



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. JR. 126 OF 2014

**IN THE MATTER OF AN APPLICATION BY APEX COMMUNICATIONS LIMITED
(TRADING**

AS APEX PORTER NOVELLI) FOR AN APPLICATION FOR ORDERS OF JUDICIAL

REVIEW OF THE NATURE OF CERTIORARI AND PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005,

AND THE PUBLIC PROCUREMENT AND DISPOSAL (REGULATIONS) 2006

AND

**IN THE MATTER OF THE DECISIONS DATED 10TH FEBRUARY, 2014, AND
COMMUNICATED**

BY A LETTER DATED 10TH FEBRUARY, 2014 AND 17TH MARCH, 2014, BY THE

PUBLIC PROCUREMENT ADMINISTRATIVE & REVIEW BOARD

AND

BY THE MINISTRY OF HEALTH

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS

IN THE NATURE OF CERTIORARI AND PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

AND

PRINCIPAL SECRETARY MINISTRY OF HEALTH....1ST RESPONDENT

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....2ND RESPONDENT

EX PARTE

APEX COMMUNICATION LIMITED

Trading as APEX PORTER NOVELLI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 4th April, 2014, the ex parte applicant herein, **Apex Communication Limited Trading As Apex Porter Novelli**, seeks the following orders:

1. **Certiorari: to bring into this Court and quash the decision of the 1st Respondent dated 10th February, 2014, or thereabouts and also its decision to terminate the negotiations with the Applicant and the decisions of the 2nd respondent (PPARB) dated 17th March, 2014.**
2. **Prohibition: An order in the nature of prohibition to prohibit the procuring entity or any one claiming under them, pursuant to the decision aforesaid in its letter dated 10th February, 2014, proceeding to negotiate with the next qualified bidder in this procurement or re-advertising the same, notwithstanding the complaint lodged herein.**
3. **Mandamus: An order directing the 1st Respondent to conclude the tender/award process by finalizing the negotiations and entering into contract with the ex-parte Applicant in line with Sections 84 and 85 of the Public Procurement and Disposal Act 2005.**
4. **Any other Orders that Honourable Court would deem just, equitable and fair to grant in the circumstances and in addition to the above.**
5. **The costs of these proceedings be provided for.**

Ex Parte Applicant's Case

2. The same application was supported by a verifying affidavit sworn by **Lawrence Gikaru**, a Director of the Applicant and also its Project Team Leader on 31st March, 2014.

3. According to the deponent, the ex-parte Applicants are internationally and regionally well established consultancy business firm that deals with their expertise sectors of a full service public relations and strategic communications agency and have since establishment undertaken successfully a large number of communications programmes and are a full brand network partner of Porter Novelli one of the largest communications firms in the world and networks with a host of World class industry leading tools.

4. It was deposed that on 10th February, 2012, or thereabout, the 1st Respondent, by its predecessors, the Ministry of Public Health And Sanitation, by an advertisement in the local print media, advertised and called for Requests for Expression of Interest (REO1) for a project generally referred to as for **Communication Consultancy Services for the Health Sector Services Fund (HSSF)** which services included the Communication Strategy Implementation and Media Campaign for the HSSF that were to be financed by the World Bank.

5. Pursuant thereto, it was deposed that the Applicant, amongst the following firms were the ones addressed for the expression of interest;

- a. M/s Capital Guardians;**
- b. M/s ICON- Institute of Von- Grootte;**
- c. M/s Euro Health Group A/S (EHG);**
- d. M/s Sage Media;**
- e. M/s Apex Porter Novelli;**
- f. M/s Strategy Centre Africa.**

6. It was deposed that upon the 1st Respondent checking the bids on their responsiveness to the conditions set out in the request for expression of interest, the 1st Respondent found only the following firms' bids as qualified and shortlisted them.

