REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 260 OF 2017

IN THE MATTER OF PROCUREMENT OF TENDER NO. NTSA/NCB-011/2015-2016: TENDER FOR SUPPLY, DELIVERY AND INSTALLATION OF ASSET TAGGING, BAR CODING AND MANAGEMENT SYSTEM BY MS NATIONAL TRANSPORT SAFETY AUTHORITY

AND

IN THE MATTER OF AWARD OF TENDER NO. NTSA/NCB-011/2015-2016: TENDER FOR SUPPLY, DELIVERY AND INSTALLATION OF ASSET TAGGING, BAR CODING MANAGEMENT SYSTEM TO MS EXTRA SOLUTION LIMITED.

AND

IN THE MATTER OF THE CANCELLATION OF THE TENDER AWARD.

AND

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

AND

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

REPUBLIC.....APPLICANT

VERSUS

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....RESPONDENT

EXTRA SOLUTIONS LTD.....EXPARTE APPLICANT

RULING

1. Vide an application dated 24th May, 2017 the exparte applicant herein **Extra Solutions Ltd** seeks from this court leave to institute Judicial Review proceedings and more specifically for:

a) orders of certiorari and prohibition for purposes of quashing the decision of the **National Transport and Safety Authority** (NTSA) to terminate the award of Tender No. **NTSA/NCB-**

011/2015-2016, tender for supply, delivery and Installations of Assets Tagging, Bar Coding and Management System awarded to the applicant and that such leave do operate as a stay of any process to commence the procurement of the same services afresh;

b) That pending the hearing and determination of the application, the Honourable court do make an interlocutory order of prohibition and or injunction barring the respondent from procuring afresh in respect of the Tender No. NTSA/NCB-011/2015-2016, tender for supply, Delivery and Installation of Assets Tagging, Bar Coding and Management System already awarded to the applicant but readvertised on 9th May 2017 for purposes of fresh procurement;

c) Costs of the application

2. The application is predicted on the grounds stipulated on the face of the notice of motion and verifying affidavit of **Kennedy Wamae** and statutory statement all dated 24th May 2017.

3. The applicant's case is that the respondent NTSA advertised a tender in the daily press for supply; Delivery and Installation of Asset Tagging, Bar Coding and Management System, being Tender No. No. NTSA/NCB-011/2015-2016 and the applicant was one of the bidders out of the 11 bidders who submitted their bids on 5th October 2016. The applicant's deponent then received a call from National Transport and Safety Authority by one Ms Silvia Njoki of the Procurement Department of the respondent informing him that his company had been awarded the tender, and inquiring about the applicant's acceptance letter.

4. That since the deponent did not know the caller, he decided to visit the respondent's offices to present his acceptance letter and get more information, as he had not received any formal letter of award. This was on 6th October 2016 when the deponent together with the Managing Director of the applicant company, Mr Ndegwa Muriithi visited the respondent's offices.

5. It is alleged that while at the respondent's offices, they met Ms Sylvia Njoki who showed them the letter of notification of award and she indicated to the applicant's representatives that the original letter had been send to them through the applicant's postal address No. 7686-00100 Nairobi and that the letter of acceptance from the applicant was needed urgently.

6. It is claimed that the applicant's representatives returned to their offices immediately and wrote the letter of acceptance which they dispatched to the respondent via courier services and it was received by Ms Sylvia Njoki. The applicant followed up with an email addressed to Patrick and copied to Sylvia and on 7th June 2016, Sylvia acknowledged receipt of the acceptance letter by way of an email.

7. The applicants claim that they sat back and waited for the next step and on 13th October 2017 Mr Patrick of the respondent send an email requesting the applicant to provide a performance bond of 10% of the tendered sum and since the request did not tally with the particulars provided in the tender document, the applicant Managing Director wrote an email to Patrick Wanjuki asking for clarification as to the percentage of the performance bond.

8. That on confirmation of the performance bond, the same was submitted on 14th October 2016 and Sylvia acknowledged receipt of the same.

9. It is alleged that strangely, on 18th October 2016 four days later, the applicant received a communication from Patrick giving an ultimatum that the performance bond must be furnished by close of business on 18th October 2016 and a response was given to the effect that a performance bond had already been delivered on 14th October 2016 to the respondent and acknowledged by Sylvia.

