field" was not defined. In any case, 2 of the Board finds that the Applicant was thus entitled to three points.

c. The tender also required bidders to show Schedule of Work, with an indication that the requirement included assignment of manpower the item carried 10 marks. The tender did not specify what exactly that Schedule of Work would entail in a tender for portable toilets. Different bidders gave different things. The Applicant did submit a Schedule of Work, but it left out the assignment of manpower. The Board finds that the zero score was unreasonable in view of the ambiguity and the fact that the Applicant complied with part of the requirement.

d. The Tender required the bidders to attach "current inspection certificates of the equipment" from the relevant authority. The Applicant attached an inspection certificate of the exhauster (motor vehicle) but not for the toilet and was given a score of one out of three points. The Applicant argued that there was no requirement for the testing of portable toilets in the industry. The Procuring Entity admitted at the hearing that it did not know which authority had the mandate of inspecting portable toilets. The Board noted that the fact that one bidder opted to obtain an inspection certificate form the county government did not make that the standard or requirement for other bidders. It was up to the Procuring Entity to give clear requirements in its tender document. In view of this ambiguity, the board finds that there was no justification to deny the Applicant the 3 points.

e. All bidders were required to submit audited accounts for 3 years from which the Procuring Entity would work out the Liquidity Ratio, the Gearing Ratio and the Profitability Ratio. The Procuring Entity, which worked out the ratios, did not attaché the calculation to its pleadings or to the original documents which it presented to the Board. That left the Board without a way of verifying the Procuring Entity's allegations, the Procuring Entity did not discharge its clear burden of proof. To disqualify one bidder on the same was unjustified and clothed in ambiguity. The Board notes that the Applicant should have been awarded full mark in this regard just as all other bidders who produced audited accounts.

f. The Applicant scored 66 points overall awarded to the Applicant was unjustified and arrived at out of the application of a criteria not to be found in the tender document and in violation of Section 80(2) of the Act which clearly set out that only the criteria to be found in the tender document would be used to evaluate tenders and no other.

g. The cumulative effect of the Boards rulings place the applicant's technical bid well over the 75 point threshold. The Board finds that the Procuring Entity was not justified in disqualifying the Applicant at the technical stage.

50. It was the Respondent's case that in making its decision, the Board considered considering all documents of evidentiary value placed before the Respondent by the parties and the submission of the parties on each of the issues raised in the Request for Review and that its decision was made within its mandate, and the specific sections of the law in particularly section 173 of the **Public Procurement and Asset Disposal Act 2015**, on which the Board's decision was pegged.

51. To the Respondent, the Applicant has 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 or irrationality in arriving at its decision. The decision by the Board is grounded in law after review of all material conditions placed before it and importantly in line with its mandate to uphold public procurement process. Further, 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.

52. It was the Respondent's view that the Applicant's application was 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 and the Court was to dismiss the applicant's Application and all the orders prayed for therein.

53. It was submitted on behalf of the Respondent that its decision was delivered on the 19th October, 2016 well within the statutory period of 21 days in consonance with the provided timelines as imposed by section 171 of the **Public Procurement Disposals Act 2015** and that it furnished the ex-parte applicants with a copy of the decision on the 27th October, 2016. Having been furnished with a copy of the ruling, the applicant was well within the statutory period of 14 days to exercise its right to file a Judicial Review application in the High Court and that the applicant filed the present Judicial Review application on the 31st October, 2016. It was submitted that the delay in furnishing the applicant with a written copy of the ruling was not inordinate and hence no prejudice whatsoever was suffered by the ex-parte applicant and relied on **Republic vs. Public Procurement and Administrative Review Board ex parte Akamai Creative Limited Misc Civil Applic. No. 513 of 2015.**

54. With respect to the contention that the Respondents decision to order the applicant to re-open and re-evaluate the financial bids submitted by the bidders who had qualified to go to the financial evaluation was irrational and in dereliction of the Respondents duty, the Respondent relied on **Republic vs. Kenya Power & Lighting Company Ltd & another [2013] eKLR** and **Republic vs. Public Procurement and Administrative Review Board & Another Ex-parte Gibb Africa Ltd & Another [2012] eKLR** and contended that there is an onus placed on the Ex-parte applicant to demonstrate that the decision of the Respondent was so absurd that no sensible person could ever dream that it lay within the powers of the Authority.

55. In this case the 1st respondent maintained that it did not make an absurd conclusion that would warrant the intervention of this court since there is no evidence placed before the court by the applicants to show that the decision of the 1st respondent is unreasonable in the Wednesbury sense. In the present case the Respondent Board made a finding and Ordered that the procuring entity to allow the applicants bid back to the procurement process and proceed to carry out a financial evaluation alongside other bids which passed the technical evaluation, the question then begs was that such a grossly unreasonable that would merit a quashing of the same. The Respondents submit that, that cannot possibly be the case.