- a. M/s Capital Guardians;**
- b. M/s ICON- Institut of Von- Grootte;**
- c. M/s Sage Media;**
- d. M/s Apex Porter Novelli; (The Applicant)**
- e. M/s Strategy Centre Africa.**

7. The 1st Respondent then invited these shortlisted firms to bid further by submitting their "Request for Proposals" after which the 1st Respondent proceeded and evaluated the Technical and Financial Proposals of the firms that bid which included the Applicant's. On completion of the technical evaluation, the 1st Respondent found the Applicant's bid as the most responsive and invited it for contract negotiations on 31st of October 2013 and due to the positive contract negotiations, the 1st Respondent and the Applicant held another meeting on the 18th of November 2013 on the breakdown of costs.

8. It was deposed that the Applicant provided the 1st Respondent with its strategy on breakdown of costs as requested and duly extended its bid validity on every occasion also as requested by the 1st Respondent. However, the 1st Respondent rather uncharacteristically took longer than anticipated in evaluating and finally in the negotiations to contract, in the course of which it requested for various bid validity extensions. While the aforesaid was the status, and while the negotiations were ongoing without any gridlock, the 1st Respondent by a letter dated 10th February, 2014, wrote and notified the ex-parte Applicant that its financial proposal was found non-responsive allegedly because it was not in line with the terms of reference and hence the 1st Respondent had terminated the contract negotiations.

9. This action prompted the Applicant filed a Request for Review at the Public Procurement Administrative Review Board *vide* No. 5 of, 2014 for amongst other reasons as set out in the Applicant's Substantive Grounds;

- a. It irregularly and un-procedurally reopened the evaluation of the financial evaluation whose evaluation criteria, and the scores allocated were by then beyond their powers, hence acted beyond their jurisdiction.**
- b. It illegally created another evaluation step and criteria contrary to the criteria set out in**

the tender documents, and the law governing procurement in Kenya, when it injudiciously introduced what it is not in line with the terms of reference.

10. However, on 17th March 2014, the 2nd Respondent dismissed the Applicant's Request for Review, and dissatisfied with the said decision, the Applicant instructed the firm of **C.N. Kihara Advocates** to file the proceedings herein against the said decision for amongst other reasons as set out in the Applicant's Substantive Grounds;

a. The 2nd respondent acted in excess of its powers and jurisdiction it entertained and was influenced unfairly and contrary to the limit of its powers, held that the time limit in Legal Notice No. 106 of 2013, was applicable retrospectively in this procurement, although the procurement had commenced before its enactment and commencement date, hence applying it retrospectively, to defeat the already accrued rights of the Applicant in this procurement.

b. The 2nd Respondent again acted in excess of its jurisdiction when it failed to consider the merits of the application before it simultaneously, and/or alternatively to making the decision of want of jurisdiction, even against the Applicant's plea, thereby denying the Applicant the benefit of a hearing and a decision on merit, at the tribunal of first instance, so to be able to converge at the 2nd instance the twin issues, unlike the situation now, interrogate the basis of the 1st Respondent silence and failure to apply the spirit and policy of the entire Act, as read wholly and together with the concerned **Articles 227(1) of the Constitution, 2010**, to be that the 1st Respondent was obliged to process this procurement in a fair, equitable, transparent, competitive and cost-effective, so much that to give value to these principles, the 1st Respondent was obligated, before terminating the negotiations to contract with, the only truly mentioned contentiously substantive issue, was the failure to add up the (sic), although it was unconditionally stated, the cost of implementation of the design, once agreed.

11. It Was submitted on behalf of the applicant that decisions affecting the legal rights of an individual which is arrived at by procedure which offends the principles of natural justice is outside the jurisdiction of the decision making body and that the 1st Respondent's letter dated 10th February, 2014 notifying the ex parte applicant that its financial proposal was non-responsive allegedly because it was not in line with the terms of reference offends the principle of natural justice. To the applicant the 1st Respondent purported to re-open the financial proposal evaluation during negotiations despite the fact that the same had already been determined hence the 1st Respondent created 'another' evaluation criteria that never existed, hence beyond jurisdiction and the said decision was tainted with illegality, irrationality and procedural impropriety. In support of its submissions the applicant relied on **Republic vs. Deputy Inspector General of Police & 32 Others [2013] eKLR and Rahab Wanjiru Njuguna vs. Inspector General of Police & Another [2013] eKLR.**

12. It was submitted that Legal Notice No. 106 of 18th June, 2013 which the 2nd Respondent relied upon to hold that the ex parte applicant's request for review had been filed out of time was not applicable to the subject tendering process as the said legislation was effective after the subject tendering process had commenced. In support of this limb of submission reliance was placed on section 28 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya.

