REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLENOUS CIVIL APPLICATION NO.185 OF 2017

IN THE MATTER OF AN APPLICATION BY SIMBA PHARMACEUTICALS LIMITED FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF AN APPLICATION BY KENYA MEDICAL SUPPLIES AUTHORITY FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI AND DECLARATIONS

AND

IN THE MATTER OF THE DECISION BY THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD IN APPLICATION NO. 28 OF 2017

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26

AND

IN THE MATTER OF SECTIONS 155 AND 175(1) OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT 2015

AND

IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSAL (PREFERENCE AND RESERVATIONS) REGULATIONS, 2011

AND

IN THE MATTER OF ARTICLES 10, 22, 23(3) (f), 43(1) (a) 47(1), 50(1), 165(6) & (7)

AND ARTICLE 227 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF PART III OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF TENDER NO. KEMSA/GOK-CPF/HIV-16/17-01T 001 TENDER FOR PROCUREMENT OF HIV/AIDS, TB AND MALARIA COMMODITIES UNDER THE GOVERNMENT OF KENYA GLOBAL FUNDING FOR PROCUREMENT OF ANTIRETROVIRAL MEDICINES UNDER THE HIV PROGRAM.

BETWEEN

SIMBA PHARMACEUTICALS LIMITED….....1ST APPLICANT

KENYA MEDICAL SUPPLIES AUTHORITY……..... 2ND APPLICANT

AND

THE PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD…….....RESPONDENT

QUESTA CARE LIMITED..... INTERESTED PARTY

JUDGMENT

Main issue: Applicability of margin of preference in public procurement and whether local manufacturers who are not the actual manufacturers of the specific tendered products are entitled to a 15%margin of preference.

1. On 8th May 2017, parties consented to have the two judicial review applications JR 185 of 2017 and JR 186 of 2017 consolidated under judicial review application number 185 of 2017, with the exparte applicants in both cases becoming the main applicants while the Procuring entity became the respondent and the interested party Questacare Limited remained as such.

2. Therefore, the exparte applicants in this case as consolidated with JR 186 of 2017 are **SIMBA PHARMACEUTICALS LIMITED and KENYA MEDICAL SUPPLIES AUTHORITY.**

3. The 1st Applicant **SIMBA PHARMACEUTICALS LIMITED** is a Pharmaceutical Limited liability Company whose majority shares are held by a Kenyan and is duly registered to trade in Kenya and in this case was the successful bidder in the subject tender.

4. The second exparte applicant **KENYA MEDICAL SUPPLIES AGENCY** is a state agency duly incorporated in Kenya with the capacity to sue and be sued in its own name and is the Procuring Entity [PE].

5. The respondent is the **PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD** a public entity established under the Public Procurement and Asset Disposal Act, 2015.

6. The interested Party is **QUESTA CARE LIMITED**, a limited liability Company duly registered under the Companies Act and was the unsuccessful tenderer/applicant before the Review Board in the subject tender.

The 1st exparte applicant's case

7. The 1st exparte applicant seeks from this court the following judicial review reliefs:

> ***1. AN ORDER OF CERTIORARI to bring into this court and to quash the determination and Orders of the Respondent in Public Procurement Administrative Review Application No. 28 of 2017 delivered on 3rd April 2017.***
>
> ***2. AN ORDER OF PROHIBITION to prohibit and/or restrain the 2nd Applicant from carrying out a re-evaluation of the financial bids of the 1st Applicant and the Interested Party in TENDER NO. KEMSA/GOK-CPF/HIV-16/17-01T 001 TENDER FOR PROCUREMENT OF HIV/AIDS, TB AND MALARIA COMMODITIES UNDER THE GOVERNMENT OF KENYA GLOBAL FUNDING FOR PROCUREMENT OF ANTIRETROVIRAL MEDICINES UNDER THE HIV PROGRAM as ordered by the Respondent on 3rd April, 2017.***
>
> ***3. AN ORDER OF PROHIBITION to prohibit and/or restrain the 2nd Applicant from carrying out a re-evaluation of the financial bid of the Interested Party and applying a 15% margin of preference against the price tendered in TENDER NO. KEMSA/GOK-CPF/HIV-16/17-01T 001 TENDER FOR PROCUREMENT OF HIV/AIDS, TB AND MALARIA COMMODITIES UNDER THE GOVERNMENT OF KENYA GLOBAL FUNDING FOR PROCUREMENT OF ANTIRETROVIRAL MEDICINES UNDER THE HIV PROGRAM as ordered by the Respondent on 3rd April, 2017.***
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> ***4. Costs.***

8. The 1st exparte applicant's case is as detailed in the statutory statement and verifying affidavit sworn by **KALITHODI RAVINDER MENON** the Chief Executive Officer of the 1st exparte applicant company, accompanying the chamber summons for leave.

9. It is alleged and deposed by the 1st exparte applicant that the Applicant participated as a bidder as was declared the successful bidder in the **Tender No. KEMSA/GOK-CPF/HIV-16/17-01T 001 [TENDER FOR PROCUREMENT OF HIV/AIDS, TB AND MALARIA COMMODITIES UNDER THE GOVERNMENT OF KENYA GLOBAL FUNDING OF ANTIRETROVIRAL MEDICINES UNDER THE HIV PROGRAM]** having quoted a total price USD 10,125,006.75.

10. That however, one of the unsuccessful bidders- **Questa Care Limited** lodged a review application before the 1st Respondent, **Review Board vide Application No. 28 of 2017** seeking a nullification of the tender award and a re-evaluation of the said tender.

11. According to the exparte applicant, the decision of the Review Board was unreasonable and irrational because, in its pleading and at the hearing of its application before the Review Board, **Questa Care Limited** conceded that for the said tender it was in a technical agreement with another foreign company which manufactures the products and supplied to the Questa Care Limited for commercial distribution of the finished products in Kenya and that indeed **Questa Care Limited** described itself thus:-

> ***"The Applicant[Questa Care Limited] is engaged in manufacturing (packaging and Release) of Antiretroviral medicines (hereinafter "ARVS") and has a Technical Agreement with Mylan Laboratories Limited (hereinafter "Mylan" pursuant to which the ARVs finished drug products are being manufactured in India at WHO pre-qualified manufacturing site and further packaged in registered commercial patient pack/tested per registered control & release for commercial distribution in Kenya, at the Applicant's production facility."***

12. The 1st applicant claims that before the Review Board, **Questa Care Limited** alleged that it is a

Kenyan manufacturer of the Antiretroviral medicines ("ARVS") it tendered to supply and was therefore entitled to be awarded against its tender price, a maximum margin of preference of 15% and not the 10% awarded by the procuring entity.

13. The a1st applicant further claims that at the hearing of the Review Application before the Board it became clearer to the Board going by the oral testimony of **Questa Care Limited'**s own witness- a **Dr. Reubenson Mugo** that the company was only engaged in the process of packaging, storage and labeling of HIV/AIDS, TB and malaria commodities which it obtains from Mylan Laboratories Limited in India.

14. The 1st applicant claims that under the applicable Regulation 16 of the Public Procurement and Asset Disposal (Preference and Reservations) Regulations, 2011, where citizen contractors have entered into contractual arrangements with foreign contractors, a ten percent (10%) margin of preference in the evaluated tender price of the tender was to be awarded.

15. That *Appendix 1* of the tender document on Preference and Reservations (at page 55 of the tender document and particularly Clause 5 thereof) stated that where citizen contractors have entered into contractual arrangements with foreign contractors, a ten percent (10%) margin of preference in the evaluated tender price of the tender was to be awarded as was awarded to the **Questa Care Limited** by the Procuring Entity.

16. It was claimed that surprisingly, in its decision delivered on 3rd April,2017, the 1st Respondent Review Board held that **Questa Care Limited** is a Kenyan manufacturer of the of HIV/AIDS, TB and malaria commodities and was therefore entitled to a preference margin of 15% instead of 10% that was awarded to it by the procuring entity.

17. According to the 1st applicant, the decision to award 15% margin of preference to goods not manufactured in Kenya is not rationally connected to the empowering provision of law on Preference and Reservations which require National preference to be enjoyed only by contractors manufacturing goods in Kenya.

18. The 1st applicant asserts that on account of the evidence adduced by the parties before the Review Board, it is clear that 1st Respondent therefore acted unreasonably, irrationally and illogically in arriving at the said decision.

19. The 1st applicant further claimed that the decision by the 1st Respondent Review Board was made in error of law and fact in that its determination was based largely upon a material error of law and completely disregarded the applicable laws therein.

20. That the 1st Respondent's decision purports to classify products being manufactured by a foreign company **(Mylan Laboratories Limited)** by a foreign country **(India)** and subsequently packaged in Kenya by the 3rd Respondent (Questa CARE) (on a contractual arrangement) as locally manufactured products in order to benefit from the preference margins under the law, which would obviously defeat the very noble objective of the procurement law of promoting local industry as stipulated under section 3(i) of the Public Procurement and Asset Disposal Act, 2015.

21. It was asserted that the 1st Respondent acted on misdirection and a misinterpretation of the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 leading to a decision which is discriminative to the Applicant herein and if allowed to stand would also create uncertainty and inconsistency in classifying local manufacturers.

22. The 1st applicant also claimed that the decision by the Review Board is contrary to constitutional and statutory objectives of public procurement law as stipulated under Article 227 of the Constitution, Section 3 and 155 of the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011.

23. That the 1st Respondent, a statutory tribunal arrived at its decision in total disregard of the provision of Article 159(2) (d) of the Constitution of Kenya.

24. According to the 1st exparte applicant, the decision by the Review Board was made *ultra vires* and beyond its jurisdiction by ordering the procuring entity to award the 3rd respondent a 15% margin of preference against the price tendered notwithstanding that a procuring entity had discretion on this which it exercises based on other relevant considerations under the law.

25. It was further claimed that the decision by the Review Board ignored relevant considerations, that the 1st Respondent acted in bad faith by ignoring and wishing away a relevant interpretation of what a local manufacturer is as was laid out in a binding Court of Appeal precedent of **Mjengo Ltd. –Vs- Commissioner of Domestic Tax [2016]eKLR.**

26. Further, that the Review Board ignored and/or failed to sufficiently consider the oral testimony of Questa Care Limited 's own witness- a **Dr. Reubenson Mugo** that the company was only engaged in the process of packaging, storage and labeling of HIV/AIDS, TB and malaria commodities which it obtains from Mylan Laboratories Limited in India.

27. that the Review Board purported to sacrifice and ignore a broad and far reaching constitutional requirement and tenet of public procurement which is the promotion of local industries at the expense of giving undue consideration to an extremely legal and technical definition of the word ***"manufacturer."***

28. That under the express provision of section 175 of the PPADA, 2015 the decision of the Review Board is amenable to a judicial review by this Honorable Court.

29. It was further asserted that this case presents a unique opportunity for the court to step in and clarify the interpretation and application of the Public Procurement and Disposal (Preference and Reservations) Regulations in light of the new PPADA, 2015.

30. It was claimed that unless restrained by this Honorable Court, the 2nd Respondent will be left with no option but to comply with the impugned decision of the Review Board to the detriment of the Applicant.

The 2nd exparte applicant's case

31. On 19th April, 2017 the 2nd exparte applicant herein **KENYA MEDICAL SUPPLIES AUTHORITY (KEMSA)** obtained leave of court in **JR 186 of 201**7 to institute judicial review proceedings and on 25th April, 2017 the exparte applicant filed the substantive Notice of motion seeking orders:

> ***a. THAT the applicant be granted leave to apply for AN ORDER OF CERTIORARI to bring into this court and to quash the determination and Orders of the Respondent in Public Procurement Administrative Review Application No. 28 of 2017 delivered on 3rd April 2017.***
>
> ***b. THAT A DECLARATION to issue to the ex-parte applicant did apply a correct margin of preference being a 10% margin of preference to the 1st Interested Party.***
>
> ***c. THAT A DECLARATION to issue that packaging as a stand-alone activity does not amount to manufacture.***

32. The 2nd exparte applicant's case is predicated on the grounds on the face of the notice of motion dated 25th April, 2017, the statutory statement and verifying affidavit sworn by Phillip Omondi, Ag Chef Executive Officer of KEMSA on 25th April, 2017 and annextures thereto, together with the further affidavit sworn on 16th June, 2017 annexing the record of Hansard proceedings conducted by the Review Board in Request for Review Application No 28 of 2016.

33. According to the 2nd exparte applicant Procuring Entity, Kenya received approval of the National Treasury on allocation of 20% counterpart funding for the year 2016/2017 for procurement of HIV/AIDS,TB and MALARIA commodities under the Government of Kenya Global Funding for procurement of Antiretroviral medicines under the HIV Program.

34. The 2nd exparte applicant PE was given authority to initiate procurement of the said drugs by the Ministry of Health. It therefore advertised a tender No. KEMSA/GOK-CPF/HIV-16/17-01T 001 in the local newspapers on 11th October 2016 for eligible bidders to participate in the tender.

35. That the 1st exparte applicant Simba Pharmaceuticals and the Interested Party Questa CARE Limited among other bidders participated in the tender which, after evaluation, found the Interested Party Questa Care Limited Non responsive bidder at the technical evaluation stage and a notification send to it to that effect.

36. On 27th January 2017 the interested party applied for review of the decision of the Procuring entity before the Review Board vide Review CASE No. 10 of 2017 and the Review Board allowed the application for Review and ordered a re-evaluation to be conducted by the procuring entity.

37. At the reevaluation, the interested party was again disqualified at the financial evaluation stage for not being the lowest evaluated bidder after a 10% margin of preference was apportioned to it and a notification of non-responsiveness forwarded to it.

38. That on 13th March, 2013 the interested party filed another application for review before the Review Board contending that it had not been awarded a 15% margin preference yet it was a manufacturer.

39. According to the 2nd exparte applicant, the interested party, as far as the tender was concerned, did not qualify for the 15%margin preference because the Interested Party was merely packaging finished products for Mylan Laboratories India which latter was the manufacturer of the tendered drugs hence it could only be entitled to a 10%margin preference, not 15%.

40. That in its determination made on 3rd April, 2017 the Review Board found that the Interested Party was a manufacture and therefore entitled to 15% margin preference and directed the Procuring Entity to award the Interested party 15%margin preference against the price tendered by the 2nd exparte applicant; and ordered the PE to carry out a financial reevaluation.

41. The 2nd exparte applicant claims that the decision by the Review Board was unreasonable, irrational and made in bad faith because the Review Board failed to take into account matters that it was bound to consider in making its determination; that the decision violated Article 227 of the Constitution, section 3 and 155 of the PPADA, 2015 and the 2011 Public procurement and Disposal (Preference and Reservations)Regulations ; that the Review Board failed to take into account the fact that the Interested Party had never manufacture red the drug tendered for or any drug at all and thus the decision was unreasonable; that the Interested Party is only engaged in packaging activities on behalf of Mylan laboratories Limited located in India pursuant to a Technical/Quality Agreement between the two.