56. Based on **Republic vs Public Procurement and Administrative Review Board & 3 Others Exparte Olive Telecommunication PTV Limited [2014] eKLR**, it was submitted that in rendering its decision on the 19th October, 2016, the Respondent was guided by the law and more specifically the provisions of section 171, 173(2) and(3) of the **Public Procurement & Assets Disposal Act, 2015**. The respondent has powers granted to it under section 173(2) to give directions to the accounting Officer of a procurement entity in respect of anything to be done or redone in the procurement process which includes reconsideration of the 1st Interested Party's bid. In view of the facts placed before it in the Review application the Respondent acted within the law in its analysis.

1st Interested Party's Case

57. The application was similarly opposed by the 1st interested party.

58. According to them, through tender No. KPA/149/2015-16/MO the Applicant herein as the procuring

entity floated a tender for provision of mobile/portable toilets services inviting prospective and eligible candidates to place their bids in respect of the tender in accordance with the bidding procedures set out under the **Public Procurement & Asset Disposal Act, 2015**. The 1st Interested Party herein submitted its bid for the tender on the 6th of July 2016 in accordance with the terms of clause 20.1 0 Instructions to Tenderers (ITT) of the Tender Document and submitted the same to the Chairman of the ex-parte Applicant Tender Committee.

59. It was averred that the ex-parte Applicant as the procuring entity received 10 bids from prospective firms that applied for the tender including the 1st and 2nd Interested parties herein together with other firms namely: M/s JengaIdeas Limited, Labour Plannet, Bek Supplies, Groupage Ventures, Alphatech International Limited, Eurolink Ventures, Kasamba Enterprises and Moreflow Enterprises and that upon submission of the bids by all the prospective entities, all the tenders were subjected to preliminary evaluation in accordance with clause 27.1 of the Instructions to Tenderers of the Tender document after which 6 bidders met the criteria for preliminary evaluation which included the 1st and 2nd Interested party as well as Messrs. Labour Plannet, Bek supplies, Groupage Ventures, Alphatech International limited which firms proceeded to technical evaluation stage of the procurement process. The foregoing 6 firms were thereafter subjected to the Technical Evaluation criteria as set out in clause 28.2 of ITT of the Tender document and after the technical evaluation, the 1st Interested party was notified by the ex parte Applicant herein vide a letter dated the 16th of September 2016 that its bid was not successful and that it did not attain a minimum score of 75% as required by the tender document in order to proceed to financial evaluation.

60. Being aggrieved by the said decision of the ex-parte applicant as the procuring entity, the 1st Interested Party lodged an application for Review with the Respondent being **Public Procurement Administrative Review Board Application No.81 of 2016, Brooms Limited –versus- Kenya Ports Authority** setting out 8 grounds for consideration by the Board in accordance with the provisions of 167 of the **Public Procurement & Asset Disposal Act, 2015**.

61. Upon considering submission by all the parties before it, the Respondent delivered a sound decision vide its award dated the 10th of October 2016 which forms the subject matter of the dispute before this Court.

62. It was the 1st interested party's case that the Application as filed by the ex-parte applicant herein does not demonstrate any reasons to warrant the grant of the orders sought herein as the decision of the respondent herein is sound in law and is guided by the provisions of the **Public Procurement & Asset Disposal Act of 2015** as read together with the attendant regulations.

63. The 1st interested party's view was that having been furnished with a copy of the decision as aforesaid, the Applicant herein was within its right to lodge an Application for Judicial Review before this Honourable Court within the 14 days prescribed under the provisions of section 175 of the **Public Procurement & Asset Disposal Act, 2015** and that the Applicant herein indeed lodged the Judicial Review Application herewith on the 31st of October 2016 seeking leave to commence Judicial Review Proceedings barely four days later and within the prescribed timeframe as provided for under the provisions of section 175 of the said Act and as such, no prejudice of whatever shape or form was suffered whatsoever on the part of the Applicant herein.

64. It was asserted that it is not in contention that the Respondent herein delivered its decision within the parameters and time frames set out in section 171 of the **Public Procurement & Asset Disposal Act, 2015** and thereby the Respondent discharged its mandate and acted within its statutory timeframes set out in the said Act and as such there no ground to warrant issuance of the judicial review orders sought on the basis of this ground.

Determinations

65. I have considered the Notice of Motion, affidavits, the written submissions and judicial authorities herein and this is the view I form of the matter.

