



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT KENYA**  
**AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO 2 OF 2015**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**CHIEF REGISTRAR OF THE JUDICIARY.....RESPONDENT**  
**LAVINGTON SECURITY LIMITED.....1<sup>ST</sup> INTERESTED PARTY**  
**BEDROCK SECURITY SERVICES LIMITED.....2<sup>ND</sup> INTERESTED PARTY**  
**EX PARTE RILEY SERVICES LIMITED**  
**RULING**

### **Introduction**

1. The ex parte applicant, **Riley Services Limited**, is a limited liability company incorporated in Kenya which provides these services. It appears that the applicant had been providing security services to the judiciary, but its contract had ended and the respondent had invited tenders for supply of the said services. The applicant and the interested parties, which are also limited liability companies involved in provision of security services in Kenya, tendered for the provision of the said services to the judiciary.
2. The respondent is the Chief Registrar of the Judiciary, the chief administrator and accounting officer of the judiciary for purposes of **Article 161 (2) (c)** of the **Constitution** and the **Public Procurement and Disposal Act**. The Chief Registrar invited tenders for the provision of security services by way of Tender No JUD/102/2014-2015, and among the tenderers were the applicant and the interested parties. By a letter dated 11<sup>th</sup> December 2014 which the applicant avers it received on 17<sup>th</sup> December 2014, the respondent informed the applicant that it had been unsuccessful in its bid. The applicant avers that the respondent awarded tenders to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, though it also avers that it is aware that no contracts have been signed between the respondent and the interested parties.
3. Aggrieved by the decision of the respondent, the applicant filed, on 22<sup>nd</sup> December 2014, a request for review with the Public Procurement Administrative Review Board (hereinafter referred to as “the Board”) being Review Application No 57 of 2014 which application is pending hearing and determination. The application was filed pursuant to **Section 93 (1)** of the **Public Procurement and Disposal Act** (hereafter “the Act”) read with **Regulation 73** of the **Public Procurement and Disposal Regulations** as amended

by **Regulation 20** of the **Public Procurement and Disposal (Amendment) Regulations** (hereafter the Regulations)

4. On 22<sup>nd</sup> December 2014, pursuant to section 94 of the Act read with regulation 74 (1) and (2), the Board notified the respondent, vide a Notification of Appeal, not to enter into any contract until the application for review is finalized.

5. According to the applicant, on 31<sup>st</sup> December 2014, the interested parties deployed security guards at the respondent's premises across the country, purporting to take over the provision of security services from the applicant.

6. By an application dated 31<sup>st</sup> December 2014 filed under certificate of urgency, the applicant sought leave to file judicial review proceedings against the respondent. It alleged that the respondent had breached her public duty to comply with the orders of the Board, as well as the Constitution and the Act, and thereby contravened the applicant's rights by disobeying the order of the Board issued on 22<sup>nd</sup> December 2014 and entering into contracts with the interested parties.

7. In its Chamber Summons application expressed to be brought under Article 165(6)&(7) of the Constitution of Kenya, 2010, Part V1 of the Law Reform Act, Cap 26 of the laws of Kenya, Order 53 Rule 1,2 and 4 of the Civil Procedure Rules, 2010 and Section 99 of the Public Procurement and Disposal Act 2005, the applicant sought orders as follows:

