



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 395 OF 2016

IN THE MATTER OF: APPLICATION FOR LEAVE TO FILE JUDICIAL REVIEW PROCEEDINGS IN THIS COURT UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR A PREROGATIVE WRIT OF CERTIORARI

AND

IN THE MATTER OF: SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF: ARTICLE 10, 47, 50, 159, 259(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, ACT NO. 4 OF 2015

AND

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

AND

IN THE MATTER OF: PPARRB NO. 53 OF 2016: MOCAM SECURITY SERVICES LIMITED V. MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY

BETWEEN

REPUBLICAPPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

MOCAM SECURITY SERVICES LIMITED.....1ST INTERESTED PARTY

COBRA SECURITY COMPANY LIMITED.....2ND INTERESTED PARTY

EX PARTE : MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY

JUDGMENT

1. The Ex-Parte Applicant is Masinde Muliro University of Science and Technology, a public University. By a Notice of Motion application dated 8th September 2016, the Ex-Parte Applicant seeks the following orders:-

a. An Order of Certiorari to remove and bring to this Honourable Court for the purposes of quashing the whole Ruling/decision of the Respondent delivered on the 17th day of August, 2016 in Application No. 53 of 2016; Mocam Security Services Limited v. Masinde Muliro University of Science and Technology.

b. Costs of this Application be provided for.

2. The Exparte applicant's case is supported by the statutory statement, the verifying affidavit, supporting affidavit and the exhibits annexed to the chamber summons for leave to apply.

3. It is claimed that the exparte Applicant University advertised Tender No. MMUST/SEC/02/2016-2018 for provision of Security Services, which tender was awarded to the 2nd Interested Party **COBRA SECURITY COMPANY LIMITED** as the successful bidder.

4. That the 1st Interested Party **MOCAM SECURITY SERVICES LIMITED** which was one of the bidders was dissatisfied with its being declared non-compliant at the mandatory stage for not having a fidelity guarantee and as a consequence filed **PPARB APPL. No. 38 of 2016** which was determined on 29th June 2016, in which the Respondent Public Procurement Administrative Review Board directed that there be a re-evaluation of all the tenders of all bidders at the preliminary stage *without the requirement of the fidelity guarantee.*

5. That following that decision of the respondent, the Ex-Parte Applicant's Evaluation Committee conducted a reevaluation of all tenders and the 2nd Interested Party **COBRA SECURITY COMPANY LIMITED** again emerged the successful bidder and was awarded the tender necessitating the filing of **Application No. 53 of 2016; Mocam Security Services Limited v. Masinde Muliro University of Science and Technology**, by the 1st Interested Party. *That the Review Board after hearing all the parties made a determination in favour of the 1st interested party hence the challenge hereto by the Procuring entity.*

6. The grounds relied upon by the 1st Interested Party and which formed the basis of submissions as contained in the Request for Review dated 28th July 2016 are:-

a. In evaluating the 1st Interested Party's technical bid, the ex-parte Applicant did not use the criteria set out in the tender document contrary to section 80(2) of the Public Procurement and Asset Disposal Act, 2015;

b. The criteria adopted by the Ex-Parte Applicant in evaluating the 1st Interested Party's bid failed to meet the objectivity and quantifiable requirements set out at section 80(3) (a) of the Act;

c. The Ex-parte Applicant failed to evaluate the 1st Interested Party's bid with all fairness and due diligence contrary to Regulation 16 (4) (a) and (c) of the Regulations and thus arrived at an

erroneous finding that the 1st Interested Party's technical bid did not attain a score of 70%.

7. The impugned ruling of the respondent was to the effect that:-

a. The Request for Review dated 28th July 2016 and which was filed with the Board on 29th July 2016 be and is hereby allowed.

b. The decision of the procuring entity awarding tender number MMUST/SEC/02/2016-2018 for the provision of Security Services to M/s Cobra Security Company Limited is hereby annulled.

c. The procuring entity's decision declaring the Applicant's tender as unsuccessful as contained in its letter dated 19th July, 2016 be and is hereby annulled.

d. The procuring entity's finding that the Applicant's technical bid did not attain the 70% threshold is hereby also annulled and set aside and is hereby substituted with a finding that the Applicant met the technical threshold.

e. The procuring entity is directed to carry out a financial evaluation of the Applicant's tender and that of the successful bidder and award the tender to the lowest evaluated bidder within thirty days from the date hereof.

f. For the avoidance of doubt and further to order No. (g) of the decision given on the 29th June, 2016 in PPARB APPL. No. 38 of 2016, the procuring entity is directed to extend the contract of the current service provider, namely the Applicant herein until such time as it shall complete the procurement process herein.

g. The Applicant will have costs of this application assessed at Kshs 150, 000, 000 plus any filing fees that it may have incurred.

THE RESPONDENT'S CASE

8. The Respondent's objection to these judicial review proceedings is predicated on the replying affidavit sworn by Henock K. Kirungu the Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as 'the Board') wherein it is deposed that on 29th July, 2016, the 1stInterested Party filed a Request for Review before the Respondent challenging the award of the Tender No. MMUST/02/SEC/16-18 for the Provision of Security Services as shown by the annexed copy of the Request for Review marked "**HKK. 1.**"

9. That immediately after receiving the Request for Review from the 1stInterested Party, the Respondent served a copy thereof on the Applicant, notifying it of the pending Review and the suspension of the procurement process in accordance with Regulation 74 (1) and 74(2) of the Public Procurement and Disposal Regulations, 2006, hereinafter referred to as "the Regulations."

10. That the Respondent heard the parties on 9thAugust, 2016, considered their pleadings and submissions, determined the application for review and delivered its ruling on 17thAugust, 2016 as shown by copy of the ruling annexed as "**HKK. 2**"

11. That the Respondent only took into consideration facts that were presented before it and were relevant in deciding the above issues; and that the Respondent's decision was based on its findings in that:

a. this was the second time that the dispute between the same parties was being filed for consideration and determination by the Board;

b. That upon hearing case No. 38 of 2016, the Board allowed the Request for Review and directed

the procuring entity which had eliminated the Applicant at the preliminary evaluation stage to re-evaluate all the tenders submitted to it including the tender submitted by the Applicant from the preliminary evaluation and complete the entire exercise within thirty (30) days from the date of the said decision which was given on 29th June, 2016;

c. the procuring entity was directed to extend the contract for the current service provider of the said services until such time as it shall complete the procurement exercise;

d. the procuring entity in a purported compliance with the Board's order carried out a preliminary evaluation of the bids where the Applicant's bid was found to be responsive and thereafter embarked on the process of technical evaluation where the Applicant scored 59 points and did not therefore ostensibly meet the cut off points of 70 points and could not thus proceed to the next state of evaluation;

e. an examination of the technical re-evaluation report shows the following glaring errors which are apparent on the face of the technical evaluation report:-

f. The procuring entity did not take into account the letter dated 5th March, 2016 signed by one W. Kimutai, the Applicant's Managing Director which confirms that there was no litigation pending before the court and the University as stated under item II. This was fortified by an affidavit signed by one Laban Katam a director of the Applicant dated 18th May, 2015 confirming that there was no litigation. The Applicant therefore ought to have been awarded the full marks on this score. The procuring entity is further reminded that the mere fact that the Applicant lodged Review no. 38 of 2016 with the Board did not create any criminal litigation to warrant the Applicant being denied the marks under this item.

g. The letter dated 18th April, 2016 from Mwito Sacco under Ref: NO. MW/MSS/4/16 confirms that the employees of Mocam are members and remittances are up to date. The letter counter with limited under Ref: CL/139/52/2015 dated 25th September, 2015 confirms that the employees of Mocam are treated at their facilities and bills are settled at the end of the month. The Applicant therefore ought to have also been awarded marks on that score under item III of the schedule.

h. The Applicant produced copies of pay slips for guards which the Board finds as authentic showing that the Applicant's guards are paid a house allowance, a factor which ought to have been taken into account under item VI.

i. The Applicant produced 15 copies of discharge certificates of guides and ought to have been awarded marks under item VI;

j. That the Board took into consideration the said factors and found that the Applicant indeed attained the required technical score and had no hesitation in declaring so;

k. That the Applicant having attained the requisite technical score on the basis of documents which were evident in its original tender document then it was entitled to proceed to the financial evaluation stage;

l. That where there were glaring errors in the technical evaluation process then the Board could, and had previously intervened;

12. The Respondent contended that it made a Decision on 17th August, 2016 and gave the following orders:-

i. The Request for Review dated 28th July, 2016 and which was filed with the Board on 29th July, 2016 was allowed.

ii. The decision of the procuring entity awarding tender number MMUST/SEC/02/2016-2018 for the provision of Security Services to M/s Cobra Security Company Limited was annulled.

iii. The procuring entity's decision declaring the Applicant's tender as unsuccessful as contained in its letter dated 19th July, 2016 was annulled.

iv. The procuring entity's finding that the Applicant's technical bid did not attain the 70% threshold was also annulled and set aside and was substituted with a finding that the Applicant met the technical threshold of over 70%.

v. The procuring entity was directed to carry out a financial evaluation of the Applicant's tender and that of the successful bidder and award the tender to the lowest evaluated bidder within thirty days from the date of the decision.

vi. For the avoidance of doubt and further to order No. (g) of the decision given on 29th June, 2016 in PPARB APPL. No. 38 of 2016, the procuring entity was directed to extend the contract of the current service provider, namely the Applicant herein until such time as it shall complete the procurement process herein.

vii. The Applicant would have costs of the application for review assessed at Kshs. 150,000/= plus any filing fees that it may have incurred.

13. According to the respondent, the costs of the application assessed at Kshs. 150,000,000/= was a typographical error which was corrected to read "The Applicant will have costs of this application assessed at Kshs. 150,000/= plus any filing fees that it may have incurred".

14. It was further contended that in making its decision, the Board considered all documents of evidentiary value placed before the Respondent by the parties and the submissions of the parties on each of the issues raised in the Request for Review.

15. Further, the respondent contended that the decision by the Board was a decision made within its mandate, particularly Section 173 of the Public Procurement and Disposal Act 2005, on which the Board's decision was pegged have been expressly pronounced in the Board's decision and not section 80 as alleged by the ex-parte applicant.