66. The first issue for determination is the legality of section 175(3) & (5) of the *PP&AD Act 2015*. The said provisions state as follows:

(3) The High Court shall determine the judicial review application within forty five days after such application.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

67. The precursor to the above section was section 100(4) of the repealed *Public Procurement and Disposal Act*. The said provision provided as follows:

If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect.

68. That the Court's jurisdiction can be restricted or ousted by legislation is not in doubt. However over time there are principles which have been developed by the Courts in determining when the ouster clauses ought to be applied. The starting point in my view in the decision of **Mulenga, JSC** in the Supreme Court of Uganda case in **Habre International Co. Ltd vs. Kassam and Others [1999] 1 EA 125** in which the learned Judge expressed himself as follows:

“The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this.”

69. It was in the same spirit that **Biron, J** in **Mtenga vs. University of Dar-Es-Salaam, Dar-Es-Salaam HCCC No. 39 of 1971** opined that:

“It is trite to observe that a court is, and has to be for the protection of the public, jealous of its jurisdiction, and will not lightly find its jurisdiction ousted. The legislature may, and often does, far too often, oust the jurisdiction of the Court in certain matters, but for the court to find that the Legislature has ousted its jurisdiction, the Legislature must so state in no uncertain and in most unequivocal terms.”

70. In **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**, **Nyamu, J** (as he then was) recognised the public interest in the enactment of the Act when he stated as follows:

“Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public. Indeed, sections 36(6) and 100(4) of the Act which are ouster clauses, were tailored to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and

accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant. Adjudication of disputes is a constitutional mandate of the Courts and the Court cannot abdicate from it.”

71. In the above case, it was held that ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. The learned Judge recognised that the Court’s jurisdiction may be precluded or restricted by either legislative mandate or certain special texts. However, where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable.

72. This position was appreciated by the East African Court of Appeal in **The District Commissioner Kiambu, vs. R and Others Ex Parte Ethan Njau [1960] EA 109** where it pronounced itself as follows:

“Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. But it is the court’s plain duty to give the words of an Act their proper meaning.”

73. Under Article 48 of the Constitution the State is enjoined to ensure access to justice for all persons. Under Article 20(3) and (4) of the Constitution this Court in applying any provision of the Bill of Rights under which Article 48 falls, is enjoined to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. In so doing the Court is constitutionally obliged to promote the spirit, purport and objects of the Bill of Rights. Under Article 259 of the Constitution, some of the tools of the interpretation of the Constitution are that it must be interpreted in a manner that advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights and permits the development of the law.

74. It was accordingly held by **Rawal, J** (as she then was) in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331** that:

“Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits.”

75. In **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57** the Court of Appeal expressed itself as follows:

“The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle.”

See **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130.**

76. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, “Why then, this must be an end to it”. The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

77. That the law must of necessity, adapt itself to the changing social conditions and not lay still was

similarly appreciated in **Kimani vs. Attorney General [1969] EA 29.**

78. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

79. In enacting legislation Parliament ought to take into account the prevailing legal conditions since access to justice can only be realized in an atmosphere where there is in place efficient infrastructures conducive to the realization of the right. To enact legislation without taking into account the realities under which the judicial system operates may well hinder access to justice. Such legislation may well fall foul of the spirit of the Constitution and may well be struck down as being unconstitutional. As appreciated by Nyamu, J in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati** (supra):

“In the exercise of judicial review jurisdiction the Courts have tried to cope and give rulings and judgments within a reasonable time. However due to the disproportionate ratio of judges vis a vis the population, to achieve the ideal of a timed determination of sometimes complex procurement matters whose documents are invariably voluminous and also accompanied by complex technical data giving, a determination within 30 days, could have been achieved at the expense of other matters before the Court. In the long run in the interest of the overriding objectives of case management, no group of litigants no matter how privileged are entitled to more judicial time than any other. Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court. Every file is important. For Courts to continually inspire confidence of the Court users and litigants, they must have a very sharp sense of proportionality, fairness and equity in the allocation of judicial time. The ouster clauses fly in the face of the above principles. It must in addition, not be forgotten that the ouster clause in question, has been imposed in the face of a backlog in the courts (which although being tackled with vigour and determination) still averages between 3 to 10 years. This Court is of course not oblivious to the fact that procurement matters demand efficiency, speed and finality in their determination because of the very nature of procurements. But the answer to this is to leave the matter in to the individual discretion of a judge. On my part, I have severally held that speed and expedition are the hallmarks of judicial review given the Courts have no right to hold to ransom, decision makers unless they can do so within a reasonable time.”