13. It was submitted that the 2nd Respondent acted ultra vires its powers when it applied the amended regulations retrospectively against the applicant's request for review which is against the principle of legitimate expectation.

14. By an amendment brought about by the publication on 18th June 2013 of the Legal Notice No. 106 of 2013, the ***Public Procurement and Disposal Regulations, 2006*** were amended by way of ***Public Procurement and Disposal (Amendment) Regulations, 2013***. It was however contended that the said amended Regulations did not as is expected from a well drafted legislative process contain in clear terms, the transitional provisions setting out the time by when they were to be effective and at what stage of the

procurement they were to be applied. It was submitted that to interpret the said amendments to operate retrospectively would not meet the legality test and would also be contrary to public policy. In support of this submission the ex parte applicant relied on **Law & Orders** by **C K Allen** 3rd Edn. page 204, **Odgers' Construction of Deeds and Statutes**, 5th Edn. 2008 by **Gerald Dworkin** and **Dunlop Rubber Co. Ltd vs. Longlife Battery Depot [1958] LR 1-65**.

15. It was the ex parte applicant's position that as the parties had commenced negotiations with a view to entering into a contract the decision by the ex parte applicant to terminate the negotiations without giving the applicant an opportunity to make representations went against the applicant's legitimate expectations. The applicant in support of this submission relied on **Abdul Waheed Sheikh & Another vs. Commissioner of Lands & 3 Others [2012] eKLR**.

16. Based on **Rahab Wanjiru Case** (supra) it was submitted that the grounds upon which the Court exercises judicial review jurisdiction are incapable of exhaustive listing and cannot be limited to the usual grounds of illegality, irrationality and impropriety of procedure.

1st Respondent's Case

17. On behalf of the 1st Respondent a replying affidavit was filed sworn by **Prof. Fred H K Segor**, the Principal Secretary in the Ministry of Health on 8th July, 2014.

18. According to the deponent, the Ministry the 1st Respondent herein advertised in the print media and called for requests for expression of interest (REO1) for a project referred to as communication consultancy services for the Health Sector Services Fund (HSSF) which advertisement was for services that included communication strategy implementation and media campaign for the HSSF under the tender number MPHS/RFP/HSSF/KHSSP-CS/004/2012-2013 and the same was to be financed by the world bank.

19. It was deposed that the tender was governed by the selection and employment of consultant under IBRD Loans and IDA Credits and Grants by World Bank Borrowers guidelines, and the Ministry of Public Health and sanitation tender documents instructions which were consistent with the World Bank guidelines.

20. Pursuant thereto, 14 firms did express their interest and among them the applicant herein and upon the bids being checked on their responsiveness to the conditions set out in the request for the expression of interest, 6 firms amongst which was the applicant were shortlisted as successful. The 1st Respondent proceeded to evaluate the technical and financial proposals of the firms that bid, which included the applicants firm which evaluation was to be done as per the evaluation criteria set out in the tender documents. It was deposed that the stipulated method of selection was Quality and Cost Based Selection method (QCBS) which takes into account the weighted scores of the technical and financial proposals in determining the ranking of the prospective firms and that on completion of the technical evaluation, the applicant was found to be the most responsive and it was invited for the contract negotiations.