42. The 2nd exparte applicant asserted that the decision by the Review Board was unreasonable because it departed from good law established to the effect that packaging as stand-alone activity cannot amount to manufacturing hence the decision to award 15% margin preference to the interested party involved in packaging activities and not manufacturing is irrational and a misdirection in law.

43. It was also claimed by the 2nd exparte applicant that the decision by the Review Board deviated from the purposes envisaged in Articles 227 of the Constitution and sections 3 and 155 of the PPADA, 2015, and Regulation 16 of the PPD (Preference and Reservations)Regulations, 2011which espouse promotion of local industry hence, it committed errors of law and acted disproportionally and that it was irrational for the Review Board to award 15% margin preference to the interested party whose tendered goods were

not locally manufactured in Kenya.

44. The 2nd exparte applicant therefore urged this court to grant it the judicial review orders sought in the notice of motion. The 2nd exparte applicant availed to court the Hansard report of all the proceedings of the Review Board where viva voce evidence was taken from the Interested Party's witness Dr. Reubenson Mugo. In that evidence, Dr Mugo was cross-examined at length on the issue of whether the interested party was a manufacturer of the tendered drugs.

45. According to the procuring entity, the interested party was merely a packaging site for the Mylan Laboratories of India who were the manufacturers of the tendered drug and that therefore there is no way packaging of finished products could be synonymous with manufacture of the said product.

46. That the Dr Mugo testified that the interested party does not granulate as the product is already compressed and filmed thus a finished product.

47. The 1st applicant asserted that the respondent despite being supplied with the binding authority of Mjengo ltd on the interpretation of the term manufacturer, it ignored that interpretation and gave its own interpretation thereby departing from the law as established by the Court of Appeal hence it failed to take into consideration relevant factors including the said Mjengo Limited authority. The rest of the depositions are reiterations of the verifying affidavit and the statutory statement filed by the 1st applicant.

The Respondent's case

48. The Respondent Review Board filed a replying affidavit sworn by its Secretary **Mr Henock K. Kirungu** on 5TH June, 21017 supporting its decision in Request for Review case No 28 of 2-17 and contending that on 13th March, 2017, the 1st Interested Party filed a Request for Review before the Respondent challenging the award of the Tender No. KEMSA/GOK-CPF/HIV-16/17- OIT 001 for the supply and delivery of ARV Medicines – Adults.

49. That 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.

50. The Respondent contends that after hearing the parties on 30th March, 2017 it considered their pleadings and submissions, determined the application for review and delivered its ruling on 3rd April, 2017 based on its findings that:

> a. The Applicant was entitled to the benefit of preference as ***a locally registered company and also as a manufacturer and whereas the first class of preference made it entitled to a preference margin of 10%, the second class of preference made is entitled to a preference of 15%;***
>
> b. under the provisions of Section 2 of the Pharmacy and Poisons Act and Section 3(e) (v) of the income Tax Act (Cap 470) Laws of Kenya and the Public Procurement and Disposal Regulations (Preference and Disposal Regulations) 2011, the Applicant was entitled to a percentage of preference which was most beneficial to it namely 15% preference.
>
> c. The Applicant is entitled to a 15% margin of preference and the procuring entity therefore erred in failing to accord the Applicant the said margin of preference.

51. That the Respondent made a Decision on 3rd April, 2017 and gave the following orders:-

> a. The Applicant's Request for review dated 13th March, 2017 is hereby allowed.

b. The procuring entity be and is hereby directed to apply a 15% margin of preference against the price tendered for by the Applicant.

c. That the procuring entity shall carry out the financial re-evaluation process in terms of order 2 above and complete the same within a period of Fourteen (14) days from today's date.

d. In view of the nature of the orders make above, the Board orders that each party shall bear its own costs of this Request for Review.

52. According to the Review Board, in making its decision**, it** considered all documents of evidentiary value placed before it by the parties and the submissions of the parties on each of the issues raised in the Request for Review. Accordingly, it was contended that the decision by the Review Board was made within its mandate and the specific sections of the law in particular Section 173 of the Public Procurement and Asset Disposal Act 2015, on powers of the Review Board, on which the Review Board's decision was pegged.

53. The Respondent contended that the Ex-parte Applicant had not demonstrated by an iota of truth that the Board was unreasonable in arriving at its decision or that the Board was guilty of unreasonable exercise of power and irrationality in arriving at its decision. Further, that the decision by the Board was grounded in law after review of all material conditions placed before it and importantly in line with its mandate to uphold public procurement process.

54. The Respondent maintained that the Ex-parte Applicant had 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 decision of the Board.

55. On the allegation by the exparte applicants that the Review Board's orders were a form of abuse of power, it was contended that the Board in arriving at its decision complied with the requirements of Section 173 of the Act.in that regard, it was the Respondent's contention that the Ex-parte Applicants' applications are made in bad faith, have no merit and are only calculated to discredit the credibility of the Respondent's mandate and functions, while ultimately eroding the public's confidence in procurement procedures and processes.

56. The Respondent urged the court to dismiss the exparte applicants' Applications for Judicial Review for lack of merit while maintaining that the Review Board's decision was nothing short of reasonable, consistent and in line with the exercise of its powers and the provisions of the Act.

The interested Party's case

57. The Interested party Questa Care Limited filed a replying affidavit sworn by its Director **Mr Hiren Mehta** on 18th May, 2017 contending that it is engaged in the manufacturing (packaging and release) of the Anti-Retroviral medicines(**ARVs)** and that it packages the said drugs at its **WHO** prequalified facility in Industrial Area, Nairobi.

58. According to the interested party, it bid for an international tender advertised by the procuring entity whose paragraph 3 at page 55 of the tender documents that fifteen percent 15% margin preference in the evaluated price of the tender would be given to the candidates offering goods manufactured in Kenya for goods with values beyond the exclusive preference threshold.

59. That after the evaluation process, the interested party was on 19th January, 2017 notified that its bid was unsuccessful for reasons, among others that the interested party did not indicate the manufacturing site address on the product label.

60. It was upon receipt of the notification above that the interested party filed a request for review No 10 of 2017 with the Review Board on the grounds inter alia that the procuring entity had introduced a criteria which was not in the tender documents, and claiming that it had met all the technical specifications under

the tender documents and was therefore entitled to 15%margin preference having offered goods manufactured in Kenya.

61. That the Review Board allowed the request on grounds inter alia, that the PE had introduced an extrinsic criteria at the evaluation stage which criteria was never part of the tender documents contrary to section 80 of the PPADA, 2015 and that therefore the interested party had been wrongly declared an unsuccessful bidder at the preliminary evaluation stage.

62. That the Review Board after considering the request for review that it found that the interested party was wholly owned by Kenyans and that fell within the definition of manufacturer hence it was entitled to the preference, relying on section 155 of the PPADA and that the decision of 16th February 2017 has never been appealed against by either the successful bidder or the procuring entity. That the procuring entity subsequently evaluated the interested party's bid and once again found the interested party unsuccessful and notified it vide letter dated 1st March 2017 applying the 10% margin of preference thereby making the interested parties not being the lowest evaluated bid in financials

63. The interested party claims that the decision by the procuring entity was done with the intention of denying the interested party the award of the tender and in contravention of the law and the decision of the Review Board made on 16th February, 2017.

64. accordingly, the interested party did lodge another request for review on 13th March 2017 vide Request for Review Application No. 28 of 2017 challenging the PE's decision and that it was in the latter request for review that the Review Board directed the Procuring entity to award 15%margin of preference instead of the 10% margin of preference awarded to it by the procuring entity, pursuant to section 156 of the PPADA and the relevant Regulations on Preference and Reservations.

65. That in the response by the procuring entity, it was alleged that the interested party was not a manufacturer but involved in packaging and storage for Mylan Laboratories Limited of India and that therefore it could not be given the 15%margin of preference but the Review Board overruled it using the definition of manufacturer found in the Pharmacy and Poisons Act section 2 thereof and the WHO Good Manufacturing Practices for Pharmaceutical Products.

66. It was contended that the procuring entity an the successful bidder have mislead the court by not disclosing that the Review Board relied on the definitions above in arriving at the decision that the interested party was a manufacturer hence the allegations of irrationality, illegality are not founded at all.

67. Further, that the Review Board correctly distinguished the **Mjengo Ltd vs. Commissioner of Domestic Tax [2016] eKLR** case which related to rice which is not manufactured unlike drugs hence the procuring entity was bound to apply 15% margin of preference being the scheme with the highest advantage available to the interested party, in order to promote local industry as stipulated in section 3 and 155 of the PPADA, 2015.

68. According to the interested party, the procuring entity and the successful bidder failed to disclose to court the fact that even if the goods were partially manufactured in Kenya the bidder would be entitled to the 15% margin of preference under the PPADA, 2015 and Regulations made thereto.

69. It was contended that the exparte applicants herein have misapprehended the purpose of judicial review proceedings and using the said proceedings to reintroduce issues of merit that were already determined by the Review Board thereby improperly using this court as an appellate court hence their applications should be dismissed with costs.

SUBMISSIONS

1st Exparte Applicant's written submissions

70. The 1st exparte applicant filed written submissions dated 7r June, 2017 setting out the factual background to this matter as deposed in the verifying affidavit of Phillip Omondi, his further affidavit sworn on 16th June, 2017 and the statutory statement accompanying the chamber summons for leave.

71. Three issues were framed for determination namely:

a. Whether the respondent's decision is unreasonable and or irrational;

b. Whether the decision of the respondent is contrary to the Constitution and statutory objectives of the public procurement; and

c. Whether the respondent's decision ignored relevant considerations.

72. O the first issue of whether the respondent's decision is unreasonable and or irrational, the 1st applicant submitted that although it was the case for the Interested party that it was Kenyan manufacturer of the tendered ARV drugs and that it was therefore entitled to the 15%margin of preference as local manufacturer, the evidence tendered before the Review Board pointed to the contrary. Further, that in its own pleadings before the Review Board, the interested Party conceded that for the said tender it had a Technical Agreement with Mylan Laboratories Limited India who are the manufacturers of the tendered drug and released to the interested party in Kenya for commercial distribution, at the interested party's production facility.

73. It was submitted that under the Agreement, it was clear that Mylan Laboratories Limited, a foreign company based in India was the product manufacturer while the interested party Questa care Limited was one of its contracted site for undertaking packaging of the finished tablets and capsules on its behalf.

74. It was also submitted that the interested party conceded vide a notification dated 30th September, 2015 annexed to its further affidavit to the Board and at page 147 of the interested party' a replying affidavit that Questa care was an additional packaging site for Mylan Laboratories limited.

75. It was submitted that finished products refers to finished dosage form that has undergone all stages of manufacture including packaging its final container and labeling hence the interested party cannot claim that the product as tendered was manufactured by the Interested party in Kenya.

76. Further, that even the WHO Public Inspection Report says that the interested party is a packaging site for Mylan.

77. It was further submitted that during the oral testimony tendered by Dr Reubenson Mugo he made it clear that the only process that the interested party was involved in as far as the tendered drug was concerned was to package the ARVs and that so far, the interested party had not even packaged the drug in issue and that it had intended to do so after the procurement.

78. It was submitted that the Dr Reubenson was clear that the interested party was to leverage of the experience of Mylan to fulfill the requirement of two years' experience in manufacturing ARVs.

79. Accordingly, it was submitted that albeit the 1st exparte applicant and the interested party were both Kenyan Companies, but neither of them manufactured the products subject of the tender. Hence, they were both entitled to a 10% margin of preference as stipulated in section 156 of the Act as read with the 2011 Public Procurement preference and Reservations Regulations. The 1st applicant maintained that to classify Questa Care Limited as a local manufacturer would be to disadvantage the 1st applicant and to illegally and unfairly give the interested party a higher margin of 15% margin of preference. Reliance was placed on **Commissioner General Income Tax vs Power Limited[1970]EA 328** where the former East African Court of Appeal defined the verb ***"manufacture"*** and stated that:

"The verb may within certain limits have different meanings according to the context in which

it issued, but that in almost every sense it must mean to produce something by some form of activity. It may be a question of degree in certain cases whether an activity has produced a thing as opposed to merely embellishing an existing thing."

80. Further that the court in the above case held that the tax payer was a manufacturer because the taxpayers changed the form of the material from mere paper and ink to cigarette cartons. On the contrary, it was submitted that the interested party herein is only involved in packaging of the tendered drugs which it intendeds to obtain from Mylan Laboratories of India.

81. It was therefore submitted that it was grossly unreasonable and irrational for the Review Board to hold that the interested party was a manufacturer of the tendered product and t order the Procuring Entity to award a 15%margin of preference to it after a reevaluation. Reliance was placed on the P**rovincial Pictures Houses Ltd v Wednesbury Corporation [1948] 1 KB 223** on what unreasonableness and irrationality mean.

82. Further reliance was placed on **Republic v Jomo Kenyatta University of Agriculture and technology Exparte Cecilia Mwathi &Another[2008] EKLR** where it was held that judicial review remedy is available where there is abuse of discretion; where the decision maker exercises discretion for an improper purpose; or in breach of duty to act fairly or acts in a manner to frustrate the purpose of the Act or fails to act reasonably in the exercise of discretion or fails to exercise discretion; fetters the discretion given or where the decision is irrational and unreasonable.

83. Relying on the decision in **R V PPARB Exparte Zhongman Petroleum& Natural Gas Group Company Limited [2010] eKLR** it was submitted that an unreasonable decision is a nullity for failure to comply with the rules of natural justice, deciding matters not remitted to a tribunal, taking into account irrelevant matters as well as failing to take into account relevant matters.

84. It was further submitted that the impugned decision was contrary to the Constitution and statutory objectives of the PPADA, 2015 more specifically Article 227 of the Constitution and PART XII of the Act on Preference and Reservations in Procurement, section 155 which sets out the threshold for such margin preference.

85. It was sub mitted that the interpretation by the Review board that the interested party which was merely involved in the packaging of the tendered drug for Mylan Laboratories was a manufacturer did not promote local industry as stipulated in the Act and that it the Review Board did not contextualize the definition of manufacturer within the Public Procurement and Asset Disposal Act and that the Act under section 5(1) is clear that any other legislation, government notices or circulars which was in conflict with it then the Act would prevail. Further reliance was placed on **Law Society of Kenya v KRA & another [2017]** on how to interpret words, depending on the context and text. Accordingly, it was submitted that section 2 of the Pharmacy and Poisons Act must be interpreted in line with section 7 of the Sixth Schedule to the Constitution. Further reliance was placed on **RV PPARB Exparte Selex Sistemi Integrati [2008] eKLR**. Where Nyamu J (as he then was) held inter alia that the Procuring Entity and the Review Board had a responsibility to correctly apply the law and that where a procuring entity had committed an error apparent on the face of both the decision and the ruling the same was amenable of judicial review.