80. Therefore in interpreting the legislation the Court must be alive to the fact that a strict interpretation of legislation may lead to results which may not advance the constitutional principles. It was in appreciation of this fact that in **Selex Sistemi Case** (supra) Nyamu, J expressed himself as follows:

“It [literal interpretation] is the voice of strict constructionists. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal grammatical construction of

words, heedless of the consequences. Faced with staring injustice, the judges are, it is said, impotent, incapable and sterile. Not with us in this Court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the “purposive approach.” In all cases now in the interpretation of statutes we adopt such a construction as will “promote the general legislative purpose” underlying the provision ... It is no longer necessary for the judges to wring their hands and say: “There is nothing we can do about it”. Whatever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy ... by reading words in, if necessary - so as to do what Parliament would have done, had they the situation in mind... defect that appears in a statute cannot be ignored by the judge, he must set out to work on the constructive task of finding the intention of the Parliament. The judge should not only consider the language of the statute but also the social conditions which gave rise to it, and supplement the written word so as to give “force and life” to the intention of the Legislature.”

81. In my view to adopt the literal interpretation of section 175(3) and (5) Of the PP&AD Act under the current judicial set up, would amount to punishing persons who come to Court to seek justice for reasons beyond their control. To do so would in my view abet impunity. The Constitution having placed the duty of exercising judicial authority on the Judiciary on behalf of the people, the Courts ought to be permitted in an atmosphere that is conducive to the realization of its mandate without being seen to be at the sufferance of the Legislature, to carry out its judicial mandate. As stated in *Selex Sistemi* (supra):

“To exempt a public authority from the jurisdiction of the Courts of law is, to that extent, to grant docterial power. It is no exaggeration, therefore, to describe this as an abuse of power of Parliament speaking constitutionally. This is the justification for the strong, it might even be rebellious, stand which the courts have made against allowing Acts of Parliament to create pockets of uncontrollable power in violation of the rule of law. Parliament is unduly addicted to this practice giving too much weight to temporary convenience and too little to constitutional principle. The law’s delay together with its uncertainty and expense, tempts governments to take short cuts by elimination of the Courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease” (Wade 1980 pp 65-6).”

82. Professor Sir William Wade in his authoritative work, *Administrative Law*, 8th Edition at page 708 properly captured the failure of Parliamentary draughtsman as hereunder:

“Parliament is mostly concerned with short term considerations and is strangely indifferent to the paradox of enacting law and then preventing courts from enforcing it. The Judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power.”

83. Nyamu, J in *Selex Sistemi Case* (supra) did not mince his words when he stated:

“The 2nd respondent also seems not to appreciate the ordinary procedure in judicial review applications. It is a misconception that time starts to run as purported by the 2nd respondent when a chamber summons seeking leave is filed. Once leave is granted to apply for judicial review orders, the applicant is granted 21 days within which to file the notice of motion seeking substantive orders. The notice of motion unless the Judge otherwise directs at the time of granting leave is to be heard at least eight clear days between the service of the same and the day named therein for hearing. Considering the Christmas vacation, this case would have been determined on 18th of January 2008 if the said Act is to be applicable... The Procedure for judicial review set out by the Public Procurement and Disposal Act 2005 is in conflict with that laid down by the Law Reform Act and order LIII of the Civil Procedure Rules. According to section A 100(1) of the said Act, judicial review must be commenced within fourteen days from the date of the Review Board while under order LIII, the applicant must file the same within 21 days after leave is granted. It is arguable that the novel procedure introduced by the Public Procurement and Disposal Act, 2005 is impractical and

may lead to miscarriage of justice. Sometimes it is very difficult to deal with judicial review applications expeditiously because of the weighty issues that need to be determined. Most of the applications even in the area are bulky and complex and the Court cannot pay lip service to serious issues that come before it for determination merely to beat a deadline set by a stranger to the Court process.”

84. Under Article 227(1) of the Constitution it is required that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. To put in place a system by which the Court’s ability to determine whether public procurement complies with the constitutional dictates is whittled away by unattainable timelines, without taking into consideration the resource at the disposal of the judiciary, would be to render the Constitutional provisions ineffective and would defeat the very principles of procurement decreed under the Constitution. It behoves the Court to investigate whether the principles of the Constitution have been adhered to in a particular process of public procurement and this duty cannot be taken away by Parliament placing roadblocks in the path of the Court by prescribing timelines within which such disputes are to be determined in default of which a process which may well violate the constitutional principles would be sanitized and permitted to stand.