21. According to the deponent, during negotiations the Ministry applied the World Bank guidelines for the selection and employment of consultants in the sourcing for the communication consultancy services for the Health Sector Funds in accordance with section 3a 2, page 11 of the financial agreement signed between the Government of Kenya and the World Bank on the 5th of June, 2010 for the support of the Kenya health sector support project which was also consistent with the provisions of Article 7(1) of the **Public Procurement and Disposal Act 2005**. He added that as provided in the said financial agreement the World Bank Standard Request For Proposal (hereinafter referred to as "SRFP") document dated December 2008 and revised in May 2010 was used to invite the proposals from the shortlisted consultants the SRFP document included the Terms Of Reference (hereinafter referred to as 'TOR') and the evaluation criteria. To him, the Terms of Reference required consultants to prepare and submit both technical and financial proposal which Terms of Reference comprised of two components namely the design of HSSF Communication strategy on one part and its implementation on the other part. The

financial proposal was to include the cost of the consultants input in the delivery of the two components.

22. The deponent further deposed that the minimum quality score for the technical proposal was 70 points and considered specific experience of consultants, adequacy of the proposed methodology and work plan in responding to terms of reference, key professional staff qualifications and participation by nationals among proposed key staff. The applicant's technical proposal was considered responsive and therefore considered in the next stage of evaluation process and its financial proposal was opened together with other firms that had met the minimum quality score and its financial proposal was for a total sum of Kshs. 4,500,000.00 and following the weighting of the technical and financial scores at the ratio of 80:20 respectively, its proposal was ranked the highest and therefore invited for contract negotiations.

23. It was averred that the Ministry appointed a team that negotiated the contract with the consultant as provided for in the bidding document at Para 5.8, that the successful bidder shall be invited for contract negotiations and during the contract negotiations the Applicant indicated that their financial proposal did not cover the entire assignment as per the Terms of Reference but only included the cost of the design of the communication strategy and excluded the cost of its implementation with the intention to negotiate the cost of the implementation component once the design is concluded and contract signed. This, according to the deponent was inconsistent with the provisions of Para 3 of the RFP, which provided that a financial proposal shall be prepared and shall list all costs associated with the assignment, hence its proposal rejected for being non responsive.

24. It was deposed that the Ministry could not enter into negotiations of costs once the contract had been signed. This is pursuant to the World Bank Guidelines for selection and Employment of Consultants Para 2.24 of the guidelines, for lump sum contracts the consultant is deemed to have included all prices in its financial proposal so neither arithmetical correction nor price adjustments shall be made. Therefore the Ministry would have breached the Guidelines if it had allowed for variations in the financial proposal. It was on the basis of the above that the Ministry of Health terminated the contract negotiations with the Applicant and wrote to the World Bank requesting it to allow the Ministry to invite the second highest ranked firm for negotiations. This decision, it was contended was in line with the RFP and that the applicant Financial Proposal was for partial and not full assignment. It was reiterated that the applicant's failure to give full cost of the assignment was inconsistent with the World Bank's guidelines, which guidelines the 1st respondent were bound to follow. It was the deponent's view that for the applicants to have qualified for negotiations did not mean that it was automatic for them to enter into a contract with the 1st respondent since the applicant had to satisfy the negotiating committee that they met the set out requirements.

25. To the deponent, the ex-parte applicant has not demonstrated any reason(s) why any of the order sought should be granted and having lost in a fair process, the ex-parte applicant is merely trying to use the court process as an avenue for a second appeal. It was asserted that Communication Consultancy Services for the Health Sector Services Fund (HSSF) is integral to the health sector and the public at large considering the prevailing health issues in the country and that the delay of negotiations with the next bidder is wrong. In his view, the Court is being asked to overturn a properly conducted process of evaluation and if the orders sought by the applicant are granted as prayed, the court will be seeking to force the World Bank to advance funds a bidder who has not fulfilled the requirements of the tender, and in any case the World Bank will not advance the funds in this circumstances, which will jeopardize the implementation of the project. It was therefore the deponent's position that the ex-parte applicants request to be awarded the contract as the successful bidder has no basis since after the cost analysis it was found to have not fulfilled the requirements as to the costs. The ex-parte applicants had quoted only partial costs as against the full cost requirement with the intention of re negotiating after it has entered into the contract.

