



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**J.R. MISC. APPLICATION NO. 496 OF 2017**

**IN THE MATTER OF AN APPLICATION BY S.G.S. KENYA LIMITED FOR JUDICIAL  
REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

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

**AND**

**IN THE MATTER OF SECTION 3, 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT NO. 33  
OF 2015**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD,  
APPLICATION NO. 64 OF 2017 DATED 13 JULY 2017, S.G.S. KENYA LIMITED AND  
ENERGY REGULATORY COMMISSION.**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**PUBLIC PROCUREMENT**

**ADMINISTRATIVE REVIEW BOARD.....1<sup>ST</sup> INTERESTED PARTY**

**INTERTEK TESTING SERVICES**

**(EA) LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

## JUDGEMENT

### Introduction

1. In our society, tendering plays a vital role in the delivery of goods and services. Large sums of public money are poured into the process and public bodies wield massive public power when choosing to award a tender. It is for this reason that the Constitution obliges organs of the state to ensure that a procurement process is fair, equitable, transparent, competitive and cost-effective.<sup>[1]</sup> Where the procurement process is shown not to be so, courts have the power to intervene.

2. To give effect to the above constitution dictates, Parliament enacted the Public Procurement and Asset Disposal Act<sup>[2]</sup> (hereinafter referred to as the Act). Section 3 of the Act provides that Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

- a. the national values and principles provided for under Article 10;*
- b. the equality and freedom from discrimination provided for under Article 27;*
- c. affirmative action programmes provided for under for under Articles 55 and 56;*
- d. principles of integrity under the Leadership and Integrity Act, 2012*
- e. the principles of public finance under Article 201;*
- f. the values and principles of public service as provided for under Article 232;*
- g. principles governing procurement profession, international norms;*
- h. maximisation of value for money;*
- i. ...and*
- j. ....*

### ***Factual Background***

3. By an application dated 15<sup>th</sup> August 2017, pursuant to the leave of this court granted on 14<sup>th</sup> August 2017, the ex parte applicant seeks judicial Review orders of certiorari, mandamus and prohibition as more particularly set out in the said application.

4. The application is premised on the statement of facts and the verifying affidavit filed together with the chamber summons filed on 11<sup>th</sup> August 2017 whereby the applicant sought and was granted leave to institute these Judicial Review proceedings.

5. The core of the applicants case is that on 18<sup>th</sup> April 2017, the Energy Regulatory Commission (hereinafter referred to as the Commission) advertised and invited bids from tenders for the provision of marking and Monitoring of Petroleum Products in a local newspaper. The closing date for the said advertisement was 12<sup>th</sup> May 2017 at 11.30 a.m. At a pre-bid conference held on 27<sup>th</sup> April 2017, interested bidders in attendance made various requests for clarification in relation to the tender. On 2<sup>nd</sup> May 2017 the commission clarified that the date for submission of the bids had been extended to 31<sup>st</sup> May 2017 at 11.30am and in line with the invitation the applicant submitted its bid on 31<sup>st</sup> May 2017.

6. The applicant attended the meeting for the opening of the financial proposals and three financial bids were read out after the opening in the presence of representatives of the different tenderers. It was confirmed that three tenderers passed the minimum technical requirement being SICPA Security Solutions S.A., Intertek Testing Services (East Africa) Limited and SGS Kenya Limited.

7. The applicant avers that the technical scores for each tender were not read out at the opening of the financial proposal as required and that the applicants financial proposal was the lowest among the three tenderers. On 30<sup>th</sup> June 2017, the financial proposals were opened and the tenderers were informed that the final award would be made within a period of seven days from the said date. On 7<sup>th</sup> July 2017, the applicant was notified by e-mail that tender number ERC/PROC/4/2/16-17/119 was terminated on grounds that "the terms of reference did not include emergent technical requirements." The applicant avers that the said ground requires evidence or a technical report, that the said decision ought to have been exercised judicially through legal and valid grounds, and that the termination was undertaken in breach of section 63 (2) and (3) of the Public Procurement and Asset Disposal Act<sup>[3]</sup> (hereinafter referred to as the Act.)

