



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 41 OF 2017.

**IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS
OF CERTIORARI AND PROHIBITION.**

AND

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

AND

THE PUBLIC PROCUREMENT REGULATIONS, 2006

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

AND

**IN THE MATTER OF APPLICATION NO. 01 OF 2017 OF 6th JANUARY, 2017 CONCERNING
TENDER NO. KeNHA/1466/2016 FOR PERFORMANCE BASED ROAD CONTRACT FOR THE**

MAINTENANCE OF MERILLE RIVER-MARSABIT (A2) ROAD.

BETWEEN

REPUBLICAPPLICANT

VERSUS

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

NORTHERN FRONTIER ENTERPRISES.....INTERESTED PARTY

EX-PARTE: NOMADS CONSTRUCTION LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 9th February 2017, the *ex parte* applicants herein, **Nomads Construction Limited**, seeks the following orders:

- 1) **An order of certiorari removing to this Honorable Court for the purposes of being quashed the decision of the Public Procurement Administrative Review Board made on the 26th January, 2017 in Application No. 01/2017 of 6th January, 2017.**
- 2) **An order of prohibition to prohibit and restrain the Second Respondent from acting upon the decision made by the First Respondent made on the 26th January, 2017 or and/or signing any contract with any persons or entity other than the Applicant in respect to the tender in question.**
- 3) **The costs of this application be provided for.**

Ex Parte Applicants' Case

2. What seems to have provoked these proceedings was the decision by is made in respect of the decision made by the 1st Respondent on the 26th January, 2017 concerning tender no. KeNHA/1466/2016 for Performance Based Road Contract for the Maintenance of Merille River-Marsabit (A2) Road.

3. According to the applicant, it first filed a Request for Review before the 1st Respondent herein, the **Public Procurement Administrative Review Board** (hereinafter referred to as "the Board") which was designated as Application No. 01 of 2017 of 6th January, 2017 wherein it protested *inter-alia* its unfair disqualification from the tender process and the award of the tender to interested party who did not qualify in the first place bearing in mind that the Interested party is a business name as opposed to a company limited.

4. It was averred that the said request was heard and by its decision of 26th January, 2017 the Board disallowed the Request for Review and allowed the procuring entity herein, the **Kenya National Highways Authority**, to proceed with the procurement process in respect to the award of the tender in question.

5. It was the applicant's case that the said decision was tainted with illegality as the Board did not consider all the germane issues raised in the Request for Review bearing in mind that the tender was awarded to a bidder who did not meet the minimum mandatory requirements including *inter-alia* form CR 12 which the interested party could not produce bearing in mind that it is a business name registered pursuant to the provisions of the **Registration of Business Names Act**, Chapter 499 Laws of Kenya.

6. It was therefore contended that in light of the foregoing, the decision of the Board was tainted with illegality and no sensible person would have arrived at the aforesaid decision bearing mind that the interested party herein did not meet the minimum mandatory requirements for participating in the bid and thus there was no basis for an award to be made to the interested party herein.

7. It was contended that in the Request for Review the Board did not fully address the germane issues as raised by the Applicant therein but proceeded to misapply and or profane the mandatory instructions to bidders as contained in the tender document and in so doing the 1st Respondent breached its duty to act judicially by failing to apply its judicial mind to all the issues as raised by the parties thereby occasioning injustice on the applicant herein.

8. It was further averred that the said decision was made *ultra vires* in light of the salient provisions of the **Public Procurement and Asset Disposal Act, 2015**. In addition, that decision was made against the

principles of Public interest and legitimate expectation that the law will be strictly followed and adhered to. To the applicant, the decision was tainted with illegality and further the award to a non-responsive bidder i.e. the interested party herein was not in compliance with the **Public Procurement and Asset Disposal Act, 2015** and amounted to a breach of the principles of natural justice and fair administrative justice, the rule of law and the legal imperatives of public procurement of fairness, equity transparency, competition and cost effectiveness, good governance, integrity and accountability.