16. In addition, it was contended by the respondent that the Applicant has not demonstrated in any way that the decision of the Board was outside the scope of the law governing the Board or that the Board took into account irrelevant consideration, or failed to accord the Applicant a right to be heard in breach of Article 47 or 50 of the Constitution.

17. The respondent maintained that it expressly considered all the documents and submissions filed by the Applicant and all other parties to the Review in arriving at its decision in upholding the principle of natural justice.

18. The respondent also contends that the Applicant has not demonstrated by an iota of truth that the Board was unreasonable in arriving at its decision or exercise of power in arriving at its decision, and that the decision by the Board is grounded in law after review of all material conditions placed before it and importantly in line with its mandate to uphold public procurement process; and that the Applicant has 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 order of the Board.

19. On the allegation that the Board's orders were ultravires, it is contended by the respondent that the Board in arriving at its decision complied with the requirements of Section 173 of the Act.

20. It was therefore contended that the Applicant's application is made in bad faith, has no merit and is only calculated to discredit the credibility of the Respondent's mandate and function, while ultimately

eroding the public's confidence in procurement procedures and processes.

21. The respondent urged the Court to dismiss the Applicant's Application for Judicial Review as it lacks merit; and that the 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 1ST INTERESTED PARTY'S CASE

22. The 1st interested party filed a replying affidavit sworn by Esther Jemutai Kibor, its director, on 23rd September, 2016. In her depositions, Ms Kibor reiterated the history of this matter and dispute between the parties hereto complaining, among others, that the applicant after being ordered to reinstate the 1st interested party's guards did not comply with the orders of the Board until 16/8/2016 and that the deployment was besides the 2nd interested guards thereby committing the procuring entity to additional expenses.

23. Further, that delay in issuing the decision to the applicant cannot vitiate the merits of the respondent's decision as the applicant has not suffered any prejudice as a result of such delay.

24. The deponent also denied that the applicant was ordered to pay Kshs 150 million in costs but that there was an error to the initial award which was recalled by the board and replaced with the one with Kshs 1500,000.

25. That the respondent considered whether the 1st interested party had succeeded in the technical evaluation and to arrive at a decision it had to consider the tender documents submitted by the 1st interested party to the applicant and the evaluation criteria hence the review Board did not exceed its jurisdiction under section 173© of the Act which also gives the respondent Board discretion to substitute its decision for that of the applicant.

26. That in its application for review, the 1st interested party only asked for review of the 1st interested party's bid and as to whether it attained 70% mark, and not to review the bids of other bidders.

27. That the decision of the respondent was based on the criteria set out in the applicant's tender documents and the bid document submitted by the 1st interested party, in conformity with the tender document and that because the applicant ignored them during evaluation does not render them irrelevant.

THE 2ND INTERESTED PARTY'S CASE

28. The second interested party- **COBRA SECURITY COMPANY LIMITED** filed a replying affidavit sworn by James A. Ngwalla the Administrator and Human Resource Manager who deposed that the tender documents were explicit that the tenderers who did not meet the requirements of scoring 70 marks out of 100 would not proceed to the next stage of evaluation. That the Fidelity Guarantee insurance cover was a mandatory requirement but which the 1st interested party did not fulfill hence its disqualification from proceeding to the next level of technical evaluation.

29. That instead of providing the Fidelity Guarantee cover, the 1st interested party provided a contractual legal Liability Policy which was completely different from the Fidelity Guarantee Insurance cover required by the tender documents.

30. That therefore the Review Board was in error when it reinstated the 1st interested party into the bid as the 1st interested party did not meet the qualifications for consideration into the technical evaluation hence the decision of the Review Board was unreasonable, as the 1st interested party moved into the technical committee evaluation without attaining the 70 mark which was mandatory.

31. That again, despite the 1st interested party scoring only 50% marks at the technical evaluation level

and disqualified to proceed to the Financial evaluation, it is irrational that the Review Board again in the request for review dated 28th July, 2016 was asked to review the decision declaring the 1st interested party a non-successful bidder.

32. It was contended that the decision of the review Board was contrary to section 80 of the Act on the requirement to comply with all criteria set by the procuring entity and that the criteria was objective and quantifiable in that all bidders were subjected to the same standards but the Review Board was unfortunately misled into marking the technical information submitted instead of leaving that work to the evaluation committee which is mandated by statute to do so.

33. Further, it was deposed that the Review Board relied on a letter from the 1st interested Party's managing director on non-existence of any case pending in court without according the evaluation committee an opportunity to verify the truthfulness of the contents of that letter, as mandated by the Act.

34. That on the whole, the review Board took over the mandate of the evaluation committee which was an illegal process. Further, that even if there were errors made by the evaluation committee, the Review Board had no mandate to take over the evaluation process from the evaluation committee hence it acted outside its jurisdiction. The 2nd interested party urged the court to quash the decision of the Review Board and declare it the 2nd interested party the winner of the tender.

EXPARTE APPLICANT'S SUBMISSIONS

35. According to the Ex-Parte Applicant, the Notice of Motion application dated 8-9-2016 as well as the Statutory Statement raises serious improprieties in the decision making process of the Respondent in that:- *the ruling was delivered on 17/8/2016 but the same was only availed to the exparte applicant on 26th June, 2016 only for days to the end of the 14 days within which it could challenge the decision; the respondent condemned the applicant to pay Kshs 150 million yet the value of the procurement was 29 million; the respondent failed to address itself to the allegations of breach of the Act and instead descended into the dispute by usurping the role of the applicant's evaluation Committee and proceeded to remark only the 1st interested party's bid to the exclusion of five other bidders who had made it to the technical evaluation Committee stage; the respondent altered the terms of the tender document to the benefit of the 1st interested party in the process of remarking the 1st interested Party's bid; that counsel for the interested party was allowed to access the original tender document submitted to the respondent which remains a confidential document' and that the decision by the respondent is illegal, irrational and in excess of jurisdiction, unfair, ultra vires, oppressive, in bad faith, biased, unreasonable; breach of the Fair Administrative Action Act, 2015, and ought to be quashed.*

36. It was alleged by the exparte applicant that the respondent acted in **Excess of jurisdiction, illegality, ultra vires and error of law**, against the provisions of Articles 159(1), 165 (3) (a) & (e), (6) of the Constitution, Section 8 and 9 of the Law Reform Act, Section 7 of the Fair Administrative Action Act 2015, and Order 53 of the Civil Procedure Rules 2010.

37. Reliance was placed on the **COUNCIL OF CIVIL SERVICE UNIONS AND OTHERS n MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935**, at page 950 where Lord Diplock defined the ground of illegality as encapsulating the requirement “ **that the decision maker must understand correctly the law that regulates his decision making power and give effect to it.**”

38. The Ex-Parte Applicant submitted that the Respondent did not correctly understand sections **173** and **67** of the Public Procurement and Asset Disposal Act (hereinafter referred to as the “Act”) as well as Regulation 49 of the Public Procurement and Disposal Regulations, 2006.

39. It was submitted that the Respondent in descending into the dispute and re-marking only the 1st Interested Party's tender to the exclusion of other bidders, awarding it 71 points above the cut off of 70 points and substituting and issuing orders (d) and (e) in its Ruling was an act of illegality, ultra vires and in excess of jurisdiction. Reliance was placed on the case of **REPUBLIC V PUBLIC**

PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 2 OTHERS EX-PARTE NUMERICAL MACHINING COMPLEX LIMITED [2016] EKL, where the Court held that;

“If I understand the Respondents correctly they seem to be relying on the provision of section 98(c) which donated to the 1st Respondent the power to substitute its decision for that of the procuring entity. However, this provision cannot be read in isolation to the other provisions. In my view the power to substitute the decision of the procuring entity cannot be unlimited. It must be exercised lawfully. That power can only be exercised with respect to what the procuring entity was lawfully permitted to undertake both substantively and procedurally.”

40. It was submitted that section 98 (c) of the repealed Act is similar to section 173 of the present Act hence section 173(c) relied upon by the Respondent in issuing orders (d) and (e) should not be read in isolation and that the same is not unlimited.

41. The Ex-Parte Applicant further submitted that by undertaking a re-marking of only the 1st Interested Party’s tender to the exclusion of other bidders who had made it to the technical evaluation stage, the Respondent usurped the mandate of the Ex-Parte Applicant’s Evaluation Committee as provided for in **Regulation 49 (1)** of the Regulations which provides that;

“Upon completion of preliminary evaluation under Regulation 47, the Evaluation Committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document.”

42. It was submitted that if there was found to be any shortcomings in the evaluation, the Respondent’s only recourse as provided for in the Act and the Regulations was to order a fresh evaluation of all the bidders by a differently constituted tender committee. Reliance was placed on the case of **REPUBLIC V PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 2 OTHERS EX-PARTE COAST WATER SERVICES BOARD & ANOTHER [2016] eKLR** where it was held that;

“It was the Entity’s position that in its Award, the Board found at page 45 that the tender documents were vague. However, despite finding that the tender documents lacked clarity, the Board went on to interpret the tender documents in favour of Toddy. It was submitted that having found the tender to have been vague, the only reasonable and lawful action for the Board was to refer the tender back to the Entity with directions to amend the tender documents to cure such vagueness.

In my view, it is unlawful for the Board to adopt a procedure by which the provisions of the Tender documents are bypassed in the award of the tender. Where the Board awards the tender in disregard of the provisions of the Tender document the Court would not hesitate to quash such a decision since section 66 of the repealed Act provides that the successful tender shall be the tender with the lowest evaluated price.”

43. Further reliance was placed on the case of **REPUBLIC V PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 3 OTHERS EX-PARTE OLIVE TELECOMMUNICATION PVT LIMITED**, a three Judge bench of the High Court held that;

“In our view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilized governance, by holding the public authority to the limit defined by the law.

153. Whereas, we are not in a position to hold that the Board was in error in finding that the applicant ought not to have included additional services in its quotation we hold that view ought to have been applied to all the parties which made provision for the said additional services and having found that all the parties herein did so, there was no justification in picking out the

applicant and applying that criteria to disqualify the applicant from the process.”