26. Based on legal advice it was deposed that judicial review orders sought by the ex-parte applicant can only be issued by the High court when it is shown that the decision making body exceeded its jurisdiction or acted in breach of the rules of natural justice yet there is no evidence produced by the applicant showing that the 1st and 2nd Respondents in coming up with their respective decisions acted unreasonably, arbitrarily or in bad faith. It was therefore the 1st Respondent's case that his application is an

abuse of the court processes as the applicant seeks to delay the provision of the consultancy services that would benefit the public. The same is bad in law and against the public interest and thus ought to be dismissed with costs.

27. It was submitted on behalf of the 1st Respondent that the decision to terminate the negotiations was warranted after the 1st Respondent discovered that the applicant's financial proposal did not cover the entire assignment.

28. It was submitted that the 2nd Respondent's decision to dismiss the request for review was on the ground that the 2nd Respondent had no jurisdiction to hear the review since the same had been filed out of time based on Legal Notice No. 106 of 2013.

29. It was submitted that the ex parte applicant was given an opportunity during the negotiation to defend its financial proposal and that the Court cannot compel the 1st Respondent to conclude the tender process if the applicant's proposal was not responsive. In support of the submission the 1st Respondent relied on **Republic vs. Judicial Service Commission ex parte Pareno [2007] 1 KLR, Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** and **Patoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.**

2nd Respondent's Case

30. On their part the 2nd Respondent opposed the application by way of a replying affidavit sworn by **Pauline Opiyo**, the secretary of the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") on 25th April, 2014.

31. According to the deponent, the respondent received the Applicant's Request for review on the award of tender No. MPHS/REF/HSSF/KHSSP-CS/004/2012-2013 for communication consultancy services for health sector fund (HSSF) on 24th February 2014 and the Board heard both parties on 17th March 2014, considered their submissions, determined the Applicant for review and delivered its ruling on same day in which it dismissed the request for review by the applicant therein based on the findings that (a) the request for review relates to a complaint that arose on 10th February 2014 when the provisions of legal notice number 106 of 18th June 2013 were already in force and (b) that the Board has no jurisdiction to hear and determine the Request for review dated 24th February 2014 as the request was filed out of time contrary to Regulation 73(2)(c) of the ***Public Procurements and Disposal Regulation 2006*** as amended by paragraph 20 of Legal Notice 106 of 18th June 2013 which requires that a request for review be filed within 7 days from the date of occurrence of a breach or date of notification. Therefore in making its decision, the board considered only the provisions of the Act, the Regulations and the facts presented before it by the Parties and no extraneous issues whatsoever were considered and being a creature of statute, the Board can only exercise such powers conferred on it by statute and the governing regulations.

32. It was the deponent's position that jurisdiction is everything, without it the board has no basis to proceed with the hearing and determination of proceedings. To her since the legal Notice No.106 of 2013 which provided that a request for review should be made 7 days after notification came into force on 18th June 2014 and the ex-parte applicant received the notification on 12th February 2014, the applicant requested for review on 24th February 2014, past the seven days mandated by law. Once the board realized it has no jurisdiction to determine the matter it had no mandate to determine the merit of the application.

33. It was therefore the Board's case that its decision was made within its mandate, and the specific sections in the law on which the board's decision was pegged have been expressly pronounced in the Board's decision hence the applicants allegation that the board acted unreasonably, in excess of its powers/ jurisdiction and was influenced unfairly in making its decision is baseless. Further, the applicant's application was, 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.

Determinations

34. Having considered the application, the affidavits both in support of and in opposition to the application and the submissions of the parties, this is the view I form of the matter.

35. It is clear that in this application the ex parte applicant is challenging both the decisions made by the 1st Respondent terminating the negotiations between the two parties and the decision of the 2nd Respondent holding that it had no jurisdiction to entertain the request for review on the ground that the same was made out of time.