9. Based on legal advice the applicant further averred that:-

(a) The decision made by the Board was made *ultra vires* in light of the salient provisions of the **Public Procurement and Disposal Act, 2015** and the same is tainted with illegality.

(b) The First/Second Respondents decision is unlawful and is made in bad faith, malicious, whimsical and is for an ulterior and improper motive.

(c) That the Board has acted irresponsibly, arbitrarily, capriciously, unreasonably, unprocedurally and his conduct is aimed at frustrating the Applicant's legitimate expectation that due process and the law will be followed.

(d) The Board's conduct exhibits bias and partiality incompatible with his roles and duties.

(e) That the decision by the Board was made against the principles of Public interest and legitimate expectation.

(f) The Board did not fully address the germane issues as raised by the parties and failed to take into account relevant matters and took into account irrelevant consideration including failing to find that the certificate of incorporation, the NCA certificate, the form CR 12 and the Single Business Permit were duly certified by duly qualified advocates. Consequently, the First Respondent breached its duty to act judicially by failing to apply its judicial mind to all the issues as raised by the Applicant thereby occasioning an injustice on the applicant.

10. The applicant asserted that its application was made *bonafides*, without delay and in the best interests of Justice and fairness and that unless the application as granted, there was a grave danger that the 2nd Respondent would proceed to act and/or enforce the unlawful decision as made by the Board on the 26th January, 2017 with a grave danger that the Applicant would suffer injustice and irreparable loss and damage and consequently, the proceedings herein might otherwise be rendered superfluous.

11. While reiterating the foregoing, it was submitted on behalf of the applicant that Board had no powers to make orders that violate the express provisions of the law and exceeded the requirements expressly set out in the tender document. Further, the Board cannot disregard mandatory provisions of the **Public Procurement and Asset Disposal Act, 2015** and where it does so, it amounts to a fundamental misdirection or failure to address the applicable law or a fundamental error of law thereby rendering the decision reached devoid of legality and therefore void. It is also its submission that a procurement process is not complete or done by just coming up with a mathematically lowest tenderer on top of the pile but the integrity of reaching there is equally important. In this regard the applicant relied on PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR and Nairobi JR No. 513 of 2015 - Republic – vs. The Public Procurement and Administrative Review Board & 2 Others ex parte Akamai Creative Limited.

12. It was further submitted that the Respondents' conduct is a clear circumvention of the law and an attempt to frustrate the judicial process which is in motion bearing in mind that the alleged contract in question is bad in law in light of the salient provision of section 175 of the **Public Procurement and Asset Disposal Act, 2015**. It was submitted that the procuring entity cannot enter into any binding contract with a tender within the first 14 days of the decision of the Review Board bearing that the proceedings herein were brought within time and reliance was placed on JR 371 of 2016 - Republic vs. Public Procurement Administrative Review Board Ex-parte Syner Chemie Limited, Republic v

Public Procurement Administrative Review Board Ex-parte Noble Gases International Limited (2013) eKLR and Pastoli vs. Kabale District Local Government Council & Others [2008] 2 EA 300.

13. It was submitted that 1st Respondent failed to find that all the germane documents of the tender including form CR 12, certificate of Incorporation, single business permit and others had been fully certified as true copies of the originals by competent advocates and as such the Board was partial and treated the Applicant unreasonably. In rejecting the Ex-parte Applicant's tender on the grounds that the certificate of Incorporation, the NCA Certificate, the CR12 and the Single Business Permit were certified as true copies of the original by an Advocate and not Commissioner for Oaths, it was submitted that the decision contravened the provisions of Articles 159 and 227 of the Constitution of Kenya since the documents were duly certified as true copies of the original by **Mr. Henry Karibu**, Advocate and Commissioner of Oaths.