- 1. That the application be certified most urgent and be heard ex parte in the first instance.***
- 2. That the ex parte applicant be granted leave to apply for an order of certiorari to remove to the High Court for purpose of quashing:***
  - a. The Contracts for provision of security services entered into between the respondent and the interested parties herein;***
  - b. The instructions or authority or approval granted by the respondent to the interested parties to deploy guards and or take-over the provision of security services at any of the respondent's premises.***
- 3. That the ex parte applicant be granted leave to apply for an order of prohibition to prohibit the respondent from evicting the ex parte applicant from any of its premises or handing over any such premises to any of the interested parties or entering into any written contracts for provision of security services or honouring any of terms and obligations thereof.***
- 4. That the ex parte applicant be granted leave to apply for an order of mandamus to direct the respondent to comply with Articles 3 (1), 10, 27 (1), 47 (1), 73 (1) and (2) (b), (d) and (e) and 232 (1) (a), (b), (c), (e) and (f) of the Constitution and Sections 27 (1), 68 (2) and (3) and 94 of the Public Procurement and Disposal Act read with Regulation 74 (2) of the Public Procurement and Disposal Regulations.***
- 5. That the ex parte applicant be granted leave to apply for an order of mandamus to direct the respondent to comply with order of the Public Procurement Administrative Review Board issued on 22<sup>nd</sup> December 2014.***
- 6. That the leave granted to apply for orders of certiorari, prohibition and mandamus do operate as a stay of:***
  - a. The intended removal or eviction of the ex parte applicant from the respondent's premises where it currently provides security services under the Contract for provision of security services dated 28<sup>th</sup> November 2014 which contract was automatically extended by***

*the order of the Board issued on 22<sup>nd</sup> December 2014 pending the hearing and determination of the Notice of Motion.*

*b. The intended conclusion, execution and or implementation of any written or unwritten Contracts for provision of security services or parts thereof between the respondent and the interested parties herein pending the hearing and determination of the Notice of Motion.*

*7. That being a matter arising under the Public Procurement and Disposal Act, the Honourable court be pleased to order that the attendant Notice of Motion be heard on priority basis during the current Christmas vacation or at the earliest in the next term.*

*8. That the honourable court be at liberty to make any further orders in the interest of justice and good governance.*

*9. That the ex parte applicant be awarded costs of and or incidental hereof.*

8. The court granted leave to file the application for orders of judicial review but directed that the prayer on whether the orders should operate as a stay be argued inter partes.

9. In response, the 1<sup>st</sup> interested party filed a Notice of Preliminary Objection dated 6<sup>th</sup> January 2015 in which it challenged the jurisdiction of the court to hear this application. The Preliminary Objection, to which this ruling relates, is couched in the following terms:

*1. That the Honourable Court has no jurisdiction pursuant to Article 165 (6) and (7) of the Constitution of Kenya, Law Reform Act, Section 3 and 3A of the Civil Procedure Act, Order 53 Rule 1, 2 and 4 of the Civil Procedure Rules 2010, Section 99 of the Public Procurement and Disposal Act to grant the orders sought and or to entertain the Judicial Review Proceedings herein.*

*2. That the powers conferred to the court is stipulated at Section 100 of the Public Procurement and Disposal Act and as the request for review filed by the ex parte applicant is yet to be determined, the Judicial Review Proceedings are premature, mislaid, frivolous and incurably defective.*

## **The Submissions**

### **Submissions by the 1<sup>st</sup> Interested Party**

10. Mr. Bundotich, Learned Counsel for the 1<sup>st</sup> interested party, submitted that this court has no jurisdiction to entertain the Chamber Summons Application dated 31<sup>st</sup> December 2014 and the entire Judicial Review proceedings. This was because the application invokes Section 99 of the Public Procurement and Disposal Act while the jurisdiction of the court under the Act is provided for in section 100. It was his submission that a party can only approach the court under section 100 once the Board makes a decision, and it was undisputed that no decision had been made by the Board to enable the applicant invoke the provisions of section 100.

11. According to the 1<sup>st</sup> interested party, section 99 of the Act allows the applicant to pursue any other remedy it can lodge such as a complaint with any other constitutional body if there is a basis, or to the Director General of the Board, or by filing any other cause of action other than judicial review. It was its case therefore that in the circumstances, not having moved the court under section 100, these proceedings are a nullity and should be struck out.

