REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 504 OF 2015

KENYA CIVIL AVIATION AUTHORITY. ……...……APPELLANT

VERSUS

INDRA LIMITED. ……...……..……. RESPONDENT

AND

NANJING LES INFORMATION TECHNOLOGY. ……..…INTERESTED PARTY

(Being an Appeal from the Decision of the Public Procurement Administrative Review Board delivered at Nairobi on 16th October, 2015)

J U D G M E N T

1. The Appeal herein was filed pursuant to Section 100 of the Public Procurement and Disposal Act 2005 (herein referred to as the Act). It arises from the decision of Public Procurement Administrative Review Board (herein referred to as the Review Board) delivered on 16th October, 2015. The decision in question was with the respect to an award of Tender, No. KCAA/030/2014-2015.
2. A brief background on the tender is that the Appellant is a State Corporation established under the Kenya Civil Aviation Act, 2013 with a mandate to plan, develop, manage, regulate and operate a safe economically sustainable and efficient Civil Aviation System in Kenya. It serves as both a regulator and a service provider. Amongst the services offered by the Appellant is the provision of Surveillance Radar Data within the Kenyan Airspace.
3. In order to reduce incidences or accidents due to an instance of unavailability of surveillance Radar Data, it was in the process of procuring a back-up Surveillance Radar System to act as a fall back system in case of radar failure. The Automatic Dependent Surveillance – Broadcast (ADS – B) and Multi-Lateration (MLAT) Systems are considered the best alternative for secondary surveillance radar. Indeed, the Appellant's master plan proposes to have the Kenyan Airspace under surveillance in order to reduce incidents and increase capacity.
4. It was against the forgoing background that KCAA placed an International Open Tender Advertisement in the Daily Nation and Standard Newspapers on the 9th February, 2015, People Daily on the 6th February, 2015 and the East African Issue on the 7th to 13th February, 2015 inviting Bidders to bid for the supply, installation and Commissioning of ADS – B and MLAT System.
5. The tender initial closing date was 17th March, 2015 but was extended to 9th April, 2015. The extension was published in the Daily Nation and the Standard Newspapers of 12th March, 2015.
6. The tender was a two-envelop tender process where the bidders were supposed to provide the technical and financial proposals in separate envelops. The tender opening of the technical

proposals was done on the 9th April, 2015 in the presence of bidder's representatives who chose to attend. Out of the 12 bidders who obtained bidding documents only seven submitted their bids. The tender evaluation committee carried out evaluation of the submitted tenders in three stages namely, the Mandatory Tender Requirements, Technical Capability Assessment and Financial Evaluation.

7. Out of the seven (7) bidders who submitted their bid documents, six including the Respondent herein, met the mandatory requirements and were evaluated further under the Technical Evaluation criteria. All the six (6) bidders who were evaluated under the Technical Evaluation Criteria attained the required minimum technical score of 90% and were therefore, evaluated further under the Financial Evaluation Criteria.
8. After carrying out the Financial Evaluation, the six bidders were accordingly ranked on the basis of their financial bids and the outcome was as follows: -

1. Nanjing Les I. T. Co. Ltd Kshs.271,380,429.93
2. Indra Limited Kshs.306,583,522.58
3. Selex Es Kshs.411,299,442.72
4. Thales Air Systems SAS Kshs. 45,020,016.43
5. Saab Sensis Corporation Kshs.460,049,776.92
6. Symphony Kshs.469,568,476.00

And Nanjing Les I. T. Co. Limited was the lowest evaluated bidder.

9. The Procuring entity further conducted due diligence on the successful bidder (Nanjing Les I.T. Co. Limited, the interested party in this Appeal. The procuring entity proceeded and notified all the unsuccessful bidders including the Respondent herein and successful bidder of the outcome of the procuring process vide a letter dated 3rd September, 2015 after approval by the tender committee to award the contract to the lowest evaluated bidder.
10. The Respondent was aggrieved by the decision of the KCAA notifying it that its bid in the subject tender was unsuccessful. It moved to the Public Procurement Administrative Review Board and filed a request for review No. 48 of 2015 and upon hearing the Respondent and the Appellant herein the Board delivered its decision on the 16th October, 2015.
11. The Appellant being dissatisfied with the decision of the review Board filed an Appeal against the said decision on the 30th October, 2015 and contemporaneously filed a Notice of Motion dated 29th October, 2015 under a certificate of urgency which sought inter alia an order staying execution or further execution of the decision of the Review Board which Application was first heard by Hon. Justice Aburili ex parte but she declined to grant the orders of stay of execution.
12. On the 5th November, 2015, parties herein recorded several orders by consent inter alia that the parties to file their written submissions and the status quo to be maintained pending the hearing and determination of the Appeal. With regard to the Preliminary Objection by the Respondent and filed on the 4th November, 2015, it was agreed that the same be heard together with the Appeal. In addition, the Appellant/Applicant abandoned its Application dated 29th October, 2015 and parties agreed to proceed with the Appeal which was canvassed by way of written submissions which all the parties duly filed.
13. In the Memorandum of Appeal, the Appellant has listed the following grounds of Appeal.