*160 .Therefore where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. However, if Parliament gives great powers to them, the courts must allow them to it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. See *Re Hardial Singh and Others* [1979] KLR 18; [1976-80] 1 KLR 1090, *Padfield vs. Minister of Agriculture, Fisheries and Food* [1968] AC 997; *Secretary of State for Employment vs. Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 QB 455, *Secretary of State for Education and Science vs. Tameside Metropolitan Borough Council* [1977] AC 1014.”*

44. It was therefore submitted that the Respondent committed an error of law in that the Respondent did not understand correctly the law that regulated its decision making power. That the act of descending into the arena of the dispute and re-marking only the 1st Interested Party’s tender is a fundamental error of law which goes to the jurisdiction of the Respondent. Reliance was placed on the case of **GH MARINE A/S WESTERN MARINE SERVICES LTD CNPC NORTHEAST REFINING & CHEMICAL ENGINEERING CO.LTD/PRIDE ENTERPRISES V PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 2 OTHERS** [2015] eKLR, where the Court held that:

90. This matter is centered on the allegation that the Review Board committed an error of law. What then amounts to an error of law? The learned authors of Halsbury’s Laws of England at paragraph 77 page 170 of the 4th Edition discuss this topic and state that:

“There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed.

In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete.

A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfill an express or implied duty to give reasons or otherwise abuses its power.”

98. I have intentionally reproduced the decision of the Review Board in order to show that it completely failed to take into consideration Section 66(2) of the PP&DA.

99. If indeed the Review Board had found that there was a problem with the Tender Document, it ought to have asked the PE to retender. You cannot use a faulty Tender Document to award a

tender. Doing so would invoke the Macfoy (supra) principle.”

45. It was further submitted that the 1st Interested Party having alleged breaches of sections 80 (2) and (3), as well as Regulations 16 (4) (a) and (c), the Respondent should have addressed the statutory parameters of those provisions. In this case, it was submitted that the Respondent completely failed on all fours to address those provisions.

46. The Ex-parte Applicant further submitted that in availing the original tender document to the 1st Interested Party, the Respondent committed an illegality as provided for in section 67 regarding confidentiality. That section 67 (1) of the Act prohibits the Respondent or its employees from disclosing inter alia contents of tenders, proposals or quotations. That the qualification in section 67(3) (c) is subject to section 67 (4) which in effect means that the 1st Interested Party was only entitled to a summary and which was availed to it by the Ex-Parte Applicant.

47. It was submitted that the furnishing of the original tender document to the 1st Interested Party by the Respondent two days before the hearing and on the hearing date is an illegality and which fundamentally taints the proceedings before the Board. That there was therefore no guarantee for the parties that the Original Tender document was not tampered with to favour the 1st Interested Party.

48. The Ex-parte Applicant submitted that the breach is so fundamental that integrity of the original tender which has been given to one party is called into question and that the only way to ensure fairness is for this Court to order a re-tender of the services.

49. Further, that by ordering payment of kshs. 150, 000, 000/-, it was submitted that the Respondent acted in excess of jurisdiction conferred by **section 173(d)** of the Act which provides that payment of costs shall be in accordance with the scale as prescribed.

50. On Irrationality and unreasonableness the Exparte-Applicant cited the case of **DE SMITH’S JUDICIAL REVIEW (SIXTH EDITION)** at Page 559 where irrationality is elucidated as follows;

“Although the terms irrationality and unreasonableness are these days used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion perhaps by spinning a coin or consulting an astrologer or where the decision simply fails to add up-in which in other words there is an error of reasoning which robs the decision of logic...”

Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decisions or where there is absence of evidence in support of the decision.”

51. Further reliance was placed on the case of **COUNCIL OF CIVIL SERVICE UNIONS AND OTHERS nMINISTER FORTHE CIVIL SERVICE [1984] 3 ALL ER** where the Court held that:

“By ‘irrationality’ I mean what can by 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 decide could have arrived at it.”

52. The Ex-Parte Applicant submitted that the award of kshs. 150, 000, 000/- for a procurement where the total value for two years is kshs. 29, 000, 000/- defies logic and common sense. That the Act in section 173 (d) mandates the Respondent to consider the prescribed scale but the Respondent did not adhere to the same.

53. Further, it was submitted that it is unreasonable and irrational for the Respondent to only re-mark the 1st Interested Party's tender document and avail the same benefit to the other five bidders who made it to the technical evaluation stage. That at a bare minimum, a re-evaluation of all the bidders who were at the technical stage should have been re-evaluated by a differently constituted evaluation committee.

54. The Ex-Parte Applicant submitted that it defies logic and it was unreasonable for the Respondent to avail the original tender document to the 1st Interested Party and use the same original tender document to carry out the illegal re-evaluation and pass the 1st Interested Party.

55. On Bias, reliance was placed on **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400**, where the court held that:

“In considering the merits of the test to be applied in a case where there is allegation of bias, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done.”

56. It was submitted that the act of availing the original tender document to the 1st Interested Party was contrary to section 67 of the Act and which the 1st Interested Party used as a basis for its submissions before the Board is manifestation of bias. That the Board further re-marked the same original tender which had been availed to the 1st Interested Party and scored it 71 out of 70 points and did not re-mark the other five bidders or avail the same benefit to them. It was therefore submitted that these acts detract from the appearance of impartiality and justice cannot be seen to be done.

57. Further, it was submitted that the Respondent was categorical that it can go ahead and submit on the issue of res judicata but in the end it distinguished the same, which was a manifest bias that the Respondent had already made up its mind on the issue. That it did not give Counsel the benefit of the doubt to argue its clients case and have its day before an impartial tribunal.

58. On the Error of facts and irrelevancy reliance was placed on the **Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited (supra)**, where it was held that:

145. However, while we reiterate that this Court in exercise of its supervisory jurisdiction by way of judicial review ought not to usurp the powers of the Board, where the Board fails to consider relevant evidence and considers irrelevant ones this Court must intervene where the failure to do so renders the decision so grossly unreasonable as to render it irrational. In our view, this is the ex parte applicant's case.”

59. It was submitted that the Board's observation at page 27 of its ruling that there is an increase in the practice of procuring entity's using the preliminary and technical evaluation to eliminate certain bidders in favour of others for certain reasons was irrelevant to the proceedings and error of facts as there were no allegations or evidence on record that the Ex-Parte Applicant was hell bent on eliminating the 1st Interested Party at all costs. It was submitted that it is on this basis that the Respondent invoked what it calls, *“its wide powers under section 173 of the Act which allows it to issue various orders including the making of direct awards of tenders where the case so requires.”*

60. It was submitted that in its illegal spirited effort to remark the 1st Interested Party, the Respondent relied on a letter dated 29-5-2015 to award marks under criteria III of the tender document yet the tender was advertised on 9th April 2016. It was submitted that the said letter was irrelevant having been issued almost a year before hence could not be used in the year 2016 for this tender.

61. The Ex-Parte Applicant further submitted that the Respondent failed to take into account relevant provisions of the law to wit section 80(2) and (3) of the Act and Regulation 16 (4) (a) and (c) which

formed the substratum of the request for review as presented by the 1st Interested Party.

62. On the Violation of the Fair Administrative Actions Act, 2015 The Ex-Parte Applicant submitted that section 7 of the Fair Administrative Action Act is applicable and the Respondent as a public body failed to uphold the said provision. That the Respondent in purporting to substitute its decision and giving its orders violated the Fair Administrative Actions Act, 2015 leading to the tainting of his decision making with illegality, irrationality and acting in excess of its powers. That in awarding kshs. 150, 000, 000/- as costs the Respondent acted irrationally and unreasonable considering section 173(d) of the procurement Act mandates the Respondent to use the prescribed scale.

63. Further, that the decision to avail the original tender document to the 1st Interested Party, and which party together with the Board proceeded to re-mark itself amounts to bias and bad faith on the part of the Respondent.

64. That the Respondent's decision making was in defiance of logic and considered irrelevant matters for which no evidence had been placed before the Respondent.

65. That in so far as the Respondent failed to exercise sound reasonable and correct legal decision making with regard to the applicable procurement laws, the process smacks of arbitrariness, is tainted with procedural impropriety and abuse of discretion.

66. The Ex-parte Applicant submitted that it has made a case showing that the decision making process and the whole conduct of proceedings by the Respondent is underpinned by illegality, acting in excess of powers, ultra vires, unreasonableness, irrationality, irrelevancy, error of law, bias, error of facts and breach of the Fair Administrative Actions Act and hence this Honourable Court has jurisdiction to grant the orders prayed for in the Notice of Motion.

67. The Ex-parte Applicant further submitted that this Honourable Court should in the interest of justice order a re-tender of the security services since the integrity of the original tender which was illegally availed to the 1st Interested Party by the Respondent has been compromised.

68. The Ex parte Applicant also filed **Supplementary Submissions**, necessitated by the service by the 1st Interested Party and the Respondent's Replying Affidavits and with leave of court.

69. On the contention by the Respondent in its Replying Affidavit at paragraph 9 and the 1st Interested Party at paragraph 19 that the costs of kshs. 150, 000, 000/- was typographical which was corrected and the initial ruling replaced with one indicating costs of kshs. 150, 000, it was submitted in response that the purported typographical error was never communicated to the Ex-Parte Applicant. That the Ex-parte Applicant was left in the dark with a ruling requiring it to pay the hefty amount of kshs. 150, 000, 000/- whilst the Respondent and the 1st Interested Party sat with a purported ruling of kshs. 150, 000/-.

70. It was therefore submitted that the Respondent as the decision maker ought to have annexed its version of the ruling as it emanates from them which they did not. That instead, it was the 1st Interested Party who had in its possession the revised ruling which ruling does not show when it was revised or amended and that neither does it show under which section of the law the same has been purportedly amended.

71. It was further submitted that the circumstances under which the said "typographic error" in the ruling was "corrected" is unknown. Further, that it is not known who noticed the error or who probed the correction. It was submitted that these post ruling activities, if any were conducted in the absence of the Ex-Parte Applicant and violated Article 47 of the Constitution on openness and transparency.

72. It was submitted that the disclosure to the 1st Interested Party by the Respondent that the ruling had been "corrected" and the non-disclosure to the Ex-Parte Applicant points to discrimination, bias and bad faith against the Ex-Parte Applicant by the Respondent and that Justice cannot be seen to be done in the

circumstances.