85. As rightly pointed out in the *Selex Sistemi Case* (supra):

“As observed from the Constitution, any law that is in conflict with it is void to the extent of the inconsistency. However, it is interesting to note that section 100 of the Public Procurement and Disposal Act, 2005 again submits the decisions of the Review Board to judicial review by the High Court but imposes a time bar. The Courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts’ power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal... It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court.

86. This Court is aware of the principle under Article 159 of the Constitution that justice ought not to be delayed. However, it is in the interest of justice that litigation must be got on with at reasonable speed – reasonable expedition, the wise say: not too quickly; not too slowly. In the administration of justice proceeding at break-neck speed may work injustice in some cases; so may tardiness. Unreasonable haste aborts justice. Proceeding sluggishly fossilizes it. See *Savanna Development Company Ltd. vs. Mercantile Finance Company Ltd Nairobi HCCC No. 2113 of 1989 [1992] KLR 463.*

87. As held in the *Selex Sistemi Case* (supra)::

Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public. Indeed, sections 36(6) and 100(4) of the Act which are ouster clauses, were tailored to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to

an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant. Adjudication of disputes is a constitutional mandate of the Courts and the Court cannot abdicate from it...Speed is the hallmark of judicial review and even an application for leave is filed under certificate of urgency. The law also sets out the period within which to file the application for substantive orders, failure of which the orders granted at leave stage automatically lapse. It is therefore arguable that finality is the very nature of judicial review. It is also arguable that whenever, a party comes to court for redress in public procurement cases, finality cannot outweigh judicial adjudication as there may be other issues such as integrity, transparency and accountability which are also in public interest and if adjudicated upon by the court, may maximize economy and increase public confidence in the procurement procedures. Perhaps, if finality is overemphasized at the expense of other equally important core values in the said Act, the very intention of the Parliament captured by section 2 will substantially fail...It is clear that the Constitution envisages hearing of a case within a reasonable time with due regard to practicality. A reasonable time is not defined but it is an issue of construction by the judge who presides over a case. A reasonable time would depend on the circumstances of the case and other relevant factors that the Court must consider. Perhaps thirty days may be reasonable to the 1st respondent but due to lack of information on the reality on the ground and the Courts' calendar, the period may be unreasonable and impracticable. The reasonable period for the hearing and determination of a judicial review case where there is a proper judge/population, ratio eg in the United Kingdom, is three months (3)...The Court appreciates that one of the objects of the said Act in section 2(a) is to maximize economy and efficiency. However, while time is of essence in carrying out projects, speed cannot override justice and an illegality cannot be countenanced by the court merely because the offending party is overzealous to complete a project. It is also one of the objects of the said Act, to promote integrity and fairness of procurement and disposal procedures. The law acknowledges the need for speedy certainty as to the legitimacy of target activities and requires applicants for judicial review to act promptly to avoid frustrating a public body whose decision is challenged, particularly because of public interest. However, limiting or specifying that the Court must deal with judicial review within thirty days may be impractical and may lead to denying justice to deserving applicants. It is arguable if or not section 100(4) of the Public Procurement and Disposal Act, 2005 offends section 77(9) of the Constitution. Further, the Legislature and the Executive have failed to appreciate the constitutional doctrine of separation of powers. The Legislature by providing that the Court must hear and determine a judicial review case within 30 days and the enthusiastic implementation of the same by the 2nd respondent which is part of the Executive, is a deliberate encroachment to the strictly operational independence of the Judiciary which is an independent arm of the government...Finally, the fourth issue is whether section 100(4) of the Public Procurement and Disposal Act, 2005 is the applicable law as regards the procedure in judicial review proceedings? Applications filed in court for judicial review are brought under sections 8 and 9 of the Law Reform Act cap 26 Laws of Kenya and order LIII of the Civil Procedure Rules. The applicant strongly argues that any other procedure apart from the abovementioned has no force of law and would amount to a fatal defect and incompetence. According to the applicant, the Public Procurement and Disposal Act, 2005 cannot purport to introduce any other procedure apart from what is known in law and practice. Ordinarily, the law can limit the period of filing a suit but the period within which the case must be determined before courts should be a preserve of the Courts due to different circumstances such as case backlog, vacation among others where an applicant may have no control.”