    i. That, the Review Board erred in law and in fact in holding that the procuring entity's (the Appellant herein) evaluation of the Respondent's tender was not in accordance with Section 66 of the Public Procurement and Disposal Act, 2006.

    ii. That, the Review Board erred in law and in fact in holding that the Respondent (Indra Limited) request for Review lodged with the Board on the 21st September, 2015 is successful and proceeded to award the orders sought.

    iii. That the Review Board erred in law and in fact in making an order of annulling the tender awarded to M/s Nanging Les Information Technology Limited (The successful Bidder who

had already been notified) without the said successful bidder being enjoined nor heard in the proceedings in clear breach of the express provisions of Section 96 of the Public Procurement and Disposal Act, 2006 and the well known rule of natural justice that no persons shall be condemned unheard.

iv. That the Review Board erred in law and in fact in making contradicting findings and interpretations and application of Clause 2:24:2 of the tender document.

v. That the Review Board erred in law and in fact in making a contradicting finding because on the one hand it held that the Applicant did not provide proof that the equipment it offered to supply was manufactured in Kenya or Equipment of foreign origin was already in Kenya as required in clause 2:24:2 of the tender document yet on the other hand that clause 2:24:2 was not clear on when the equipment was to be in store in Kenya and its therefore not capable of being enforced before the tender is awarded or contract signed.

vi. That the Review Board erred in fact and in law in holding that Clause 2:24:2 of the tender document was not clear and is therefore not capable of being enforced before the tender is awarded or contract signed.

vii. That in excluding the Application that Clause 2:24:2 on the ground that it was not clear and is therefore not capable of being enforced before the tender is awarded or contract signed, the Review Board in effect erred in law and in fact in failing to uphold the legal requirement under Section 66 (2) of the Public Procurement and Disposal Act, 2006 that evaluation and comparison shall be done by the procuring entity using the procedure and criteria set out in the tender document.

viii. That the Review Board erred in law and in fact in imposing an order that the Appellant do enter into a contract with the Respondents for a bid price of Ksh.264,296,166.60 less VAT of Ksh.42,287,385.58. This in effect means that the Applicant/Appellant shall pay the applicable VAT making the total tender sum of Ksh.306,583,552.58 thus incur an extra colossal contract sum of Ksh.35,203,122.65 (being the difference between the amount quoted by the lowest evaluated bidder of Ksh.271,380,429.93 and that quoted by the Respondent with VAT for supply, installation and commissioning of ADS – B and MLAT Systems with Ms Indra Limited and to complete the process within 30 days notwithstanding the fact that even then a due diligence ought to be done to ascertain the capability of the Respondent.

ix. That the Review Board erred in law and in fact in imposing an order that the Appellant do enter into a contract with the Respondent for the supply, installation and commissioning of ADS – B and MLAT Systems with Indra Limited and to complete the process within 30 days notwithstanding the fact that even then a due diligence ought to be done to ascertain the capability of the Respondent.

x. That the Review Board erred in law and in fact by holding that the Appellant awards the tender to messers Indra Ltd as the lowest bidder at the bid price in its form of tender, less VAT, that is Ksh.264,296,166.00 but failed to appreciate that the lowest evaluated bidder Nanging Les I.T. Company Limited bid of Ksh.271,380,429.93 was inclusive of VAT and would still have been the lowest bid less VAT as the Applicable rate of VAT is uniform.

xi. That the Review Board erred in law and in fact in failing to appreciate the immense public interest involved in the subject matter.

xii. That the Review Board erred in law and in fact in failing to appreciate the applicable tax regime in this dispute and particularly Section 5(1) of the Value Added Tax Act 2013 to the effect that the ADS – B and MLAT Systems were neither VAT exempt nor was the Respondent granted an exemption to justify exclusion of costs from its bid price.

xiii. That the Review Board erred in law and in fact completely misunderstood and misapprehended the response filed and the submissions made both in the documents filed and also the oral arguments made before it by the Appellant herein to the Review Application.

14. The Appellant sought for orders that: -

a. The Appeal be allowed
b. The decision and orders of the Public Procurement Administrative Review Board (the board) delivered in Nairobi on the 16th October, 2015 be set aside and an order to issue that the Appellant proceed and execute a contract with the successful bidder Nanjing Les Information Technology Limited.
c. Costs of the Appeal be awarded to the Appellant.
d. This Honourable court be pleased to make such further orders as it may deem necessary.