86. It was also submitted that the Review Board ignored relevant considerations in making its decision by refusing to accept the holding in the Court of Appeal decision of **Mjengo Ltd Vs Commissioner of Domestic Tax[2016]eKLR** where the Court of Appeal made it clear that packaging was not a stand-alone activity in the definition of ***"manufacturer."*** The 1st applicant also submitted, relying on the case of **Rv PPARB Exparte Selex Sistemi Integrati** on the rationale behind grant of Preference. In this case, it was submitted that the Review Board ignored the principle that for one to qualify for preference they had to be Kenyan manufacturers.

87. The 1st applicant urged this court to allow the judicial review application and supported the 2nd exparte applicant's case as presented in JR 186 of 2016, consolidated with this matter as one.

2nd Exparte Applicant's written submissions

88. The 2nd Applicant submitted on the following areas:

89. On the scope of judicial review, it was submitted that prior to the Constitution 2010, judicial review was an exclusive purview of writs of *mandamus, certiorari prohibition* strictly addressing itself only to issues of procedure and deliberately downing its tools where the court was apprehensive that it may delve into issue of the merits of the case notwithstanding that there existed an indistinguishable correlation between the merits and the procedure.

90. It was submitted that the contention that issues touching on merit cannot be raised in judicial review proceedings was the position of the law through the **Law Reform Act, which** law has now changed and the provisions of ***Articles 22, 23 (3)*** of the ***Constitution*** as read with ***Article 47*** of the ***Constitution*** and ***Sections 5 (2) (b)*** and ***(c)*** and ***Section 7 (1) (a)*** and ***(2)*** of the **Fair Administrative Action Act** suggests that issues of merit can be entertained by way of statutory judicial review.

91. It was submitted that Article 47 of the Constitution as read with the provisions of ***Section 5 (2)*** of the **Fair Administrative Action Act** repudiates the exclusivity to challenge an administrative action through only writs of prerogative Orders. That the section permits a split approach for remedies against administrative actions. One approach is by way of statutory judicial review under the Act; the other is through proceedings for any other remedies as may be available under the Constitution or any written law. Further, that Subject to ***Section 9 (2),*** and ***(4)*** of the **Fair Administrative Action Act**, the two approaches are not mutually exclusive.

92. It was submitted that the common law principles previously encumbering judicial review for administrative actions have now been included under ***Article 47*** Constitution and ***Section 7*** of the **Fair Administrative Action Act**. Therefore, it was submitted that as it stands now there is not a bilateral system of law regulating administrative actions which are the common law and the Constitution but only a singular system grounded in the Constitution. It was submitted that the courts' power to statutorily review administrative action no longer flows directly from the common law, but *inter alia* from the constitutionally mandated **Fair Administrative Action Act** and ***Article 47*** of the Constitution.

93. It was submitted that the scope as at now on issues of Judicial Review is not exclusively founded on the common law principles of prerogative writ orders but on a higher principle which is the Constitution of Kenya as read with the Fair Administrative Actions Act which deduces action reviewable by this court to subscribe to a minimum threshold built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision making process.

94. Reliance was placed on **Judicial Review 371 & 372 of 2015 (Consolidated) Republic v Public Procurement Administrative Review Board Ex-parte Syner- Chemie Limited** where this very court held:-

> ***"Article 47 of the constitution elevates fair administrative action from a common law action to a constitutional right under the Bill of rights. The same position applies to Article 48 of the Constitution which commands the state to ensure that all persons are facilitated to access justice without any impediments.***
>
> ***Further, Article 20(3) (a) of the Constitution commands that in applying a provision of the Bill of Rights like in this case Article 47 of the Constitution on the right to fair administrative action which is invoked by the exparte applicant in this case, a court should '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."*** [Emphasis added].
>
> ***"By virtue of the fact that Judicial Review is now a constitutional tool for the vindication of fundamental rights and freedoms, more specifically, the right to fair administrative action, in***

***my humble view, any conflict between the Law Reform Act in Sections 8 and 9 and the Fair Administrative Action Act , 2015 must be resolved in favour of the latter Act which directly implements the constitutionally guaranteed right since Article 47(3) of the Constitution is what reflects the will of the people of Kenya and therefore in applying Sections 8 and 9 of the Law Reform Act, the court must interpret those sections with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution, as stipulated in Section 7(1) of the Sixth Schedule to the Constitution, until the said provisions are amended as appropriate*.[emphasis added].**

95. Further reliance was placed on the Court of Appeal decision in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR,** at paragraphs 55-58 to advance the argument that the Fair Administrative Action Act which underpins the values of the Constitution of Kenya forms the foundation for the exercise of Judicial Review and ousts the previously utilized common law principles that set Judicial Review to be exclusively on procedural matters. The Court of Appeal expressed itself thus:

"An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case.

However, Section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued.

In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications. Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. [Emphasis added]. ***Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review.***

In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision.

It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in

Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act."

96. It was the 2nd applicant's submission that this Court has Jurisdiction emanating from the Constitution which allows this Court to consider the Judicial Review applications herein and make appropriate orders.

97. On whether the Orders sought can be issued by this Honorable Court: On the prayer for Certiorari, it was submitted that the nature of an order of certiorari is to quash a decision by a body and such decision is underpinned on various fundamental breaches of law, natural, procedural improprieties and/or other relevant factors. Reliance was placed on **Republic v Chief Magistrate Makindu & another Ex-Parte Bernard Musau Mailu & 2 others [2016] eKLR** where the Court cited with approval the decision in the case of **Captain Geoffrey Kujoga Murungi vs Attorney General, Misc. App No. 293 of 1993** where it was stated:

"Certiorari deals with decisions already made – so that when issued an order brings up into this Court a decision of an inferior court, tribunal or of a public authority to be quashed. Such an order (certiorari) can on1y be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice; or contrary to law."

98. The 2nd applicant further relied on the case of **Okiya Omtatah Okoiti v Kenya Revenue Authority & 2 others [2016] eKLR** where the court relied on the writings of **Ferris** in his Book on the ***Law of Extraordinary Legal Remedies*** *and* observed thus:

"It is well settled that a writ of prohibition may not be used to usurp or perform the functions of an appeal, writ of error or certiorari, or to correct any mistakes, errors or irregularities in deciding any question of law or fact within its jurisdiction.

99. In this case it was submitted that there exist manifest errors or irregularities made by the Respondent in deciding the questions of law and fact in the impugned decision as outlined herein below.

100. On unreasonableness, irrationality and bad faith: it was submitted that the respondent failed to call to its attention matters that it was bound to consider before and while making its determination and as such acted unreasonably. That the Respondent was presented with uncontroverted evidence consisting of an admission by the Interested Party's witness one Dr. Reubenson Mugo which showed that the 1st Interested Party only undertook packaging and was not a manufacturer of the product tendered and had never undertaken the process of manufacturing. Section **7(2)(f)** of the **Fair Administrative Actions Act** was cited:

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(f) the administrator failed to take into account relevant considerations;

101. And a submission made to the effect that the issue for determination in the impugned decision was whether the Interested Party was a manufacturer so as to benefit from the 15% margin of preference available to local manufacturers.

102. According to the 2nd exparte applicant, the Respondent failed to take into consideration that the Interested Party is involved in packaging activities on behalf of Mylan Laboratories Limited located in India pursuant to a Technical/Quality Agreement between the two where Mylan Laboratories Limited manufactured the drug tendered for in its laboratories in India.

103. It was therefore submitted that the evidence or lack thereof as to whether the Interested Party was a

manufacturer was a relevant consideration to be taken into account so as to determine the margin of preference available to the interested party.

104. Further r submission was made to the effect that the Respondent equally failed to take into consideration good law established by the Court of appeal in Civil **Appeal 85 of 2014 between *Mjengo Limited v Commissioner of Domestic Tax*** which held that packaging as a standalone activity does not amount to manufacturing.

105. In the view of the 2nd exparte applicant, the Respondent by deliberately refusing to be guided by the Law as was declared by the Court of appeal which categorically stated that packaging as a standalone activity without an element of 'making' as was the case herein, was unreasonable by the Respondent considering that this was evidence within the hands of the Respondent at the time of the hearing.

106. On errors of law and proportionality of interests and rights affected it was submitted that the Respondent's decision was influenced by a material error of law whereby the Respondent in the impugned decision interpreted the Interested Party to be a manufacturer based on the definition given in **Section 2 of the** Pharmacy and Poisons Act Cap 244 Laws of Kenya which states:

> ***"manufacture" means** any process carried out in the course of making a product or medicinal substance and includes packaging, blending, mixing, assembling, distillation, processing, changing of form or application of any chemical or physical process in the preparation of a medicinal substance or product; but does not include dissolving or dispensing the product by diluting or mixing it with some other substances used as a vehicle for administration"*

107. Reliance was placed on **Civil Appeal 85 of 2014-Mjengo Limited v Commissioner of Domestic Tax(supra) where** the Court of Appeal was faced with this definition problem and as a result stated the following:

> "***It is noteworthy that the definition of the word "Manufacture" in Paragraph 24(3)(e) begins with the words, "Manufacture" means…". It does not, as counsel for the appellant suggested begin with the words, "Manufacture" includes…." The distinction is significant. In his book, Legislative Drafting, to which we were referred, Professor G C Thornton says that***:
>
> *"**Means' is appropriate where the stipulated meaning is expressed in a complete form and no part of the intended meaning is omitted. The significance to be attached by the reader to the word defined is limited to the stipulated meaning. 'Means' may be appropriate for delimiting, extending or narrowing definitions. The vital element is that the definition must give a complete meaning**." [Emphasis]*

108. It was submitted that the same point is captured in **Stroud's Judicial Dictionary of Words and Phrases** where the word "mean" is defined in terms that:

> *"**When a statute says that a word or phrase shall "mean" - not merely that it shall "include" - certain things or acts, "the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in the definition**."*

109. That the Court in the said **Mjengo Limited v Commissioner of Domestic Tax**(supra)further stated :

> "***However, within the meaning assigned to the word "manufacture" under that provision are the words, "the making (including packaging) of goods or materials from raw or partly manufactured materials or other goods". The effect, is to extend the meaning of the word "making" to include packaging. It does not however equate "packaging" on its own without "making" to manufacturing.***"

110. It was therefore submitted that all this was information that was available and indeed supplied to the

Respondent by the Applicants during the hearing of the Request for Review Application No 28 of 2017. That it is not a new fact being introduced and that therefore as it stands, it is the law of the land as interpreted by the Court of Appeal.

111. The 2nd exparte applicant further submitted relying on the 9th Edition of **BLACK'S LAW DICTIONARY** at page 594 which defines and expounds the rule thus:-

> ***"A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed. ?For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animals, the general language or any other farm animals – despite its seeming breath – would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chicken."***

112. The 2nd exparte applicant therefore submitted that the Respondent fell into a material error of law by considering ***packaging as a standalone activity to amount to manufacturing where the same has been interpreted by the Court of Appeal to the effect that where the said packaging lacks the element of "making" it cannot fall into the definition of manufacture.***

113. It was therefore submitted that the Respondent was in view of the above obligated to interpret the law as it is and thereby award the Interested Party with a 10% margin of preference as provided by Regulation 16 of the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011. It was submitted that the Respondent's departure thereof was influenced by a material error of law.

114. Further, the 2nd exparte applicant submitted that the Respondent equally failed to act proportionate to the weight accorded to the interests and considerations in this matter between the legitimate aim of the Constitution, the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 in protecting local industries and safeguarding public funds.

115. It was submitted that the legitimate aim of the Constitution, the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 all demand that local industries be promoted for sustainable development.

116. The 2nd exparte applicant cited the provisions of **Section 3 of the Public Procurement and Asset Disposal Act 2015** which espouse the guiding principles for procurement in the following terms, *inter alia*:

> ***"3. 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-***
>
> (***i) Promotion of local industry, sustainable development and protection of the environment; and***
>
> ***(j) Promotion of citizen contractors."***

117. It was submitted that it is for the above reason that the legislature in promoting the local industry embodied a legitimate aim within the Law to goods manufactured in Kenya to enjoy the highest margin of preference during procurement, being a 15% margin of preference.

118. That Section 157 (2) of **The Public Procurement and Asset Disposal Act 2015** provides:

> ***"Subject to subsection (8), the Cabinet Secretary shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and asset disposal."***

Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 stipulates at Regulation 14::

> ***"For the purposes of section 39(8) (b) (i) of the Act, a fifteen percent margin of preference in the evaluated price of the tender shall be given to candidates offering goods manufactured, mined, extracted or grown in Kenya."***

119. It was submitted that the weight accorded to the interests of the law as outlined hereinabove all seek to promote local manufacturers by providing a 15% margin of preference that the said firms are entitled to benefit from being the highest margin available in law.

120. In that regard, it was submitted that the legitimate aim of the law as drafted by the framers of the law was to expand and enhance the technological development of local manufacturers to ensure that they were at par with global manufacturers. And that therefore to allow ***packaging*** as a standalone activity, which did not include ***"making",*** to be considered as **manufacturing** defeated the rights of person(s) actually undertaking the ***"making"*** of any product.

121. It was a submission that the Respondent by stating that the interested party was entitled to a 15% margin of preference yet they had no evidence that they undertook any ***'making'*** of the tendered product failed to act proportionate to the weight accorded to interests and considerations in this matter between the legitimate aim of the Constitution, the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 in protecting local industries and safeguarding public funds.

122. On that basis, it was urged that this court should grant the judicial review orders of Certiorari to bring the ruling and Orders of the Respondent in PPARB 28 of 2017 and quash them.

123. On whether Prohibition should issue, it was submitted that the writ of **prohibition** is much narrower than that of certiorari because it is a writ intended to halt any or further proceedings being undertaken or are likely to be undertaken by an inferior tribunal or body since the proceedings if they were to be allowed would be against the law of the land.

124. Reliance was placed on **Halsbury's Laws of England 4th Edition Vol. 1 Page 37 Para 128** on the scope of prohibition:

> ***"It is an order from the High Court directed to an inferior tribunal or body which forbids the tribunal or body to continue proceedings that are in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie, to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings."***

125. Further reliance was placed on **JR CASE NO. 382 OF 2014 Republic v Land Disputes Tribunal, Karuri & 2 others** where the court interpreted the scope of prohibition thus:

> ***"In Paragraph 123 (Page 273) of the 4th Edition (2001 Reissue Volume 1(1) of Halsbury's Laws of England, the learned authors discuss the nature of certiorari and prohibition.***
>
> ***In regard to an order of prohibition they state that:***
>
> ***"A prohibiting order is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority or body which is susceptible to judicial review which forbids that court or tribunal or authority or body to act in excess of its jurisdiction or contrary to law…. Whereas quashing orders are concerned with decisions in the past, prohibiting orders are concerned with those in the future."***

In the case of Kenya National Examinations Council v Republic, ex-parte Geoffrey Gathenji Njoroge & 9 others, Civil Appeal No. 266 of 1996 the Court of Appeal expressed its opinion on the use of a prohibition order as follows:

"What does an <u>ORDER OF PROHIBITION</u> do and when will it issue" It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol. 1 at pg.37 paragraph 128…..The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition"

An order of prohibition therefore looks into the future. Its aim is to stop a wrong from being committed or the continuation of such a wrong."