12. With regard to the directive issued by the Board pursuant to section 94 of the Act against the respondent entering into a contract pending the hearing of the review application, Mr. Bundotich

submitted that a directive is not a decision within the meaning of Section 98 of the Act. Consequently, a party aggrieved by the directive or failure to comply with it can only go back to the Board for redress.

13. With regard to the authorities that the applicant sought to rely on in opposition to the Preliminary Objection, Mr. Bundotich submitted that in **Republic –vs- Ministry of Interior and Coordination of National Government Ex-parte ZTE Corporation and Another Judicial Review Case No 441 of 2013**, and **Republic v Chairman, Emuhaya Land Disputes Tribunal and Another Ex parte Alfred Esitiba Ebita Judicial Review Case No 53 of 2010**, the jurisdiction of the High Court was properly invoked by the applicants as a decision had already been made by the Board, which was not the case in the present application.

14. It was his further submission that the present case was similar to that in **Judicial Review Case No 87 of 2014 Republic –vs- Central Bank of Kenya ex parte Horsebridge Network Systems EA limited**, in which the applicant went back to the review Board for further orders, and that this is what the applicant in this case should have done.

15. The interested party submitted further that in any event, the applicant's application before the Board was filed out of the time allowed under the Act. Mr. Bundotich contended that by virtue of the amendments to the Public Procurement and Disposal Act through Legal Notice No 106 of 18<sup>th</sup> June 2013, a request for review can only be made within 7 days from the date of notification of the results of the tender. It was his submission therefore that the applicant's request in this case was filed outside the 7 day window allowed under the Act, the decision of the respondent having been communicated to it on 11<sup>th</sup> December 2014, and the review filed 11 days later on 22<sup>nd</sup> December 2014. Counsel submitted that the application is therefore an abuse of the court process, and prayed that the preliminary objection be upheld and the entire proceedings struck out with costs.

### **Submissions by the Respondent**

16. The 2<sup>nd</sup> interested party did not participate in the proceedings while Ms. Wawira, Learned Counsel for the respondent, supported the submissions made on behalf of the 1<sup>st</sup> interested party.

### **The Applicant's Submissions in Response**

17. In his submissions on behalf of the applicant, Mr. Gachuba argued that the preliminary objection is premature as judicial review proceedings commence upon the filing of a Notice of Motion. It was his contention therefore that as the court did grant leave on 5<sup>th</sup> January 2015, the right time for the interested party to raise a preliminary objection was when it responded to the Notice of Motion which is yet to be filed.

18. Counsel submitted further that the preliminary objection does not meet the threshold set in the case of **Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] E.A. 696**. It was his submission that a preliminary objection, in accordance with the test set in the **Mukisa Biscuits** case, should only be on pure points of law and not when facts are contested, as in this case.

19. Mr. Gachuba submitted further that the applicant was seeking orders to compel the respondent to comply with her public duty to obey directions or orders of the Board, which directions were made pursuant to section 94 of the Public Procurement and Disposal Act under which procurement proceedings are suspended once an application for review is filed. Counsel relied on the decision in **Chairman, Emuhaya Land Disputes Tribunal (supra)** to submit that the respondent is bound by the provisions of Article 10 of the Constitution and section 2 of the Act to obey the law. It was his submission that the respondent's obligation to obey the law are enforced under sections 94 and 127 of the Act, and that the respondent commits a criminal offence under Section 136 if she contravenes any direction or orders of the Board.

20. With regard to the submission by the 1<sup>st</sup> interested party that the request for review before the Board

had been filed out of time, Mr. Gachuba submitted that section 68(2) and (3) of the Act provide that no contract should be entered into before 14 days after the notification. It was his submission that the notification contained in the letter dated 11<sup>th</sup> December 2014 was received on 17<sup>th</sup> December 2014, and that, as was decided in the case of **Chairman, Emuhaya Land Disputes Tribunal (supra)** time for filing the request for review began to run from the date on which the applicant receives the notification, which in this case was 17<sup>th</sup> December 2014. It was his submission therefore that the applicant's request was properly before the Board.