15. The Appeal came up for hearing before me on the 10th November, 2015 by which time the 30 days period was about to expire with only two days to go and due to the time constraints I was unable to write the whole judgment and on the 13th November, 2015 Hon. Justice Sergon delivered it on my behalf but reserved the reasons which were to be given on a later date.
16. As stated earlier in this judgment, the Appeal herein was filed pursuant to Section 100 of the Public Procurement and Disposal act, 2005 but before I consider the merits and demerits of the Appeal, I first wish to deal with the Preliminary Objection by the Respondent. The Respondent's objection is on a point of law and is premised on the fact that the court lacks jurisdiction to hear and determine the Appeal as Section 100 (1) and (2) of the Public Procurement and Disposal Act provides that the procedure for appealing is only by way of Judicial Review.
17. The Respondent contends that the redress procedure provided under the Public Procurement and Disposal Act does not envisage the normal long and tedious process of Appeals under Order 42 of the Civil Procedure Rules. The decisions of the PPARB are meant to be swiftly challenged by way of Judicial Review only which are determined within 30 days. Judicial Review is governed by order 53 of the Civil Procedure Rules and does not presuppose the filing of a Memorandum of Appeal as the Applicant has done in the present case.
18. It is further contended that the current appeal and the court's jurisdiction have been wrongly invoked under the provisions of Section 112 (Part VII, Authority Powers to ensure compliance) of the Public Procurement and Disposal Act 2005. That the Section deals with Appeals from the decisions originally made by the Director General of the Public Procurement Oversight Authority.
19. In support of the Preliminary Objection, the Respondent relied on their understanding of Section 100 of the Act and the Judicial Proceedings in the case of **Riley Services Limited Vs Judiciary (2015) eKLR** and the case of **Samuel Kamau Macharia Vs Commercial Bank Limited & 2 Others (2012) eKLR**. In the Riley case, the Honourable Justice Mabeya dismissed on a Preliminary Objection, an Appeal similarly filed from the decision of the Public Procurement Administrative Review Board. The learned Judge stated as follows: -

> ***"It is clear from the foregoing that, the Section gives both the right and the procedure of a recourse for a party aggrieved by the decision of the PPARB. To my mind the terms "Appeal and Judicial Review" in the circumstances of the Act, may mean and refer to one and the same thing, i.e. seeking a relook at the decision made by the PPARB.***
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> ***Judicial Review is a process by which exercise of powers by statutory bodies are checked, reviewed or looked at by the High Court. Both the Act and the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya do not define the term "appeal". However, the term has been defined in Blacks Law Dictionary, 9th Edition 2009 at page 12 as: -***
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> ***"A proceeding undertaken to have a decision reconsidered by a higher authority; especially, the submission of a lower court's or agency's decision to a higher court for review and possible reversal."***

The learned Judge went further to hold that based on the time lines for determining an appeal from the PPARB, as provided under Section 100 (4) of the PPDA, the only valid interpretation would be the one upholding Judicial Review as the mode to redress, by stating: -

> ***"…I hold that it was the intention of the drafters of the Public Procurement and Disposal Act, 2005 that decisions relating to procurement be expendited and concluded within the shortest time possible. The procedure given did not envisage the normal long and tedious process of appeals under Order 42 of the Civil Procedure Rules. The decisions of the PPARB are meant to be swiftly challenged by way of Judicial Review only."***

20. The learned Judge went ahead to strike out the Appeal filed in that matter and in Respondent's submissions, the current Appeal should suffer the same fate.
21. The Respondent further submitted that if the drafters of PPDA intended to have two modes of redress within Section 100, then there would be no need to have other provisions for appeals under Section 112 of the PPDA which provides for Appeals against the decisions of PPARB where the original claim arose from an independent decision against a procuring entity or tender made by the Director-General of the Public Procurement oversight Authority.
22. It was the Respondent's further submission that the current appeal and the court's jurisdiction have been wrongly invoked under the provisions of Section 112 of the Public Procurement and Disposal Act. The Appellant herein has filed its Appeal under the provisions of Section 112 of the PPDA, which is captured under Part II of the Act titled ***"AUTHORITY POWERS TO ENSURE COMPLAINCE."***
23. It was the Respondent's submissions that Section 112 of the PPDA which the Appellant seeks to rely on in filing the Appeal specifically deals with challenges to decisions of the Director General of the PPARD which is not the position in the current appeal. The provision of Section 112 are couched in mandatory terms and leaves no room for a different interpretation and for that reason, the Honourable Court cannot entertain this appeal as filed, and the only recourse would be to strike out the same.
24. In its further submissions, the Respondent submitted that in its expectation the Appellant herein may wish to rely on the provisions of Article 159 of the Constitution in an attempt to waive the stricted requirement of Section 100 of the PPDA to enable it rely on the wrongly invoked provisions of this Appeal.
25. In response to this, it relied on the case of **Nick Salat Vs IEBC & Others (2013) eKLR** where the Court of Appeal Judges, the learned Justices P O Kiage, Ouko J and Mohammed J stated and I quote: -

> "***I am not in the least persuaded that Article 159 of the Constitution and the Oxygen Principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow of rules and procedures and create an anarchical free-for-all in the administration of Justice. "***
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> ***This court, indeed all courts must never provide succor and cover to parties who exhibit scant respect for the rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the ever-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcome can be anticipated with a measure of confidence, certainty and clarity where powers of rules and their application are concerned"***

26. On the issue of technicality, the Respondent further quoted the case of **Kakuta Maimai Hamisi Vs IEBC & Others (2013) eKLR** where the learned Justices of Appeal held inter alia: -

"In our view, it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with the rules of procedure is anti-ethical to Article 159 of the Constitution and the overriding objective principle under Sections 1A and 1B of the Civil Procedure Act (Cap 21) and Sections 3A and 3B of the Appellate jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases."