73. On the Respondent and the 1st Interested Party's arguments that the Respondent correctly exercised its powers under section 173 (c) of the Public Procurement and Asset Disposal Act, it was submitted that Section 173 (c) avails only power to **substitute the decision of the Accounting Officer of a procuring entity. That No power is given to the Respondent to substitute the decision of the Evaluation Committee of the Ex-Parte Applicant.**

74. It was submitted that order (d) in the Ruling where the Respondent substituted its own finding in place of the procuring entity's decision is premised on section 98 (c) of the repealed Public Procurement and Disposal Act, 2005 which is not the law applicable to this case at the moment.

75. It was further submitted that in remarking the 1st Interested Party's tender document, the Respondent usurped the role of the Ex-Parte Applicant's Evaluation Committee. That in the past, the Respondent has always ordered for re-evaluation by the Evaluation Committee.

76. Reliance was placed on the case of **ITALBUILD IMPORTS LTD V MINISTRY OF ROADS AND PUBLIC WORKS (Application No. 11 of 2008) (2008-2010) PPLR 66**, where the Respondent found that the Procuring Entity applied evaluation criteria that was not stated in the Tender Document and did not evaluate the bid in accordance with the ct. A re-evaluation was ordered.

77. Further reliance was placed on the decision in **KENBRIGHT INSURANCE BROKERS LTD V MUNICIPAL COUNCIL OF KISUMU (Application No. 27 of 2009)) (2008-2010) PPLR 457**, where the Respondent found that the use of criterion not stated in the tender document namely the choice of underwriters should not have been considered as it was not among the criteria set out in the tender documents. The respondent also noted that the choice of the underwriters as evaluation criteria was tantamount to introduction of new criteria contrary to section 66 (2) of the Public Procurement and Disposal Act ("the Act"). In that case, the Respondent ordered a re-evaluation of the tender.

78. The Ex-Parte Applicant submitted that the Respondent altered the terms of the tender document by giving order (e) which requires the Ex-Parte Applicant to carry out a financial evaluation of the Applicant's tender.

79. That the tender document at page 22 (see page 61 of the Notice of Motion) required the Evaluation Committee to visit those firms that scored 70 points and above for purposes of due diligence and verification of information submitted. It was submitted that this was a mandatory requirement of the tender document and that the Respondent cannot alter the terms of the tender document to benefit the 1st Interested Party who is not to be subjected to the provisions of the tender document. Reliance was placed on the case of **REPUBLIC V PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 2 OTHERS EX-PARTE COAST WATER SERVICES BOARD & ANOTHER [2016] eKLR** where it was held that;

***"In my view, it is unlawful for the Board to adopt a procedure by which the provisions of the Tender documents are bypassed in the award of the tender. Where the Board awards the tender in disregard of the provisions of the Tender document, the Court would not hesitate to quash such a decision since section 66 of the repealed Act provides that the successful tender shall be the tender with the lowest evaluated price."*[emphasis added].**

80. On the 1st Interested Party's contention at paragraphs 28 and 29 of the Replying Affidavit that it had indicated at paragraph 7 of the Request for Review that it will seek the leave of the Respondent to peruse its bid document; The Ex-Parte Applicant submitted that no application for leave was made during the hearing when all parties were present. Further, that the 1st Interested Party abandoned ground 7 of its Request for Review (see page 13 of the Ruling found in page 185 of the Notice of Motion). Thus, the availing of the original tender document to the 1st Interested Party by the Respondent was outside the review proceedings and in violation of the Public Procurement and Asset Disposal Act hence an illegality

and bias.

81. The Ex-Parte Applicant also denied that it disobeyed any orders of the Respondent as argued by the 1st Interested Party.

82. The Ex parte Applicant reiterated its submissions dated 9th September 2016 and prayed that the Notice of Motion be allowed as prayed and the Court in the interest of justice orders a re-tender of the tender for security services.

THE RESPONDENT'S SUBMISSIONS

84. It was the Respondent's submission that the said record of its decision demonstrates that the present application is unmeritorious as it seeks to challenge the merits of the said decision albeit disguised as a judicial review application.

85. The Respondent identified the following issues as the basis for the application made against it for determination by this court:

- a. Whether the Respondent's decision was made without jurisdiction with specific reference to section 80& 173 of The Procurement Act and regulation 49.*
- b. Whether the Respondent acted unreasonably and irrationally while making the impugned decision.*
- c. Whether the Respondent was in breach of the rules of natural justice.*
- d. Whether the Respondent considered irrelevant considerations when making its decision.*
- e. Whether there was procedural impropriety on the part of the 1st Respondent in making its decision.*

85. On whether the Respondent's decision was made without jurisdiction, the respondent cited in extenso the law Applicable to these proceedings being the Public Procurement and Asset Disposal Act No. 33 of 2015 came into force on 7th January 2016. The said Act at section 182(1) repealed the Public Procurement and Disposal Act of 2005.

86. It was submitted that Section 1(1) of the 2015 Act in the Third Schedule that deals with Transitional Provisions provides:

"1 (1) Procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act.

(2) For the purposes of subparagraph (1), procurement proceeding commences when the first advertisement relating to the procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding."

87. It was submitted that the first advertisement in respect of the procurement in question was done on 9th April 2016. This was after the commencement of the 2015 Act and therefore the applicable law to the procurement in question.

88. That the challenge to the Respondent's jurisdiction in making the impugned decision delivered on 17th August 2016 as brought out in the applicant's Statutory Statement dated 22nd April 2016 is Eight-fold largely based on **sec 80 and regulation 49** of the Act.

89. On the ex-parte applicant's argument that the Board usurped the powers of the evaluation committee, the respondent submitted that it exercised its powers in line with section 173 of the Act and that with due respect, the ex-parte applicant has misinterpreted the scope of application of section 80 of the Act which provides that:-

80 (1) The evaluation committee appointed by the Accounting Officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3).Evaluation of tenders.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) —

(a) The criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations

(6) The evaluation shall be carried out within a maximum period of thirty days.

(7)The evaluation report shall be signed by each member of evaluation committee.

Powers of Review Board.

173. Upon completing a review, the Review Board may do any one or more of the following —

a. annul anything the Accounting Officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

b. give directions to the Accounting Officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

c. substitute the decision of the Review Board for any decision of the Accounting Officer of a procuring entity in the procurement or disposal proceedings;

d. order the payment of costs as between parties to the review in accordance with the scale as prescribed; and (e) order termination of the procurement process and commencement of a new procurement process.

90. The Respondent submitted that it heard the parties on 9th August, 2016, considered their pleadings and submissions, determined the application for review and delivered its decision on 17th August 2016 and made the following final orders:

viii. *The Request for Review dated 28th July, 2016 and which was filed with the Board on 29th July, 2016 was allowed.*

ix. *The decision of the procuring entity awarding tender number MMUST/SEC/02/2016-2018 for the provision of Security Services to M/s Cobra Security Company Limited was annulled.*

x. *The procuring entity's decision declaring the Applicant's tender as unsuccessful as contained in its letter dated 19th July, 2016 was annulled.*

xi. *The procuring entity's finding that the Applicant's technical bid did not attain the 70% threshold is hereby also annulled and set aside and is hereby substituted with a finding that the Applicant met the technical threshold of over 70%.*

xii. *The procuring entity is directed to carry out a financial evaluation of the Applicant's tender and that of the successful bidder and award the tender to the lowest evaluated bidder within thirty days from the date hereof.*

xiii. *For the avoidance of doubt and further to order No. (g) of the decision given on 29th June, 2016 in PPARB APPL. No. 38 of 2016, the procuring entity is directed to extend the contract of the current service provider, namely the Applicant herein until such time as it shall complete the procurement process herein.*

xiv. *The Applicant will have costs of this application assessed at Kshs. 150,000/= plus any filing fees that it may have incurred.*

91. That in the powers of the Respondent are outlined at section 173 of the 2015 Act, Sub-section (c) provides that the Board may substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings was applied.

92. It was the Respondent's submission that in making its final orders it was guided by the said provision of the 2015 Act and not section 98 of the old Act as alleged by the ex-parte applicant.

93. It was further the Respondent's submission that it was within its jurisdiction in making its finding, and that the applicant has not demonstrated at all how the Respondent exceeded its jurisdiction. Reliance was placed on the case of **Republic v Kenya Power & Lighting Company Ltd & another [2013] eKLR** where justice Korir stated:

*".....I think the words of Lord Greene, M.R. at page 229 in the **Wednesbury Corporation case (supra)** will make good closing remarks in this case. He observed that:-*

*"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, 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 what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in **Short v Poole Corporation [1926] Ch. 66, 90, 91** 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; and, in fact, all these things run into one another*

It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted

illegally, unreasonably or in breach of the rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”[emphasis added].