126. It was submitted that by the 2nd Applicant proceeding to carry re-evaluation of the tender herein and applying a 15% margin of preference would go against the law as provided in the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011. As such it was submitted that the circumstances of this case demand that an order of prohibition do issue against the 2nd Applicant not to proceed with re-evaluation since the same would go against the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011.

127. On whether declarations should issue, it was submitted relying on the case of **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others** that the jurisdiction of Judicial Review previously fettered by the Law Reform Act has been expanded by the Constitution of Kenya and the Fair administrative Action Act in order to safeguard fundamental rights more so where Judicial Review exists as the sole remedy of choice.

128. Accordingly, it was submitted that Declarations in that regard are the new frontiers excisable by this Court. Reliance was placed on **MISCELLANEOUS CIVIL APPLICATION NO. 192 OF 2016** between **Bitange Ndemo v Director of Public Prosecutions & 4 others** where this Court declared and defined declarations as hereunder:

"***A declaration is a formal statement by the court pronouncing upon the existence or nonexistence of a legal constitutional state of affairs. It declares what the legal position is and what are the rights of the parties. It does not contain an order which can be enforced against the respondents, as it only declares what is the legal position. It is not a coercive remedy, and can be carefully couched or tailored so as not to interfere with the activities of public authorities more than is necessary to ensure that those public authorities comply with the law."***

129. It was submitted that Declarations consist of pronouncement on the current legal and constitutional state of affairs and this Court by virtue of the Constitution of Kenya, the Fair Administrative Actions Act and enabling provisions of law is permitted to declare itself on an issue of law.

130. The court was reminded that this Judicial Review Application is brought pursuant to articles 10, 22, 23(3) (f), 43(1)(a) 47(1), 50(1), 165(6) & (7) and article 227 of the Constitution of Kenya 2010 whose import, more specifically Articles 22 and 23 is to allow a party to seek enforcement of a right and the court may grant any of the Orders outlined in Article 23(3) which include:

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

131. That the scope of declarations was interpreted in ***Bitange Ndemo v Director of Public Prosecutions & 4 others (supra)***as follows:-

"However, a declaration can also be used to pronounce upon the legality of a future situation and in that way the occurrence of illegal action is avoided. In Bass V Permanent Trustee Company Ltd[1999] 161 ALR 399 at paragraph 89, Kirby J held that:

"The Declarations' development "is one of the most important and beneficial adventures in the administration of justice during this century."

"The tests to be satisfied to warrant grant of Declarations in Judicial Review proceedings were set out in the case of Aussie Airlines Pty Ltd V Australian Airlines Ltd [1996] 139 ALR 663 at 670-671 that:

"For a party to have sufficient standing to seek and obtain the grant of declaratory relief it must satisfy a number of tests which have been formulated by the courts; some in the alternative and some cumulative. I shall formulate them in summary form as follows:-

a) The proceeding must involve the determination of a question that is not abstract or hypothetical. There must be a real question involved, and the declaratory relief must be directed to the determination of legal controversies. The answer to the question must produce some real consequences or the parties.

b) The applicant for declaratory relief will not have sufficient status if relief is " claimed in relation to circumstances that (have) not occurred and might never happen or if the court's declaration will produce no foreseeable consequences for the parties.

c) The party seeking declaratory relief must have a real interest to raise it.

d) Generally there must be a proper contradiction.

e) These other rules should in general be satisfied before the court's discretion is exercised in favour of granting declaratory relief."

132. It was submitted that the 2nd Applicant seeks a declaration that it applied the correct margin of preference as provided by law to the bid submitted by the Interested Party being a 10% margin of preference and that packaging as a standalone activity does not amount to manufacture.

133. It was submitted that the Interested Party was in a contractual agreement with Mylan Laboratories India where the latter company manufactured the product subject to the tender in their laboratories in India and the interested party received and packaged the finished product in Kenya. That pursuant to the said contractual agreement the Interested Party considered itself eligible to bid for the tender subject to these proceedings. As such the 2nd applicant evaluated the Interested Party's bid as a bidder in a contractual relationship with a foreign company and therefore entitled to a 10% margin of preference, and that that is the established law hence the Court should declare that the 2nd Applicant applied the correct margin of preference as provided by law.

134. Still on the issue of packaging it was submitted that this issue was dealt with by the Court of Appeal in ***Mjengo Limited v Commissioner of Domestic Tax*** (**supra)** where the Court of Appeal stated that ***packaging*** without the element of ***'making'*** cannot amount to manufacturing. The 2nd exparte applicant maintained that by any stretch of the canons of interpretation, ***packaging*** as a standalone activity under any circumstance without any element of ***'making'*** cannot amount to manufacturing. A position interpreted and declared by the Court of Appeal and as such binding on this court.

135. It was submitted that the *viva voce* evidence of **Dr. Reubenson Mugo** the 1st Interested Party's witness adduced at the trial clearly indicated that the Interested Party does not undertake the process of changing, altering or in any way interfering with the composition of the product. That it was the evidence of Dr. Reubenson Mugo that the Interested Party is not involved in the process of **'making'** the tendered drug but simply removes the received product from large bags which is shipped in and packages the product in smaller containers.

136. It was submitted that this very evidence given by Dr. Reubenson Mugo which is in the custody of the Respondent has not been produced nor given to the 2nd Applicant despite the latter's numerous requests for the same.

137. It was therefore submitted that this Court do make a declaration that packaging as a standalone activity does not amount to manufacturing.

138. On the Respondent and Interested Party's response to the twin judicial review applications, the 2nd exparte applicant submitted as follows:

139. On the Interested Party's Response and depositions that *in Public Procurement Application No. 10 of 2017 between the same parties herein, the Respondent made a determination that the Interested Party is a manufacturer and as such entitled to a 15% margin of preference*, it was submitted that the interpretation of the decision by the Interested Party is flawed since the Respondent did not make such a finding in that case, and that the Respondent only reproduced what the Interested Party stated during the hearing and never made a determination on the same. That the only item addressed in that case was that the Interested Party was entitled to a margin of preference which could only be determined by the 2nd Applicant procuring entity.

140. The 2nd applicant reproduced the Respondent's decision found at page 17 of the 2nd applicant's application for leave that:-

> ***"The applicant stated, and this was not disputed by the procuring entity, that the applicant is wholly owned by Kenyans and falls within the definition of a manufacturer within the aforestated provision and the other relevant provisions.***
>
> ***The Board has looked at page 163 of the Applicant's request for review and has established that the Applicant is a Kenyan registered firm bearing registration No. CPR/2013/117151.***
>
> ***The Board has also read the CR12 issued by the Registrar of Companies appearing at page 289 of the request for review which shows that the shareholders of the said company were the following individuals of Kenyan origin.***
>
> ***The Board does not therefore entertain any doubt that the applicant is entitled to preference. <u>The Board will however out of abundant caution state the percentage of the preference the Applicant is entitled to since that is the function of the procuring entity acting based on the law."</u>***

141. Therefore it was submitted that it is not true that Public Procurement Application No. 10 of 2017 defined the Interested Party as a manufacturer since it was not a fact in issue at the time.

142. On the decision subject of this proceeding it was submitted that the Respondent erred in

disregarding a Court of Appeal decision in the **Mjengo Limited case** [supra] that held that **packaging** without an element of ***'making'*** cannot and does not amount to **manufacturing**. The Respondent fell into a material error of law by holding that the decision by the Court was distinguishable and did not apply to the case yet the circumstances were so closely related.

143. The 2nd Applicant further responded to the Interested Party's position that Judicial Review is only concerned with process and not the merits save for issues of proportionality. It was submitted in response that Judicial Review Court by virtue of the Constitution and the Fair Administrative Action Act has been mandated to entertain elements of merit in the decision, which Jurisdiction flows from ***Articles 22, 23 (3)*** of the ***Constitution*** as read with ***Article 47*** of the ***Constitution*** and ***Sections 5 (2) (b)*** and ***(c)*** and ***Section 7 (1) (a)*** and ***(2)*** of the **Fair Administrative Action Act.** It was submitted that the current application has been brought through **Articles 10, 22, 23(3) (f), 43(1)(a) 47(1), 50(1), 165(6) & (7) and article 227** of the **Constitution of Kenya 2010** and **PART III** of the **Fair Administrative Actions Act, 2015** all which allow this Court to address issues of merit.

144. It was also submitted that circumstances herein warrant the Court's involvement to the merits of the decision, keeping in mind that Judicial Review is the sole remedy that lies from a decision from the Respondent, and that to limit the course of justice of an aggrieved party only to issues of procedure will amount to denying a party its fundamental rights.

145. It was further submitted that the 2nd Applicant is not attempting to hoodwink this Court by failing to disclose that the Respondent relied on the definition in the Pharmacy and Poisons Act to arrive at its determination as alleged by the Interested Party. That the court should find that the 2nd Applicant has shown that indeed the Respondent relied on the definition in Pharmacy and Poisons Act albeit erroneously and without the aid of good jurisprudence established in ***Mjengo Limited v Commissioner of Domestic Tax*** (**supra)** to guide its interpretation of the definition of ***manufacturing***.

146. That contrary to the Interested Party's assertion, the 2nd Applicant has shown that all categories of goods under procurement under different categories, be it those wholly or partially manufactured in Kenya, or where local contractors are in joint venture agreements with international corporations as provided by law are entitled to a margin of preference as provided by the ***Public Procurement and Disposal (Preference and Reservations) Regulations, 2011.***

147. The 2nd Applicant submitted that the Interested Party in its submissions at paragraphs 4.1 and 4.3 establishes the grounds for judicial review and specifically at paragraph 4.3 the quoted decision of **Pastoli vs Kabale District Local Government Council and other (2008) 2 EA 300** establishes illegality as an error of law in the process of taking or making a decision.

148. That it had shown that the Respondent made an error of law in arriving at its determination that the case of ***Mjengo Limited v Commissioner of Domestic Tax*** (**supra)** is not applicable in the impugned decision and that packaging as a standalone activity amounts to manufacturing.

149. That it has further shown that the Respondent made an error of law by thereafter granting the Interested Party a 15% margin of preference when it was not entitled to the said margin of preference but a 10% margin of preference in the circumstances.

150. On the interested party's definition of Wednesbury unreasonableness, it was submitted that the test of unreasonableness was satisfied since the Applicant has shown hereinbefore that the evidence of Dr. Reubenson Mugo was not taken into consideration at all by the Respondent.

151. It was also submitted that the Respondent did not direct itself properly in law by disregarding and departing from good law set by the Court of Appeal in ***Mjengo Limited v Commissioner of Domestic Tax*** (**supra)** which was binding upon the Respondent.

152. That the Respondent equally did not take into consideration the technical/quality agreement between

the 1st Interested Party and Mylan Laboratories Ltd India where Mylan Laboratories Ltd manufactured the drug and the Interested Party only received as a finished product for packaging and distribution in the Kenyan market.

153. It was therefore submitted that the Interested Party's arguments do not hold any water in the new constitutional dispensation as Judicial Review and the Orders sought herein are enshrined in the Constitution of Kenya and the Fair Administrative Actions Act.

154. On the Respondent's Response, the 2nd exparte applicant submitted that the Respondent centered its response to their contention that the applicants had not proven any illegality, irrationality and procedural impropriety to entitle intervention through judicial review.

155. That the Respondent relied on the case of ***Pastoli v Kabale District Local Government Council*** which describes an illegality as an error of law in the process of taking or making the act, the subject of the complaint.

156. The 2nd exparte Applicant submitted that both exparte applicants have collectively shown that the Respondent fell into an error of law by departing from the law as set down by the Court of Appeal. That the Respondent by virtue of being a *quasi*-judicial body is duty bound to apply the law as interpreted by the Court of Appeal.

157. That the fact that the Respondent deliberately neglected/refused to be bound and apply the law as set down by the Court of Appeal was at the very least an error of law in the process of making the decision.

158. Further that the respondent is procedurally required to correctly apply the facts and evidence correctly to the position of law for the time being and that where the facts reveal a state of affairs that has been sufficiently covered by the law, the Respondent was duty bound to follow the procedure and marry the two.

159. It was submitted that the Respondent is fully aware of the activities undertaken by the Interested Party, which for the avoidance of doubt was packaging a finished product, and as such ought to have applied the law as governed the process of packaging as a stand-alone activity without the element of making does not amount to manufacturing.

160. It was further submitted that the Interested Party admitted that it does granulate the product any further, the product is already compressed and film coated which in simple terms means that the Interested Party does not add to or change the product in any way.

161. Relying on the Court of Appeal decision in ***Mjengo Limited v Commissioner of Domestic Tax*** (supra) it was submitted that the court was categorical that in effect packaging without an element of making does not amount to manufacturing.

162. It was therefore submitted that the Respondent was bound by law to take this into consideration and apply it as interpreted by the Court of Appeal but that the Respondent deviated from this and as such acted illegally.

163. On the Respondent's allegation in its written submissions that the issue of manufacturing was not presented to it for consideration but that the only issue presented was on the margin of preference and therefore the same is a new issue introduced through this Judicial Review Cause, it was submitted that nothing can be further from the truth since the issue of margin of preference was tied to the issue of manufacturing or lack thereof hence the Respondent simply could not decide one without considering the other.

164. It was submitted that this determination was so vital that the Respondent invited a witness from the Interested Party one Dr. Reubenson Mugo who clearly showed that the interested party only undertakes

packaging activities and not manufacturing, as per **annexure PO1 of the 2nd Applicant's further affidavit hence t**he Respondent cannot allege that the issue of manufacturing was not at the core of the determination of the Review application that it determined which is now subject to this proceeding.

165. It was submitted that the Respondent's over reliance on the old jurisprudence which limited judicial review proceedings to matters of procedural impropriety only shows that the Respondent is aware of the illegality and irrationality in their determination. That it had demonstrated that the people of Kenya collectively desired the jurisdiction Judicial Review Courts to be expanded to allow the court to examine issues which go beyond procedural impropriety.

166. That the people of Kenya were dissatisfied with *quasi*-judicial bodies hiding any illegality under the veil of procedural impropriety because they expect that when they come into a judicial review court, justice will be done and justice demands that the court do provide the same to them.

167. It was submitted that this is not an appeal, nor has this judicial review cause been disguised as an appeal. That the Applicants are simply asking this court to look at the illegality, unreasonableness, irrationality of the Respondent in their determination of the Public Procurement Review Application No. 28 of 2017.