14. It was further submitted that the Board's decision was made against the principles of Public interest and reliance was placed on **East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board and Another [2000] eKLR.**

15. It was submitted that the procuring entity unlawfully failed to adhere to section III of the Invitation to Tender document which provided a two-stage evaluation process. The Invitation to tender document set out that only bidders that meet the mandatory requirement hence substantially responsive should be evaluated in accordance with clause 34 thereof. The applicant avers that if the Procuring Entity rejected its tender on account of mandatory requirements, the Procuring Entity lacked any basis or at all to determine items listed in the second stage of the evaluation process and reliance was sought in **Republic vs. North and East Devon Health Authority, EXP Coughlan 34.**

16. It was submitted that the Respondent is expected to abide by the statutory provisions that govern its functions and it is expected to act fairly. In the instant case, the Respondent failed to carry out mandate in accordance with the law and hence breached the applicant's expectation. There was an implied duty of fairness attached to all administrative acts such as what the Respondent's officers purported to do. The only fair action that could be taken in the instant case was to follow due process and make a decision in accordance with the law. In the applicant's submissions, its legitimate expectation that the tender in question will be awarded in accordance with a system that is fair, equitable, transparent, competitive and cost effective and in accordance with the law has been frustrated and denigrated.

17. It was submitted that the Board considered irrelevant facts and failed to consider relevant ones and in support of this submission the applicant relied on **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR.**

18. It was therefore the applicant's case that the Respondent's conduct is capricious, arbitrary, oppressive and unfair and cannot be justified within the rule of law and therefore in the circumstances of the case it is the interest of justice that the prayers sought be granted.

1st Respondent's Case

19. In response to the application the 1st Respondent Board's case was that on 6th January 2017, it received the applicant's Request for Review challenging the award of Tender Number KeNHA/1466/2016 for Performance Based Road Contract for the maintenance of Merille River-Marsabit (A2), Road. Upon receiving the Request for Review, it immediately directed that the 2nd Respondent herein be served and notified of the pending Review as required by the provisions of section 168 of the **Public Procurement and Asset Disposal Act, 2015.**

20. It was averred that the Request for Review was subsequently heard wherein the Board considered the pleadings before it as well as the oral and written submissions of the parties and delivered its decision on 26th January 2017. It also considered the original tender documents, the evaluation reports and other documents supplied to it by the 2nd Respondent and in determining the Request for Review by the

applicant, the Board identified only one issue for determination namely: Whether the Procuring Entity unfairly disqualified the applicant at the preliminary stage of evaluation hence breached Clause 34 of the tender document, articles 159 and 227 of the Constitution and section 80 of the **Public Procurement and Asset Disposal Act 2015**.

21. According to the Board the applicant has not demonstrated how its decision was ultra vires the provisions of the **Public Procurement and Asset Disposal Act, 2015**. Further, the applicant has also not demonstrated how the Board's decision is unlawful, in bad faith, malicious, whimsical and is for an ulterior and improper motive and how the same is biased and impartial. In addition, the applicant has not demonstrated how the Board acted irresponsibly, arbitrarily, capriciously, unreasonably and unprocedurally and how the decision was made against the principles of public interest and legitimate expectation.

22. It was therefore the Board's case that the applicant herein had not demonstrated the existence of any grounds to warrant the grant of judicial review remedies as sought. To the Board, the applicant herein is actually challenging the merits of the decision of the Board albeit disguised as a judicial review application which ought to challenge the procedure of arriving at a decision hence the application lacks merit and should therefore be dismissed with costs to the Respondents.

23. It was submitted on behalf of the Board that it was within its jurisdiction in making its finding and that the applicant has not demonstrated at all how its decision was ultra vires any provision of the PPADA.

24. Though it was contended by the applicant that that the Board's decision is tainted with illegality because *inter alia* there was no basis for an award to be made to the Interested Party herein, it was the Board's submission that it did not make an award to the Interested Party herein in its decision dated 26th January 2017. It is therefore misleading for the applicant to allege that the Board awarded the tender to the Interested Party herein vide its decision. It was submitted that the issue of tampering with the bid document of the applicant by the 2nd Respondent herein was ever raised in the Request for Review.

