REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(JUDICIAL REVIEW DIVISION)

J.R MISC. APPL. NO. 477 OF 2014

IN THE MATTER OF TENDER NO. KAA/197/2013-2014 FOR THE DEVELOPMENT AND MANAGEMENT OF AN INTERNATIONAL BRAND FAST FOOD OUTLET AT JOMO KENYATTA INTERNATIONAL AIRPORT, NAIROBI.

AND

IN THE MATTER OF THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD MADE ON 18TH DECEMBER 2014

AND

IN THE MATTER OF SECTIONS 66, 98 AND 100 OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005 AND REGULATION 73 OF THE PUBLIC PROCUREMENT AND DISPOSAL (AMENDMENT) REGULATIONS 2013

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

BETWEEN

REPUBLIC …….APPLICANT

AND

PUBLIC PROCUREMENT .....

ADMINISTRATIVE REVIEW BOARD…….....…….....RESPONDENT

SUZAN GENERAL TRADING JLT…….....……..1ST INTERESTED PARTY

KENYA AIRPORTS AUTHORITY…….....…..2ND INTERESTED PARTY

EXPARTE: **HOGGERS LIMITED**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 31st December, 2014, the *ex parte* applicant herein, **Hoggers Limited,** seeks the following orders:

> **1. That an Order of certiorari be issued to remove to this Honourable Court for the purposes of being quashed, the Respondent's entire decision delivered on 18th December 2014 with respect to Tender No. KAA/197/2013-2014 for the Development and Management of an International Brand Fast Food Outlet at Jomo Kenyatta International Airport, Nairobi allowing the 1st Interested Party's Request for Review no. 25/2014 of 19th June 2014 and awarding the Tender No. KAA/197/2013 – 2014 for the Development and Management of an International Brand Fast Food Outlet at JKIA to Suzan General Trading JLT.**
>
> **2. That an Order of certiorari be issued to remove to this Honourable Court for the purposes of being quashed all contracts/agreements entered into between Suzan General Trading JLT and Kenya Airports Authority consequential to the Respondent's entire decision delivered on 18th December 2014 with respect to Tender No. KAA/197/2013-2014 for the Development and Management of an International Brand Fast Food Outlet at Jomo Kenyatta International Airport, Nairobi.**
>
> **3. That an Order of Mandamus directed at Kenya Airports Authority requiring it to immediately enter into a contract with the Applicant as the highest evaluated bidder for the performance of the Tender No. KAA/197/2013 – 2014 for the Development and Management of an International Brand Fast Food Outlet at Jomo Kenyatta International Airport, Nairobi.**
>
> **4. That the costs of and incidental to this suit be borne by the Respondent.**

Ex Parte Applicant's Case

2. The application was supported by a verifying affidavit sworn by **Nurdin Ajania**, the Chairman of the Board Directors of the Applicant's Company on 29th December, 2014.

3. According to the deponent, the Applicant submitted a tender No. KAA/197/2013 – 2014 for the Development and Management of an International Brand Fast Food Outlet at Jomo Kenyatta International Airport (the tender). Following evaluation, the Applicant was awarded the tender by the 2nd Interested Party (**KAA**). However, being dissatisfied with the award of tender to the Applicant, the 1st Interested Party (**Suzan**) filed a Request for Review with the Respondent vide Review No. 16 of 6th May 2014 after hearing of which the Respondent nullified the award of tender to the Applicant and directed a re-evaluation.

4. According to the deponent, in nullifying the award of tender to the Applicant the Respondent directed that KAA re-evaluates the tenders of the three most responsive bidders for both technical and financial evaluation in accordance with the criteria set out in the tender documents and to take into account the findings of the Board.Upon reevaluation, the Applicant again emerged as the highest evaluated bidder when technical and financial scores were put together and on the 10th June 2014, a notification of award of tender was issued to the Applicant by KAA.