36. The applicant seems to be relying on sections 99 and 100(1) of the ***Public Procurement and Disposals Act***, 2006 (hereinafter referred to as the Act).

37. Section 99 of the said Act provides:

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

38. Section 100(1) of the Act on the other hand provides:

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.

39. In this case it is clear that the 1st Respondent's decision terminating the negotiations was challenged before the 2nd Respondent vide Request for Review No. 5 of, 2014. This Court has had an occasion to consider the said section 99 in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 in which the Court expressed itself as follows:

“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. 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. In this case, the applicant properly made a request for review to the 2nd Respondent. Having done so, it cannot return to the decision of the 1st Respondent. The only competent decision which the Applicant can question in these proceedings is the decision of the 2nd Respondent.”

40. To allow a party who has challenged a decision made by a Procuring Entity before the Public Procurement Administrative Review Board to invoke the supervisory jurisdiction of this Court and once more challenge the decision of the entity after the Board has delivered a decision which the party feels is not favorable to it would in my view amount to an abuse of the legal and court process as it would amount to playing lottery with the legal process. It must be remembered that one of the principles underlying procurement processes is the finality of the process and that principle cannot be achieved if parties are free to contrive legal ingenuity to prolong the process. Legal process, in my view ought to be invoked genuinely and ought not to be turned into a circus.

41. Accordingly it is my view and I so hold that this Court ought not to entertain the challenge to the decision of the 1st Respondent in these proceedings.

42. It must also be remembered that section 36 of the Act provides as follows:

(1) A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.

(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.

(3) On the request of a person described in subsection (2), the procuring entity shall give its reasons for terminating the procurement proceedings within fourteen days of the request.

(4) If the procurement proceedings involved tenders and the proceedings are terminated before the tenders are opened, the procuring entity shall return the tenders unopened.

(5) The procuring entity shall not be liable to any person for a termination under this section.

(6) A termination under this section shall not be reviewed by the Review Board or a court.

(7) A public entity that terminates procurement proceedings shall give the Authority a written report on the termination.

(8) A report under subsection (7) shall include the reasons for the termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due.

43. In this case the procurement proceedings were terminated during the negotiations leading to the entry of the contract and that the contract had not yet been entered into. It follows that under section 36(6) the 1st Respondent's decision is not subject to review by this Court. That being the position, the ex parte applicant cannot by relying on the principle of legitimate expectation successfully invoke the supervisory jurisdiction of this Court for an order whose effect would be to perpetuate an illegality.

44. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** it was held that:

“ Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way...

45. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held:

“The general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Judicial

resort to estoppel in these circumstances may prejudice the interests of third parties. Purported authorisation, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims.....Legitimate expectation is founded upon a basic principle of fairness that legitimate expectation ought not be thwarted – that in judging a case a judge should achieve justice, weigh the relative “strength of expectation” of the parties. For a legitimate expectation to arise the decision must affect the other person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker not to be withdrawn without giving him first an opportunity of advancing reasons for contending that they should be withdrawn.....A representation giving rise to legitimate expectation must however be based on full disclosure by the applicant. Thus where he does not put all his cards face up on the table it would not be entitled to rely on the representation. In this case any legitimate expectation has clearly been taken away firstly by the conduct of the applicant and the provisions of the Statute Act and therefore there is no discretion.”

46. It follows that the concept of legitimate expectation cannot operate against the law. Legitimate expectation as the phrase indicates must be legitimate and cannot be based on actions which are patently illegal. As was held in Republic vs. Kenya Revenue Authority & Another ex parte Kronos LCS Centre East Africa Limited [2012] eKLR:

“Legitimate expectation can only operate inside and not outside the law. One can only rely on legitimate expectation when the law has been complied with. Where taxes have not been paid then the Applicant cannot rely on the principle of legitimate expectation to avoid payment of taxes.”