25. It was reiterated that the applicant is actually appealing against the merits of the Board's decision and the Board relied on **Republic vs. Public Procurement Administrative Review Board & Another ex parte Gibb Africa Ltd & Another [2012] eKLR.**

26. It was the Board's submission that its decision was not tainted with illegality at all and that the ex parte applicant has not proved the existence of any illegality but is only attempting to appeal against that decision in this forum.

27. On whether the 1st Respondent acted irrationally, the Board submitted that the test for unreasonableness/irrationality has been laid out by the Courts and relied on **Council of Civil Service Unions vs. Minister for the Civil Service [1984] 3 ALL ER 935, Rahab Wanjiru Njuguna vs. Inspector General of Police & another [2013] eKLR** and **Republic vs. Kenya Power & Lighting Company Ltd & Another [2013] eKLR.**

28. It was the Board's case that the contention that the Board's decision was irrational due to the fact that its tender was rejected on the grounds that the Certificate of Incorporation, the NCA Certificate, the CR 12 and the Single Business Permit were certified as true copies of the original by an advocate and not Commissioner for Oaths amounted to appealing against its finding on this issue albeit disguised as irrationality.

29. To the Board, the applicant has not made out a case for the grant of judicial review orders as sought against it hence the application ought to be dismissed with costs and relied on **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR.**

30. On the part of the 2nd Respondent, it was averred that 2nd Respondent, **Kenya National Highways Authority** (hereinafter referred to as “the Authority”) received funds from the Road Maintenance Levy Fund to be utilized for the Performance Based Contract for the Maintenance of Merille River- Marsabit (A2) Road and a notice inviting all road contractors was placed in the advertisements in *the Star* and *the Standard Newspaper* of 15th November, 2016. Notices were also carried on the Authority’s website and IFMIS Portal inviting bids from eligible contractors for the Performance based Road Contract for the Maintenance of Merile River – Marsabit.

31. According to the Authority, bidders were required to obtain the Tender documents either from the Authority’s procurement office or by downloading from its website or IFMIS Portal which The Tender document contained express, comprehensive and exhaustive instructions on how to submit bids, the mandatory requirements and the scope of the work to be done. The said tender document required bidders to *inter alia* attend a mandatory Pre Tender site visit and annex certain evidentiary documents and failure to adhere to the mandatory requirements would lead to disqualification or the submitted bid being declared unresponsive.

32. It was averred that the Applicant was among six (6) firms that submitted bids for the Tender herein. Prior to detailed evaluation, bids were checked for responsiveness and completeness. It was expressly provided in Tender Notice and Tender document that all bidders had to provide and/or meet the mandatory requirement to meet the minimum responsiveness. However, the Applicant did not comply with the mandatory requirement listed in the Tender Notice and Tender Document since:-

- i. Its bid document was not serialized contrary to the requirements that all pages for each tender submitted shall be serialized.
- ii. Litigation history of the firm was never stated and/or provided contrary to the requirements.
- iii. A copy of the National Construction Authority Certificate was certified by an Advocate contrary to the requirement that it shall be certified by a Commissioner for oaths.
- iv. A copy of the Applicant’s firm Certificate of Incorporation was certified by an Advocate contrary to the requirement that it shall be certified by a Commissioner for oaths.
- v. A copy of the C12 form was certified by an Advocate contrary to the requirement that it shall be certified by a Commissioner for oaths.
- vi. A copy of the Single Business permit was certified by an Advocate while it was a requirement that it shall be certified by a Commissioner for oaths.
- vii. Conflict of interest was not declared and/ or stated.