27. Before I consider the submissions by the Appellant on the Preliminary Objection, I need to note here that though the Respondent has made submissions on whether the interested party enjoined on 5th November, 2015 has a right of audience before the Honourable court, that issue was not orally argued by the learned counsels and I will consider the same as having been abandoned by the Respondent.
28. In Response the Appellant submitted that the Honourable court indeed has the jurisdiction to hear and determine the Appeal before it. That should be the understanding and interpretation of Article 165 (3) (c) of the Constitution which in the circumstances of this case is to be read with Section 100 of the Public Procurement and Disposal Act 2005.
29. He submitted that the decision of the **Riley Services Case** (Supra) which the Respondent appears to have heavily relied on is distinguishable and not binding on this court for the reason that it was made per incuriam and without the knowledge and consideration of the more authoritative finding of a three judge bench decision of **Milicons Limited & Another Vs Parliamentary Service Commission & another, HCC Appeal No. 509 of 2013** where the same issue was raised in the following words: -

"….. a party can choose to either file a judicial review proceedings as the 1st Respondent did after the Review Board's decision or as provided under Section 100(2) file an appeal. The provisions of Section 100(1) do not in any way oust this court's jurisdiction. A party is at liberty from the wording of the said Section to take the option it chooses. Once the party opts to file an Appeal which has been expressly stated by Section 100(2), then it shall be guided by the provisions of the Civil Procedure Act and Civil Procedure Rules on Appeals. However, the High Court must be mindful that the Appeal must be dealt with in an expeditious manner bearing in mind the objectives of the Act and that the procurement process should not be prolonged merely because of an appeal." (Underlining mine)

30. The Appellant also relied on the case of **M/s Master Power Systems Limited Vs Public Procurement Administrative Review Board & 2 others (2015) eKLR** wherein the learned Honourable Justice Aburili made a finding on the same issue and disagreed with the interpretation of Honourable Justice Mabeya in the Riley Services Case by holding that: -

"While I am in agreement that the procurement law was meant to expedite procurement procedures and that in appeals, there may be delays due to the many lengthy procedures attendant thereto, I nonetheless do not agree with my brother judge's (Justice Mabeya) interpretation of Section 100 of the Public Procurement and Disposal Act, 2005."

She gave her reasons as follows: -

"Section 100(2) of the Act in her view, gives an aggrieved part a choice between Judicial Review and Appeal depending on what is being challenged. The Act in that section provides for two alternatives for challenging the decision of the Review Board and therefore once a party chooses the judicial review path, they are precluded from filing an appeal at the same time and if they choose the appeal way, then they cannot be allowed to pursue Judicial Review."

The Appellant concluded by submitting that when a right has been given by a statute, the court should be careful not to take it away from a litigant except for a good reason and urged the court to allow the first limb of the Preliminary Objection.

31. The Appellant submitted that it has not invoked the wrong provisions in the Appeal and even if that were so, that should not defeat a right given by the statute. We are in a new dispensation and the purpose of the court is to do justice and a right cannot be defeated by quoting the wrong provision of the law. He based his argument on the case of Milicon Limited and M/s Master Power Systems Limited and submitted that once a party opts to file an appeal from the decision of Public Procurement Administrative Review Board, the appeal shall be guided by the provisions of Civil procedure Act and the Rules on appeals and that is how the Appellant has approached the court. The Section 112 mentioned by the Respondent is not mentioned anywhere in the Notice of Appeal or in the Memorandum of Appeal.
32. In his further submissions, the Appellant submitted that the Appeal raises issues of immense public importance and that the Respondent is seeking to have it struck out on a technicality. He urged the court to be guided by the overriding objective principle of the court under the Civil Procedure Act, Cap 21 Laws of Kenya as enshrined in Section 1A thereof to facilitate the just, expeditious proportionate and affordable resolution of civil disputes. The court is mandated by article 159 (2) (d) of the Constitution of Kenya to administer justice without undue regard to procedural technicalities.
33. The Appellant also cited the case of **R Vs Anti-Counterfeit Agency & 2 others ex parte Surgippharm Limited (2014) eKLR** where the High Court Odunga J held as follows: -

> ***"However, in the light of the provisions of Article 159(2) (d) of the Constitution the mere fact that a party cites the wrong provisions of the law ought not to deprive the court of a jurisdiction where such jurisdiction exists. As I have demonstrated above, jurisdiction to review or set aside orders made in judicial review proceedings exist hence the mere fact that the instant application is expressed to be brought under Order 45 in my view does not render the Application fatally defective or incompetent."***