94. On whether the Respondent acted unreasonably and irrationally while making the impugned decision, it was submitted that it only took into consideration facts that were presented before it and were relevant in deciding the above issues namely,

f. That this was the second time that the dispute between the same parties was being filed for consideration and determination by the Board;

g. That upon hearing case No. 38 of 2016, the Board allowed the Request for Review and directed the procuring entity which had eliminated the Applicant at the preliminary evaluation stage to re-evaluate all the tenders submitted to it including the tender submitted by the Applicant from the preliminary evaluation and complete the entire exercise within thirty (30) days from the date of the said decision which was given on 29th June, 2016;

h. That the procuring entity was directed to extend the contract for the current service provider of the said services until such time as it shall complete the procurement exercise;

i. That the procuring entity in a purported compliance with the Board’s order carried out a preliminary evaluation of the bids where the Applicant’s bid was found to be responsive and thereafter embarked on the process of technical evaluation where the Applicant scored 59 points and did not therefore ostensibly meet the cut off points of 70 points and could not thus proceed to the next state of evaluation;

j. That an examination of the technical re-evaluation report shows the following glaring errors which are apparent on the face of the technical evaluation report:-

a. The procuring entity did not take into account the letter dated 5th March, 2016 signed by one W. Kimutai, the Applicant’s Managing Director which confirms that there was no litigation pending before the court and the University as stated under item II. This was fortified by an affidavit signed by one Laban Katam a director of the Applicant dated 18th May, 2015 confirming that there was no litigation. The Applicant therefore ought to have been awarded the full marks on this score.

b. The procuring entity was further reminded that the mere fact that the Applicant lodged Review no. 38 of 2016 with the Board did not create any criminal litigation to warrant the Applicant being denied the marks under this item.

c. The letter dated 18th April, 2016 from Mwito Sacco under Ref: NO. MW/MSS/4/16 confirms that the employees of Mocam are members and remittances are up to date. The letter counter with limited under Ref: CL/139/52/2015 dated 25th September, 2015 confirms that the employees of Mocam are treated at their facilities and bills are settled at the end of the month. The Applicant therefore ought to have also been awarded marks on that score under item III of the schedule.

d. The Applicant produced copies of pay slips for guards which the Board finds as authentic showing that the Applicant’s guards are paid a house allowance a factor which ought to have been taken into account under item VI.

e. The Applicant produced 15 copies of discharge certificates of guides and ought to have awarded marks under item VI;

k. That the Board has taken into consideration the said factors and finds that the Applicant indeed attained the required technical score and has no hesitation in declaring so;

l. That the Applicant having attained the requisite technical score on the basis of documents which are evident in its original tender document then it is entitled to proceed to the financial evaluation stage;

m. That where there are glaring errors in a technical evaluation process then the Board can and has previously intervened;

95. It was submitted further by the respondent that nowhere in its decision dated 17th August 2016 did it come up with the findings enumerated at (a) to (f) on particulars of unreasonableness in the statutory statement and accordingly to make such allegations is a deliberate falsehood on the part of the exparte applicant.

96. On the issue of costs, it was the Respondent's submission that the same was made within its powers as provided under section 173(d) of the Public Procurement and Asset Disposal Act 2015. The respondent submitted that the question of costs assessed at Kshs. 150,000,000/= was a typographical error which was corrected to read "The Applicant will have costs of this application assessed at Kshs. 150,000/= plus any filing fees that it may have incurred".

97. On whether the Respondent acted irrationally, the Respondent submitted that the test for unreasonableness/irrationality has been laid out by the Courts. **Reliance was placed** on the case of **Council of Civil Service Unions v Minister for the Civil Service [1984] 3 ALL ER 935** Lord Diplock summarized the scope of judicial review thus:-

"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action are subject to control by judicial review. 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. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"

(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223).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. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system."

98. Further reliance was placed on the case of **Rahab Wanjiru Njuguna v Inspector General of Police & another [2013] eKLR** where justice Odunga stated that;

'.....From the foregoing it is clear that where the authority whose decision is challenged displays gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision such as where the decision is in defiance of logic and acceptable moral standards, the Court will interfere even if there is no illegality or procedural impropriety.'

99. The Respondent maintained that it did not make the findings stated above on which basis the applicant alleges that the said decision was irrational and unreasonable.

100. On whether the 1st Respondent was in breach of the rules of natural justice/fair administrative action, it was submitted that the *ex parte* applicant has not clearly set out how the rules of natural justice have been violated. It was submitted that Section 170 of the Public Procurement and Asset Disposal Act 2015 provides that:

The parties to a review shall be:-

- a. The person who requested the review*
- b. The accounting officer of a procuring entity*
- c. The tenderer notified as successful by the procuring entity; and*
- d. Such other persons as the Review Board may determine.*

101. It was submitted by the Respondent that all the parties that participated in the proceedings are the ones captured in section 170 of the Act.

102. It was the Respondent's submission that it acted without bias and without breaching the rules of natural justice and that the said record of its decision delivered on 17th August 2016 speaks for itself.

103. On whether the Respondent considered irrelevant considerations when making its decision, It was the Respondent's submission that nowhere in its decision did it base its finding on the irrelevant considerations as alleged.

104. On Whether the application meets the threshold for grant of judicial review orders, it was the Respondent's submission that what is before the court is actually an appeal disguised as a judicial review application. That the *ex parte* applicant is actually challenging the merits of the Respondent's decision albeit through a judicial review application. It relied on case of **Republic versus Public Procurement Administrative Review Board & Another ex parte Gibb Africa Ltd & Another [2012] eKLR** where it was observed that:

“.....Indeed Parliament was alive to the distinction between judicial review and appeal in procurement proceedings when it provided in Section 100 of the Act that:-

100(1) A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision.

(2) 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.

(3) ...”

105. It was submitted that a party aggrieved by any decision of the Respondent is at liberty to seek recourse against the same by preferring either an appeal or judicial review application. that Parliament envisaged a clear distinction between the two and a party can only elect either but not both. that the court stated further in the above quoted case as follows;

“.....In Amirji Singh v The Board of Post Graduate Studies Kenyatta University, Civil Application Number 1400 of 1995, Justice Aganyanya (as he then was) clearly explained that a judicial review application cannot be turned into an appeal. He stated that:-

“But 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.”

Professor Mumma for the 2nd respondent rightly pointed out to this court that a party who has chosen judicial review must play within the rules of judicial review. A party should not be allowed to argue an appeal through a judicial review application. The path to the sublime orders of judicial review is narrow and those who opt to take this road must be ready to operate within its limited space.”

106. Further reliance was placed on **Republic v Public Procurement Administrative Review Board & Another ex parte Gibb Africa Ltd & Another** [2012] eKLR where the court set out the established reach of judicial review in Kenya thus:

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

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

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

107. The respondent relied on the case of **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited** [2008] eKLR it was held that;

*‘The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See **Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60.**’*

108. Further reliance was placed on **Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another** [2014] eKLR where it was held that:

*“The purpose of judicial review proceedings is to ensure that the individual is given fair treatment by the authority to which he has been subjected and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court. See **Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155** and **R vs. Secretary of State for Education and***

Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.”

109. Further reliance was placed on **Municipal Council of Mombasa vs. Republic &Umoja Consultants Ltd Civil Appeal No. 185 of 2001 [2002] eKLR** where the Court of Appeal held:

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

110. It was submitted that the Court of Appeal in **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR** observed that:-

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

Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1st Respondent’s tender had met the mandatory conditions. The issue whether or not the 1st Respondent’s tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it.

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

The High Court erred in essence in treating the judicial review application as an appeal and in granting judicial review orders on the grounds which were outside the scope of Judicial Review jurisdiction.”

111. The respondent urged the court to find that the ex parte applicant's Notice of Motion application is unmerited and that the ex parte applicant has not made out a case for the grant of judicial review orders as sought against it hence the present application should be dismissed with costs to the Respondent.

THE 1ST INTERESTED PARTY’S SUBMISSIONS

112. The 1st Interested Party opposed the application and relied on the filed replying affidavit sworn by a director of the company, **Esther Jemutai Kibor** on 23/09/2016 (hereinafter the affidavit). In a nutshell the 1st Interested Party supports the Respondent’s decision dated 17/08/2016.

113. On the allegation of Excess of jurisdiction, ultra vires and illegality, it was submitted that **Section 80** of the Public Procurement and Asset Disposal Act, 2015 (**hereinafter the Act**) bestows the Evaluation Committee with the responsibility of evaluating tenders. That the Act at Part XV grants the Respondent powers to review **decisions made by the procuring entities through the said Evaluation Committees. Further, that Section 173 of the Act sets out the powers of the Respondent, and that under Section 173 (c) of the Act, the Respondent has the discretion to substitute its decision for that of the procuring entity, in this case, the Applicant.**

114. It was submitted that the exparte Applicant's borne of contention is that the Respondent had gone ahead to evaluate and score the 1st Interested Party's bid, which act it argues is ultra vires the Act. The 1st Interested Party submitted that Respondent acted within its jurisdiction by scoring the 1st Interested Party's technical bid based on the bid document submitted by the 1st Interested Party to the Applicant and the criteria set out by the Applicant in the tender document.

115. Reliance was placed on **Republic –vs- Public Procurement Administrative Review Board & 3 Others, Ex Parte Olive Telecommunication PVT Limited eKLR; (hereinafter the Olive Case)** where the court adopted the definition of Review in the **Black's Law Dictionary** and held as follows;

“Review is defined in...inter alia as Consideration, inspection, or reexamination of a subject or a thing.” Ballentines Law Dictionary on the other hand defines the same word...inter alia as “A reevaluation or reexamination of anything.” Clearly a review is much wider in scope than an appeal.

116. It was thus submitted that it was within the Respondent's powers as donated by the Act to reevaluate and/or reexamine the scoring undertaken by the Applicant's evaluation committee in order to satisfy itself whether; (1) the evaluation was done as per the evaluation criteria, (2) the evaluation committee considered all the documents submitted by 1st Interested Party in its bid document, and (3) the 1st Interested Party's contention that it had been scored low had any merit.

117. It was submitted that the Respondent rightly observed at page 27 of the decision that where there are glaring errors in the technical evaluation process, it can intervene.

118. It was submitted that the court in the Olive Case summed up the powers of the Respondent under section 98 (now section 173) as follows;

“Section 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal.”

119. The 1st Interested Party further submitted that once the court finds that the Respondent acted within its jurisdiction, then the allegation that its acted *ultra vires* must fail.

120. Further, that making available the 1st Interested Party's original bid document to its counsel does not amount to an illegality. That a document cannot be confidential, within the provisions of section 67 of the Act, to the very party that submitted it. That the perusal of the bid document submitted by the 1st Interested Party by its counsel was necessitated by the fact that the 1st Interested Party had not retained a copy of the same at the time of submitting its bid to the Applicant.

121. That the 1st Interested Party had stated at paragraph 7 of the request for review and paragraph 8 of the statement in support that it would seek the leave of the Respondent to peruse its bid document before the hearing of the review. That neither the Applicant nor the 2nd Interested Party objected to the 1st Interested Party's request to peruse its original bid document.

122. On Particulars of unreasonableness; it was submitted that a review by the Respondent entails reevaluation or reexamination of the decision made by the evaluation committee. That it was within the mandate of the Respondent to reexamine the scores awarded to the 1st Interested Party and come up with its conclusion as it did. Failure to refer the matter for re-evaluation by the same evaluation committee or a newly constituted committee does not render the Respondent's decision unreasonable.