5. Once again being dissatisfied with KAA's decision to award the tender to the Applicant, on the 19th of June 2014 Suzan filed yet another Request for Review and on the 3rd of July 2014, filed supplementary grounds of review. Before commencement of the hearing for the Request for Review, an objection was raised by KAA supported by the Applicant on the admissibility of the said supplementary grounds on the basis that the Respondent lacked jurisdiction to consider them as they had been filed out of time which objection was upheld by the Respondent and the said supplementary grounds struck out on 16th July, 2014 and the Respondent dismissed the Request for Review and ruled

that KAA had complied with its earlier orders of 3rd June 2014 and further that the Applicant had emerged the highest evaluated bidder for technical and financial scores combined.

6. Suzan then took out Judicial Review proceedings in J.R Application No. 289 of 2014 where it among other things contended that they were not afforded a chance to make oral submissions before the said supplementary grounds were struck out. The Superior Court in its judgment delivered on 19th November 2014, ruled only on the issue of whether Suzan was heard before their Supplementary Grounds for Review were struck out and being satisfied that they were not, quashed the Respondent's decision of 16th July 2014. The Superior Court further directed that the Request for Review be heard *de novo* in compliance with the rules of natural justice.

7. Thereafter, parties were invited by the Respondent to appear before it on 5th December 2014 where it was directed that both the preliminary objection on the Supplementary Grounds for Review and the Request for Review be argued together and parties were then directed to file their written submissions. Pursuant thereto parties appeared before the Respondent on the 10th of December 2014 for purposes of highlighting their written submissions and a ruling was delivered on 18th of December 2014 in which the Respondent allowed Suzan to rely on the Supplementary Grounds on the basis that they were not new grounds. Further it sought reliance on Article 159(2) of the Constitution and Section 98 of the ***Public Procurement & Disposal Act*** **("the Act")**.

8. However the applicant's position was that there exists no provision under the Act which confers the Respondent with jurisdiction to admit the so-called supplementary grounds out of time; that the Act does not distinguish between new and supplementary grounds and Regulation 73(2)(b) and (c) of the ***Public Procurement & Disposal Regulations*** ("the Regulations") is very explicit that the Request for Review shall be accompanied by such statements as the Applicant considers necessary to support its request and should be done within 7 days of the notification of award, hence the statement contains the grounds and must be filed within 7 days of the Request for Review; it is not in doubt that the Supplementary Grounds of Review were filed on the 3rd of July 2014, 23 days after the notification of award of tender to the Applicant; Article 159(2) of the Constitution cannot provide a cure for documents filed out of time; section 98 of the Act does not confer any jurisdiction to admit a document filed out of time and besides, the finding by the Respondent that it has jurisdiction to allow amendment of pleadings is completely misplaced as it was not dealing with an issue of amendment of pleadings; and a power to do something must be expressly conferred and cannot be a matter of implication.

9. It was deposed that the Respondent in its decision identified only one issue for determination which was whether the Kenya Airports Authority failed to comply with the Orders of the Board as directed in Review Case No. 16/2014 of 6th May 2014. According to him, in its said orders, the Respondent had directed that KAA to re-evaluate the tenders of the three most responsive bidders for both technical and financial in accordance with the criteria set out in the tender document and take into account the findings of the Board. However, the Respondent in its impugned decision did not point out where in the said reevaluation KAA failed to comply with its Orders instead and without any jurisdiction whatsoever, the Respondent introduced a totally new requirement that was not in its previous Orders to the effect;

> **"It was the Board's <u>expectations</u> that the procuring entity...would ensure that the bidder with the highest minimum guaranteed concession fee for the period of the tender would then be awarded the tender…."**

10. According to the deponent, there was never an Order by the Respondent that the award of tender was to be made to the tenderer offering the highest minimum guaranteed concession fee and no wonder the Respondent faults KAA on the basis of an 'expectation' as opposed to a specific order they found to have been violated. To him, by introducing a new directive/order as a basis to overturn KAA's award of tender to the Applicant after its earlier orders had been made and became binding under section 100 of the Act, was without jurisdiction and the Respondent lacked powers to revisit the

same. Besides, the tender document was very clear that the minimum guaranteed concession fee is Kshs 500,000/- and under Section 66 of the Act, the evaluation and comparison is to be done using procedures and criteria set out in the tender documents and no other criteria shall be used.