34. The Appellant further relied on the case of **Crescent Construction Co. Limited Vs Delphis Bank Limited (2007) eKLR** to drive the point of Legal technicality home and submitted that the power of the court to strike out pleadings is a discretionary one that should be exercised with greatest caution. This comes from the realization that the rules of natural justice require that the court must not drive any litigant however weak his cause may be from the seat of justice. That is a time honoured legal principle. He urged the court to dismiss the Preliminary Objection with costs.
35. On the part of the Interested Party, Mr. Omwanza made very brief submissions on the Preliminary Objection. He supported the submissions made by the Appellant and emphasized that the decision of Justice Mabeya in the Riley's Case was per incuriam and supported the reliance on the case of Master Power Systems Limited.
36. Let me start by stating that the essence of a Preliminary Objection was given by Law JA and Sir Charles Newbold P in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors (1969) E. A. 696 at page 700 Law JA. stated: -**

> ***"….. a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit. Examples are objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.***

Sir Charles New Bold P added as follows: -

> ***"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the presumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

37. In view of the court's finding in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors (1969) EA** (supra) and in my humble view, the courts in dealing with a Preliminary Objection have to be very cautious because depending on the outcome of the same, it

may dispose of the suit without hearing the parties substantively, though in doing so, it should not compromise its core duty of doing justice to all the parties to the case.

38. Courts have often held that the power to strike out a pleading or a suit is one that a court should exercise sparingly and cautiously, as the same is exercised without the court being fully informed on the merits of the case, unless the case is so hopeless that no amount of amendment can inject life in it. In the celebrated case of **D. T Dobie & Co. (K)Ltd Vs Muchina (1982) KLR** Madan JA (as he then was) held: -

> ***"the court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action for being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that function is solely reserved for the trial judge as the court itself is not usually fully informed so as to deal with the merits. No suits ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, is so weak as to be beyond redemption… A court of Justice ought not to act in darkness without the full facts of the case before it."***

39. The jurisdiction of this Honourable court has been challenged and depending on the outcome of the Preliminary Objection it might as well determine the entire appeal. In the case of **Owners of the Motor Vessel "Lilians" Vs Caltex Oil (Kenya) Limited (1989) KLR 1.** The court observed: -

> ***"By jurisdiction, is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits for this authority are imposed by the statute, charter or commission under which the court is constituted and may be extended or restricted by the like means. A limitation may be either as to the kind and nature of actions and matter of which the particular court has cognizance or as to the area over which the jurisdiction of an inferior court of Tribunal (including an arbitrator) depends on the existence of a particular state of facts. The court or the Tribunal must enquire into the existence of facts in order to decide whether it has jurisdiction, but except where the court or tribunal has been given power to determine conclusively whether the facts exist where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."***

40. The right to a hearing is well protected and enshrined in our constitution. The Constitution of Kenya 2010, Article 50 provides: -

> ***"Every person has the right to have any dispute that can be resolved by the Application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."***

In the case of **Richard Ncharpi Leiyagu CA 83/2013** the Court of Appeal stated: -

> ***"the right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the Rule of law. This is why even if the court has inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."***

41. Back to the case before me, Section 100(1) of the Public Procurement Disposal Act provides that: -

> ***"A decision made by the Review Board shall be final and binding on all the parties unless judicial review thereof commences within 14 days from the date of the review,***

Board's decision."

Section 100(2) provides: -

"***Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court, and the decision of the High Court shall be final."***

42. The processes and the remedies of Judicial Review and Appeal are very different and distinct. Under Section 100(1) a party aggrieved by the decision of the Review Board can challenge the same by way of Judicial Review which proceedings should be filed within 14 days from the date of the decision of the Review Board.
43. On the other hand, Section 100(2) gives a party to the review who is dissatisfied with the decision of the Review Board a right to appeal to the High Court against the decision of the Board. The importance of adhering to the laid down legal procedures was considered in the Court of Appeal case of **Speaker of the National Assembly Vs Karume (2009) KLR 426** that: -

"where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

44. In law Judicial Review process is very different from an Appeal Process. Judicial Review is provided for under Order 54 of the Civil Procedure Rules while Civil Appeals are provided for under Order 42 of the same Act. A Judicial Review process deals with illegality, impropriety and irregularity of a decision while the appeal process goes to the merits of the decision by the court or the tribunal. The Appellant herein is not challenging the process but the merit of the decision of the Review Board.
45. I agree with the Appellants submissions that under Section 100, a party can choose to either approach the High Court by way of Judicial Review or by way of Appeal. If a party chooses to go by way of appeal, it shall be guided by the provisions of the Civil Procedure Act and Civil Procedure Rules on Appeal. However, the High Court must be mindful that the Appeal must be dealt in an expeditious manner bearing in mind the objectives of the Act and that the procurement process should not be prolonged merely because of an appeal. In view of the aforegoing and with a lot of respect to my learned brother Hon. Mabeya J., I beg to differ with him on his interpretation of Section 100.
46. On the second limb of the Preliminary Objection, the provisions of Article 159(2) (d) should be the guiding principle. I have, however, noted the cited authorities of the Court of Appeal in Civil Appeal 154 of 2013,:**Kakuta Maimai Hamisi Vs IEBC and Others** and that of **Nick Salat Vs IEBC & others (2013) eKLR**.
47. In the Appeal herein, the Notice of Motion dated the 29th October, 2014 was brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 of the Civil Procedure Rules. As submitted by the Appellant, the Section 112 of the Act though mentioned by the Appellant is not mentioned anywhere in the Notice of Appeal or in the Memorandum of Appeal. And even if it were otherwise, I would not dismiss the Appeal on account of such a technicality just because the same has been bought under the wrong provisions of the law.
48. Having considered the foregoing, I am satisfied that the court has jurisdiction to hear and determine the Appeal herein and in the premises the Respondent's Preliminary Objection dated 4th November, 2015 is hereby dismissed.
49. I now turn to the merits of the Appeal.