33. It was averred that two firms, **Precision Civil Engineering Limited** and **Northern Frontier Enterprises Limited** were responsive to the preliminary requirements of the tender and were subjected to detailed Technical evaluation. Bidders were required to obtain a pass mark of 75% to proceed to the financial evaluation and the above two Bidders scored above the minimum score of 75% of the Technical Evaluation and proceeded to Financial Evaluation stage. It was averred that the Evaluation Committee checked arithmetic errors, compared quoted prices with the Engineer’s Estimate and ranked the two bidders’ at the financial evaluation stage and since Northern Frontier Enterprises Limited, the Interested Party, offered the lowest tender sum of Kshs. 68,619,800.00 (Kenya Shillings Sixty Eight Million, Six Hundred and Nineteen Thousand and Eight Hundred Only, it was recommended for award of the tender. Following completion of the evaluation process and pursuant to the report by the Evaluation Committee, the Head of Procurement of the Authority gave a professional opinion on the procurement process and recommended that the Director General (Accounting Officer) consider and approve the report of the Evaluation Committee. Accordingly, the Director General of the Authority approved the recommendations for the award of tender to the lowest evaluated bidder being **Northern Frontier Enterprises Limited** (the interested party).

34. The Applicant having failed at the preliminary evaluation stage was duly notified vide a letter dated 23rd December, 2016 that its tender was unsuccessful for failure to meet the conditions listed herein.

35. However, being dissatisfied with the decision of the Authority, the applicant filed a request for review on 6th January, 2017 and alleged that:

i) Its bid was responsive and fulfilled all the mandatory requirements, hence its bid was evaluated on both preliminary and technical evaluation stage in accordance to Section III which provided a two stage process.

ii) The 2nd Respondent unfairly rejected its bid yet it met all mandatory requirements.

iii) The mandatory documents Certificate of Incorporation, NCA certificate, CR12 form and the single business permit were certified as true copies by two Advocates, **Mr. Henry Kabiru** and **Evans Asuga**.

iv) The Interested party (successful bidder) did not meet the minimum mandatory requirements for failure to submit a certified copy of its Certificate of Incorporation.

v) Its bid document was serialized.

vi) The 2nd Respondent failed to adhere to the evaluation criteria as set out in the Invitation to Tender document therefore the process was flawed.

36. It was averred that upon the Authority filing the Memorandum of Reply and annexing the interested Party's Certificate of Incorporation, the Applicant changed its position and orally submitted before the Review Board that the Interested Party failed to submit its certified copy of the CR12 to the Authority during the tender process. It was averred that the Review Board delivered its decision on 26th January, 2017 by which the Board observed that it had taken into consideration submissions made by the parties and perused the information in the documents provided.

37. It was contended that the allegation that the Interested Party did not meet the minimum requirement of the tender process is unfounded and baseless. To the contrary, the Authority was satisfied that the Interested Party met all the minimum mandatory requirements and proceeded to the Technical and Financial evaluation stage wherein it was evaluated with the lowest responsive bid. This position was confirmed by the Public Procurement Administrative Review Board.

38. According to the Authority, the contract having been executed between it and the interested Party on 6th February, 2017 the Application and orders issued herein have been overtaken by events. To the Authority, the Applicant's allegation that its bid document was tampered with is baseless. The allegation was not raised by the Applicant in its Request for Review or in its submissions made before the Review Board. It was therefore its view that the Applicant was introducing new evidence that was not presented before the Review Board without leave of Court as the annexed Certificate of business name was not presented before the Review Board and the same is extremely faded therefore its authenticity and evidentiary value is in question.

39. It was therefore its case that the Applicant failed to demonstrate that the decision made by the Public Procurement Review Board is *ultra vires*, made in bad faith, malicious and is for an ulterior and improper motive.

40. It was submitted that Applicant miserably failed to clearly point out with precision that the decision of the Review Board is *ultra vires* and that it is tainted with illegibility, is unlawful and is made in bad faith, malicious, whimsical and is for an ulterior and improper motive and reference was made to **Republic vs. Chairman Retirement Benefits Authority Appeals Tribunal & 2 Others Ex Parte Local Authorities Pensionstrust (Laptrust) [2013] eKLR** and it was submitted that the principles of natural justice in

terms of procedural fairness were adhered to by the Review Board which conducted its proceedings in fair manner and line with Article 50 of the Constitution 2010.