123. It was submitted that in the **Olive Case**, the court held that to justify interference with the decision of the Respondent, the decision must be grossly unreasonable. That the court held as follows;

...In our view, to justify interference the decision in question must be so grossly unreasonable that no authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it.

124. It was further submitted that the only issue for the Respondent's determination was whether or not the 1st Interested Party's technical bid had attained the 70% threshold required for it to proceed to financial evaluation. It was contended in submissions that neither of the parties to the review had urged the Respondent to reevaluate the bids of the other bidders whose technical bids had been evaluated by the Applicant.

125. On the Applicant accusing the Respondent of awarding the 1st Interested Party costs of Kshs.150,000,000/-, which it terms unreasonable, it was submitted that it would have been outrageous to make an award of such costs. However it was submitted that the accusation is not true as the costs awarded are Kshs.150,000/- (See page 108 of the affidavit).

126. It was submitted that affidavits by the 1st interested party and the respondent reveal that when the Respondent noted the error on the costs, it recalled the entire ruling for purposes of rectifying the error, and that the 2nd Interested Party has annexed the correct decision, which it marked as annexure "JN 4" in its replying affidavit.

127. The 1st interested party therefore maintained that the decision by the Respondent was not only within the Respondent's jurisdiction to make but the same meets the reasonableness test.

128. The 1st Interested Party urged this court not to interfere with the same.

129. On the particulars of breach of the right to fair administrative action and bad faith; it was submitted that as pointed out above, the alleged costs of Kshs.150M was erroneous as the costs awarded had since been shown as Kshs.150,000/- That allowing the 1st Interested Party to peruse its original bid document is not unfair for the following reasons;

a. The 1st Interested Party had pleaded in its request that it would seek the Respondent's leave to peruse its original bid before urging the request for review. Neither the Applicant nor the 2nd Interested Party raised an objection to the same.

b. The advocates for the Applicant and the 2nd Interested Party made submissions in response to the 1st Interested Party's submissions at the hearing. They did not raise an objection to the same being relied upon by the 1st Interested Party.

c. The documents referred to by the 1st Interested Party in its submissions are contained in the original bid document submitted to the Applicant by the 1st Interested Party. They were in the Applicant's possession and custody. It is the same document that the Applicant had used to evaluate the 1st Interested Party's bid.

130. It was also submitted that the delay by the Respondent, if any, in issuing a copy of its decision affected all the parties to the review. The delay cannot impugn the merits of the Respondent's decision, and that in any event the Applicant suffered no prejudice as it was able to file this application within the prescribed time.

131. On the issue of delay, reliance was placed on the decision by Odunga J in **R-vs- Public Procurement Administrative Board & 2 others Ex Parte Akamai Creative Ltd**, where the learned judge held as follows;

“Accordingly where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefore when requested to do so, that action may well be contrary to the spirit of Article 47 aforesaid. However since these proceedings were instituted within the time nothing of substance turns on the said issue.”

132. It was further submitted that the Applicant has similarly not shown that the delay was unreasonable or that some parties got the decision earlier than them and/or whether such a delay affected the Applicant's rights to lodge this application. It was submitted that on the contrary, the Applicant was able to file this application within the time set out under section 175 (1) of the Act.

133. On the **Particulars of bias, it was submitted that** the review of the Applicant's decision awarding the 1st Interested Party a technical score of 59% was within the Respondent's mandate. That in order to arrive at a decision, the Respondent had to consider the bid document submitted to the Applicant by the 1st Interested Party and the Applicant's evaluation criteria.

134. That an assertion by the Chairman of the Board, if at all, that judicial precedents are distinguishable is not evidence of bias. That Judicial and quasi-judicial officers are entitled to distinguish precedents where the facts of the case under consideration are not on all fours with precedents submitted by litigants.

135. It was submitted that the Respondent's assertion as to actions of procuring entities whose aim is to eliminate certain bidders was obiter, that is, general in nature and content. That the Respondent held as follows at page 27 of the decision;

“Counsel for the procuring entity further argued that it was the province of the procuring entity and not the Board to carry out technical evaluation. The Board however wishes to disagree with the stated position and wishes to make it clear that where there are glaring errors in a technical evaluation process then the Board can and has previously intervened. The Board cannot therefore sit back and see a bidder or bidders being denied marks that they are entitled to. The Board can also not sit back and laud the actions of a procuring entity whose aim is to eliminate certain bidders at all costs.”

136. It was submitted that even if the foregoing observation was in the context of this case, then the Respondent's observation is founded and/or underpinned by the 1st Interested Party's letter dated 29/07/2016.

137. It was submitted that the Applicant had not adduced any evidence of bias on the part of the Respondent. This ground must therefore fail.

138. On the particulars of errors of law and facts, it was submitted that the Respondent derives its powers to reevaluate and/or reexamine the decisions of a procuring entity from the Act, and that ascertaining whether or not the 1st Interested Party had been scored as per the tender document is not in excess of the Respondent's jurisdiction.

139. Further, that the Respondent could not address itself on whether or not there was breach of the law without addressing its mind on the issues placed before the Board by the 1st Interested Party.

140. In addition, it was submitted that the Respondent rightly held at page 27 of the decision that the request for review in PPARB NO. 38 of 2016 dealt with a challenge relating to the Applicant's exclusion from the tendering process at the preliminary evaluation stage; that at the time of the decision in PPARB NO. 38 of 2016, the 1st Interested Party's tender had not gone through the technical evaluation and thus the question relating to the technical evaluation stage was not before the Respondent for consideration in PPARB NO. 38 of 2016.

141. Further, it was submitted that even if the matter was *res judicata* and the Respondent misconstrued itself as urged by the Applicant, the same cannot be ground for grant of orders of judicial review sought by the Applicant. that in the ***Olive Case***, the court held that it is not every "wrong" decision that an inferior tribunal makes that renders it amenable to judicial review as opposed to appeal.

142. That in the ***Olive Case***, the court adopted the decision in **Republic –vs- Business Premises Rent Tribunal & 3 Others Ex-parte Christine Wangari Gachege [2014] eKLR** where the Learned Judge held as follows;

"In judicial review proceedings the mere fact that the Tribunal's decision was based on insufficient evidence, or misconstruing of the evidence...or that in the course of the proceedings the Tribunal committed an error are not grounds for granting judicial review remedies. In reaching its determination, it must however, be recognized that a Tribunal or a statutory body or authority has jurisdiction to err and the mere fact that in the course of its enquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal." (See paragraph 143, page 89 of the NM).

143. On the Applicant accusing the Respondent of altering the tender document to suit the 1st Interested Party, it was submitted that there is however no evidence of such alteration; and that the reexamination of the 1st Interested Party's technical bid was carried out in accordance with the criteria set out at page 20 of the tender document. That upon applying the set criteria, the Respondent noted glaring errors which were apparent on the face of the technical evaluation. (*See page 23 of the decision*).

144. On the Applicant faulting the Respondent's finding that the Applicant had allowed the 2nd Respondent to take possession of the site while there was a pending request for review, it was submitted that this finding by the Respondent was sound for the following reasons;

- a. The 2nd Interested Party took possession of the Applicant's site on 30/07/2016.
- b. The request for review was filed on 29/07/2016 (*see page 67 of the affidavit*).
- c. The notification of appeal which serves as stay was issued on the same day, 29/07/2016 (*see page 72 of the affidavit*).
- d. The extended contract between the Applicant and the 1st Interested Party was to lapse on 31/07/2016 whereas they were ejected from the site on 30/07/2016 to pave way for deployment of the 2nd Interested Party's guards (*see ROM 11 at page 202 of NM and 73 of the affidavit*).

145. It was further submitted that in any event the Applicant was prohibited by law from deploying the 2nd Interested Party's guards until a contract had been signed between them as provided under section 135 (4) of the Act.

146. In addition, it was submitted that Section 135 (3) of the Act provides that such a contract can only be executed 14 days after the notification of the award; and that the award having been made to the 2nd Interested Party on 19/07/2016, the earliest the contract could be executed was 03/08/2016. It was therefore submitted that there was no contractual and/or legal basis for the deployment of the 2nd Interested Party's guards on 30/07/2016.

147. It was further submitted that not only did the contractual obligation the exparte applicant had with the 1st Interested Party prohibit the Applicant from deploying the 2nd Interested Party's guards but also the operation of the law as pointed herein above.

148. It was submitted that from the foregoing, the particulars of errors of law and fact urged by the Applicant cannot be sustained.

149. On the Particulars of irrationality and irrelevancy, it was submitted that a substantial number of issues raised by the Applicant under this head have been addressed herein above. The only issue that was submitted on is the letter dated 25/09/2015. This is the letter submitted by the 1st Interested Party to the Applicant as evidence of social welfare programs (medical) provided by the 1st Interested Party to its guards as required under criteria III of the technical evaluation criteria.

150. It was submitted that the consideration of the said letter by the Respondent as proof that the 1st Interested Party had medical programs for its guards under criteria III cannot be taken as an irrelevant consideration on the part of the Respondent.

151. Further, that as pointed above, the Applicant's act of deploying the 2nd Interested Party's guards before the execution of the contract and when a request for review was pending is a clear demonstration of the Applicant's disregard of the law and the Respondent's orders.

152. That even after redeploying the 1st Interested Party's guards, the Applicant continued to retain the services of the 2nd Interested Party and thus incurred unnecessary expenses, which Kenyan taxpayers will now be asked to foot.

153. It was submitted that the Applicant not only disobeyed the orders of the Respondent but had on several occasions acted in breach of the law, hence it was submitted that it is therefore not deserving of the orders of this court.

154. On the contrary, it was submitted that the 1st Interested Party is a law abiding citizen in that when its guards were ejected on 30/07/2016 to facilitate the illegal deployment of the 2nd Interested Party's guards, it removed its guards. Similarly that when this court stayed the Respondent's decision, the 1st Interested Party removed its guards from the Applicant's premises.

155. In view of the foregoing, it was submitted that the Applicant has not demonstrated that the Respondent acted in excess of its jurisdiction, ultra vires, illegally, unreasonableness, with bias, in breach of the right to fair administrative action, in bad faith, in error of law or fact, irrationally and irrelevancy to warrant this court's interference with the Respondent's decision dated 17/08/2016.