10. That there was silence from the respondent's side as the applicant's Managing Director send emails enquiring on the position of the matter.

11. That on 11th November 2016 when an sms was send to Patrick, he responded saying their legal department had raised issues of acceptance of award outside the time allowed and that they wrote ***"National Transport and Safety Authority had sought the Public Procurement Oversight Authority's guidance and were awaiting a response"***

12. That on 15th November 2016, the applicants send out a hard copy letter enquiring the position and kept asking the position of the matter from the respondent until 20th January 2017 when the applicant's deponent visited the respondent's offices and met Ms Jacqueline Githinji who also invited Patrick to her office and they explained to the applicant's deponent that the Legal Department of the respondent had raised a query about the acceptance letter which had been received and the time it was received hence they were seeking legal advise from the Attorney General. That the deponent informed Patrick that on the part of the applicant, it had sought PPOA's advise who had informed them that there was no issue with the "acceptance time" and promised to get back as soon as the respondent Authority received a reply from the Attorney General.

13. It is further alleged that the respondent remained silent until 21st March 2017 when Sylvia wrote an email to the applicant with an attachment to the effect that the respondent Authority had decided to cancel the tender to the applicant and asked the applicant to collect letter of notification of cancellation as well as the performance bond.

14. That on approaching the Postal Corporation of Kenya the applicant found that the notification of award letter was dated 4th October 2016 and the acceptance letter was delivered on 6th October 2016 within 7 days required, on receipt of the notification.

15. That the applicants formally objected to the decision through their lawyers but the respondent has never responded and on 9th May 2017 the respondent readvertised the tender inviting fresh bids. The applicant claims that the procedure adopted by the respondent is suspect and has violated their right to information and a right to be heard over the termination of the contract or the facts taken into account in doing so and that the respondent acted illegally hence their action should be reviewed.

16. Further, that the respondent made no reply to the demand within the stipulated time to enable the applicant proceed before the Review Board.

17. The application for leave to institute judicial review proceedings was initially struck out by this court but on application for review, which was opposed by the respondent, the court reconsidered the matter and reinstated the application hence these proceedings pursuant to the ruling on review delivered on 7th November, 2017.

18. On 17th November 2017, the respondent filed a replying affidavit sworn by Patrick K. Wanjuki, the Head of Procurement of the respondent Authority, denying the depositions of the applicant and contending that the statement is fatally defective because it contains facts only and not supported by any grounds. Mr Wanjuki maintained that the purported acceptance of the award was too late and of no legal effect as the tender validity period had lapsed hence the respondent properly cancelled the tender award.

19. It was deposed that the applicant is a dilatory and indolent suitor and ought not to benefit from equity and that once the tender validity period had lapsed, the respondent acted lawfully as no contract could be entered into in the circumstances.

20. The respondent urged the court to dismiss the application for leave with costs because it lacks merit and raises no ground.

21. The court notes that the applicant, simultaneous with the filing of the written submissions on 30th November, 2017 also filed a supplementary Statement but without leave of court and neither did he intimate to court that it had filed such further document for the court to allude to it hence this court is not

inclined to rely on the said document. It is hereby struck out for being improperly on record as it was sneaked in during the filing of submissions without leave of court.

22. The parties' advocates Mr Omino for the applicant and Mr Gachuba for the respondent filed written submissions canvassing their respective client's position.

23. The applicant submitted that at the leave stage, the applicant is not to argue the merits of his case and that the respondent Authority acted irrationally and with malice because the acceptance of notification of award was received within 7 days of such notification hence there was no reason to cancel the tender and that such cancellation was unreasonable. That although the applicant should have filed a request for review before the Public Procurement Administrative Review Board, Section 174 of the Act states that ***" the right to request a review under this part is in addition to any other legal remedy a person may have"*** hence, the applicant is properly before the court and that is the reason why Section 167 of the Act limits the time for filing request for renew before the Review Board to 14 days but does not limit any other action taken elsewhere to address the inequities of a procuring entity after such time has lapsed.

24. It was submitted that the applicant was not accorded fair administrative action in accordance with Section 4 of the Fair Administrative Action Act, 2016 and Article 47 of the Constitution.