168. In Conclusion, the 2nd applicant submitted urging the Court to allow the Notice of Motion dated 25th April 2017 and grant the orders sought in Judicial Review No. 185 of 2017 and 186 of 2017 between the same parties herein.

The respondent's submissions

169. The respondent Procuring Entity relied on the replying affidavit sworn on 5th June 2017 by Hennock. K Kirungu the Secretary to the Review Board and made submissions setting out three issues for determination namely:

1. ***Whether the Exparte applicants are entitled to the judicial review orders.***

2. ***Whether the Exparte applicants are entitled to the reliefs sought.***

3. ***Who should pay the costs?***

170. According to the respondent, three grounds namely; illegality, irrationality and procedural impropriety were set down by Lord Diplock in the case ***Council for Civil Service Unions v Minister for Civil Service (1985) A.C 374, at 401D*** as being the premises upon which Judicial review remedies can be granted.

171. In the respondent's view, the ex parte applicants had failed to demonstrate that the respondent is guilty of all the above principles. On Illegality it was submitted that it is a breach of the law as demonstrated in ***Pastoli vs Kabale District Local Government Council and Others (2008) 2EA 300*** which described it thus ''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.

172. It was submitted in contention that the exparte applicants had failed to demonstrate that there was any illegality in the process. That their arguments for breach of Article 227 of the Constitution, section 3 and 155 of the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Disposal (Preference and Reservations) Regulations 2011 is premised on a wrong interpretation of section 155 of the Public Procurement and Asset Disposal Act.

173. That the exparte applicants' continued assertion that the interested party is not a local manufacturer and therefore seeking that the interested party be excluded from enjoying the preference margin would be an illegality.

174. Further, it was submitted that the interested party was and is rightfully entitled to the preference granted as it is wholly owned by Kenyans and befits the description of a manufacturer stated under section 2 of the Pharmacy and Poisons Act which describes a manufacturer to be: ***"any process carried out in the course of making a product or medicinal substance and includes packaging, blending, mixing, assembling, distillation, processing, changing of form or application of any chemical or physical process in the preparation of a medicinal substance or product; but does not include dissolving or dispensing the product by diluting or mixing it with some other substances used as a vehicle for administration.***

175. The respondent maintained in its submissions that the applicants had equally failed to demonstrate that the respondent was irrational in its actions. That irrationality was described in **Pastoli vs Kabale District Local Government Council and Others (2008) 2EA 300** as ***"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."***

176. That what the ex-parte applicants want this court to believe amounts to irrationality is failure by the Review Board to take into consideration the oral testimony of Dr.Reubenson Mugo representing the interested party when he appeared before the Review Board that they are only involved in packaging and storing finished drugs and not manufacturing them. However, it was the respondent's contention that the Exparte applicants fell short of informing the court that the Review Board relied on the provisions of the Pharmacy and Poisons Act which defines ***"manufacturing"*** under section 2 as "any process carried out in the course of making a product or medicinal substance and includes packaging, blending, mixing, assembling, distillation, processing, changing of form or application of any chemical or physical process in the preparation of a medicinal substance or product; but does not include dissolving or dispensing the product by diluting or mixing it with some other substances used as a vehicle for administration."

177. The respondent further submitted that the question of manufacturing was not presented to the Review Board for consideration, and that the only question the ex-parte applicants presented for review was the question of which preference margin between 10 and 15 percent applied to the matter in question hence this court should not be persuaded to factor in matters that were not before the Review Board in exercising the judicial review discretion.

178. The respondent also submitted that the ex-parte applicants had further failed to substantiate the tenet of procedural impropriety to warrant judicial review orders. That Procedural impropriety was defined in the **Pastoli[supra]** case as "***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 or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."***

179. It was therefore submitted by the respondent that the ex-parte applicants demonstrated no single breach of the rules of natural justice and that neither did they demonstrate to the court any single rule under the Public Procurement and Disposal Regulations 2006 breached to warrant the court's intervention.

180. It was further submitted that this Application is an appeal disguised as a Judicial Review Application hence the same should therefore not be entertained, and that there is a clear distinction between an appeal and judicial review proceedings in that in Judicial review the court is only concerned with the fairness of the process under which the impugned decision or action was reached. Further, that once a judicial review court gives a clean bill of health to the process, it must down its tools without considering the merits of the decision for to do so would amount to usurping the power of the body that was mandated by the law giver to make the decision. Reliance was placed on the Court of Appeal decision in **Municipal Council of Mombasa V Republic & another (2002)e KLR** where the court held that in judicial review:

> "***The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction***

to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters of did he take into account irrelevant matters? These are the kind of the questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was ore there was not sufficient evidence to support the decision –and that, as we have, is not the province of judicial review..

181. Further reliance was placed on **Republic Vs Kenya Power & Lighting Company Limited & Another [2013]e KLR** where the learned Judge citing with approval the decision of the Court of Appeal stated:

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

182. On whether prayers sought should be granted, the respondent submitted that since the ex-parte applicants had failed to demonstrate enough reasons to warrant the judicial review remedies then their applications should be dismissed with costs.

The Interested Party's Submissions

183. The interested party submitted raising the following issues for the court's determination:

I. ***Whether the Ex-parte Applicants have established grounds for the grant of judicial review remedies;***

i. Whether the reliefs sought should be granted to the Ex-Parte Applicants; and

ii. Who should meet the costs of the application?

184. On whether the *Ex-parte* Applicants have established grounds for the grant of the judicial review remedies sought, it was submitted that **t**he principles governing the grant of judicial review remedies were set out in the case of **Council for Civil Service Unions v Minister for Civil Service [1985] A.C. 374, at 401D** where Lord Diplock classified the heads under which an administrative action can be controlled by judicial review as follows:

"The first ground I would call 'illegality,' the second 'irrationality' and the third 'procedural impropriety'. By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it... By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness".....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ..... I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

185. It was further submitted that the case of **The Commissioner of Lands v Kunste Hotel Limited. Civil Appeal No 234 of 1995** by the Court of Appeal further defined the parameters of judicial review proceedings where it held that:

"….it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process."

186. It was therefore the Interested Party's submission that the *Ex-parte* Applicants have not established any ground for judicial review as further elaborated herein below:-

187. On Illegality, reliance was placed on the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, where the Court defined illegality as follows:-

> "***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"***

188. The Interested Party also invited the Court to note that neither of the *Ex-parte* applicants had, in their respective Statement of Facts, cited the illegality of the Respondent's actions as the ground upon which they are seeking the intervention of this Honorable court by way of judicial review orders.

189. It was the Interested Party's submission that the Review Board, in making its determination dated 3rd April 2017, acted within the mandate accorded to it under Part XV of the Public Procurement and Disposal Act, 2015 and that the *Ex-parte* Applicants have not led any evidence in their affidavits to controvert this position.

190. It was submitted that in view of this, and in view of the *Ex-parte* Applicants' failure to cite grounds of illegality, the Interested Party urged the Court to find that the *Ex-parte* Applicants have failed to meet this first tenet of judicial review.

191. On Irrationality, it was submitted that the grounds of irrationality, unreasonableness and bad faith form the crux of the *Ex-parte* Applicant's Applications and have been extensively alluded to in their Statutory Statements and Verifying Affidavits. That "Irrationality" was defined in the **Pastoli case(*supra*)** to mean**:**

> ***"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."***

192. Further, that in the *locus classicus* **Associated Provincial Pictures Ltd v Wednesbury Corporation [1948] 1 KB 223** the court in defining 'unreasonableness' held:

> ***"In the present case we have heard a great deal about the meaning of the word 'unreasonable'. It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It is frequently used as a general description of the things that must be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may be said, and often is said, to be acting 'unreasonably'. Similarly, you may leave something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ, I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all those things largely fall under one head."***

193. In response to the *Ex-parte* Applicants' case that the Board failed to call to its attention matters that it was bound to consider before and while making its determination and thereby acted unreasonably. In support of this position, the Procuring Entity asserts that the Board failed to take into consideration that the Interested Party has never manufactured the drug tendered for and thus the decision is unreasonable.The Interested Party submitted in response thereto that the issue of whether or not it had ever manufactured the drugs was not raised as a ground for declining to award it the tender and was therefore not before the board for determination and that in its letter dated 1st March 2017 the Procuring

Entity stated thus:

> ***"After the re-evaluation, we are pleased to inform you that your bid was unsuccessful because of the following reasons:***
>
> > ***Your financial proposal for the item was not the lowest evaluated after applying a 10% margin of preference"***

194. It was submitted that no other reason was given for the failure of the Procuring Entity to award the tender to the Interested Party. It was therefore submitted that the Review Board was not required to consider issues which were not placed before it for determination. It was further submitted that, any such consideration would have been deemed to be unreasonable in terms of the **Wednesbury case** (*Supra*).

195. The Interested Party further submitted that the *Ex-parte* Applicants are not seeking judicial review relief but are instead proffering an appeal against the decision of the Board. Reliance was placed on the case of **Republic v Public Procurement Administrative Review Board & another ex parte Gibb Africa Ltd & another [2012] eKLR where the court held that:**

> *"…**an application by way of judicial review before the High Court is not intended to [turn] it (this Court) into an appellate one to deal with the merits of the issue before the inferior tribunal."***

196. Further, that the Court, in setting out the scope of judicial review applications against decisions of the Review Board, cited the Court of Appeal decision in **Civil Appeal No. 145 of 2011 Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others where the** Court of Appeal declined to consider the merits of the decision of the Public Procurement Administrative Review Board and held:

> ***".....where proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong on matters of fact or that it misdirects itself in some matter."***

197. The Court of Appeal further found that:-

> ***"The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of the rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather 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."***

198. It was submitted that similarly, in this case, the *Ex-parte* Applicants have not established that the Review Board acted without jurisdiction or in excess of jurisdiction or in breach of the natural rules of justice or that the decision was irrational. That the *Ex-Parte* Applicants are asking this Honorable Court to find that the decision was wrong on the merits, and therefore ought to be quashed.

199. The Interested Party submitted that this action falls squarely outside the ambit of judicial review and should therefore be dismissed by this Court. It further urged the court to find that the *Ex-parte* Applicants have failed to meet this second tenet of judicial review.

200. On Procedural Impropriety, it was submitted that Procedural impropriety was defined in the **Pastoli**

case (*supra*) thus:

> ***"Procedural Impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."***

201. It was therefore submitted that it had not been alleged anywhere in the *Ex-parte* Applicants' pleadings that there was failure on the part of the Review Board to observe the rules of natural justice or to act fairly in the process of taking a decision. That to the contrary, the Respondent duly complied with rules 167 to 173 of The Public Procurement and Disposal Regulations, 2006 which set out the procedure for the hearings conducted before the Review Board.

202. The Interested Party emphasised that the *Ex-parte* Applicants' applications have failed to plead or demonstrate this last head of judicial review, concerning procedural impropriety.

203. On reliance on Fair Administrative Action, it was submitted that **w**hereas the scope of judicial review was expanded with the enactment of the Fair Administrative Action Act No. 4 of 2015 pursuant to Article 47 of the Constitution, thereby allowing the evaluation of the merits of the decision of an administrative body, the Interested Party submitted that this scope of review is subject to certain limitations as was set out in the case of **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR where** the court held that:

> ***"Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications."***

204. It was the Interested Party's submission that a review of the merits would only be available to the *Ex-parte* Applicants where the decision of the administrative body was not proportional in view of the interests, considerations and reliefs sought. It was submitted that in this case, the Review Board, upon noting the '***Manufacturing License'*** issued by the Pharmacy and Poisons Board to the Interested Party, was bound by statute to confirm that Interested Party was a ***'manufacturer'*** and consequently was right in directing the Procuring Entity to re-evaluate the financial bids, applying a 15% margin of preference for the Interested Party. As such, it was contended that its decision was therefore not only proportional, but also statutorily grounded under part XII of the Public Procurement and Asset Disposal Act, 2015 which prescribes the grant of preferences and reservations under the Act. In the circumstances, it was submitted that the review the merits of the decision of the Board as sought by the Procuring Entity is entirely misplaced and premised on a misapprehension of the law. Further reliance was placed on the same case, where the Court, in further addressing grounds for review under the Fair Administrative held:

> ***"Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a***

ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision."

205. It was the Interested Party's submission that **section 7(2)** of the **Fair Administrative Action Act** further reiterates the grounds of unreasonableness as set out in paragraph 4.7 to 4.17 herein above. The Interested Party reiterated that *Ex-parte* Applicants have not demonstrated that the Review Board lacked the jurisdiction to make its decision under the provisions of the Public Procurement and Asset Disposal Act, 2015 or that the decision was issued outside the scope of the said Act.

206. That to the contrary, in paragraphs 26 to 31 of its statutory statement, the Procuring Entity has intentionally sought to mislead this Court in failing to state that the Interested Party is a local manufacturer duly examined and thereafter approved by the Pharmacy and Poisons Board, Kenya and thereby entitled to a 15% margin of preference under the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011. Further, that it has further failed to disclose to this Court that in arriving at the finding that the Interested Party was a ***manufacturer,*** the Board at page 29 of its award relied on the definition of ***manufacture*** under the Pharmacy and Poisons Act where it held that:

"Section 2 of the Pharmacy and Poisons Act which is described as an act of parliament to make better provision for the control of the profession of pharmacy and trade in drugs and poisons describe a manufacturer as follows:-

"Manufacture" means any process carried out in the course of making a product or medicinal substance and includes packaging, blending, mixing, assembling, distillation, processing, changing of form or application of any physical process in the preparation of a medicinal substance or product but does not include dissolving or dispensing the produce my diluting or mixing it with some other substances used as a vehicle for administration"(emphasis own)

It was further submitted that the Ex-parte Applicants have further sought to mislead this court by stating that the Board departed from and/or failed to take into consideration good law previously established stating that packaging as a standalone activity cannot amount to manufacturing. The Board at page 30 of its award held that:

"During the hearing of the Request for Review both Counsel for the procuring entity and the successful bidder relied on the case of Mjengo Limited vs the Commissioner of Domestic Taxes [2016] eKLR for the proposition that packaging alone could not amount to manufacturing. The Board has read the said decision and finds the same is distinguishable from the present case in that the said decision was dealing with the issue of rice whereas the present case deals with the issue of drugs which is almost exclusively dealt with and regulated by the provisions of the pharmacy and poisons Act and the World Health Organization good manufacturing practices for pharmaceutical products."

207. It was further submitted that the Review Board took the case of **Mjengo Limited vs. The commissioner of Domestic Taxes [2016] eKLR** into consideration and found it to be distinguishable on the basis that it related to rice which is unregulated and not pharmaceutical products which are highly regulated by the Pharmacy and Poisons Act.

208. The Interested Party submitted that it is quite unfortunate that the *Ex-parte* Applicants, in seeking redress from this Honorable Court, have sought to do so by way of non-disclosure of material information and blatant falsehoods. On these grounds alone, the interested party submits that *Ex-parte* Applicants applications ought not to be entertained by this Honorable Court either under the Fair Administrative Action Act or on the grounds of Judicial Review.