“In a way, the allocation of judicial time in advance by other organs of government, constitute usurpation of judicial function and power and/or amount to sharing of judicial function, and this is therefore clearly unconstitutional... I hold that the Court must be left to allocate sufficient time to do justice in every case including procurement cases before the Court. As acknowledged by the objector, the courts have given top priority, and in some cases fast tracked procurement matters both before the time limitation provision was imposed and after the time limitation provision. The balance which the Court must be allowed to strike or achieve was very well put *Gravells* ‘978 pp 383-4 as follows: It is arguable that (this) is a fundamental issue underlying much modern administrative law ...Ultimately every challenge to administrative action can be seen to represent a conflict between, on the one hand, the constitutional priorities of fairness and the rule of law, and on the other hand, the administrators’ priorities of expediency and finality. Since however there is in reality no typical administrator, it follows that the resolution of those conflicting priorities will tend to vary with the particular process in question; different considerations will apply in different contexts and the reliance of the same considerations will apply in different contexts and the relevance of the same consideration will vary according to circumstances. In other words there can be no such thing as a general solution: rather there must be a series of particular solutions.”...There are situations in which the Court must of necessity allow expediency and principles of good administration to apply such as in the *Ostler* case, but I must find that the decision has to be made by the Court, on the facts before the Court, and this cannot be substituted by a 30 days rule of thumb imposed without consultations whatsoever and without regard whatsoever, to the current law requirements on Judicial review proceedings or to the principles of constitutional balance. Allowing decisions of the Procurement Board to automatically apply after 30 days, does not make the decisions correct even on matters as fundamental as on jurisdiction for example. This cannot possibly be right. The way to get things right, is to hold that no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, touching on jurisdiction and it goes outside its jurisdiction then *certiorari* will lie from the Court to correct it even after the 30 days, whether or not the matter before the Court is a procurement matter. In the case of Kenya there is no such thing as Parliamentary supremacy and every legislation is subject to the Constitution. The Courts are the guardians of the Constitution. There cannot therefore be any allegation of the Courts disobedience of Parliament. Where Parliament itself, purports to restrict or curtail the powers allocated to the Court by the Constitution the Court must promptly intervene. Constitutional power once allocated cannot be shifted by either by the Legislature or the Executive under the banner of policy. Prof Wade’s defence in the Constitutional Fundamentals 1980 of *Anisminic* brings out the constitutional fundamentals which are relevant to the English position without a written Constitution in these words:- “... For judicial control particularly over discretionary power, is a constitutional fundamental. In their self defensive campaign the Judges have almost given us a Constitution, establishing a kind of entrenched provision to the effect that even Parliament cannot deprive them of their proper function. They may be discovering a deeper constitutional logic than the crude absolute of statutory omnipotence!...It is wrong for the executive to literally allocate themselves administrative finality in matters that are at the core business of the Courts - namely the judicial function of adjudication. Operational independence, of the Courts is part of the wider principle of the independence of the courts. They should be stopped in their tracks as I have here.”

89. The learned Judge concluded, a conclusion which I adopt that:

“...the preliminary objection cannot be upheld for the following reasons:- (1) The ouster clause section 100(4) of the Procurement Act is not entirely clear and the Court must therefore resolve the dispute by upholding its jurisdiction instead of its ouster. (2) The ouster section is not in tandem with the other laws on judicial review namely the Law Reform Act and order 53 and the section was inserted in obvious ignorance of the Judicial review laws. (3) An ouster section cannot be effective where it is inconsistent with the main objectives of the Act. (4) An ouster section is void where it violates provisions of the constitution. (5) Ouster

clauses are usually grounded on public interests consideration and good administration, and there cannot be greater public interest than that expressed in the constitution. In this regard ouster clauses will be ineffective unless they pass the test of reasonableness and proportionality. (6) Ouster sections or clauses are ineffective in the face of jurisdictional issues. With the above analysis in view, I have no hesitation whatsoever in dismissing the objection with costs to be paid by the interested party objector.”

90. In the result I have no hesitation in reaffirming the decisions in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** and **Republic vs. Public Procurement Administrative Review Board & Another exp Hyosung Ebara Company Limited [2011] KLR** and whereas Nyamu, J and Musinga, J (as they were) in the above cases did not expressly carry out their opinions to their logical conclusion based on what Nyamu, J deemed the inability to make declaratory orders in the matter before him, on my part just as I held in **Republic vs. Kenya Revenue Authority Ex Parte Webb Fontaine Group FZ-LLC & 3 Others [2015] eKLR**, I have no hesitation in declaring which I hereby do that section 175(3) and (5) of the ***Public Procurement and Asset Disposals Act, 2015***, is unconstitutional to the extent that it purports to restrict the timelines within which judicial review proceedings are to be determined and is therefore inconsequential. Since the enactment of the ***Fair Administrative Action Act, 2015***, a piece of legislation which I must observe in passing suffers from a similar malady in its section 8, this Court now has the power, thanks to section 11 thereof, to make declaratory orders.