11. It was therefore the applicant's case that for the Respondent to nullify the award of tender to the Applicant and award it to Suzan based on a criteria that departs from the tender document and the Act which was not expressly stated in its earlier decision was unlawful and *ultra vires*. Moreover, the award of tender was not based solely on concession fees but the cumulative score for both technical and financial evaluation, which Suzan did not emerge as the highest**.**

12.The applicant's case was that in view of the reasons given by the Respondent for the nullification of the Applicant's award of tender, it is evident that the same was actuated by extraneous considerations, is unreasonable, irrational and arbitrary.

13.The applicant also filed rejoinders to the replying affidavits.

14.It was submitted on behalf of the applicant that in arriving at the impugned decision, the Respondent unlawfully admitted and relied on the Supplementary Grounds of review filed on 3rd July 2014, two weeks after the Request for Review was filed. This the Applicant contended was contrary to Regulation 73 of the ***Public Procurement and Disposal Regulations 2013***, which provides that the Request for Review shall be filed within seven days from the date of notification of the decision being challenged and shall be accompanied by such statements as the Applicant considers necessary in support of its request. To the applicant, by the Respondent's admitting the said Supplementary Grounds it acted unlawfully and without jurisdiction. In support of this submission the Applicant relied on **JR No.401 of 2013, Republic vs. Public Procurement Review and Administrative Review Board & 2 Ors Ex Parte Fursy's Kenya.**

15. To the applicant Article 159(2) of the Constitution which was relied upon as the basis for its decision to allow the Supplementary Grounds was inapplicable as matters of limitation of time are not technicalities but are part of substantive law and to support this submission, the Applicant relied on **Rosaline Tubei & 8 Ors vs. Partrick K Cheroiyot 3 Ors (2014) eKLR, Civil Appeal No.159 of 2013** and **Charles Kamuren vs. Grace Jelagat Kipchoim & 2 Ors [2013] eKLR**. It was asserted on behalf of the Applicant that the said grounds were not new but merely elaborated the original hence the Applicant deviated from its original issue.

16. The Applicant further submitted that the Respondent in the impugned decision departed from its own decision on 3rd June, 2014 by making a finding of none compliance which it could not point out in its earlier decision hence acted without jurisdiction. The decision was according to it arbitrary, unreasonable and irrational.

Respondent's Case

17. In opposition to the application the Respondent filed a replying affidavit sworn by **Pauline O. Opiyo**, its Secretary on 16th January, 2015.

18.According to her, on 19th June, 2014, in the Matter of Tender No. KAA/197/2013-2014 Tender for the Development and Management of an International Brand Fast Food Outlet at JKIA, requested the Respondent to review the above Tender on the grounds that the Procuring Entity, not only in contravention of the directions given by the Review Board in Application No. 16 of 2014 but also the requirements of Sections 2, 31 and 66 of the Act and the regulations thereunder, unjustifiably failed and/ or ignored to identify, evaluate and objectively score the concession fees criteria, and as a result, ended up with a wrong scoring result in respect of the concession fee; that the Procuring Entity, in contravention of the directions given by the Review Board in Application No. 16 of 2014, but also the requirements of integrity, fairness, objectivity and accountability Secured by Sections 2, 31 and 66 of the Act, unjustifiably awarded the successful bidder marks for the cash flow statements while the same did not factually, legally and/or objectively support its proposed concession fees; and that by

reason of all the above, the Procuring Entity, in both its technical and financial evaluation of the factors identified contravened the directions given by the Review Board under Section 98(b) of the Act as well as the requirements of integrity, fairness, transparency, objectivity and accountability secured by Sections 2, 31 and 66 of the Act, in such a manner as to amount to an unjustifiable denial of the Applicant's right, to be declared the winning bidder with not only the highest combined technical and financial score, but also offering the best value for money.

19.It was deposed that on 3rd July, 2014 Suzan filed Supplementary Grounds for Review consisting of totally new grounds for Review which had not been part of the Request for Review filed on 19th June, 2014 and that prior to the hearing of the Application on its merits, the Respondent heard and made a determination on the admissibility of the Supplementary Grounds for Review filed by Suzan as a preliminary issue. Upon considering the submissions of the parties and the documents before it on the preliminary issue of Supplementary Grounds for Review as well as the provisions of Regulation 73(2)(c)(ii),the Respondent struck out Suzan's Supplementary Grounds for Review and proceeded to hear the case based on the grounds of review as filed on 19th June, 2014 after which it delivered its ruling on 16th July, 2014 in which it dismissed the Request for Review by Suzan and directed that the procurement process may proceed to its logical conclusion.