209. On whether the reliefs sought should be granted to the *Ex-parte* Applicants, it was submitted that as demonstrated hereinabove, the *Ex-parte* applicants had failed to establish any of the grounds for judicial review being illegality, irrationality and procedural impropriety and are therefore not entitled to the orders of certiorari or mandamus as sought or at all.

210. Further, that the *Ex-parte* Applicants had failed to establish any ground warranting interference with the decision of the Board under the provisions of Section 7(2) of the Fair Administrative Action Act. That instead, the *Ex-parte* Applicants had sought to have this court substitute the decision of the Board with its own decision by way of declaratory orders. Reliance was place on the ***Suchan Investment Case* (Supra) where the court held inter alia:**

> "***Must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act."***

211. The Interested Party submitted that that the declaratory order sought, particularly that packaging as a standalone activity, would in reference to this case, contradict the provisions of **Section 2** of the **Pharmacy and Poisons Act**, Cap 224 of the Laws of Kenya, which expressly defines manufacture to include packaging within the context of pharmaceutical products.

212. It was the Interested Party's further submission that the Declaratory Orders sought, if granted, will amount to a substitution of the decision of the Board contrary to the determination by the Honorable court in the **Suchan Investment Case (Supra) and finally that** the declaratory orders sought contradict express provisions of statute, *to wit* the Pharmacy and Poisons Act, and cannot therefore avail to the *Ex-parte* Applicants.

It was submitted in conclusion that the *Ex-parte* Applicants had not met the required threshold meriting the granting of orders of judicial review of the decision of the Board issued on 3rd April 2017 hence the applications should be dismissed for being frivolous, vexatious, unjustified and unfounded.

The interested party's rejoinder submissions

213. The Interested Party filed its submissions dated 19th June, 2017 in response to the 1st Applicant's submissions filed on 8th June 2017 together with the 2nd Applicant's submissions and Further Affidavit filed on 16th June 2017. It wholly reiterates and relies on the contents of its submissions filed on 18th May 2017 and briefly submitted as follows in rejoinder:

214. On Omission of Material Facts, the Interested party invited the court to note that the 2nd Applicant has in its Application, Supporting Affidavit, Further Affidavit and Submissions, intentionally omitted and/or failed to disclose or make any single reference to the fact that the Respondent Review Board in arriving at the definition of a ***"manufacturer"*** relied on **Section 2(1)** of the **Pharmacy and Poisons Act** which states:-

> ***"manufacture" means any process carried out in the course of making a product or medicinal substance and includes packaging, blending, mixing, assembling, distillation, processing, changing of form or application of any chemical or physical process in the preparation of a medicinal substance or product; but does not include dissolving or dispensing the product by diluting or mixing it with some other substances used as a vehicle for administration;***

215. It was therefore submitted that it was evident that the 2nd Applicant sought to falsely posit that the Review Board did not rely on any statutory provision in arriving at its determination that the Interested Party is a manufacturer.

216. Further, that it also seeks to mislead this Court into finding that the Review Board did not take into

consideration the case of **Mjengo Limited v Commissioner for Domestic of Tax [2016]eKLR**, the subject matter of which was packaging of rice, which unlike the pharmaceutical products the subject of the tender in this matter, is not governed by any statute. It was submitted that at page 30 of its award dated 13th March 2017, the Review Board held that:

> ***"During the hearing of the Request for Review both Counsel for the procuring entity and the successful bidder relied on the case of Mjengo Limited –vs- Commissioner of Domestic Taxes [2016]eKLR for the proposition that packaging alone could not amount to manufacturing. The board has read the said decision and finds that the same is distinguishable from the present case in that the said decision was dealing with the issue of rice whereas the present case deals with the issue of drugs which is almost exclusively dealt with and regulated by the provisions of the Pharmacy and Poisons Act and the World Health Organization good manufacturing practices for pharmaceutical products. The Act and the World Health organization good manufacturing practices for pharmaceutical products main principles recognize packaging as part of manufacturing."***

217. The Interested Party urged the court to find that the 2nd Applicant is guilty of misrepresentation and/or material non-disclosure of facts and therefore undeserving of the orders sought because he who comes to equity must come with clean hands.

218. **On the argument regarding the Purview of Fair Administrative Action in Judicial Review, it was submitted that the 2nd exparte applicant is not entitled to the prayers and orders for declaration that** *"it applied the correct margin of preference as provided by law to the bid submitted by the interested party being a 10% margin of preference and that packaging as a standalone activity does not amount to manufacture"* because the traditional scope of judicial review is supplemented by the provisions of the Fair Administrative Action Act, 2015 and further, that the remedies that the court can grant with respect to a judicial review application brought under the provisions of the Act are set out at Section 11 which provides and include declaring the rights of parties in respect of any matter to which the administrative action relates. Reliance was placed on the Court of Appeal decision in the case of **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] eKLR** where it was held:

> ***"The reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator or make the orders stipulated in Section 11 of the Act."***

219. The Interested Party therefore submitted that declaration as sought by the 2nd Applicant is not of the nature envisioned by the Act, as it is not one that seeks to declare the rights of parties in respect of the tender document.

220. It was submitted that in seeking for declaration, the 2nd Applicant seeks to have this court substitute the decision of the Board with the decision that it applied the correct margin of preference and that in seeking a declaration on the definition of manufacturing, the 2nd Interested Party mischievously seeks to have this Court, by way of declaration, issue an edict that is directly contradictory to the provisions of statute as set out under Section 2(1) of the Pharmacy and Poisons Act.

221. It was the Interested Party's submission that the 2nd Applicant's actions constitute an outright abuse of the court process. The interested party therefore urged this court to dismiss the Applicant' applications as the applicants had failed to meet the legal threshold for the grant of judicial review orders or declaratory orders as sought.

DETERMINATION:

222. I have carefully considered all the foregoing and in my humble view, the main issues for determination in this matter are:

a. Whether the judicial review court can delve into the merits issue;:

b. Whether the exparte applicants are entitled to the orders sought;

c. What orders should the court make ; and

d. Who should bear costs of these proceedings?

223. On the first issue of whether the court in exercise of its judicial review jurisdiction can delve into the merits issue, determination of this issue calls for an examination of the scope of judicial review. The respondent Review Board and the interested party submitted in contention that the application herein seeks to attack the merits of the decision made by the Review Board and not the decision making process contrary to the established practice as espoused in the many cited cases.

224. On the other hand, the exparte applicants maintained that the scope of judicial review has moved from the traditional remedies to constitutional remedies and that the Constitution has elevated the right to fair administrative action to a constitutional right hence the remedies are also found in the constitution being judicial review remedies which require that the merits issue be determined.

225. Prior to the effective date of the Constitution of Kenya 2010, judicial review was exclusively in the purview of the traditional writs of *mandamus, certiorari prohibition* strictly addressing itself only to issues of procedure and purposely down its tools where the court was apprehensive that it may delve into issues of the merits of the case notwithstanding that there existed an indistinguishable correlation between the merits and the procedure.

226. Odunga J in **Republic v Ministry of Health & 5 others Ex-Parte Pius Wanjala & 2 others [2017] eKLR** had this to say concerning the current scope of judicial review remedies:

> ***"Judicial review is therefore no longer just a statutory or common law remedy but is a constitutional remedy hence the distinction between judicial review remedies and constitutional remedies have become more blurred than ever. In jurisdictions with similar constitutions as ours, this position has been held to ring true.*** This *was the position of* ***Chaskalson, P*** *in the Constitutional Court of South African case of* ***Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99 where he held that:***
>
> ***"Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution…Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was "the main crucible" for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law.***

Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control."

227. Articles 22, 23 (3) of the Constitution as read with Article 47 of the Constitution and Sections 5 (2) (b) and (c) and 7 (1) (a) and (2) of the Fair Administrative Action Act stipulates that issues of merit can be entertained in statutory judicial review proceedings as the Constitution now establishes judicial review as a constitutional remedy. The section, as correctly submitted by the exparte applicants permits a split approach for remedies against administrative actions. One approach is by way of statutory judicial review under the Act; the other is through proceedings for any other remedies as may be available under the Constitution or any other written law.

228. It is for that reason that common law principles previously impeding judicial review for administrative actions has now been incorporated in **Article 47** Constitution and **Section 7** of the **Fair Administrative Action Act**. Accordingly, I concur that as it stands now, there is not a bilateral system of law regulating administrative actions which are the common law and the Constitution but a singular system grounded in the Constitution.

229. It follows that indeed, the courts' power to statutorily review administrative action no longer flows directly from the common law, but also from the **Fair Administrative Action Act** which implements Article 47 of the Constitution. And which stipulate a minimum threshold fashioned on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision making process.

230. This very court in the case of **Republic v Public Procurement Administrative Review Board Ex-parte Syner- Chemie Limited HC Judicial Review 371 & 372 of 2015** (Consolidated) stated:

"Article 47 of the constitution elevates fair administrative action from a common law action to a constitutional right under the Bill of rights. The same position applies to Article 48 of the Constitution which commands the state to ensure that all persons are facilitated to access justice without any impediments.

Further, Article 20(3) (a) of the Constitution commands that in applying a provision of the Bill of Rights like in this case Article 47 of the Constitution on the right to fair administrative action which is invoked by the exparte applicant in this case, a court should '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." [Emphasis added].

"By virtue of the fact that Judicial Review is now a constitutional tool for the vindication of fundamental rights and freedoms, more specifically, the right to fair administrative action, in my humble view, any conflict between the Law Reform Act in Sections 8 and 9 and the Fair Administrative Action Act , 2015 must be resolved in favour of the latter Act which directly implements the constitutionally guaranteed right since Article 47(3) of the Constitution is what reflects the will of the people of Kenya and therefore in applying Sections 8 and 9 of the Law Reform Act, the court must interpret those sections with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution, as stipulated in Section 7(1) of the Sixth Schedule to the Constitution, until the said provisions are amended as appropriate.

231. The Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] eKLR** at paragraphs 55-58 observed that the Fair Administrative Action Act which underpins the values of the Constitution of Kenya forms the foundation for the exercise of Judicial Review and ousts the previously utilized common law principles that set Judicial Review to be exclusively on procedural matters. The Court of Appeal expressed itself thus and I have no reason to depart therefrom:

"An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case.

However, Section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued.

In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications. Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review.

In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision.

It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act."

232. Accordingly, I have no hesitation in finding and holding that in determining the issues before the court flowing from pleadings and submissions, this court has the jurisdiction to consider the merit part of the decision reached by the Review Board, without necessarily substituting its decision with that of the procuring entity.

233. On the second issue of whether the exparte applicants are entitled to the orders sought, this court must examine the orders sought first to determine whether the prayers are available to the exparte applicants.

234. On the prayer for certiorari, **Certiorari,** it is established law that this remedy is available and issues to bring into the court and to quash a decision by a tribunal, judicial body or authority or person exercising administrative powers as stipulated in section 2 of the Fair Administrative Action Act, 2015.

Such decision is predicated on violations of the law or the constitution, procedural improprieties, irrationalities/unreasonableness, breach of legitimate expectations among others. In **Republic v Chief Magistrate Makindu & another Ex-Parte Bernard Masau Mailu & 2 others** [2016] eKLR the Court citing with approval the case of **Captain Geoffrey Kujoga Murungi vs Attorney General, Misc. App No. 293 of 1993** where it was stated:

> ***"Certiorari deals with decisions already made – so that when issued an order brings up into this Court a decision of an inferior court, tribunal or of a public authority to be quashed. Such an order (certiorari) can on1y be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice; or contrary to law."***

235. In **Okiya Omtatah Okoiti v Kenya Revenue Authority & 2 others [2016] eKLR** the court relied on the writings of F***erris*** in his Book on the ***Law of Extraordinary Legal Remedie****s and* observed:

> ***"It is well settled that a writ of prohibition may not be used to usurp or perform the functions of an appeal, writ of error or certiorari, or to correct any mistakes, errors or irregularities in deciding any question of law or fact within its jurisdiction.***

236. Section **7(2)(f)** of the **Fair Administrative Actions Act** stipulates:

> ***(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-***
>
> ***(f) the administrator failed to take into account relevant considerations;***

237. In the Request for Review Application No. 28 of 2017 the Review Board's decision rendered on 3rd April 2017 was based on the following single issue framed for determination:

> ***"The only question the Board needs to answer is therefore whether the Applicant is a manufacturer by virtue of undertaking the processes of packing, storage and labelling so as to make it a manufacturer within the meaning of the law so as to be entitled to a preference of 15% instead of 10% that was awarded it by the procuring entity****."*

238. The Review Board found that the *process of packaging, storage and labelling of products fell within the definition of a manufacturer as defined under the provisions of the Pharmacy and Poisons Act Cap 244 Laws of Kenya which had issued a* ***'Manufacturing License'*** *designating the Interested Party as a* ***'manufacturer'*** *and under the World Health Organization Good Manufacturing Practices for Pharmaceutical products*. [GMP].

239. Accordingly, the Review Board ordered the procuring entity to apply a 15% margin of preference against the price tendered for by the Applicant on account that it was a manufacturer. The exparte applicants have urged this court to issue judicial review orders of certiorari quashing the orders of the Review Board, mandamus, and a declaration and a declaration that packaging as a standalone activity does not amount to manufacturing.

240. What the court gathers from the arguments by all the parties is that whereas the applicants claim that the interested party was not a manufacturer of the subject drugs and therefore not entitled to the 15% preference under section 155 of the Act, as directed by the Review Board, the Review Board and the interested party believe that the interested party was by no means a "manufacturer" as defined in the Pharmacy and Poisons Act Cap 244 Laws of Kenya and the WHO MGP. It should however be noted that from the documents presented before the court, no doubt, the interested party is registered as a manufacturer by the Pharmacy and Poisons Board established under the Act.

241. The issue that I find not addressed by the interested party and even by the Review Board is whether, by virtue of the licence to manufacture pharmaceutical products, the interested party was a manufacturer of the specific tendered drug.

242. The Review Board and the interested party focussed on interpretation of the term "manufacture" as used in the Pharmacy and Poisons Act more particularly, that the interested party was a manufacturer because it packaged and stored and labelled the tendered drug and that packaging was a component of manufacturing.

243. The answer to the question of whether the interested party was a manufacturer of the tendered drug, in my humble view, can readily be found in the testimony of Dr Mugo who was put to task in examination in chief and in cross examination to explain whether the interested party company manufactured the drugs tendered and his answer though quite elusive and winding was clear that his company had a technical agreement with Mylan Laboratories Ltd (of India) who manufacture the drugs products in India at (WHO) manufacturing site and packaged for commercial distribution in Kenya at the applicant's production facility.