21. Counsel further submitted that the Court had jurisdiction, in accordance with Article 165(6) and (7) which contains the supervisory powers of the court, to issue orders of Mandamus to compel the respondent to comply with the orders of the Board. Counsel relied on the decision in **Republic –vs- Ministry of Interior and Coordination of National Government(supra)** and the **Republic –vs- Central Bank of Kenya(supra)** on the circumstances in which orders of Mandamus can issue in respect of public procurement. He asked the court to dismiss the preliminary objection which was misplaced as the court had power to entertain the application in accordance with section 99 of the Act.

### **Rejoinder**

22. In his response to the applicant's submissions, Mr. Bundotich argued that Order 53 of the Civil Procedure Code does not bar the interested party from raising the issue of jurisdiction at the consideration of the Chamber Summons application, and the preliminary objection could not therefore be said to be premature. It was also his submission that the applicant had conceded that it has a remedy under section 136 of the Act.

23. To the argument that the preliminary objection did not meet the test set in **Mukisa Biscuits (supra)**, Mr. Bundotich submitted that the case is to the effect that a preliminary objection should address itself to issues of law on undisputed facts, and it was his contention that this is what the interested party's objection did.

### **Determination**

24. In determining the preliminary objection raised by the interested party, I do so by considering three issues that arise from the submissions of the parties. The first is whether the preliminary objection is premature, as argued by the applicant, and that the interested party should have waited to raise it upon the applicant filing the substantive judicial review application since judicial review proceedings commence upon the filing of a Notice of Motion.

25. The question of the appropriate time to raise a preliminary objection has been addressed in various decisions in our courts. In the case of **Beatrice Cherotich Koskei and Another –vs- Olunguruone Land Dispute Tribunal and 2 Others Misc Civil Appl 861 of 2007**, the court observed as follows:

***“If, as respondents’ counsel contends, the present application is defective and incompetent, any proceedings based on it would be a nullity and a waste of everybody’s time. It is trite law that a preliminary objection can be raised at any time and that if such an objection exists, it is preferable for it to be raised at the earliest possible opportunity. I, therefore, hold that respondents’ counsel is entitled to raise his preliminary objection to the application as it stands, for the applicants to respond thereto for the court to make a determination thereon.”*** (Emphasis added)

26. These sentiments echoed the view of the court in the case of **Ali Oshan and Others –vs- Mrs. Catherine Kaswii Nyiha and Others Misc Civil Application 525 of 2002** where the court stated as follows:

***“It is obvious that the Kenya National Football Federation Constitution does not allow parties whose disputes fall within the definition of Article XIX (1) to commence proceedings in a court of law but to refer them to Arbitration. ... It is trite law that a preliminary objection can be***

***raised at any time when the action is still active. Hence Mr. Gikandi is perfectly right to raise the preliminary point at this stage...*** ” (Emphasis added)

27. I agree with the views expressed in the above matters. If there is a valid objection in law to a matter proceeding before a court of law, either for want of jurisdiction or for some other sufficient reason, then such objection should be raised at the earliest opportunity to avoid a waste of valuable judicial time. As the Court of Appeal observed in **Suleiman Said Shabhal –vs- Independent Electoral and Boundaries Commission and 3 Others, Civil Appeal No 42 of 2013:**

*“This Court, in **The Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (supra)** stated that a question as to the jurisdiction of the court, which may be raised by way of a preliminary objection, ought to be raised at the earliest opportunity and the court seized of the matter is obliged to decide the issue straight away on the material before it.”*

28. I therefore find and hold that it was in order for the interested party to raise the preliminary objection at this early stage in the proceedings.

29. The second issue to consider is whether the objection before me falls within the rubric of the **Mukisa Biscuits** case. The applicant argues that it does not, as the rule requires that a preliminary objection be raised on a point of law on undisputed facts.