8. Aggrieved by the termination, the ex-parte moved to the Public Procurement Administrative Review Board (hereinafter referred to as the Review Board). The Review Board dismissed his case with liberty to the commission to re-advertise the tender. The applicant challenges the said decision on grounds that:-

*(a) the Review Board correctly held that section 63 of the Act permitted a procuring entity to terminate a tender process if the procurement in question has been overtaken by a substantial technological change but it erroneously proceeded to make a finding on the matter before it that the grounds for termination, despite there not being admissible evidence o a substantial technological change, was within those permitted by the said provisions.*

*(b) that the Review Board made an error in law in making a finding and decision on the requirement for a valid technical report that was in conflict with its previous decisions, and by holding that the parties were bound by the tender document notwithstanding the provisions of section 63 of the Act and misconstrued the recommendation of the evaluation committee and failed to appreciate the constitutional principles and framework of public finance and management of public funds.*

9. The applicant avers that the subsequent re-advertisement made on 2<sup>nd</sup> August 2017 in compliance with the decision of the Review Board and the new tender documents have changed critical provisions and introduced new issues that were not in the initial bid documents with a view to favouring a specific bidder.

10. In particular, even though the commission terminated the tender on one ground, namely, emergent technological change, the new tender document has completely changed the requested proposal. For example, it is averred that the removal of technical scores creates doubts on the transparency on the intended tender process, the allowable variations were changed from 10% to 25% creating a room for substantial increase of the contract sum, a drastic reduction of the scoring for staffing, thus allowing bidders with less qualified staff to succeed, and doubling the scoring experience of the specific bidder to favour a specific bidder.

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

11. The crux of the first interested party's Response is that on 18<sup>th</sup> April 2017, it advertised tender number ERC/PROC/4/3/16-17/119. The tendering process closed on 31<sup>st</sup> May 2017 with three successful bidders, namely, SGS Kenya Limited, SICPA Security Solutions (South Africa) and Intertek Testing Services Limited. It evaluated the tenders but before the award was made, the first interested party was made aware that there was actually existing technology that can easily detect the presence of jet A1 in motor fuels and that the technical committee observed that the increasing need of detection of adulteration by use of jet A1 ought to have been captured in the terms of reference for the tender because perpetrators of

adulteration have shifted to use of jet A1 as an adulterant for diesel.

12. It is the first interested party's case that the information on the new technology was captured in the technical opinion from the first interested party's acting director for petroleum and further that this technological advancement in the field of marking and monitoring of the petroleum products was not factored in the terms of reference of the tender given to potential bidders at the tendering stage., hence, in light of the new technological advancements, the first interested party opted to terminate the tender lawfully under section 63 (1) (a) of the Act and that the tender allowed for termination at any time prior to the contract award, and that by submitting its tender, the ex parte applicant bound itself to the terms of the tender.

13. It is also averred that if the opening of the proposals have been conducted in violation of the tender document, then this is a ground for nullification of the tender process, not a ground for awarding of the tender to the ex parte applicant and that there are no grounds to grant the reliefs sought and that the variation conforms with section 139 (4) of the Act. However, in my view, section 139 of the Act deal with amendments or variations to contracts and not termination as in the present case.

#### ***Ex-parte applicants' supplementary affidavit***

14. The crux of the ex parte applicant's supplementary affidavit is that the evaluation committee constituted by the interested party recommended award of the contract to the ex parte applicant, and further, that globally, jet fuel A1 is never marked unlike Kerosine according to International Regulations for safety reasons and further that the ex parte applicant owns a laboratory locally that tests all fuels in the country including Jet A1 and is accredited ISO 17025 and casted doubts on the testing done and pointed out that annexure EMK2 annexed to the interested parties' affidavit is incomplete and in event the ex-parte applicant had no expert report at the material time to warrant terminating the tender.