The Appellant in his submissions consolidated and made arguments on the grounds of Appeal under two limbs.

Under the 1st Limb, he covered grounds 1, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the Memorandum of Appeal. The Review Board erred in law and in fact in its interpretation and findings on clause 2:24:2 of the tender document and holding that the procuring entity's (the Appellant herein) evaluation of the Respondent's tender was not in accordance with Section 66 of the Public Procurement and Disposal Act, 2005 and in its interpretation of the tender document.

50. The second limb of the argument is on ground 2 of the Appeal – the Review Board erred in law and in fact in making an order of annulling the tender awarded to M/s Nanjing Les Information Technology Limited (the successful)bidder who had already been notified) without the said successful bidder being enjoined nor heard in the proceedings in clear breach of the express provisions of Section 96 of the Public Procurement and Disposal Act, 2005 and the well known rule of natural justice that no person shall be condemned unheard.
51. The Respondent on its part has listed down the following issues for determination by the court.

i. Whether the court has jurisdiction to entertain the subject appeal.

ii. Whether the interested party enjoined on 5th November, 2015 has the right of audience before this Honourable Court.

iii. Whether the Appellant's grounds of Appeal are valid.

iv. Who should bear the costs of the Appeal?

The court has already dealt with the first and the second issues as per the Respondent's list of issues while the 3rd issue can effectively be covered under the Appellant's grounds of Appeal as summarized under the first and the 2nd limbs. The issue of costs will automatically follow the events or such other orders as this court may deem fit to grant.

52. Clause 2:24:2 of the tender document provide as follows: -

"The procuring entity's evaluation of a tender will exclude and not take into account: -

a. In the case of Equipment Manufactured in Kenya or Equipment of foreign origin already located in Kenya, sale and other similar taxes, which will be payable on the ground if a contract is awarded to the tender.

b. Any allowance for the price adjustment during the period of execution of the contract, if provided in the tender."

53. Before the Review Board, the Applicant raised the following grounds in support of the request for review.

a. That the procuring entity did not take into consideration that the bid prices submitted by the Applicant had a tax element namely VAT and ought to have deducted/ignored the said tax element during its price evaluation process. The Applicant submitted that this was in contravention of Clause 2:24:2 of the Request for Proposal.

b. The procurement entity failed to appreciate that the mischief, tenor, spirit and intent of Clause 2:24:2 in the Request for Proposal was to create a level playing field for all the bidders, be they local or foreign and as a result erred and unfairly penalized the applicant for being a Local Company by considering its sales Tax (VAT) inclusive price of Ksh.306,583,552.58 in the price comparison during the financial evaluation.

c. That the procuring agent failed to recognize that VAT is not a cost, based on the VAT operative mechanism which provides to all qualifying input VAT paid to be offset against output VAT and, therefore, failed to create an equal playing ground for both locally incorporated and foreign companies.

d. That the only effective cost element as bid by the Applicant was Ksh.264,296,166.02 which was the lowest bid (the winning bid declared by the procuring entity was

Ksh.271,380,429.93 as notified to the Applicant on the15th September, 2015). Therefore, the Applicant's bid should be declared the winning bid.