91. On the issue of the delay in supplying copies of the Board’s decision to the parties, this Court has decried the same in **Republic vs. Public Procurement and Administrative Review Board ex parte Akamai Creative Limited Misc Civil Applic. No. 513 of 2015** where the Court expressed itself as follows:

“It was contended that the Board’s failure to furnish the applicant with a signed decision until after the expiry of 7 days after the delivery of the decision violated Article 47 of the Constitution. In my view, Article 47 of the Constitution requires that parties to an administrative proceedings be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid.”

92. The recurrent delays by the Respondent in supplying parties with copies of its decision was lamented by this Court in **Republic vs. Public Procurement Administrative Review Board & 2 Others Ex-parte Coast Water Services Board & Another [2016] eKLR** where this Court expressed its sentiments thereon as follows:

“A complaint was raised with respect to the delay in supplying the parties with typed copies of the proceedings and decision. This complaint I must say with respect to the Board is a recurring complaint in many applications. In my view efficiency in procurement processes not only demands speedy determination of the disputes but also encompasses speedy and timely availability of the decisions to the parties so as to enable them decide on their next course of action. It is therefore my view that to unreasonably delay in furnishing proceedings and decisions to the parties amounts to unfair administrative action...The Board is therefore advised to put into motion the necessary steps to rectify this problem. Where the Court finds that the period between the furnishing of the proceedings and the decision and the last day for filing the request for review was too short to enable the party challenge the decision, the Court may well be entitled to find that such action was meant to deprive the said party of the opportunity to challenge the said decision hence would amount to a violation of the letter and/or spirit of Article 47 of the Constitution as read with section 6 of the *Fair Administrative Action Act, 2015*.”

93. In **Republic vs. Public Procurement Administrative Review Board & Another Ex parte Wajir County Government [2016] eKLR**, this Court warned that:

“The Board ought take the above sentiments seriously in future if only to void imputation of malice on their part.”

94. As the Respondent Board has continuously adopted a practice of not furnishing parties with its proceedings expeditiously in violation of Article 47 of the Constitution and as there is no reason advanced in the instant case for such a delay, I find that the Respondent by its conduct violated the ex parte applicant’s rights under Article 47 of the Constitution. Such conduct cannot be countenanced by a public body that is established to promote principles of maximisation of economy and efficiency, promotion of competition and fairness, increment of transparency, accountability and public confidence. Whereas occasional delays in furnishing reasons for the decision may be excused, such justification must be on a case to case basis and cannot be treated as the general rule as has become routine in matters before the Respondent Board.

95. In this case the Respondent was accused of having in effect taken over the role of the ex parte applicant and purported to re-evaluate tender and given directions whose effect was to give undue advantage to the 1st interested party.

96. In this decision the Board variously made the following findings to the effect that in conducting the technical evaluation of the 1st Interested Party’s bid, it found that some provisions of the Tender Document were either unclear, unspecific, vague or ambiguous. For example at page 475 of the record of the application last paragraph, the Board says:

The tender also required demonstration of minimum diploma requirement “in respective filed”. At the hearing the Procuring Entity argued that the respective field was “environmental science” and that the Applicant’s undisputed Managing Director’s Bachelor of Commerce in Marketing did not count, that was why it had given the Applicant a score of zero out of three. The Board finds that the requirement was ambiguous because the “respective field” was not defined. The Board finds that the Applicant was entitled to three points.

97. Similarly, in page 476 of the record of the application second paragraph the Board says;

The Board notes that the tender did not specify what exactly that Schedule of Work would entail in a tender for portable toilets. Different bidders gave different things. The Applicant did submit but it left out the assignment of manpower. The Board finds that the zero score was unreasonable in view of the ambiguity and the fact that the Applicant complied with part of the requirement.

98. On the same page in the third paragraph the Board there says as follows:

The Tender required the bidders to attach “current inspection certificates of the equipment” from the relevant authority. The Applicant attached an inspection certificate of the exhauster (motor vehicle) but not for the toilet and was given a score of one out of three points....However, the Procuring Entity admitted at the hearing that it did not know which Government Agency or Authority had the mandate of inspecting portable toilets....it was up to the procuring entity to give clear requirements in its tender document. In view of this ambiguity, the Board finds that there was no justification to deny the Applicant the 3 points...

99. At page 477 of the record of the application the Board in dealing with the requirement for audited accounts says:

It [Procuring Entity] did not justify the reason for not granting the 10 points to the Applicant and neither did it satisfy the Board whether all bidders understood how these formulae were to be applied. To disqualify one bidder on the same was therefore unjustified as the same was

clothed in ambiguity and it was only the Procuring Entity who knew how these were to applied. The Board notes that the Applicant should have been awarded full mark in this regard just all other bidders who produced audited accounts.