47. It must be noted that Section 2 of the *Public Procurement and Disposal Act, 2005* is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. Therefore to compel the procuring entity to enter into a contract in contravention of the principles underlying public procurement would defeat the purpose for which the Act was enacted. In this case, the 1st Respondent contends that the reason for the termination of the negotiations was the discovery that ex-parte applicants had quoted only partial costs as against the full cost requirement with the intention of re negotiating after it has entered into the contract. To investigate this issue with a view to arriving at a different conclusion would amount to usurping the powers of the 1st Respondent. As was held in Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR 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*.

48. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

49. It was contended that the 2nd Respondent erred in declining to entertain the request for review based

on the provisions of Legal Notice No. 106 of 18th June, 2013 which reduced the period for making the request from 14 days to 7 days. It is not in doubt that the applicant's request for review was lodged with the 2nd Respondent on 24th February, 2014, long after the said amendment had come into force. Whereas it is true that the procurement process was commenced before the said amendment, the request was made after the amendment. What the Legal Notice did, in my view was to introduce a procedural amendment.

50. It is a rule of statutory interpretation that amendments to procedural rules operate retrospectively unless indicated otherwise. In the case of **Said Hemed Said vs. Emmanuel Karisa Maitha & Another Mombasa HCEP No. 1 of 1998** stated as follows:

“The general rule is that when the law is altered during the pendency of an action or proceeding, the rights of the parties are to be decided according to the law as it existed when the action or proceeding was begun unless the new statute shows a clear intention to vary or affect such rights and such intention may be even by implication. But in the case of an enactment, which alters or affects only procedure or practice of the Court, the general principle is that it has a retrospective effect unless it has some very good reason against it”.

51. Again in the case of **Mistry Jadva Parbat & Company Ltd vs. Ameer Kassim Lakha & 2 Others Civil Appeal (Application) No. 296 of 2001** the Court of Appeal stated inter alia as follows:

“It is also a rule of construction of statutes that prima facie, if a provision of legislation affects procedure only, it operates retrospectively. Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction and one of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective effect unless a clear intention to that effect is manifested. Whereas, if it affects procedure only, prima facie, it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation, which has to be ascertained, and the rule of construction is only one of the factors to which regard must be had in order to ascertain that intention”.

52. The applicant however relied on section 28 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya which provides:

Subsidiary legislation may be made to operate retrospectively to any date, not being a date earlier than the commencement of the written law under which the subsidiary legislation is made, but no person shall be made or become liable to any penalty whatsoever in respect of an act committed or of the failure to do anything before the day on which that subsidiary legislation is published in the Gazette.

53. What that provision states is that whereas a subsidiary legislation may be retrospective, its retrospectivity cannot predate the primary legislation and even where the subsidiary legislation operates retrospectively, no person can be liable to any penalty in respect of an act committed or omission which took place before the publication of the said legislation. However as appears from **Dunlop Rubber Co. Ltd vs. Longlife Battery Depot** (supra) a decision cited by the ex parte applicant itself:

“The rule of construction...is that, save as concerns procedural matters...retrospective operation is not to be given to a statute so as to impair existing rights unless that effect cannot be avoided without doing violence to the language of the enactment.”

54. It is therefore clear that where the effect of an amendment affects substantive rights as opposed to procedural rights the same ought not to operate retrospectively. Whereas I agree that the drafters of the Legal Notice ought to have inserted transitional provisions in order not to prejudice those matters where decisions had been made by the Procuring Entity but the 14 days' period had not lapsed, in the circumstances of this case, where the decision was made long after the amendment, I do not see any prejudice caused by the retrospective application of the amendment. In any case, these proceedings are

not a challenge towards the said amendment.

55. In the premises I find that the 2nd Respondent was properly entitled to invoke the provisions of Legal Notice No. 106 of 2013 in its decision.

Order

56. Having considered the issues raised in these proceedings the order which commends itself to me and which I hereby make is that the Notice of Motion dated 4th April, 2014 is unmerited. Consequently, the same is dismissed with costs to the Respondents.

Dated at Nairobi this 22nd day of January, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Wilson for Mr. C N Kihara for the applicant

Mr. Munene for Ms Chilaka for the Respondent

Cc Patricia