54. In support of the Appeal, the Appellant argued that the tender document sent out to all bidders including the Appellant, in its Clause 2:10:2 (1) clearly and categorically required the bid price to be quoted inclusive of all customs duties and sales and other taxes already paid or payable. The same was stated in the mandatory form of Tender Price schedule and appendix to instructions to tenderers under Clause 2:10.
55. The price quoted by the bidder (the Respondent herein) clearly indicates the Applicants quoted the price as Ksh.306,583,552.58 inclusive of VAT. The Appellant quoted the case of **Revital Health Care (EPZ) Limited and the Ministry of Health, Civil Application Number 10/2008** to emphasize the importance of the bid price as quoted in the form of tender. In that case, the Review Board observed that the incompleteness of the form of Tender was a critical issue and would render a contract formation impractical. The form of tender comprises the offer in contract formation and the same is emphasized in all standard tender documents issued by PPOA.
56. The Appellant argued, in this particular instance, the request by the Applicant requesting the Review Board to consider a different price whether inclusive or exclusive of VAT or any other costing element is not only a misinterpretation of the law but amounts to an invitation to the Review Board to proceed in contravention of the Procurement Rules and Regulations. The Applicants assertion and reliance on Clause 2:24:2 for request for review that is specifically intended for equipment manufactured in Kenya or equipment of foreign origin already located in Kenya is a grave misinterpretation of the clause.
57. The Appellant submitted, Applicant would, therefore, be misleading the Review Board by asserting that the systems it bid to offer was manufactured in Kenya or that the equipment was already located in Kenya yet the Applicant had in its bid unequivocally indicated that the Indra Sistemas S. A. whose premises and factory is at Ctra, Loeches, 9. Tottejon de Ardoz, 28850 Madrid Spain was the manufacturers of the Indra ADS –B and MLAT and WAM/MLAT Systems that the Applicant intended to supply.
58. The Appellant further submitted that Respondent's invitation to the Review Board to disregard VAT as a cost based on its assertions is legally and thoroughly misguided. The Appellant relied on Section 5(1) of the Value Added Tax Act, 2013, which defines VAT as a charge imposed on the supply of taxable goods or services made or provided in Kenya and on the importation of taxable goods or services into Kenya. The VAT Act enumerates and in details sets out all the goods and services that are exempted from this tax. Further, any requests for exemption must be granted by the Commissioner General pursuant to the VAT Act.

The ADS – B and MLAT systems, those are the subject of this tender, are neither VAT exempt nor has the Respondent been granted exemption per the VAT Act to justify exclusion of the cost from its bid price. Therefore, the assertion by the Respondent that the Appellant ought to consider its bid net of VAT does not, therefore hold.

59. The Appellant submitted that the Respondent did not satisfy the requirements specified namely, that the systems it was offering was manufactured in Kenya or the equipment was already located in Kenya. The Review Board observed that the Respondent was unable to prove this fact but it erred by introducing a new element "***that the clause was not clear on when the equipment was to be in the store in Kenya".***
60. On the second limb of the Appellant's argument under, ground 2 of the Appeal, Counsel for the Appellant submitted that the Review Board erred in law and in fact in making an Order of annulling the tender awarded to M/s Nanjing LES Information Technology Ltd (the successful bidder who had already been notified) without the said successful bidder being enjoined nor heard in the proceedings in breach of express mandatory provisions of Section 96 of PPDA Act 2006.
61. Section 96 of the Act states that:- The parties to a Review shall be:-

a. ***The person who requested the Review.***

b. The procuring entity.

c. If the procuring entity has notified a person that the person's tender, proposal or quotation was successful, that person; and

d. Such other person as the Review Board may determine.

The successful bidder in this Appeal the interested party had been notified of the outcome of the bid and for that reason the proceedings before the court should be set aside.

62. The Interested party herein supported the Appeal and reiterated the submissions made by the counsel for the Appellant.
63. On the issue of service, the counsel for the interested Party submitted that his client was not served with request for review. No service was done as required under Section 96 of the Act yet the Interested Party had been notified that its bid was successful.
64. On Clause 2:24:2, it was his submission that it was the duty of the Respondent to prove that the systems they intended to offer were indeed manufactured in Kenya or that the equipment was already in Kenya which they were not able to prove.
65. The Respondent's counsel on his part submitted on Clauses 2:24:2, 2:10:2 and 2:26:4. He also made reference to Section 2 of the PPDA, Section 5 of the VAT Act, 2013.
66. On clause 2:24:2, he submitted that none of the bidders manufactured the tender goods here in Kenya or even Africa and further that it was not possible for any of the bidders to have the tender goods stored in Kenya before execution of the contract with a winning bidder as the same were to be manufactured or custom-made to the Appellant's specification. He argued that it was on that basis that Clause 2:24:2 could not be applicable before execution of a contract with the winning bidder.
67. Following that argument, he submitted the only issue arising would be which of the bidders herein qualified to be favoured by Clause 2:24:2 and this would and could only be the bidder with the lowest evaluated bid in the tender process.
68. On Clause 2:10:2 of the tender document the Respondent submitted that, it entered a bid which price was inclusive of VAT and in its bid specifically indicated the price exclusive bid, the VAT payable and finally the VAT inclusive bid while the Appellant simply entered a bid which was all inclusive.
69. On Section 5 of the VAT Act the Respondent case was that only a registered entity is liable to pay VAT. The Interested Party herein is a foreign entity, not registered in Kenya and as such cannot invoice for or pay VAT to the Kenya Revenue Authority. Once the VAT element is excluded during the evaluation process, the Respondent's bid would be lower than that of the Interested Party.
70. It was his submission that VAT is not a cost element to the Appellant as the same is recoverable or offset as against its output VAT and for this reason, the said VAT element is to be ignored, not exempted during the Financial Evaluation Process.
71. Finally, the Respondent submitted that public interest should not trump fairness and justice and accused the Appellant for seeking to use public card to appoint a bidder it favours to carry out the subject tender much to the detriment of the public at large. On this point, counsel relied on the cases of **Avante International Technology Inc Vs PPARB, IEBC & Others (2013) eKLR**, High Court Petition No. 58 of 2014, **Okiyo Omtatah Vs Kenya Railways Corporation & Others** and **Holicious Pictures Put Limited Vs Prem Chadra Moshra & Others A12 2008 sc 913**. In the Holicious Case it was held: -