156. The 1st interested party urged the court to dismiss the application with costs.

THE 2ND INTERESTED PARTY'S SUBMISSIONS

157. The 2nd Interested Party submitted pointing out the Responsibilities or the functions of the Accounting Officer, the Evaluation Committee and the Public Procurement Review Board (hereinafter called the Review Board) as the present Judicial Review revolves on their functions or jurisdiction as donated by the statute.

158. According to the 2nd interested party, the Accounting Officer's functions are spelt out in sections 44, 45 and 46 of the Public Procurement and Asset Disposal Act, and that one of the responsibilities of the Accounting Officer as spelt out in section 46 of the Act is to appoint an adhoc Evaluation Committee to deal with evaluation of tenders. His functions do not include evaluation of tenders.

159. Further, that Section 80 of the Act mandates the adhoc Evaluation Committee to evaluate the

tenders. Under Section 80 (2), the Evaluation Committee is enjoined to evaluate and compare the responsive tenders using the procedures and criteria set out in the tender documents. That professional opinion may be sought where the tender requires professional or technical input and that under Section 85 of the Act; the Evaluation Committee makes a recommendation to the Accounting Officer through the head of the Procuring Entity to award the tender to the successful tenderer.

160. On the other hand, it was submitted that the powers of the Review Board are contained in section 173 of the Act. Under the Section, the Review Board can annul the decision of the Accounting Officer, give directions as to what is to be done or redone in the procurement proceedings, substitute the decision of the accounting officer with its own decision, order termination of the procurement process and commencement of a new procurement process or order payment of costs.

161. It was submitted that Section 173 does not give the Review Board any power to evaluate the tender documents as to declare none-responsive tender successful or a none responsive tender to proceed to the next stage. Accordingly, it was submitted that the respondent has no jurisdiction or power to substitute the decision of the Evaluation Committee with its own decision, but that it can only annul that decision and order termination or a recommencement of the procurement process. In other words what to be done or redone.

162. It was submitted that the Review Board acted irrationally and unlawfully because:-

i. Under Section 60 of the Act it is the responsibility of the Accounting Officer of the Procuring entity to set out the requirements relating to the tender and that once the criteria is set out and is based on good reasons as in the present case, the Review Board cannot travesty it by declaring it unreasonable when it was based on sound reasons.

ii. The Review Board acted irrationally in that it ordered that the 1st Interested Party should skip the Preliminary Stage which was mandatory, and proceed to the Technical Evaluation State without providing Fidelity Guarantee Insurance Cover.

iii. The Review Board acted irrationally in that it ordered that the 1st Interested Party could provide the Fidelity Guarantee Insurance Cover at the time of signing the Contract meaning therefore that the cover was important after all and not unimportant or unnecessary.

iv. The Review Board acted in excess of its jurisdiction as it was the Accounting officers responsibility to set out the criteria and Evaluation Committee's responsibility to evaluate but not the Review Board.

163. It was further submitted that the 2nd Interested Party was subjected to the criteria whereby it was required to provide the Fidelity Guarantee Insurance Cover which it did. It was therefore submitted that the Review Board was biased in favour of the 1st Interested Party because the 1st Interested Party proceeded to the Technical Evaluation Stage **NOT** because it was qualified, but by the Order of Review Board.

164. The 2nd interested party further submitted that from the conduct of the respondent, it was clear that as the parties proceeded to the Technical Evaluation Stage, the Review Board was hell bent to have the 1st Interested Party's tender be declared successful and that of the 2nd Interested Party unsuccessful, which was an act of bias.

165. It was further submitted that during the Technical Evaluation stage, the Evaluation Committee evaluated the 1st Interested Party's Technical bid by using the criteria set out in the tender documents and Section 80 of the Act, which tender document required a tenderer to score 70 points and above in criteria I to XV on pages 20 to 22 of the Tender Document (annexed) before proceeding to Financial Evaluation stage.

166. That for those bidders who would score 70 points and above, the applicant would visit their companies to verify and physically confirm the information given and that upon Evaluation, the 1st Interested party scored 59 points. The procuring entity did not therefore visit the 1st interested Company premises to physically verify and confirm the information given.

167. It was submitted that on 28th July 2016 the 1st interested party made a request for review to the Review Board. That it complained that in evaluating the 1st Interested party's technical bid, the applicant failed to use the criteria set out in the tender document and the criteria it used failed to meet the objectivity and quantifiable requirements that are set out in Section 80 (3)(a) of the Act.

168. However, that it supplied no evidence to show that the applicant was not objective. Nonetheless, the 1st interested party submitted that in its Ruling the Review Board declared the 1st Interested Party's request successful and that in so doing, it relied on the 1st Respondent's Managing Director's letter dated 5th March 2016 which purported to indicate that there was no case pending either in Court or with the University involving loss suffered by the University caused by the 1st Interested Party's employees. That it also relied on letters dated 18th April 2016 and 25th September 2015 authored by Mwito Sacco to the effect that the 1st Interested Party's employees were members of Mwito Sacco and were being treated at their facilities. The Review Board decided that the 1st Interested Party's Technical bid was successful and ordered that it should proceed to the Financial Evaluation Stage.

169. It was submitted that in making and awarding a total of 15 points to the 1st Interested Party, the Review Board acted illegally, and in excess of its jurisdiction because for the following reasons:-

- i. The Review Board purported to mark and award points to the 1st Interested Party when the role of Evaluation and awarding of points was donated to the Evaluation Committee only as stipulated under Section 80 of the Act.
- ii. The Review Board awarded 15 points to the 1st Interested Party without inquiring as to whether the 1st Interested Party ever complained as to exclusion of the said documents from evaluation in the request for review.
- iii. The Review Board made an error in that it ordered that the 1st Interested Party's bid proceed to the Financial Evaluation Stage without allowing and given the Procuring Entity a chance to verify and confirm the information it relied on by physical visitation contrary to clear requirements of the tender document.
- iv. The Review Board committed a grave error in procedure in that having found that the Procuring Entity did not consider all the documents set out before it by the 1st Interested Party, albeit mistakenly, and having annulled the Applicants decision, it proceeded to substitute its decision that the 1st Interested Party proceed to the Financial Evaluation Stage instead of ordering the Applicant to recommence the Evaluation of the Technical bid.

170. It was submitted that the Review Board committed a serious error of law in its mistaken belief that under Section 173 of the Act, it can take over the role of the Evaluation Committee, re-write or eliminate tender requirements, award points, substitute its own decision and order a tenderer's bid to proceed to the next stage before verification, which was an indication that this was a clear trend the Review Board had taken from the inception of the process.

171. It was submitted that in the Preliminary Stage, the Review Board set the trend by declaring that the provision of Fidelity Guarantee Insurance Cover required by the tender document was unnecessary and unreasonable, and eliminated that requirement from the requirements of the tender and unreasonably ordered that all bids proceed to the Technical Evaluation Stage.

172. According to the 2nd interested party, it provided the Cover, but the 1st Interested Party did not. Therefore, that it was unreasonable when the Review Board declared that a party could provide the Fidelity Guarantee Insurance Cover at the time of signing the contract meaning therefore that it was important after all.

173. The 2nd interested party further submitted that in the Technical Evaluation Stage, the Review Board took upon itself the task of evaluating the 1st Interested Party's Technical bid instead of allowing the Evaluation Committee to re-evaluate as mandated by law. That the respondent marked and awarded the 1st Interested Party 15 points over the 59 points awarded by the Evaluation Committee when it had no powers to do so; that it again substituted its own decision to that of the Evaluation Committee that the 1st Interested Party had attained 70 points and therefore could proceed to the Financial evaluation stage even without verifying the documents it used, a role which under the Act is bestowed upon the Evaluation Committee.

174. It was therefore submitted that on the whole, the exparte Applicant's application for Review is merited and consequently the decision delivered by the Respondent on 17th August 2016 should be quashed by this court.

175. Mr Chege counsel for the 2nd interested party also wholly associated himself with the submissions and position of the exparte applicant as pleaded and as submitted orally by Mr Malebe advocate. Counsel's oral submissions reiterated the written submissions as filed.

DETERMINATION

176. On 22nd April 2016, the Applicant Masinde Muliro University of Science and Technology (MMUST) issued Tender No. MMUST/SEC/02/16-18 a copy whereof is attached to the 2nd Interested Party's replying affidavit sworn on 19th September 2016 and marked as exhibit JN1. The tenders were to be evaluated through three stages process namely:

- i. Preliminary Evaluation Stage.
- ii. Technical Evaluation Stage, and finally,
- iii. Financial Evaluation stage.

177. On page 18 of Exhibit JN1, the Preliminary Evaluation checklist was expressed to be mandatory. Those tenders which did not meet the criteria as set out in item I to XIX would be declared none responsive and would be eliminated from the evaluation process, and would not proceed to the Financial Evaluation Stage. Tenderers were also required to attach documentary evidence of the information provided and the Applicant reserved the right to verify the documents by visitation and physical check.

178. Criteria XIX required the tenderers to provide a copy of Fidelity Guarantee Insurance Cover to cover liabilities arising from burglary, robbery, thefts, disappearance, destruction and embezzlement perpetrated by the tenderers employees. The 1st Interested Party admittedly did not submit the Fidelity Guarantee Insurance cover. The Applicant rejected the 1st Interested Party's bid but on an application for review brought by the 1st Interested Party, to the Review Board, the Review Board ruled that requirement XIX was unreasonable as the Applicant could require the tenderer to provide Fidelity Insurance Cover at the point of signing the contract. It ordered that the Applicant should not disqualify any tenderer for none provision of the Fidelity Guarantee Insurance Cover and that the 1st Interested Party should proceed to the next Technical Evaluation Stage.

179. The applicant was dissatisfied with the decision of the Review Board and filed these judicial review proceedings challenging the Board's decision.

180. Having carefully considered the exparte applicant's Notice of Motion, the supporting documents, the replying affidavits by the respondent and the interested parties and their respective counsels' able written and oral submissions as supported by Constitutional, statutory and case law, in my humble view, the main issues for determination are:

181. Whether the award of costs issue of Kshs 150,000,000 was a typographical error and whether the correction thereof by the Respondent was acceptable: The applicant laments that the order for costs against it was outrageous and illegal as the powers of the Respondent are to award costs as per the scale. In this case, it was submitted that the costs awarded were many times more than the procurement sum of just 29 million.