100. Despite the foregoing misgivings the Board proceeded to award marks to the 1st Interested Party so that its technical score moved from the 66% awarded to some undisclosed figure beyond the 75% required in the tender document. In effect by awarding the said marks the Board did technically and unilaterally re-evaluate the 1st Interested Party's tender by stating at page 479 of the record of the application says that:

The cumulative effect of the Board's finding above place the Applicant technical bid score well over the 75 point threshold.

107. In JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 others [2015] eKLR it was held:

“The PP&DA and the Regulations bequeath the onus of amending a Tender Document on a procuring entity. When the Review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and in such circumstances it is said that it has acted outside jurisdiction.

In the instant case, the Review Board exceeded its authority by purporting to read its own words in the Tender Document. If the Tender Document was defective, then the only order that was available to the Board was to direct the PE to commence the tender process afresh.”

102. Those sentiments were echoed in Republic vs. Public Procurement Administrative Review Board & 2 Others Ex- Parte Akamai Creative Limited [2016] eKLR where the court said;

“I therefore agree that where the Board finds that a particular clause in the tender document is vague, it is not for the Board to substitute that clause with its own view of what ought to have been contained in the tender document. The best option is for the Board to remit the tender back to the procuring entity with appropriate directions. Therefore if the Board found that the clause in the tender dealing with the survey on the prevailing market prices was vague, one wonders on what basis it proceeded to award the subject tender to the 2nd interested party. Such decision can, as rightly contended by the Applicant, be termed as being Wednesbury irrational.”

103. As was held in Nairobi JR No. 137 of 2015 - Republic vs. The Public Procurement and Administrative Review Board & 2 Others Ex Parte CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises (the Civicon Case) at page 22:

“If indeed the Review Board had found that there was a problem with the Tender Document, it ought to have asked the PE to retender. You cannot use a faulty Tender Document to award a tender.”

104. In my view what in effect the Board was attempting to do was to give a head-start to the 1st interested party to the detriment of the other parties to the tender. In my view the Board just fell short of awarding the tender to the 1st interested party herein.

105. This Court while addressing itself on the issue in Republic vs. Public Procurement Review Board & 2 Others ex-parte MIG International Ltd & Another [2016] eKLR expressed itself 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."

106. This Court has held before that Article 227(1) provides the minimum threshold that any public procurement must meet. It is however my view that in public procurement and disposal, the starting point is the Constitution. A procurement must therefore, before any other consideration is taken into account whether in the parent legislation or the rules and regulations made thereunder, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words any legislative consideration which does not espouse these ingredients can only be secondary to the said Constitutional dictates. Therefore the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tenderer has met one or some only of the Constitutional mandates. My view is reinforced by the decision in PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR in which the Court held that:

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

107. This was the position adopted by this Court in Nairobi JR No. 513 of 2015 - Republic –vs. The Public Procurement and Administrative Review Board & 2 Others ex parte Akamai Creative Limited in which the Court held the view that:

"It is therefore clear that apart from the lowest tender, the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest."

108. In this case, the Respondent advanced no compelling reasons why it proceeded to award marks to the

1st Interested Party so that its technical score moved from the 66% awarded to some undisclosed figure beyond the 75%. I associate myself with the decision in **South Bucks District Council & Another vs. Porter [2004] UKHL 33** to the effect that:

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the “principal important controversial issues”. Disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds.”

109. The Court in the case of **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati [2008] KLR 728** held that the Procuring Entity’s failure to give reasons for terminating the Applicant’s tender amounted to breach of one of the fundamental principles of natural justice expressed itself as follows:

“Failure by the 2nd Respondent to render reasons for the decision to terminate the applicant’s tender made the decision amenable to review by the Court since the giving of reasons was one of the fundamental tenets of the principle of natural justice.”

Order

110. In the result, an order of certiorari is hereby issued removing to this Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board dated 19th October, 2016 in Review Application No. 81/2016, which decision is hereby quashed.

111. For avoidance of doubt the Applicant, if minded to proceed with the tender and subject to the provisions relating to termination of the tender, is hereby directed to start the process afresh since I have not interfered with the Respondent’s findings with respect to ambiguities, vagueness or lack of specificity in the various areas of the technical evaluation of the tender.

112. In the circumstances of this case, each party will bear own costs of these proceedings and those before the Respondent.

113. Orders accordingly.

Dated at Nairobi this 28th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Amalemba for the 1st interested party

Miss Muthee for the 2nd interested party

CA Mwangi