244. The Interested party conceded and pleaded that it was a commercial distributor of the products not a local manufacturer of the tendered products. The submission by its counsel therefore only tends to adduce evidence by interpreting manufacture to mean packaging.

245. In this case, the Review Board held that the interested party was a manufacturer but the entire decision did not determine whether it was a manufacturer of the specific tendered drug. As earlier stated, the Review Board only interpreted the word "manufacture." That failure to find whether the interested party was the local manufacturer of the specific tendered drug in my view, occasioned a misapprehension in the Board's interpretation of the term "manufacture" and "manufacturer" generally in the context of the specific tendered drug.

246. Section 2 of the Pharmacy and Poisons Act stipulates that:

> ***"manufacture" means any process carried out in the course of making a product or medicinal substance and includes packaging, blending, mixing, assembling, distillation, processing, changing of form or application of any chemical or physical process in the preparation of a medicinal substance or product; but does not include dissolving or dispensing the product by diluting or mixing it with some other substances used as a vehicle for administration.***

247. **Blackstone** proposes that "***The fairest and most rational method to interpret the will of the legislature is by exploring his intentions at the time when the law was made***."

248. There was evidence that the interested party was registered under the Pharmacy and Poisons Act as a manufacturer. Section 35A(1) of the Act provides that:

> ***No person shall manufacture any medicinal substance unless he has been granted a manufacturing licence by the Board.***

249. In other words, the licensing of the manufacture of medicinal substances rests with the Pharmacy and Poisons Board. Section 35A(2) empowers the Board to renew the manufacturing licences which expire on the 31st December of each year which renewal is subject to the conditions prescribed by the Board. Under section 35A(4) of the Act, a person who intends to manufacture such substances is required to apply for the licensing of the premises in a prescribed form and pay the fees prescribed for the same. Section 35A(5) however provides as follows:

> ***"The Director of the National Drug Quality Control Laboratory or any member of the Laboratory staff authorized by him shall have power to enter and sample any medicinal substance under production in any manufacturing premises and certify that the method of manufacture approved by the Board is being followed.***
>
> ***Every person who is granted a manufacturing licence under section 35A shall comply with the good manufacturing practices prescribed by the Board."***

250. What the above provision espouses is that as to what GMP to be applied, has to be determined by the Pharmacy and Poisons Board.

251. With regard to the tendered drug and for purposes of preferential procurement and reservation, the interested party conceded and pleaded that it was only a commercial distributor of the products, not a local manufacturer of the tendered products.

252. It therefore follows that the Board in ordering the procuring entity to apply a 15% margin of preference against the price tendered for by the Interested Party on account that the latter was a *manufacturer* of the subject drug was a decision made in error.

253. The 15% margin of preference was in accordance with the tender documents and section 155 of the Act, to be applied to the bidder that met the criteria of having goods manufactured in Kenya, not just Kenyan licensed manufacturers. This is so because not all Kenyan manufacturers would be tendering goods which are manufactured in Kenya.

254. Parties are bound by their pleadings. The license issued to the interested party allows it to manufacture drugs in accordance with the standards set by WHO and national legislation.

255. However, the test for the interested party was on the tendered drug so that this court should not be seen to be using these proceedings to determine that the interested party is not a manufacturer yet it is licensed to manufacture drugs. The lingering question is whether the interested party ever proved that it was a Kenyan manufacturer of the tendered products.

256. I reiterate that by its own pleadings, the interested party never said that it manufactures the specific drug as tendered. It said the product is manufactured in India and packaged for commercial distribution in Kenya, at the interested party's production facility.

257. When questioned by Mr Waweru Gatonye, Dr Reubenson Mugo and in line with the Technical Quality Agreement with Mylan Laboratories annexed as an exhibit, it was made clear that the interested party is contracted to undertake packaging, ***operations of finished products,*** tablets and capsules for and on behalf of Mylan Laboratories Ltd of India. From the above, it was clear **that** ***the interested party is only a contractual site for packaging of finished products not a manufacturing site.***

258. nonetheless, the interested party invited the interpretation of the term " manufacture" to mean packaging which then made the Board to find that the *process of packaging, storage and labelling of products fell within the definition of a manufacturer as defined under the provisions of the Pharmacy and Poisons Act which had issued a* ***'Manufacturing License'*** *designating the Interested Party as a* ***'manufacturer'*** *and that under the World Health Organization Good Manufacturing Practices for Pharmaceutical products*.

259. It is not in dispute that the terms " packaging, storage and labelling" of products fell within the definition of a manufacturer as defined in the section 3 of the Pharmacy and Poisons Act and the WHO GMP Guidelines which I have read**.** Dr. Reubenson Mugo a witness for the interested party in his oral testimony testified on oath to clarify whether his company was a manufacturer of the tendered drug. ***The good Doctor stated that the Interested Party only undertook packaging and was not a manufacturer of the product tendered and had never undertaken the process of manufacturing in Kenya. He went further to state that their company was new and had not yet released the tendered drug in the Kenyan market but that it was waiting for the procurement process to be completed for the company to procure and package the drugs from Mylan Laboratories in India. The interested party's witness also said in no uncertain terms that it was to leverage on Mylan Laboratories Limited 2 years' experience in manufacturing of ARVs.***

260. The (WHO) Public Inspection Report annexed to the Interested Party's replying affidavit **describes the interested party as a (packaging site for Mylan Laboratories** as shown on page 161 of interested party replying affidavit bundle.

261. Undoubtedly, the interested party was only but a conveyor of finished products manufactured by Mylan Laboratories Limited of India.

262. Accordingly, it was grossly erroneous for the Review Board, to find that the interested party was entitled to a 15% margin of preference because it was a manufacturer in the absence of any evidence that the interested party was a manufacturer of the tendered drug and therefore it matters not that the Board was trying to interpret manufacturing to mean packaging as a stand-alone component.

263. Iam in agreement with the decision in **Commissioner General of Income Tax V P. Ltd CA [1970] EALR 328** that:

> ***" the verb" to manufacture" may, within certain limits have different meanings according to the context in which it is used, but in almost every sense it must mean something by some form of activity. It may be a question of degree in certain cases whether an activity has produced a thing as opposed to merely embellishing an existing thing…"***

264. And as was stated in **Law Society of Kenya v KRA &Another[2017]** citing the Supreme Court of India in **Reserve BANK OF India V Peerless General Finance and Investments Co Ltd and others:**

> ***"interpretation must depend on the text and context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual…"***

265. In my view, to reclassify the interested party as a local manufacturer of the tendered drug by importing an interpretation into the meaning of "manufacture" to mean packaging as a stand-alone activity was a deliberate attempt to disadvantages/prejudice the 1st exparte applicant and to take away the discretion of the procuring entity and impose the Review Board's own discretion onto the procuring entity to award the tender to the interested party. Power and discretion must be exercised within the confines of the law

266. I am in agreement that the term "manufacturer" may within certain limits have different meanings according to the context in which it is used but where it is clear that the interested party was only a recipient and conveyor of an already manufactured product for distribution on behalf of another foreign company, it would be and was indeed dishonest on the part of the Review Board to claim, contrary to what the interested party's own witness had stated on oath, that the interested party was a local manufacturer of the tendered products. **See Commissioner General of Income Tax v Power Limited [1970] EA 328**.

267. Although the respondent and interested party claimed that the **Mjengo** case was inapplicable because it concerned rice which is grown and not manufactured, the said authority gives a very detailed exposition of the statutory interpretation where the words used are "means" and "includes" or "including" which fits in very well with the circumstances of this case.

268. From the interpretation of the term "manufacture" used in the Pharmacy and Poisons Act, Packaging is part of a manufacturing process but is not a stand-alone aspect of manufacturing, and in the context of this case, it was clear that the tendered drugs were manufactured in India by Mylan Laboratories Limited and brought to Kenya for packaging under the established standards set by WHO and Kenyan statutes and distribution into the Kenyan market.

269. Dr Mugo was put to task at page 29 of the Review Board's proceedings to explain what he meant by packaging of the tablets received from Mylan Laboratories and he admitted that the interested party does not granulate further since the tablets were already compressed/filmed. He conceded that the ARVs come from Mylan India through normal importation processes (see page 30 of the Hansard proceedings). At page 33 of the said proceedings the Doctor stated that ***they have no laboratory for finished products but a small one which only does quality assurance.***

270. The Retention Certificate at-Page 34 of the proceeding also shows the product belongs to Mylan Laboratory Ltd

271. In addition, the labelling of the product states that ***"manufactured by Mylan Laboratories Ltd "and packaged by Questacare Ltd."*** It therefore follows that even though Packaging is a very rigorous process, it cannot be said that in this case, it amounted to "manufacturing" of the tendered drugs, by whatever stretch of imagination that the Review Board and the interested party wished this court to believe.

272. At Page 37 of the proceedings before the Review Board, - Dr Mugo conceded that the interested party was a new company and that even bottles for packaging of the drugs are supplied by Mylan Laboratories. At page 39 thereof he stated that the Drugs come in film coated in bulk and that nothing can be added or removed – only packaged for release.

273. Although it was contended that the issue of the interested party being a manufacturer was dealt with in the earlier request for review and that the procuring entity did not raise it as the reason why it never gave the interested party the 15%preference, the record shows that that issue of the interested party being a manufacturer was not only dealt with in the earlier review but was also revisited by the Review Board and formed the basis in the subsequent determination of the second Request for Review on the issue of whether the interested party was entitled to 15% preference given by the Board because, according to the Review Board, the interested party was a local manufacturer as defined under the Pharmacy and Poisons Act.

274. The interested party herein was clear that it imported the drugs in issue and packaged them as such, without even modifying them. It only packaged the drugs into smaller packages for convenience of prescription and distribution.

275. In my view, the fact that the interested party was registered as manufacturing company does not make the company a manufacturing firm for the tendered drugs. And therefore does not make it the manufacturer of the said drug.

276. Iam not persuaded that on the evidence, there was the act of making of tendered drug by the interested party that could be construed to be a manufacturing of the tendered drug. In my humble view, it should be the ***statutory interpretation,*** and not merely the ordinary definition of the term "manufacture" or "manufacturer" that the Review Board should have adopted. And had it adopted the statutory interpretation, it would have arrived at the interpretation of the term "manufacture" as stipulated under section 2 of the Income Tax Act relied on in the **Mjengo** case which interprets "manufacture" to mean ***"the making(including packaging) of goods, or materials from raw or partly manufactured materials or other goods or the generation of electrical energy for supply to the national grid or the transformation and distribution of electricity through the national grid but does not extend to any activities which are ancillary to manufacture, such as design. Storage, transport or administration."***

277. Although the interested party and the Review Board claims that the interpretation of " manufacturer" is in line with the WHO MGP, I have examined the guidelines as stipulated in the above document and I find that the definitions therein are merely glossaries and not ***interpretative*** as would the terms be if used in the context of a statute be.

278. There is also a disclaimer to the words used in the context stipulating that**: *" the definitions given below apply to the terms used in this guide. They may have different meanings in other contexts.***

279. The said guidelines then go further to merely state the words without saying whether the words as used "mean" or "include" for example, the following words as used are defined as follows:

> ***<u>Manufacture:</u> "All operations of purchase of materials and products, production, quality control [QC], release, storage and distribution of pharmaceutical products and the related controls"***
>
> ***Manufacturer: "a company that carries out operations such as production, packaging,***

repackaging labelling and relabeling of pharmaceutical."

The guidelines also define packaging as : "all operations including filling and labelling that bulk product has to undergo in order to become a finished product. Filling of a sterile product under a septic conditions or a product intended to be terminally sterilized, would not normally be regarded as part of packaging"

Production: all operations involved in the preparation of a pharmaceutical product, from receipt of materials, through processing ,packaging and repackaging, labelling and relabeling , to completion of the finished product.

280. In Cooper Brookes (Wollongong) PTY Ltd. vs. Federal Commissioner of Taxation (1981) 147 CLR 297 it was held that:

"If the choice is between two strongly competing interpretations…the advantage may lie with that which produces the fairer and more convenient operation for as long as it conforms to the legislative intention."

281. In both instances in the *Mjengo* case and in this case where the term " manufacture" is used in the relevant statutes, the word **"including"** or **includes" packaging**" comes after the words **"manufacture means "the making"** and or any process carried out in the course of **"making,"** to indicate that **packaging** is only but one aspect of manufacturing process and **not a stand alone component**. These words ***includes*** or ***including*** are aspects of extension and not of restrictive definition and the same are not equivalent to using the phrase ***means-packaging.***

282. In In his book, ***Legislative Drafting, Professor G C Thornton*** says and I concur that:

" 'Means' is appropriate where the stipulated meaning is expressed in a complete form and no part of the intended meaning is omitted. The significance to be attached by the reader to the word defined is limited to the stipulated meaning. 'Means' may be appropriate for delimiting, extending or narrowing definitions. The vital element is that the definition must give a complete meaning."

283. In **Dilworth v Commissioner of Stamps [1899] AC 99 at pp 105 and 106** the court observed:

"the word "includes" is generally used in the interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of statutes and when it is so used these words or phrase must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was merely employed for the purpose of adding to the natural significance of the words or expressions defined."

284. It cannot be that all these holdings are erroneous. A similar holding was made in **Reylods V Income Tax Commissioner for Trinidad and Tobago [1966]1WLR 1,** where it was stated that the word "***including"*** is generally used in statutes to enlarge the meaning of the preceding words. For example, in the Standards Act, the term **"manufacture"** is interpreted to **"include"** and not **"means."**

285. In this case, it is my humble view that the usage by the Pharmacy and Poisons Act of the word ***"includes*** in the interpretation of the word ***"manufacture*** means" ***any process carried out in the course of making a product or medicinal substance and includes*** packaging is to enlarge the meaning of the term ***"making"*** so as to incorporate packaging and other listed processes and activities that would ordinarily not be regarded as making within the meaning which the word ordinarily bears and not to enlarge the term **"manufacture."**

286. For that reason, **"manufacture"** cannot be packaging without the aspect of ***making*** of the tendered

product and therefore I have no hesitation in finding and holding that packaging cannot be a stand-alone activity. See **Justice GP Singh in Principles of Statutory Interpretation 7th edition.**

287. In my humble view, the law as established by the Court of appeal in Civil **Appeal 85 of 2014 between** ***Mjengo Limited v Commissioner of Domestic Tax*** that packaging as a standalone activity does not amount to manufacturing is good law having regard to the interpretation not only under the Pharmacy and Poison Act but under any law that defines manufacturing in such manner. In that case the Court of Appeal stated:

> "***It is noteworthy that the definition of the word "Manufacture" in Paragraph 24(3)(e) begins with the words, "Manufacture" means…". It does not, as counsel for the appellant suggested begin with the words, "Manufacture" includes…" The distinction is significant. In his book, Legislative Drafting, to which we were referred, Professor G C Thornton says that***:
>
> ***"Means' is appropriate where the stipulated meaning is expressed in a complete form and no part of the intended meaning is omitted. The significance to be attached by the reader to the word defined is limited to the stipulated meaning. 'Means' may be appropriate for delimiting, extending or narrowing definitions. The vital element is that the definition must give a complete meaning".***

288. The Court further stated

> "***However, within the meaning assigned to the word "manufacture" under that provision are the words, "the making (including packaging) of goods or materials from raw or partly manufactured materials or other goods". The effect is to extend the meaning of the word "making" to include packaging. It does not however equate "packaging" on its own without "making" to manufacturing.***"

289. Although the Review Board attempted to distinguish that decision on account that it concerned rice which is not regulated under a specific statute, my view is that the Court of Appeal's interpretation was beyond interpreting that meaning of manufacture of rice. That interpretation came from the Income Tax Act which was in issue and therefore there need not have been a specific statute dealing in rice.