30. In the **Mukisa Biscuits** case (supra), Law, JA stated as follows:

*“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”* (Emphasis added)

31. This case has also been followed in various decisions in our courts. In **Livingstone Mutsune and Another –vs- African Tours and Hotels Limited (In Receivership) and Another Industrial Court Cause No 55 (N) of 2010**, the court stated as follows:

*“[6] A preliminary objection is a point of law when if taken would dispose of the suit. It is what was formerly called a “demurrer”. The Respondent's Preliminary Objection fits the definition of a preliminary objection per the leading case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**. In the celebrated case **Law J.A.** stated a preliminary objection to be thus: -*

*“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

[7] *Sir Charles Newbold, President stated in the same judgment as follows:-*

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

[8] *The Respondent does not seek the exercise of judicial discretion. No, what the preliminary objection seeks to do is determine the issue of whether there is a cause of action in limine. It is well taken because if it succeeds the Court will be saved the cost of a lengthy trial and attendant expenses on either side.”*

32. In the case of **George Oraro –vs- Barak Eston Mbaja, Civil Suit No 85 of 1992**, Ojwang, J (as he then was) observed as follows:

*“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”*

33. In the present case, the 1<sup>st</sup> interested party raises the question of the court’s jurisdiction to entertain the applicant’s case as a preliminary point of law. It has not called for the examination of any facts, or for the exercise of the court’s discretion. Its argument, as I understand it, is that on the pleadings presently before the court, the court has no jurisdiction to determine the matter before it. The only fact that can be said to be in dispute, but which does not fall for consideration by this court, is whether the applicant’s request for review was filed in time and is therefore properly before the Board, which is a question for consideration by the Board when it considers the request for review before it.

34. I am therefore satisfied, on the material before me, that the preliminary point of law with regard to the jurisdiction of the court is well taken, and I shall therefore turn to a consideration thereof as the third and final issue for determination in this matter.

35. The Court of Appeal articulated the importance of jurisdiction in the case of the **Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367** in which it expressed itself as follows:

*“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....As soon as that is done, the court should hear and dispose of that issue without further ado.”*

36. Similar sentiments were expressed in the more celebrated case of **The Owners of Motor Vessel “Lillian S” -vs- Caltex Oil Kenya Ltd, [1989] KLR 1**.

37. The question before me is whether this court has jurisdiction to entertain proceedings for judicial review said to be brought pursuant to section 99 of the Public Procurement and Disposal Act.

38. It is not in dispute that the applicant tendered for provision of security services to the respondent, and that it was unsuccessful. It is also not in dispute that the applicant, dissatisfied with the decision of the respondent to award the tender to the interested parties, filed a request for review before the Board, namely Review Application No. 57 of 2014. It has also been acknowledged that the Board notified the respondent of the request for review pursuant to section 94 of the Act and regulation 74 (2) of the Regulation, and that it issued a directive on 22<sup>nd</sup> December 2014 to the effect that the respondent should not sign any contract with the winning tenderer unless the application before it was finalized.

39. Section 94 provides as follows:

*“Upon receiving a request for a review under section 93, the secretary to the Review Board shall notify the procuring entity of the pending review and the suspension of the procurement*

*proceedings in such manner as may be prescribed”.*

40. The applicant complains that despite being served with this directive, the respondent went ahead to enter into contracts with the interested parties. It has therefore approached the court under the provisions of section 99 to seek orders of judicial review. Section 99 provides that:

***“The right to request a review under this Part is in addition to any other legal remedy a person may have.”***

41. The interested party contends that the court has no jurisdiction to entertain judicial review proceedings under section 99, and that its jurisdiction can only be invoked under section 100 **after** the Board had made a determination or decision on an application for review. Section 100 is in the following terms:

***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. A party to the review which disobeys the decision of the Review Board or the High Court shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court shall be null and void.***

***4. If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect.”***

42. The question then is whether the applicant could properly, in light of the above provisions, approach the court for orders of judicial review under section 99 of the Act. In my view, the interested party is correct when it submits that in the circumstances such as are now before the court, the jurisdiction of the court can only be invoked in the circumstances provided under section 100, either by way of judicial review on the process, or by way of appeal on the merits of the decision, but after the decision of the Review Board has been made.