20. However being dissatisfied with the Respondent's decision, Suzan exercised its right to Judicial Review in the High Court through Miscellaneous Civil Application No. 289 of 2014 upon hearing of which the High Court in its ruling dated 19th November, 2014 quashed the Respondent's in PPARB Review No.25 of 19th June, 2014 delivered on 16th July, 2014 and the tender award and contract made between Kenya Airports Authority and Suzan and directed the Board to commence the hearing of PPARB Application No.25 of 19th June, 2014 *de novo* in compliance with the rules of natural justice.

21.In compliance with the said decision, the Respondent conducted a fresh hearing of PPARB Application No. 25 of 19th June, 2014 on 5th and 10th December, 2014 during which the Supplementary Grounds for Review filed by Suzan were accepted as part of the records for the case upon the Board's finding that the Supplementary Grounds for Review were not new /fresh grounds and neither did they seek to introduce new cause of action as argued by the Applicant herein and the 2nd interested Party. Upon hearing the parties and considering all the documents before it including the Supplementary Grounds for Review, the Board made a finding that the Procuring Entity did not re-evaluate Tender No. KAA/197/2013-2014 in accordance with the Board's orders / directives in PPARB Application No. 16 of 2014 and that, had the re-evaluation been done as per its orders / directives, Suzan would have emerged as the winning bidder since it had met the technical requirements and had the highest minimum guaranteed concession fee. The Respondent therefore allowed PPARB Application No. 25 of 2014 and awarded Tender No. KAA/197/2013-2014 to Suzan.

22. It was therefore the applicant's case that the Respondent's decision was lawful, rational, reasonable, just and in line with the rules of natural Justice and that the Applicant's allegation that the Board's decision is without Jurisdiction is a fallacy since the Board's decision is in line with the exercise of its powers under Section 98 of the Act.

23. In the Respondent's view the Applicant's Application for Judicial Review lacks merit and is made in bad faith and ought to be dismissed.

24. On behalf of the Respondent, it was submitted that the Respondent after hearing the parties found that upon examining the original and supplementary grounds, the supplementary grounds were not new or fresh and neither sought to introduce a new cause of action. The Respondent contended that the ex parte Applicant was essentially challenging its substantive finding in not upholding its preliminary objection on the supplementary grounds of Request for Review which in the Respondent's view constitutes an appeal of the decision which jurisdiction this Honourable Court, while exercising its judicial review jurisdiction, lacks. The Respondent relied on inter alia **Republic vs. PPARB & Anor ex parte Gibb Africa Ltd & Anor [2012] eKLR** in support of the said

submission.

25. The Respondent submitted that the procedure for Request for Review is provided for in law and that it had jurisdictional competence to determine the Request for Review made by the ex parte Applicant. Regarding the Respondent's decision being premised on the provisions of Article 159(2) of the Constitution, the Respondent was guided by the decision of its predecessor board in the case of **Premier Medical Corporation Ltd vs. Procurement and Chain Management Consortium (appl. No.10 of 2010)**.

26. With respect to Regulation 73, it was the Respondent's case that the must be interpreted within the context of the substantive Act to give effect to the purpose and provisions of the parent Act hence ought to be interpreted in a manner which gives effect to the principles of fairness, equitableness, transparency, competitiveness and cost effectiveness as provided under Article 227(1) of the Constitution, which if applied to the circumstances of the present case would have been in favor of allowing the 1st Interested Party to clarify and elaborate on issues raised.

27. The Respondent Board stuck to its earlier decision in its finding on 3rd June 2014 that out of the two bidders, the 1st Interested Party had offered the best concession fee and that by accepting a lesser concession fee from the ex parte Applicant herein the procuring entity had denied the public the benefit of a tender that offered it the best value for money. The Respondent submitted that its decision was therefore rational, based on demonstrable facts and within its mandate under the relevant Act.