25. It was further submitted that it was unreasonable for the respondent to claim that the letter of acceptance was received out of time when the notification was given by a letter dated 4th October 2017 and acceptance letter submitted on 6th October 2016 and acknowledged.

26. It was also submitted that these proceedings were instituted in line with Section 7 of the Fair Administrative Action Act, 2015 which stipulates that " ***Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with Section 8, or a tribunal……"***

27. It was therefore submitted that time for filing a request to the Board having elapsed, the applicant is entitled to challenge the decision of the respondent before this court on whether the applicant applied itself to an alternative remedy.

28. It was submitted that the applicant sought an advise from PPOA who stated that there was no issue with acceptance time and that it engaged in communication with the respondent to resolve the matter amicably but the respondent acted unreasonably that is why the applicant resorted to court, to challenge the discrimination, bad faith and reckless bias, and irrationality of the respondent Authority.

29. It was submitted that this court is not bound by strict caprise of procedure and technicalities which are abhored by the Fair Administrative Action Act, 2015 and Article 159 of the Constitution since Judicial Review is a tool in defence of defiance by authorities and all manner of violation of rights.

30. The court was urged to be guided by the Principles laid down in **Aden Noor Ali vs IEBC, Jenipher Shamala** & Another [2017]EKLR namely:

1) *Whether the applicant has sufficient interest;*

2) *How the applicant is affected by the decision;*

3) *Demonstration that there is arguable case;*

4) *And the decision complained of must have been made by a public body.*

31. In its opposing submissions filed on 20th November 2017, the respondent contended that there exists an alternative remedy that the exparte applicant did not exhaust hence it has no prima facie case. Reliance was placed on **Nasieku Tarayia vs Board of Directors, AFC & Another [2012] e KLR**

where it was held that Judicial Review is an alternative remedy of the last resort and that where an alternative remedy exists the court has to be satisfied that Judicial Review is the more convenient, beneficial, efficacious alternative remedy available or the court to grant leave.

32. It was submitted that Section 35(2) of the Act provides for recourse to the Public Procurement Regulatory Authority (sic) and if aggrieved by the decision thereof, to institute Judicial Review under Section 39 of the Act.

33. Reliance was placed on **Environment and Combustion Consultants Ltd vs Kenya Pipeline Company Ltd & 2 others [2016] e KLR** where the court explained the application of Sections 35, 38 and 39 of the Public Procurement and Asset Disposal Act and Section 9(2) of the Fair Administrative Action Act. It was also submitted that the other alternative remedy available to the exparte applicant is under Section 167(1) of the Public Procurement and Asset Disposal Act where the applicant is obligated to request for review before the Review Board and that in this case there was no explanation for failure to exhaust this option or why it never approached the High Court to enlarge the time to file a request for review.

34. It was also submitted that the applicant was indolent so it should be denied the reliefs sought. Reliance was placed on **Abdalla Abubakar Miraj & Another v Kenya Ferry Services Ltd [2015] e KLR.**

35. On whether the application discloses a prima facie arguable case, it was submitted that the statement contains only facts and no grounds upon which the prayers are based contrary to Order 53 Rule 4(1) of the Civil Procedure Rules, 2010 and that in the absence of the grounds relied on such as illegality, unreasonableness, irrationality, procedural impropriety, etc, no prima facie case is disclosed to merit the court's review.

36. Further reliance was placed on **Republic vs Chief Magistrate's Court Nairobi Exparte Jeff Koinange & 11 Others [2017] e KLR** where the court emphasized the need for reliefs sought and grounds upon which those reliefs are predicated to be contained in the statutory statement and nowhere else, unless leave is sought and obtained to amend the statutory statement.

DETERMINATION

37. I have considered all the foregoing and in my humble view, the main issue for determination is whether the applicant is entitled to the leave sought to institute Judicial Review proceedings against the respondent. There are also anciliary questions which the court will endeavour to answer. The requirement that leave be sought and obtained before applying for Judicial Review order of mandamus, certiorari and prohibition is intended to identity and filter out at an early stage, claims which may be trivial or without merit or statute barred.

38. At the leave stage, the applicant is under a duty to demonstrate that it has a prima facie arguable case for consideration or indepth investigation at the substantive stage.