15. Further, the first Interested Party's Evaluation Committee made its unanimous recommendation after considering all the factors, including the alleged new technology, and that the Respondent differed, without justification, from its early decision on the issue of termination in the case of Avante International Technology Inc vs The Independent Electoral nd Boundaries Commission that was relied upon by the applicant.

16. Despite a consent order postponing the opening of the tender No. ERC/proc/4/3/17-18/016, the first interested party has now proceeded to advertise afresh for re-opening of the tender in contempt of the said order.

17. Further, the initial bid had a mandatory and fundamental requirement that a bidder must own or have access to an accredited petroleum testing laboratory and also the requirement for membership of the International Federation of Inspection Agencies but the said requirements were removed from the new document, hence lowering the bar to benefit a competitor in addition to other changes aimed at disadvantaging the applicant.

#### ***First Interested Party's Supplementary Affidavit***

18. Counsel for the first Interested Party filed a supplementary affidavit with courts leave and annexed the complete document marked as EMK2 in the Replying Affidavit.

#### ***Ex-parte Applicants Advocates submissions***

19. The crux of the ex-parte applicants counsel's submissions are:- the Respondent's decision omitted to take into account relevant matters; is unreasonable, and that judicial review is concerned with the decision making process[4] and that the courts mandate is to ascertain that a body acted fairly.[5] Further, the termination letter only set out one reason, namely, emergent of technology but it was not supported by "substantial technological change as the law requires and further, the committee considered the alleged emergent technology and that notwithstanding, proceeded to award the contract to the ex-parte

applicant.

20. Counsel cited absence of expert or professional evidence to proof that there was technological change as provided under the law and pointed out that the Review Board ignored its own previous decision on a similar issue where it held inter alia that substantial change requires a technical report by a technical committee or by persons who are technically competent to demonstrate that there has indeed been such a technical change and what the nature of the technological change.

21. Counsel also argued that the decision to terminate the process was triggered by a professional opinion by the first interested party's head of procurement who ironically was also a member of the evaluation committee that recommended the award to the ex-parte applicant.

22. Counsel also submitted that the ex-parte applicant had established a case for granting the orders sought[6]and argued that non-compliance with the statutory procedures set out in the act taints what would have been an otherwise lawful decision with illegality and procedural impropriety.[7]

### ***First Interested Party's Advocates' Submissions***

23. Counsels for the first interested party correctly highlighted the principles for granting judicial review orders[8] and argued that the applicant asking the court to exercise its appellate jurisdiction disguised as a judicial review and insisted that judicial review is only concerned with the process and not the merits.[9] He reiterated that the termination on grounds of technological change was within the provisions of section 63 (1) of the act and that the decision to terminate was exercised properly. Counsel further submitted that the applicant has no ground, but merely aims at re-opening the case on merits. Counsel also cited public interest in the re-tendering process and insisted that the ex-parte applicant has not established grounds for the court to grant the orders sought.

### **Analysis of the facts, issues, law, and authorities**

24. From the above facts and submissions, two issues distill themselves for determination, namely:- **(a)** whether the impugned decision is tainted with illegality or was unreasonable; and **(b)** whether or not the applicant has demonstrated sufficient grounds to warrant this court to grant the judicial Review orders sought.

25. With regard to the first issue, section 63 of the Act which the Respondent invoked to terminate the tender provides as follows:-

Termination or cancellation of procurement and asset disposal proceedings

*(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—*

*(a) the subject procurement have been overtaken by—*

*(i) operation of law; or*

*(ii) substantial technological change;*

*(b)....*

26. Specifically, the Respondent invoked the provisions of section 63 (1) (ii) which provides for cancellation in the event of "substantial technological change." The New Oxford American Dictionary defines "substantial" as "**(a)** of considerable importance, size, or worth . . . **(b)** concerning the essentials of something . . . **(c)** real and tangible rather than imaginary."<sup>[10]</sup> On the one hand, 'substantial' means 'not seeming or imaginary'; on the other, it means 'that specified to a large degree.'<sup>[11]</sup> It also means