> ***"..Public held litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interested and/or publicity seeking is not lurking."***

72. On whether or not the Interested Party was notified of the proceedings before the Review Board, it was the Respondent's submission that the Interested Party was notified but chose not to file any arguments before the PPARB. Counsel relied on the case of **Union Insurance Co. Ltd of Kenya Ltd Vs Ramzan Abdul Dhanji, Civil Application Nai 179/1991** to advance the point that the

right to be heard is not absolute. All that a litigant is entitled to is being offered an opportunity to be heard. He asked the court to dismiss the Appeal.

73. I have carefully considered the Appeal herein and the submissions made by the learned counsels together with the list of authorities. In my view, the issues for determination by the court are: -

1. Whether the Review Board erred in law and in fact in its interpretation and finding on Clause 2:24:2 of the tender documents?
2. Whether the Review Board erred in law and in fact in making an order annulling the tender awarded to the Interested Party without it being enjoined nor heard in the proceedings?

74. Clause 2:24:2 was dealt with at great length by the Review Board. In determining if the procuring entity acted in accordance with the law, the Board is guided by the provisions of Section 66(2) of the Act which states: -

> ***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.***
>
> 3. **……**
>
> 4. ***The successful tender shall be the tender with the lowest evaluated price."***

Clause 2:24:2 is among the clauses that provide for evaluation and comparison of tenders in the tender document and its only after such evaluation that the successful tender shall be determined and this should be the lowest evaluated price.

Section 66 of the Act provides that the Evaluation of Comparison shall be done using the procedures and criteria set out in the tender documents and no other.

75. This being the case, the Review Board ought to have evaluated the tenders in accordance with Clause 2:24:2. The wordings of Section 66 are couched in mandatory terms and have not left any room for speculation. It is the duty of the party relying on or wishing to benefit from that clause to satisfy the requirements. The Board in its decision found that the Respondent needed to satisfy this requirement which it failed to do. The Board however, erred when it went on to observe that Clause 2:24:2 was not clear on when the equipment was to be in store in Kenya and consequently finding that Clause 2:24:2 was not capable of being enforced before the tender was awarded or contract signed. In doing so the Board went against the provisions of section 66 and, therefore, imported the wrong interpretation to Clause 2:24:2.

76. Clause 2:10:2 is on tender prices. It provides that prices indicated on the price schedule shall be entered separately in the following manner: -

1. The price of the equipment quoted EXW (ex works, ex factory, ex-warehouse, ex showroom, or off-the-shelf, as applicable including all custom duties and sales and other taxes already paid or payable. In my understanding of this clause and with all due respect to the counsel for the Respondent, there is no contradiction of this clause with clause 2:24:2 – both provides that prices should include all custom duties, sales and other taxes and therefore, by quoting separately, the Respondent went against what the tender document provided.

77. Lastly, the issue of the Interested Party not having been enjoined in the proceedings before the Review Board was raised. Section 96 of the Act is clear on the parties to a review and among them is a party whom the procuring entity had notified that it's tender, proposal or quotation was successful. It is not in dispute that the Interested Party herein had been notified that it was the successful bidder. However, there is no evidence that it was notified of the Review proceedings. Though the Respondent has referred to notices, there is no evidence that the notices were dispatched to the Interested Party and whether the same were received. In absence of that evidence, this court finds that the Interested Party was not notified of the proceedings in which event the same were a nullity. The right of a party to be heard is enshrined in the Constitution

Article 50(1). My position is fortified in the case of **Richard Ncharp Leiyagu CA 18/2013**. It is also against the rules of natural justice for a party to be condemned unheard.

78. Lastly, Section 5(1) of the Value Added Tax Act, 2013, defines VAT as a Charge imposed on the supply of taxable goods or services made or provided in Kenya and on the importation of taxable goods or services into Kenya. Taxable and exempt goods and services are contained in the various schedules to the VAT Act. The Vat enumerates and set out all the goods and services that are exempted from this tax and any request for exemption must be granted by the Commissioner.

    The ADS-B and MLAT systems are neither VAT exempt nor has the Applicant been granted exemption per the VAT Act to justify exclusion of the cost from its bid price.

    The assertion by the Applicant that the KCAA ought to have considered the Respondent's bid net of VAT does not, therefore, hold.

    It should also be noted that the tender document did not make a distinction between local and foreign tender and therefore the terms in the tender documents applied to all the bidders without any exception. The Respondents argument that it was the only local company does not hold water.

79. The end result is that the Appeal before me succeeds and the same is allowed in its entirety save for the costs. Each party will bear its own costs.

Dated, signed and delivered at Nairobi this 28th day of January, 2016.

…….

L. NJUGUNA

JUDGE

In the presence of

…….. *for Appellant*

……. *For the Respondent*

…… *for the Interested Party.*