39. Further, at leave stage, a party would demonstrate that they have no other alternative remedy to Judicial Review proceedings or that they have exhausted the alternative remedies or that there are special circumstances warranting exemption from resorting to alternative remedies as stipulated in Section 9 of the Fair Administrative Action Act, 2015. See **Republic vs County Council of Kwale & Another Exparte Kondo & 57 Others Mombasa HC Miscellaneous Application No. 384 of 1996.**

40. The applicant at the leave stage needs to demonstrate that the impugned decision is illegal, illegitimate, irrational, procedurally improper and or that it was made in breach of the rules of natural justice and or legitimate expectation by the applicant.

41. The Onus is on the applicant to establish the arguability of his application. Judicial Review Remedies are discretionary therefore the applicant must also approach the court with expedition and the court in

exercising its jurisdiction exercises discretion judiciously. Accordingly, the conduct of the applicant and timeliness are key to the determination of whether or not leave to apply should be granted.

42. In this case, as per the chronology of events given by the applicant in its supporting affidavit, it is clear that the alleged impropriety was noted on 18th October 2016 when the applicant was given an ultimatum to submit a performance bond by end of the day yet the said bond had been delivered on 14th October 2016.

43. Despite not receiving any response for nearly over one month, the applicant waited until 11th November 2016 when it requested Partick through an sms and even then, after sending a written enquiry on 15th November 2016, it was not until 20th January 2017 when the applicant visited the respondent's offices and that it continued writing to the respondent to inquire into the status of the tender.

44. This court also notes that the documents which are listed and filed with the application for leave are not anchored on any affidavit. They are simply listed as ***list of documents*** as if they are documents to be produced later at the hearing in a civil suit as required by order 11 of the Civil Procedure Rules. The said documents are not annexed to any affidavit and are not even commissioned as exhibits or annextures. They are not marked and some of them like the 13th document is uncomplete. It is signed by Director General Francis Meja but it does not show from whom the letter or document emanates. And as correctly submitted by Mr Gachuba, the statutory statement does not accord with the provisions of Order 53 of the Civil Procedure Rules which mandates that the application for leave must be accompanied by a statement setting out the names and addresses of parties, the reliefs sought, and grounds upon which the reliefs are sought. The statement which is signed by Kennedy Wamae is not even dated and has not set out the reliefs sought and the grounds upon which the reliefs are predicated.

45. In addition, the prayer 2 for certiorari is muddled up with prohibition such that whereas it is clear that certiorari would quash, prohibition cannot quash hence the court does not decipher the purpose for which leave to apply for prohibition in the second prayer which is certiorari is sought would serve.

46. Whereas this court would and does excuse the applicant for bringing the notice of motion instead of chamber summons as stipulated in Order 53 Rule 1 of the Civil Procedure Rules as being merely want of form curable by application of Article 159 of the Constitution, and whereas this court would also excuse the applicant for swearing a supporting affidavit which is not even necessary in such proceedings; as only a verifying affidavit is required, it is inconceivable that the applicant who is ably represented by a senior advocate would file a statement with no grounds and reliefs sought and merely file a list of documents which are not marked such that the court would not be enabled to make reference to the said documents in line with either the statutory statement or affidavit by whatever name.

47. Further, it is unconceivable that the applicant would file a statement which does not set out any reliefs and or grounds upon which those reliefs are predicated and claim that the failure to do so is a procedural technicality curable by Article 159 of the Constitution and the Fair Administrative Action Act,2015.

48. Order 53 Rules 4(1) of the Civil Procedure Rules, 2010 mandates that the reliefs sought and grounds relied on be contained in the statutory statement and nowhere else. It is now established law that grounds upon which Judicial Review remedies may be sought and obtained include illegality, Wednesbury unreasonableness/irrationality, procedural impropriety; breach of rules of natural justice and breach of legitimate expectations, among others.

49. These grounds should not be haphazardly scattered and or be in the submissions which latter are not pleadings or evidence. The grounds must be clearly housed in the statutory statement without which the court would have no option but to decline to exercise its discretion to grant leave to apply. This is because once leave is granted, the applicant would only be allowed to file a substantive notice of motion

and serve upon the respondent, accompanied by the statutory statement and verifying affidavit accompanying the application for leave. Any other or further statement or affidavit can only be filed with leave of court.