"being significant or large and having substance."<sup>[12]</sup>

27. It is not disputed that the tender evaluation committee had recommended the award of the tender to the *ex-parte* applicant. The question that calls for an answer is whether or not there was material before the Review Board to demonstrate the presence of "substantial technological change." Counsel cited the respondents decision rendered in *Avante International Technology Inc vs the Independent Electoral and Boundaries Commission* where the Respondent stated that "*this reason requires evidence more particular a technical report by technical committee or by persons who are technically competent to demonstrate that there has indeed been such a technological change and what the nature of the technological change is.*"

28. The record before the Review Board does not show that evidence was tendered by a technical committee or by persons who are technologically competent to demonstrate that there has indeed been such a technological change. In particular, the document dated 7<sup>th</sup> July 2017 annexed to the first Interested party's supplementary affidavit filed on 7<sup>th</sup> September 2017 does not appear among the bundle of documents presented before the Review Board. An incomplete part of the said document was introduced for the first time in the Replying Affidavit. As expected, it raised a prompt objection from the *ex parte* applicants counsel.

29. The court allowed the Respondent to file a supplementary affidavit to introduce the complete document, but as stated above, the document was not produced before the Review Board, hence it cannot be considered in this decision because that would amount to admitting new evidence at this stage which would be improper.

30. Having found that the said evidence was not presented before the Review Board, this raises a fundamental question, namely, on what basis did the Review Board arrive at the challenged decision and in particular, the reasonableness of the challenged decision in absence of such fundamental evidence. As Viscount Haldane observed in *Local Government Board v. Arlidge*,<sup>[13]</sup> "*...those whose duty it is to decide must act Judicially....The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice.*"

31. In my view, the absence of such crucial evidence raises a valid question on the reasonableness or fairness of the decision. It is my view that there must be clear and cogent evidence in support of the technological change. The evidence must be substantial, real, and tangible and significant or large and having substance.

32. Fairness comprehends that regard must be had not only to the position and interests of the first interested party, but also those of the *ex-parte* applicant, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances.<sup>[14]</sup> And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act, and in particular the proper construction of the ground invoked while canceling the tender and the need to support such a ground with cogent evidence.

33. As the Respondent correctly stated in *Avante International Technology Inc vs the Independent Electoral and Boundaries Commission* a reason based on technological change requires evidence more particular a technical report by technical committee or by persons who are technically competent to demonstrate that there has indeed been such a technological change and what the nature of the technological change is.

34. True, the Evaluation Committee had recommended the award to be granted to the *ex-parte* applicant. Section 63 of the Act provides that "*An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the conditions specified therein applies.*"

35. It is my view that the power of discretion to terminate a tender prior to the notification of the tender award is restricted by the law to the said conditions and they must be demonstrated to be present for such

a termination to be allowed to stand.

36. To me, it is not sufficient for the first interested party to seek refuge in the termination clause in the tender award documents. The core ground for the termination was stated as technological change. The termination clause in the tender award documents cannot exonerate the first interested party from providing the Board with sufficient evidence to satisfy the existence of technological change.

37. In any event, in general, disputes of rights can be defined as being concerned with the infringement, application or interpretation of existing rights contained in a contract or agreements or breach of a statute such as the present case, and it was incumbent for the Review Board to satisfy itself that the first interested party did not violate the law and the agreement and this could only have been proved by adducing evidence to support the technological change, hence to me, the decision is tainted with illegality, is not rational or fair and these are valid grounds upon which this court can properly exercise its judicial review powers.

38. It should be recalled that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

*a. **Illegality**- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "**illegal**". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.*

*b. **Fairness**- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*

*c. **Irrationality and proportionality**- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute '**irrationality**' or '**perversity**' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of **Lord Green** in *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*<sup>[15]</sup>:-*

*"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."*

39. To me, absence of evidence to support the statutory recognized ground that meets the standard set by the Respondent in the above cited case is something overwhelming to warrant this court to conclude that the decision was irrational and /or unreasonable.