43. The applicant referred the court to the decision in **Republic -vs- Ministry of Interior and Coordination of National Government (supra)** in which the court, in considering the question of the grant of judicial review orders and ultimately declining to do so in the matter, observed as follows:

***“[44] It has been contended that this Court has the jurisdiction to review the decision of the Procuring Entity notwithstanding the availability of the procedure for review of the decision of the Entity by the Board...***

***[45] The remedy of judicial review is now not only a statutory remedy but is a constitutional remedy underpinned under Article 165(6) of the Constitution. That remedy, it is my view is one of the additional legal remedies contemplated under section 99 aforesaid. However, one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga -vs- The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate.***

43. The Court went on to conclude as follows:

***Therefore, unless due to the inherent nature of the remedy provided under the statute to resort***

**thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in *Speaker of The National Assembly -vs- Karume Civil Application No. Nai. 92 of 1992*, where it was held that *there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.***” (Emphasis added)

44. As I understand the reasoning of the court in the above matter, there are circumstances in which it may be appropriate to grant orders of judicial review under section 99 of the Act. This would, for instance be the case in such circumstances as arose in the case of **Republic –vs- Central Bank of Kenya (supra)** in which the respondent had declined to grant a contract to the successful tenderer even after a decision of the Board that it should and the court, while directing the respondent to sign the contract with the applicant, held with regard to the exercise of judicial discretion on whether or not to grant orders of judicial review as follows:

***“The discretion must be exercised judiciously. It would indeed defeat the purpose of judicial review to deny an applicant judicial review remedies where it has established that orders ought to issue and that there is no viable alternative remedy. Those are the circumstances prevailing in this case and orders of mandamus will issue as prayed in the application. The Respondent is directed to immediately proceed with the signing of a contract. This should be done not later than thirty days from the date of this judgment.”***

45. The circumstances in the Central Bank case are however, different from this case in that the applicant has an alternative remedy and process before the Board. The applicant is seeking orders of judicial review to enforce a directive of the Board made pursuant to its powers under section 93 and 94 of the Act. Section 93 provides the jurisdiction of the Board, and states as follows:

***(1) Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.***

***(2) The following matters shall not be subject to the review under subsection (1)—***

***(a) the choice of a procurement procedure pursuant to Part IV;***

***(b) a decision by the procuring entity under section 36 to reject all tenders, proposals or quotations;***

***(c) where a contract is signed in accordance to section 68; and***

***(d) where an appeal is frivolous.***

46. At section 136, which the applicant referred to in submissions by its Counsel, Mr. Gachuba, the Act provides for offences for failure to comply with an order of the Review Board. It states as follows:

***“A person who contravenes an order of the Review Board under Part VII or an order of the Director-General or the Review Board under Part VIII is guilty of an offence.”***

47. Section 94 of the Act falls under Part VII of the Act. Thus, if there indeed has been a disobedience of the directive of the Board as the applicant alleges, then the remedy for the applicant is to go back to the Board for the Board to take appropriate action under the Act.

48. For the above reasons, the preliminary objection succeeds. The present proceedings are struck out with costs to the respondent and the 1<sup>st</sup> interested party.

**Dated, Delivered and Signed at Nairobi this 23<sup>rd</sup> day of January 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr Gachuba instructed by the firm of Onyoni Opini & Gachuba & Co. Advocate for the applicant**

**Mr Njoroge instructed by the State Law Office for the respondent**

**Mr Bondotich instructed by the firm of Kale Maina & Bundotich & Co. Advocates for the 1<sup>st</sup> interested party**