50. The court would exercise its discretion to grant leave and where an application to amend the statutory statement is made, grant such leave to amend it. However, this is not the case here. The applicant does not appear to appreciate the requirement for setting out reliefs and grounds or to amend the statutory statement yet the respondent raised that issue at an early stage of filing a replying affidavit.

51. The applicant could have revisited its statutory statement and sought for an amendment to set out the reliefs sought and grounds. It did not. I refuse to accept reliance on Article 159 of the Constitution as panacea of all ills in every situation. See Republic **vs Chief Magistrate's Court Nairobi exparte Jeff Koinange & 11 Others [2017] e KLR.** See also **Civil appeal No. 154/2013 Kukuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others [2013] e KLR** (Court of Appeal).

52. Still on delay, the applicant dilly dallied filing these proceedings by lodging complaints seeking to know the position of the tender until the respondent readvertised the tender on 9th May 2017 yet the applicant was aware that by 21st March 2017 the respondent had cancelled the tender.

53. It was not until 25th May 2017 that the applicant approached this court seeking for leave and stay in the form of prohibition or injunction. Todate, the applicant who has no stay order has not filed any affidavit to demonstrate to the court that the respondent has not completed the second phase of the procurement process as per the advertisement of 9th May 2017 such that even if this court was to grant leave and stay, they would be mere academic orders meant to serve no purpose or at all. Court orders are not issued in vain. they are issued to serve a particular purpose and where, for example, the impugned decision no longer serves any purpose, or has been implemented, this court would be engaging in a pious exploration if it issued orders which are incapable of enforcement and therefore vain. The closing of the readvertised tender was on 31st June 2017 at 10.00a.m. and it is probable that the tender validity period is gone by an award and contracts may already have been executed and or performed.

54. The respondent also raised the issue of the alternative remedy being available to the applicant and submitting that Judicial Review is a remedy of the last resort and that where the alternative remedy exists, the court has to be satisfied that Judicial Review is the more convenient, beneficial efficacious alternative remedy, for the court to grant.

55. The applicant maintained that Section 174 of the Public Procurement and Asset Disposal Act allows the aggrieved persons to either file request for review or any other remedy and that it had chosen the filing of Judicial Review because the respondent being a statutory body in making the decision to cancel the tender awarded to the applicant made an administrative action which could be challenged by way of Judicial Review. Further, that the period for filing or request for review had elapsed hence Judicial Review was the most appropriate remedy in the circumstances.

56. Albeit the **Nasieku Taraya vs BOD AFC & Another** (supra) case was decided before the Fair Administrative Action Act 2015 was enacted, the **Environmental & Combustion Consultants Ltd vs Kenya Pipeline Company Ltd & 2 Others** (supra) case was initiated in March 2016 and decided on 20th May 2016 after enactment and operationalization of Fair Administrative Action Act, 2015. The court in the above Nasieku case (Odunga J) examined the provisions of the Public Procurement and Asset Disposal Act, 2015 in detail as well as the provisions of Fair Administrative Action Act, 2015 on exhaustion or resort to alternative remedies and the consequences thereof.

57. According to the applicant, it wrote to the authority seeking for a clarification and received a letter to the effect that there was no issue with regard to the acceptance time. Further, that it took time writing to the respondent seeking for an amicable settlement of the issue of the award to no

avail before resorting to court for Judicial Review.

58. However, as I have stated earlier, the ***'exhibits'*** purportedly relied on by the applicant are not marked or identified and there is no such letter written by the PPOA stating that there is no issue with the time of the letter of acceptance.

59. Documents which are simply filed without reference being made thereto in the statement or in an affidavit remain just that- documents and are of no evidential value to the proceedings before the court.

60. Nonetheless, I am in agreement with the applicant that Section 174 of the Public Procurement and Asset Disposal Act allows a person who would otherwise be locked out from invoking Section 175(1) of the Act to apply any other procedure available in law to seek a remedy.

61. Accordingly, I hold the view that the applicant was in order and at liberty to institute Judicial Review proceedings under Order 53 of the Civil Procedure Rules and Section 174 of the Public Procurement and Asset Disposal Act,2015, which proceedings differ in every respect from the Judicial Review contemplated under Section 175(1) of the Public Procurement and Asset Disposal Act,2015.