40. It is my view that section 63 of the Act imposes a statutory obligation upon the first interested party to terminate the tender award only on any of the grounds stated therein, and that those grounds are not stated therein for cosmetic purposes.

41. In order to discharge its burden under section **63** of the Act, the interested party must provide evidence that there is real and substantial technological change. The proper approach to the question whether a party invoking the said provision has discharged its burden under section **63** is therefore to ask whether the such a party has put forward sufficient evidence for a court to conclude that, on the probabilities, the technological change cited is of such a nature that it renders it imprudent for the contract to proceed on the original terms and the nature of the change and how it substantially affects the contract ought to be clearly stated. To me, that was the intention of the draftsman and the scheme and architecture of the Act so as to prevent or protect innocent bidders from being unfairly disadvantaged or deprived of the tender on flimsy grounds.

42. It is my considered view that the mere recitation of the statutory language of the ground(s); as has happened in this case is not sufficient for the first interested party to show that there exists 'technological change. Nor are mere *ipse dixit* affidavits proffered by the first interested party. The evidence tendered before the Review Board must provide sufficient information to bring the grounds within the provisions of the law. This recognizes that the tender process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands.

43. Ultimately, the question whether the information put forward is sufficient to place the termination within the ambit of the law as claimed will be determined by the nature of the reasons given. The question is not whether the best evidence to justify termination has been provided, but whether the evidence provided is sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon falls within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63. If it does not, then the body in question has only itself to blame.

44. What must be borne in mind is that public procurement has a constitutional underpinning as clearly stated in Article 227 and disputes arising from procurement processes are concerned with constitutional rights which include the Right to reasonable expectation once a bidder is successful. In addition, the scheme of the act is such that procurement process must strictly conform to the constitutional dictates of transparency, openness, accountability, fairness and generally the rule of law and such rights cannot be narrowly-construed. And what is more, the public body terminating the tender bears the onus of establishing that the termination meets all these constitutional dictates.

45. In my view, had the review Board considered the constitutional underpinnings of procurement processes as outlined above, it would have in my view arrived at a different conclusion.

46. On the issue whether or not the applicant has satisfied the threshold for granting judicial review orders, broadly speaking, the grounds upon which the courts grant judicial review were stated in the case of *Pastoli vs Kabale District Local Government Council and Others*<sup>[16]</sup> where it was held as follows:-

*“in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted ...illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without **jurisdiction** or **ultra vires** or **contrary to the provisions of a law or its principles are instances of illegality**. .....**irrationality** is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such decision is usually a defiance of logic and acceptable moral standards.....**procedural impropriety** is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice.....It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument....”*

47. The grounds upon which the court can exercise its judicial review jurisdiction are incapable of exhaustive listing.<sup>[17]</sup> I also find useful guidance in the words of **Nyamu J** in *Republic vs The Commissioner of Lands Ex Parte Lake Flowers Ltd*<sup>[18]</sup> where he held as follows:-

*“...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the principle of establishing standing for the purposes of judicial review the courts must resist being rigidly chained to the past defined situations of standing and look at **the nature of the matter** before them....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case to case basis.....”(Emphasis added)*

48. Judicial review is primarily concerned with controlling the exercise by public bodies and statutory bodies on powers conferred upon them. The role of the court is to ensure that those bodies do not exercise those powers unlawfully.

49. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others**[19] as follows:-

***“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...”***

50. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilized governance, by holding the public authority to the limit defined by the law.