290. Section 2 of the Pharmacy and Poisons Act Cap 244 Laws of Kenya which states:

> ***"manufacture" means any process carried out in the course of making a product or medicinal substance and includes packaging, blending, mixing, assembling, distillation, processing, changing of form or application of any chemical or physical process in the preparation of a medicinal substance or product; but does not include dissolving or dispensing the product by diluting or mixing it with some other substances used as a vehicle for administration.***

291. As was stated in **BLACK'S LAW DICTIONARY** 9th Edition at page 594:

> ***"A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed. ?For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animals, the general language or any other farm animals – despite its seeming breath – would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chicken."***
>
> **115. On the question of preferential procurement,** Part XII of the PPADA deals with Preferences and Reservation in procurement and subsection (1) commands all procuring entities to comply with that Part.
>
> 116. Subsection (2) of section 155 of the Act stipulates that subject to availability and realization of the applicable international or local standards, only such *manufactured articles, materials or*

supplies wholly mined and produced in Kenya shall be ***subject to preferential procurement.***

117. Under subsection 3, despite subsection 1, preferences shall be given to:

a) Manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or

b) Firms where Kenyans are shareholders.

292. The above provisions of the Act as read with section 3 of the Act on the objectives of the **Act and Regulation 16 of the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011** aims at protecting citizen contractors or local industries for sustainable development and safeguarding public funds.

293. Thus, those goods manufactured by Kenyan manufacturers are to enjoy the highest margin of preference during procurement, being a 15% margin of preference.

294. Section 157 (2) of **The Public Procurement and Asset Disposal Act 2015** provides:

"Subject to subsection (8), the Cabinet Secretary shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and asset disposal."

295. Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 stipulates at Regulation 14::

"For the purposes of section 39(8) (b) (i) of the Act, a fifteen percent margin of preference in the evaluated price of the tender shall be given to candidates offering goods manufactured, mined, extracted or grown in Kenya."

296. Fifteen per cent [15%] margin of preference that the said firms are entitled to benefit from being is the highest margin available in law.

118. Therefore stating that the interested party was the manufacturer of the tendered drugs yet all evidence pointed to it as a conveyor for Mylan Laboratories Limited, based in India was a whitewash on the rights of person actually involved in the manufacture or making undertaking the ***"making"*** of such product.

119. A reading of section 155 is clear that preferential procurement is only meant for **such *manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement*. The section does not say that as long as one is a local or citizen manufacturer then one qualifies for preferential procurement. This is followed by subsection 3, which stipulates that despite subsection (1), preferences shall be given to:**

a) Manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or

b) Firms where Kenyans are shareholders.

297. The power to give preference lay with the procuring entity, having regard to the criteria stipulated under the Act. The PE did not advise that the interested party did not meet the criteria for local manufacturers. It simply gave a 10% preference and advised that the interested party did not emerge as the lowest evaluated bidder.

298. By directing the Procuring entity to award the interested party 15% margin of preference on account that the Interested Party was a manufacturer by virtue of its involvement in the packaging , the Review

Board failed to take into account the correct criteria for preferences and reservations in procurement. The mere fact that one was manufacturer did not qualify them to preference procurement. One must meet the requirements under subsection **3 of section 155.**

299. Based on the above, this court finds and holds that the respondent acted unreasonably and failed to take into account matters that it ought to have considered before and while making its determination and as such acted unreasonably and committed an error of law in interpreting the word **"manufacture"** to mean **"packaging, labeling or storage"** contrary to the letter and spirit of the legislature.

300. Consequently, I have no hesitation finding that judicial review remedy of Certiorari to bring the decision and Orders of the Respondent Review Board in PPARB NO. 28 of 2017 for purposes of quashing is well founded.

301. On whether **Prohibition** should be issued, Prohibition is a writ intended to halt any or further proceedings being undertaken or are likely to be undertaken by an inferior tribunal or body since the proceedings if they were to be allowed would be against the law of the land. In **Halsbury's Laws of England 4th Edition Vol. 1 Page 37 Para 128** on the scope of prohibition it is stated :

> ***"It is an order from the High Court directed to an inferior tribunal or body which forbids the tribunal or body to continue proceedings that are in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie, to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings."***

302. The court in **JR CASE NO. 382 OF 2014 Republic v Land Disputes Tribunal, Karuri & 2 others** interpreted the scope of prohibition thus:

> ***"In Paragraph 123 (Page 273) of the 4th Edition (2001 Reissue Volume 1(1) of Halsbury's Laws of England, the learned authors discuss the nature of certiorari and prohibition.***
>
> In regard to an order of prohibition they state that:
>
> ***"A prohibiting order is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority or body which is susceptible to judicial review which forbids that court or tribunal or authority or body to act in excess of its jurisdiction or contrary to law…. Whereas quashing orders are concerned with decisions in the past, prohibiting orders are concerned with those in the future."***
>
> ***In the case of Kenya National Examinations Council v Republic, ex-parte Geoffrey Gathenji Njoroge & 9 others, Civil Appeal No. 266 of 1996 the Court of Appeal expressed its opinion on the use of a prohibition order as follows:***
>
> ***"What does an ORDER OF PROHIBITION do and when will it issue" It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol. 1 at pg.37 paragraph 128….. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition"***
>
> ***An order of prohibition therefore looks into the future. Its aim is to stop a wrong from being committed or the continuation of such a wrong."***

303. Under section 11 of the Fair Administrative Action Act, 2015, the court may grant such order as may be just and equitable including ***d) prohibiting the administrator from acting in a particular manner.*** Having found that there was no evidence that the interested party was a manufacturer of the tendered drugs, and that the Review Board committed an error of law in its interpretation of the term ***"manufacture"*** to mean packaging, storing and labeling, for the Review Board to direct the 2nd Applicant to undertake a re-evaluation of the tender applying a 15% margin of preference in favour of the interested party on the basis of its erroneous interpretation of the term "manufacture" would be contrary to spirit and letter of the law as stipulated in the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011.

304. Accordingly, an order of prohibition would issue against the 2nd Applicant prohibiting the Procuring entity from undertaking a re-evaluation of the tender in the manner directed by the review Board.

305. On whether **DECLARATIONS** should issue, the jurisdiction of Judicial Review previously restricted by the Law Reform Act has been stretched by Article 47 of the Constitution as implemented by the Fair Administrative Action Act, 2015 in order to safeguard fundamental rights. **See Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others.[supra].** However, section 11(1)(a) of the Fair Administrative Action Act, 2015 provides that some of the orders that a court exercising judicial review jurisdiction may issue include ***declaring the rights of the parties in respect of any matter to which the administrative action relates*; and 11(2)(b)** ***declaring the rights of the parties in relation to the taking of the decision.***

306. This court was also reminded that this Judicial Review Application is brought pursuant to Articles 10, 22, 23(3) (f), 43(1)(a) 47(1), 50(1), 165(6) & (7) and 227 of the constitution whose import, more specifically Articles 22 and 23 is to allow a party to seek enforcement of a right and that the court may grant any of the Orders outlined in Article 23(3) which include:

> ***(a) a declaration of rights;***
>
> ***(b) an injunction;***
>
> ***(c) a conservatory order;***
>
> ***(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;***
>
> ***(e) an order for compensation; and***
>
> ***(f) an order of judicial review.***

307. Accordingly, it was submitted that Declarations in that regard are the new frontiers excisable by this Court citing **Bitange Ndemo v Director of Public Prosecutions & 4 others Misc. Appl. No. 192 OF 2016** where this Court declared and defined declarations as hereunder:

> "***A declaration is a formal statement by the court pronouncing upon the existence or nonexistence of a legal constitutional state of affairs. It declares what the legal position is and what are the rights of the parties. It does not contain an order which can be enforced against the respondents, as it only declares what is the legal position. It is not a coercive remedy, and can be carefully couched or tailored so as not to interfere with the activities of public authorities more than is necessary to ensure that those public authorities comply with the law."***

308. It was submitted that Declarations consist of pronouncements on the current legal and constitutional state of affairs and this Court by virtue of the Constitution, the Fair Administrative Actions Act and enabling provisions of law is permitted to declare itself on an issue of law.

309. The scope of declarations was interpreted in ***Bitange Ndemo v Director of Public Prosecutions & 4***

others (supra)as follows:-

> ***"However, a declaration can also be used to pronounce upon the legality of a future situation and in that way the occurrence of illegal action is avoided. In Bass V Permanent Trustee Company Ltd[1999] 161 ALR 399 at paragraph 89, Kirby J held that:***
>
> ***"The Declarations' development "is one of the most important and beneficial adventures in the administration of justice during this century."***
>
> ***"The tests to be satisfied to warrant grant of Declarations in Judicial Review proceedings were set out in the case of Aussie Airlines Pty Ltd V Australian Airlines Ltd [1996] 139 ALR 663 at 670-671 that:***
>
> ***"For a party to have sufficient standing to seek and obtain the grant of declaratory relief it must satisfy a number of tests which have been formulated by the courts; some in the alternative and some cumulative. I shall formulate them in summary form as follows:-***
>
> ***a) The proceeding must involve the determination of a question that is not abstract or hypothetical. There must be a real question involved, and the declaratory relief must be directed to the determination of legal controversies. The answer to the question must produce some real consequences or the parties.***
>
> ***b) The applicant for declaratory relief will not have sufficient status if relief is " claimed in relation to circumstances that (have) not occurred and might never happen or if the court's declaration will produce no foreseeable consequences for the parties.***
>
> ***c) The party seeking declaratory relief must have a real interest to raise it.***
>
> ***d) Generally there must be a proper contradiction.***
>
> ***e) These other rules should in general be satisfied before the court's discretion is exercised in favour of granting declaratory relief."***

310. The 2nd Applicant seeks a declaration that ***it applied the correct margin of preference as provided by law to the bid submitted by the Interested Party being a 10% margin of preference and that packaging as a standalone activity does not amount to manufacture.*** In my humble view, that prayer is not available to the 2nd applicant for reasons that the 2nd applicant did not prove violation of any of its rights to warrant a declaration as stipulated in the Fair Administrative Action Act. The Bitange Ndemo case dealt with claims of violation of rights of the exparte applicant and the court in importing the scope of declarations was interpreting those situations akin to violation of rights.

311. In applying the correct margin, the 2nd applicant was simply exercising the statutory power and duty not exercising rights accruing to it. It would therefore be erroneous for this court to interpret a statutory obligation or power to mean a right capable of being enforced through a declaration. In addition, to declare in this instance would confer rights to the procuring entity and the 1st applicant contrary to Articles 23 (3) (a) of the Constitution as the court will be declaring rights which are not disclosed and Article 20 of the Constitution which clearly stipulate that in applying a provision of the Bill of rights, a court shall-(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom and (4) in interpreting the bill of rights, promote the spirit, purport and objects of the bill of Rights.

312. As correctly submitted by the respondent and interested party, to make such a declaration would be substituting the decision of the tribunal with that of this court and thereby conferring rights.

313. Furthermore, the issue of interpretation of packaging not being a stand-alone activity does not amount to manufacturer has already been dealt with as appropriate and requires no other declaration so as

to confer a right.

314. Once this court quashes the decision, and prohibits the 2nd applicant from carrying out a reevaluation as directed by the Review Board, there remains nothing to be declared as against the decision of the Review Board, bearing in mind that it is not the decision of the Procuring entity that is being impugned herein. To make declaration in the circumstances of this case will amount to taking away the discretion of the Procuring entity in the procurement process which is pending and by so doing, usurp powers of the procuring entity. Accordingly, the prayer for declaration is declined.

315. In the end, I find that the applicants have satisfied the court on the two prayers for certiorari and prohibition which I hereby grant as prayed and make the following specific judicial review orders:

> **a AN ORDER OF CERTIORARI be and is hereby issued** ***to bring into this court for purpose of quashing and I hereby quash the determination and Orders of the Respondent Public Procurement Administrative Review Board in Public Procurement Administrative Review Application No. 28 of 2017 delivered on 3rd April 2017.***
>
> **b AN ORDER OF PROHIBITION** ***be and is hereby issued prohibiting and/or restraining the 2nd Exparte Applicant from carrying out a re-evaluation of the financial bids of the 1st Applicant and the Interested Party in TENDER NO. KEMSA/GOK-CPF/HIV-16/17-01T 001 TENDER FOR PROCUREMENT OF HIV/AIDS, TB AND MALARIA COMMODITIES UNDER THE GOVERNMENT OF KENYA GLOBAL FUNDING FOR PROCUREMENT OF ANTIRETROVIRAL MEDICINES UNDER THE HIV PROGRAM as ordered by the Respondent on 3rd April, 2017.***
>
> **c AN ORDER OF PROHIBITION** ***be and is hereby issued prohibiting and/or restraining the 2nd Exparte Applicant from carrying out a re-evaluation of the financial bid of the Interested Party and applying a 15% margin of preference against the price tendered in TENDER NO. KEMSA/GOK-CPF/HIV-16/17-01T 001 TENDER FOR PROCUREMENT OF HIV/AIDS, TB AND MALARIA COMMODITIES UNDER THE GOVERNMENT OF KENYA GLOBAL FUNDING FOR PROCUREMENT OF ANTIRETROVIRAL MEDICINES UNDER THE HIV PROGRAM as ordered by the Respondent on 3rd April, 2017.***
>
> I decline to grant declarations as no violation of rights was pleaded. Furthermore, the second limb of Declaration is superfluous since the Court of Appeal in the **Mjengo Limited** [supra] case has already pronounced itself and I wholly agree that ***"packaging as stand-alone activity does not amount to "manufacture."***
>
> In accordance with section 175(4) of the Act, having quashed the decision of the Review Board, I order that each party shall bear their own costs of these proceedings.

Dated, signed and delivered in open court at Nairobi this 23rd day of November, 2017.

R.E.ABURILI

JUDGE

In the presence of

Mr Mutai h/b for Mr Wanga for the 1st exparte applicant

Mr Mbaka h/b for Mr Onganda for the 2nd exparte applicant

Mr Ngeno for Interested Party

CA: George