41. It was submitted that the Review Board in delivering its decision did not commit any error of law or fact, abuse its powers, considered irrelevant considerations, was biased and acted in bad faith. Further, the decision of the Review Board captured the issues that were raised before it by the parties and it did not depart from its duty and considered any irrelevant matters. To the Authority, the Applicant's application is vague on the basis that it does not point with precision the guiding principles that the Court may intervene through judicial review where a body acts *ultra vires*. *The Applicant has failed to demonstrate that the Review Board was biased and did not take into consideration the issues raised before it.*

42. *It was submitted that equity aids the vigilant.* In this case the decision of Public Procurement Administrative Review Board was delivered on 26th January, 2017. The Applicant filed the suit on 6th February, 2017 almost upon the expiry of the time allowed in law to file judicial review proceedings.

43. The Authority therefore prayed that the application filed by the Applicant be dismissed with costs.

Determinations

44. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

45. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285 and *Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60*.

46. This was the position adopted **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where **Majanja J.** quoted with approval the decision of **Githua, J** in **Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR** and held as follows:

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

of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.”

47. In matters challenging the decisions of specialized bodies and Tribunals such as the Respondent herein, the position was restated by the Court of Appeal in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR** as follows:

“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity...S.98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procuring entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the review board is obviously better equipped than the High Court to handle disputes relating to breach of duty of the procuring entity .it follows that its decision in matters within its jurisdiction should not be lightly interfered with...Having regard to the wide powers of the Review Board we are satisfied that the High court erred in holding that the Review Board was not competent to decide whether or not the 1st respondent’s tender had met the mandatory conditions. The issue whether or not the 1st Respondent’s tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it...In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of natural justice of that the decision was irrational. The Judicial review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly...The High Court erred in essence in treating the Judicial Review Application as an appeal and in granting review orders on the grounds which were outside the scope of Judicial Review jurisdiction”.

48. From the application, the only ground on which the issues raised by the applicant revolve is that the Board failed to fully address the issue of whether the interested party had complied with the requirements including *inter-alia* form CR 12.

49. I have considered the record of the judgement by the Board. From the said decision, it is clear that the issue of non-compliance with the requirement of submission of Form CR 12 was one of the issues before it since at page 18 of the decision, the Board clearly appreciated that:

On the issue raised by the Applicant that the Successful Bidder did not submit CR 12 form, Counsel for Procuring Entity challenged the Applicant how he would be privy of confidential information.

50. Whereas the applicant contended that this issue was only raised in the submissions, the Board failed to deal with the same. Whereas I appreciate the position in **R vs. The Public Procurement Administrative Review Board ex parte Kenya Medical Supply Agency, Crown Agents, Deutsche Gesellschaft Fur Technishe Zusammenarbeit and John Snow Inc. [2010] eKLR**, that the Respondent may well have exceeded its jurisdiction were it to attempt to deal with issues which were not specifically placed before it, since the issue was raised before the Board, the Board ought in all fairness to have commented on the issue instead of just ignoring it as it did.

51. I however agree that to deal with an issue in these proceedings which was not properly before the Board would amount to reviewing the decision of the Authority in an application challenging the Board’s decision. To do so would flout the provisions of the ***Public Procurement and Asset Disposals Act***. On that score, I associate myself with the decision of **Korir, J** in **Republic vs. Public Procurement Administrative Review Board & another Exparte Intertek International Limited [2013] eKLR**, where he held:

“In my view, the Applicant before me is trying to get a second bite of the cherry. The Applicant presented its grievances against the procuring entity (KEBS) to the Board. The Board considered those grievances and came up with its decision. The Applicant had an obligation to present all its grievances against KEBS to the Board. This court can only consider the decision of the Board and cannot look at the shortcomings, if any, of the tendering process by KEBS since the Board has already done so.”