62. This position was confirmed by the Court of Appeal in **Alghurair Printing and Publishing LLC vs Coalition for Reforms and Democracy & 2 Others [2017] e KLR** where the Court of Appeal stated inter alia:

> ***"……A distinction must therefore be drawn between Judicial Review as contemplated under Section 175, which would be akin to an appeal by an applicant from the decision of the Review Board, and the Judicial Review instituted by the 1st respondent as an alternative remedy under Order 53. This being the case, the need to comply with the 14 days period for filing of the Judicial Review under Section 175 of the Public Procurement and Asset Disposal Act did not arise, as the requirement did not apply to the 1st respondent's Judicial Review application instituted under Order 53.***
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> ***Accordingly, I find and hold that the 1st respondent was entitled to institute the Judicial Review proceedings for the review w of the IEBC's tender award under Order 53 of the Civil Procedure Rules, which proceedings were competent , and vested the High Court with jurisdiction to determine it".***

63. However, the applicant also claims that the respondent Procuring Entity acted illegally in cancelling the tender which it had awarded the applicant and which the applicant had accepted the notification within 7 days of receipt of the notification of award and even submitted the performance bond. The applicant maintains that the acceptance was done within the stipulated 7 days.

64. Albeit the applicant maintains that it submitted the acceptance letter within 7 days, and that it consulted PPOA on the acceptance time and got a clean advise that there was no issue with the acceptance time, the applicant did not annex to his affidavit or statutory statement the copies of tender documents and neither were the list of documents filed made part of the affidavit or statement as annextures.

65. Rule 9 of the Oaths and Statutory Declaration Rules (Revised 2012) provides that:

"9. All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification"

66. Under Section 10 of the said Rules, the forms of Jurat and of identification of exhibits shall be those set out in the Third Schedule.

67. In this case, whereas the court would not concern itself with the format of the jurat or the identification of the exhibits, it must be a concern that there are no exhibits securely sealed and or

marked for identification. A list of documents filed in proceedings is not an exhibit. It remains just a list. An exhibit is defined in the **Fourth Edition of Osborn's Concise Law Dictionary** as:

> ***" Exhibit: a document or thing produced for the inspection of the court; or shown to a witness when giving evidence or referred to in deposition; or a document referred to, in but not annexed to, an affidavit"***

68. The Legal Dictionary defines an exhibit as a known to ***be " a paper or document produced and exhibited to a court during as trial of hearing, or to a person taking depositions, or to auditors or arbitrators as a voucher, or in proof of facts, or as otherwise connected with the subject matter, and which, on being accepted, is marked for identification and annexed to the deposition, report, or other principal document, or filed of record, or otherwise made a part of the case."***

> ***"A paper, document, chart, map or the like, referred to and made a part of an affidavit, pleading, or brief; An item of physical, tangible evidence that it to be or has been offered to the court for inspection"***

69. What flows from the above definitions is that an exhibit ***must be referred*** **to**, ***produced for inspection*****,** shown to a witness, or annexed to either a deposition/affidavit or other principal document or report ***and made part of the case***.

70. In this case, as earlier stated, the applicant filed a list of documents which were never marked for identification and neither the affidavit filed nor statutory statement refers to those documents as exhibits and neither are the said documents marked as exhibits and neither are the said documents securely sealed or marked with serial letters of identification as required under Rule 8 of the Oaths and Statutory Declarations Rules (Revised 2012).

71. Accordingly, I have no hesitation in finding that documents which are merely filed in court and not referred to or marked as exhibits are not produces as such exhibits for the court's inspection.

72. In the end, I find that the applicant has not demonstrated that it has a prima facie arguable case for consideration or investigation by this court at the substantive stage if leave were to be granted. The application is evidently incompetent to be allowed to proceed to the substantive stage. It would be a waste of judicial time to delve into the merits of the allegations raised by the applicant.

73. Accordingly, I dismiss the application dated 24th May 2017 and filed court on 25th May 2017 with an order that each party shall bear their own costs of these proceedings.

Dated, signed and delivered in open court at Nairobi this 20th day of December 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr Omino for the exparte applicant

Mr Chadiani h/b for Mr Gachuba for the respondent

CA: George