182. On the other hand, the respondent contends that the sum of 150 million was an error which was corrected. In a rejoinder, the applicant maintains that if at all the award was an error, that error was never communicated to it until these JR proceedings were commenced and that even then, the respondent never filed any amended order on costs. That it was the 1st interested party who filed an amended order which was never served on the applicant.

183. This court in answering the above issue notes that the Public procurement and Asset Disposal Act, 2015 does not provide for the main vehicle for accessing redress for this kind of grievance, unlike the court exercising civil jurisdiction which has section 99 of the Civil Procedure Act which provides for amendment of clerical or arithmetical errors in judgments, decrees and orders arising from any accidental slip or omission.

184. That being the case, it was important, in my humble view, that the respondent upon discovery of the "error" after pronouncing the decision, to call upon all parties to the dispute, or communicate the error to all the parties to the review, so that the "error" is corrected before the filing of the Judicial Review proceedings, which is the 14 days window period.

185. Instead, it would appear that the respondent after handing out certified copies of the decision to all parties to the review, only communicated the error and the correction thereof to the 1st interested party, and the applicant only came to learn of that amendment through these judicial review proceedings.

186. The costs, however erroneous they may have been, were to be paid by the applicant and not the interested parties. It was therefore, in my humble view, critical that that serious error be communicated to the applicant as well within reasonable time since the Act is clear **that "A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision."** In other words, in the absence of any indication as to when the amendment to the award of costs was made, on the expiry of 14 days from such order, then the decision of the respondent would be binding on all parties, assuming no judicial review was filed to challenge the same within the 14 days stipulated in the Act..

187. In the Supreme Court of Canada in **Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6 it was held:**

"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."

188. In this case, I find that the amendment to the award which amendment was never communicated to the applicant thereby the applicant having in its possession a different decision from that which the 1st interested party had, was not a demonstration of fairness and openness on the part of the respondent. The Public Procurement and Asset Disposal Act, 2015 is enacted to promote transparency and accountability in the procurement of public goods and services and therefore Board in discharging its mandate is expected to be transparent and accountable to the public and moreso, to the parties before it.

189. It is for that reason that indeed I find that the applicant's challenge on the assessed costs merited that the award of costs of 150million was outrageous and illegal. The same is hereby brought into this court and quashed.

190. The second issue for determination is whether the respondent's decision to substitute the decision of the Evaluation Committee was legal or proper in law.

191. According to the applicant, the respondent Review Board exceeded its powers in the sense that it substituted the decision of the Evaluation Committee yet the Public Procurement and Asset Disposal Act, under section 173 only permits the respondent to substitute the decision of the Accounting Officer of the procuring entity. It was submitted in this case that there was no decision of the Accounting Officer

192. Odunga J in **Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & another [2016] eKLR** after citing a number of decisions, and while addressing the issue of substitution of the procuring entity's decision with the respondent's decision as stipulated in section 98 of the repealed Act stated:

"120. I hasten to add however that the Board's powers are not unlimited. As was held in JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 others [2015] eKLR: "The PP&DA and the Regulations bequeath the onus of amending a Tender Document on a procuring entity. When the Review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and in such circumstances it is said that it has acted outside jurisdiction. Those who approach the Review Board must be sure of its parameters. The power bestowed upon the Review Board does not include authority to act outside the law. Such power can only be valid if it is exercised for legitimate purposes. In the instant case, the Review Board exceeded its authority by purporting to read its own words in the Tender Document."

212. It was similarly appreciated in **Republic vs. Public Procurement Administrative Review Board & 3 Others Ex Parte Olive Telecommunication PVT Limited [2014] eKLR** that:

"Whereas we appreciate that the Board's latitude in applications for review is wide, such latitude ought not to be expanded to such an extent that it renders the idea conceived by the PE totally useless. In providing its own definition of what an OEM is the Board in essence altered the bid documents which can only be done as provided by the Act and by the PE."

122. The Board, in my view while has wide powers of review ought not to make a determination whose effect would amount to a decision totally different from the one which the procuring entity set out to achieve by commencing the tender process.

193. In the instant case, and having carefully perused the provisions of section 173 of the Public Procurement and Asset Disposal Act, 2015, I have not found any power given to the respondent to substitute the Evaluation Committee's decision. The Legislature in its wisdom found it necessary to give specific powers to the respondent and where no such powers are given; the respondent by substituting the decision of the Evaluation Committee cannot do so, in the guise of substituting the decision of the Accounting Officer.

194. There is a whole difference between the Accounting Officer of the procuring entity and the Evaluation Committee which is established under section 46 of the Act and its powers are provided thereunder as reproduced in this judgment.

195. In my humble view, substituting the Evaluation Committee's decision, as there was no decision of the Accounting Officer to be substituted, was usurpation of powers of the Evaluation Committee which

was involved in the evaluation of the tender documents. In the **Republic v Public Procurement Administrative Review Board & 2 others ex-parte Numerical Machining Complex Limited [2016] eKLR** it was held that where the law provides jurisdiction, no expansion of jurisdiction is allowed.

196. What the respondent in this case was doing, in essence, was thereby seeking to reevaluate the tender documents and which it did, by marking the 1st interested party and awarding it over 70 marks, which is the preserve of the Evaluation Committee.

197. I find that the respondent acted in excess of its jurisdiction by substituting the decision of the Evaluation Committee and such excess of jurisdiction is amenable to interference by this court.

198. The third issue for determination is whether the respondent acted in excess of its powers in remarking only the 1st respondent's tender documents.

199. Sections 2 and 3 of the Public Procurement and Asset Disposal Act, 2015 mandates that all competitors must be treated equally without discrimination and that all criteria must be based on or contained in the tender documents.

200. It therefore follows that the respondent in remarking the interested 1st party's tender documents, even if there was an error in the procurement process, the respondent had no mandate to remark only the 1st interested party's tender documents. It should have returned the process to be commenced afresh. By remarking the 1st interested party's tender documents, the respondent was usurping the powers of the Evaluation Committee. **See Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & another [2016] eKLR.**

201. In this case, the court further notes that the Board directed the award of the tender. By remarking the 1st interested party and therefore qualifying it with over 70 points and ordering that the Evaluation Committee do proceed on financials only without a fidelity Guarantee bond, and that the award should be made in favour of the lowest tenderer. No doubt, the Board was dictating to the procuring entity on who should be awarded the tender since it was clear from the Review Board's reevaluation and marking that the 1st interested party gave the lowest amount but had failed in the technical evaluation.

202. In my humble view, the respondent has no power to direct awarding of a tender on the basis of a mistake or error committed by the evaluation or tender committee and therefore the directive that it gave in this case is unlawful and in excess of jurisdiction. Consequently this court has the power to intervene.

203. Furthermore, where the respondent finds an error, it can only order for reevaluation or retender and not to use faulty tender documents to award a tender or read its own words in the tender document. In doing so, the respondent committed an error of law. In **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co.Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 others [2015] eKLR** it was held that judicial review orders were available where the Review Board committed an error of law apparent on the face of its decision. Further, that the Review Board cannot disregard mandatory provisions of the PP&DA and where it does so, it amounts to a fundamental misdirection or failure to address the applicable law or a fundamental error of law thereby rendering the decision reached devoid of legality and therefore void.

204. Tribunals or Boards are expected to act in good faith and extraneous considerations ought not to influence their decisions or actions and they must not misdirect themselves in fact or law- see the **Numerical Machining Complex Limited** case (supra) where it was held that where the law provides jurisdiction, there can be no expansion of jurisdiction.

205. Procedural propriety is the stamp of fairness in JR matters not just lowest bidder- see **R-vs- Public Procurement Administrative Board & 2 others Ex Parte Akamai Creative Ltd** (supra) where it was held that the successful bidder must pass all other stages and fulfill the requirements in the evaluation process before issue of lowest tenderer comes into play.

206. I reiterate that where there are finding of errors, the body reviewing the procurement process must refer back to entity for amendment and with appropriate directions, not to substitute with its own decision on what ought to have been contained therein or how many points ought to have been awarded .

207. On whether the respondent committed an error of law in letting the 1st interested party's counsel access the original tender documents, I find that no prejudice has been demonstrated since the 1st interested party had in its application sought to rely on such original tender documents and in any event it has not been shown that the said documents were in any way tampered with to the detriment of the exparte applicant.

208. On whether the delay in issuing the decision to the applicant was an error of law, I am in agreement with the decision by Odunga J in **R-vs- Public Procurement Administrative Board & 2 others Ex Parte Akamai Creative Ltd**, where the learned judge held as follows;

“Accordingly where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefore when requested to do so, that action may well be contrary to the spirit of Article 47 aforesaid. However since these proceedings were instituted within the time nothing of substance turns on the said issue.”

209. In this case, although there was some delay in furnishing of the decision, the proceedings herein were lodged in time hence, no prejudice was occasioned.

210. On whether the order that the 1st interested party continue guarding the applicant's premises until the process as directed was completed, I find that there was no error as no contract had been entered into with the 2nd interested party and in any event, therefore, section 135 of the Act had not been complied with. The section provides:

“135. (3) the written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.”[Emphasis added].

211. From the foregoing, it is clear that the Applicant was prohibited by law from deploying the 2nd Interested Party's guards until a contract had been signed between them as provided under section 135 (4) of the Act.

212. In the end, I find that the notice of motion herein has merit and I proceed to allow it. Accordingly, the order that commends itself for grant is judicial review order of Certiorari which is hereby issued bringing into this court and for purposes of quashing and I hereby quash the decision of the respondent delivered on 17th august, 2016 in application **No. 53 of 2016 MOCAM SECURITY SERVICES LIMITED V MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY.**

213. As the respondent and the exparte applicant are both public bodies, despite the successful challenge to the respondent's decision, I order that each party bears its own costs.

214. Those are the orders of this court.

Dated, signed and delivered at Nairobi this 13th day of December, 2016.

R.E.ABURILI

JUDGE

In the presence of: Bukania h/b for Malebe for the exparte applicant

Mr Chege for the 2nd interested party

Mr Kiprono for the 1st interested party

N/A for the Respondent