52. In my view the applicant cannot under the guise of challenging the decision of the Board attack the decision of the Procuring Entity when the same was not the subject of the proceedings before the Board.

53. That said, the Board however found that the Applicant failed to comply with the conditions in the Tender Document. That was a finding of fact and this Court sitting as a Judicial Review Court as opposed to an appellate Court cannot substitute its decision for that of the Board. Similarly, on the issue whether the Board ought to have excused the non-compliance as inconsequential as the applicant contended, to do so would amount to sitting on appeal against the decision of the Board. Accordingly the decision of the Board in respect thereof cannot be faulted in these proceedings as opposed to a merit review before an appellate Tribunal. This was the position in **Republic vs. Public Procurement Administrative Review Board & Another ex parte Gibb Africa Ltd & Another [2012] eKLR** where the court set out the established reach of judicial review in Kenya thus:

“In judicial review therefore, the court’s jurisdiction is limited to applying the three tests of “legality”, “rationality” and “procedural propriety” to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge’s decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means lest he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals. The Court of Appeal in *Grain Bulk Handlers Limited v J. B. Maina & Co. Ltd & 2 others* [2006] eKLR summarized the purpose of judicial review by stating that:-

“Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions.”

From the foregoing it is clear that in judicial review, the court does not exercise its appellate powers. It mainly looks at the decision-making process to ensure that the citizen who has come into contact with an administrative body or tribunal has been treated fairly. But as observed by Lord Diplock in the already cited *Civil Service Unions vs Minister for the Civil Service* case, the court can quash the decision if the same is so unreasonable to the extent that a reasonable tribunal addressing its mind to the facts of the case would not have arrived at such a decision. In doing so, I submit, the court will have descended into the arena of decision-making. For a court to justify such action it must be clearly obvious that the decision is truly and obviously unreasonable which I submit is not the case here.”

54. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on *Administrative Law*, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475:**

“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is

presumed to have intended.”

55. In this case both the Authority and the Board arrived at concurrent findings that the Applicant did not qualify for the award. That the applicant did not strictly meet the conditions in the Tender Document is conceded by the applicant save that it contends that the same were minor omissions. Whereas that contention may well be worthy of consideration in a purely merit investigation, it does not in my view meet the threshold that warrants interference under judicial review.

56. Having considered the issues raised herein it is my view that the grounds advanced by the Applicant ought to have been the subject of an appeal as opposed to judicial review. As was appreciated by this Court in **Republic vs. Business Premises Rent Tribunal & 3 Others Ex-Parte Christine Wangari Gachege [2014] eKLR**:

“...In this case it is not in doubt that the decision which is being challenged in these proceedings was the subject of an application for setting aside which decision was disallowed by the Respondent. Whether that decision was right or not the Applicant ought to have appealed against the same instead of challenging the decision in respect of which attempt to set aside had failed. In judicial review proceedings the mere fact that the Tribunal’s decision was based on insufficient evidence, or misconstruing of the evidence which is what the applicant seems to be raising here or that in the course of the proceedings the Tribunal committed an error are not grounds for granting judicial review remedies. In reaching its determination, it must however, be recognized that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review.”

57. In **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR** it was observed that:

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

In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly.”

58. It was similarly held in **Republic vs. Minister of Agriculture & 2 Others ex parte Equatorial Nuts Processors Limited & 3 Others [2013] eKLR** that:

“Accordingly, even if I were to find that the application was merited the law is that the decision whether or not to grant the remedy of judicial review is discretionary...judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and hence the Court will refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised.”

59. As the applicant clearly did not comply with the conditions stipulated in the Tender document, it would be futile to allow the application.

Order

60. Consequently, the Notice of Motion dated 9th February 2017 fails and is dismissed with costs.

61. Orders accordingly.

Dated at Nairobi this 19th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Wilson for Mr. Masika for the applicant

Mr. Maruti for the 2nd Respondent

CA Mwangi