51. It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognizable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction.[20]

52. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence.[21]

53. Whereas the general position is that in judicial review, the Court is only concerned with the process

through which the decision is arrived at rather than the merits of the decision itself, in practice, the distinction between the two is rather blurred. That this is so was appreciated by the Court of Appeal in ***Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others***.<sup>[22]</sup>

54. Whereas I agree judicial review remedies may be invoked even in cases which were traditionally no go zones such in matters of commercial self-interest, it is my view that for the Court to do so, the transaction itself must have some elements of statutory underpinning. In this case what underpins the subject transaction is section 63 (1) (iii) cited above which provides for grounds for termination.

55. I have carefully evaluated the material before the court and I am persuaded that the applicant has demonstrated sound grounds for the court to exercise its discretion in its favour and grant the reliefs sought.

56. The grant of the orders or certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. Upon analysing all the material before me and upon considering the arguments advanced by both sides, I find that the applicant has satisfied the threshold for this court to grant orders sought.

57. The effect is that the *ex-parte* applicants application dated 15<sup>th</sup> August 2017 succeeds. Accordingly, I order as follows:-

a. ***An order of certiorari*** to remove into the High Court and to quash the decision and ruling delivered by the Public Procurement Administrative Review Board on 1<sup>st</sup> August 2017 in Application No. 64 of 2017, *SGS Kenya Limited vs Energy Regulatory Commission*.

b. ***An order of prohibition*** to remove into the High Court and quash the decision of the Energy Regulatory Commission to proceed with the tender process in Tender Number ERC/PROC/4/3/17-18/016 for the provision of marking and monitoring of petroleum products.

c. ***An order of prohibition*** directed to the Energy Regulatory Commission prohibiting it, directly and/or through its servants and/or agents from entering and/or signing any contract with any third party concerning tender number ERC/PROC/4/3/17-18/016 for the provision of marking and monitoring of petroleum products.

d. ***An order of mandamus*** directing the Energy Regulatory Commission to proceed with the tender process in tender number ERC/PROC/4/3/16-17/119 for the provision of marking and monitoring of petroleum products in conformity with the recommendation of its evaluation committee recommending the award of the tender/contract to *SGS Kenya Limited*.

e. Each party to bear its costs.

Orders accordingly.

**Dated at Nairobi this 22<sup>nd</sup> day of September 2017**

**JOHN M. MATIVO**

**JUDGE**

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<sup>[1]</sup> Article 227 (1) of the Constitution

<sup>[2]</sup> Act No. 33 of 2015

- [3] Act No. 33 of 2015
- [4] Counsel cited Civil Application No. 185 of 2001, Municipal Council of Mombasa vs Republic.
- [5] Counsel cited Kamani vs Kenya Anti-Corruption Commission {2007} 1E.A. 112
- [6] Counsel cited Pastali vs Kabale District Local Government Council & Others {2008}2E.A. 300
- [7] Counsel cited R vs Commissioner of Custom Services Ex-parte Tetra Pak Ltd {2012}eKLR
- [8] Counsel cited R vs Administrative Review Board Procurement & 2 Others ex-parte Hoggers Limited {2015} eKLR in which the court discussed the parameters of judicial review
- [9] R vs Commissioner of Custom Services ex-parte Africa K- Link International Ltd {2012}eKLR & r VS PRINCIPAL Secretary Ministry of Mining ex-parte Airbus Helicopter Southern Africa (PTY) LTD {2017}eKLR cited
- [10] The New Oxford American Dictionary 1335 (2d ed. 2005), p 1687.
- [11] Webster's Third New International Dictionary, at 2280.
- [12] <http://thelawdictionary.org/substantial/>
- [13] {1915} AC 120 (138) HL
- [14] See NUM vs Free State Cons at 446I.
- [15] {1948} 1 K. B. 223, H.L.
- [16] {2008} 2EA 300
- [17] See JR NO. 112 of 2011, High Court, NBI, Seventh day Adventist church , applicant and PS Ministry of NBI Metropolitan Dev
- [18] HC MISC App No 1235 of 1998
- [19] **Civil Appeal No. 266 of 1996**
- [20] See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**
- [21] See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**
- [22] {2016} KLR