1st Interested Party's Case

28. In opposition to the application Suzan filed a replying affidavit sworn by **Arif Hafiz**, its General Manager on 14th January, 2015.

29. According to the deponent, the thrust of the applicant's challenge on the admission of the Supplementary Grounds is essentially a challenge to the Review Board's interpretation of Regulation 73 of the Regulations, and more specifically, the precise issue in question was not an issue of enlargement of time but rather whether supplementary grounds filed within a timely filed request for review were admissible under Regulation 73 of the Regulations.

30. In this case, and guided by the decision in **JR No. 289 of 2014 R Vs PPARB & Kenya Airports Authority Ex.P Suzan General Trading JLT,** the Respondent having heard and considered the extensive submissions and arguments of the parties *de novo*, found and essentially held that: upon examining the original grounds and the supplementary grounds, the supplementary grounds did not amount to a new or fresh cause of action and were premised on the issues already contained in the initial grounds, and more specifically, dealt with issues of technical re-evaluation already raised in Ground No.3 of the original request for review; and that the argument that a party could not lodge supplementary grounds to amplify already existing grounds would be contrary to the provisions of Article 159(2) of the Constitution that enjoins the Review Board to do justice without undue regard to procedural technicalities, and accordingly, the supplementary grounds were admissible under Regulation 73 of the Regulations.

31.It was the deponent's view that a consideration of the basis of this decision, including the submissions of **Suzan General** on the issue, clearly reveal that: the statutory language of Regulation 73 of the Regulations is ambiguous on whether it is permissible to file supplementary grounds within a timely filed Request for Review; and Regulation 73 as amended by Regulation 20 (a) of legal notice 106 of 2013 strictly construed, applied in relation to a Request for Review, and as conceded by the KAA, their challenge was not in respect of the request filed on 19th June, 2014. As such, being Supplementary Grounds, filed within a timely request for review, it was clearly not a separate request; that further, having taken all the relevant circumstances of this case into account, the Review Board's decision was based on a reasonable, rational and permissible construction of Regulation 73 of the Regulations to preserve rather than oust its statutory jurisdiction under Sections 93 & 100(3) of the

Act and balanced the need for expediency under Section 97 with the requirements of substantive justice as envisaged under Article 159(2) of the Constitution as read together with the provisions of Sections 98 & 100(3) of the Act, sufficiently appreciating that (i) the 1st Review Board had previously found that the method for comparison and scoring of the criteria applied by the Procuring Entity in the financial evaluation process was not objective as the Procuring Entity set for itself an evaluation method designed not to give it the best value out of the procurement process, and therefore for purposes of its re-evaluation, KAA had been directed under Section 98 of the Act to identify and apply a more objective method for comparison and scoring of the criteria using graduated marks (ii) that failure to comply with directions of the Review Board rendered anything done contrary thereto void and illegal under Sections 100(3) & 136 of the Act, and jurisdiction to investigate alleged violations of the Board's previous directions under Sections 93 & 100 of the Act could not be ousted by Regulation 73 until a determination had been made that there was no violation prior to considering any protests under the provisions of Regulation 73 and (iii) to this extent, the decision of the Review Board to consider the Supplementary Grounds on their merits, in any eventuality, cannot be faulted at a jurisdictional level or indeed equated with enlargement of time - the issues raised through the Supplementary grounds were weighty and novel issues that went to the very essence of a fair procurement process as demanded by Articles 159(2) &227 of the Constitution as read together with Section 2, 93 & 100 of the Act, and in the broadest sense, it would have been contrary to the aforesaid constitutional standards to adopt an interpretation that prevents the Review Board from substantively dealing with allegations of violation of its own directions and which if found established were subject to the sanctions provided by law.

32. It was the deponent's contention that it is clear that other than relying on an ambiguous, literal and/or subjective reading of the language of Regulation 73 of the Regulations, the Applicant has not and cannot assail the fact that the Review Board's decision, affirming jurisdiction, was founded on a reasonable, rational and permissible construction of Regulation 73 of the Regulations and its ultimate decision, preserving rather than ousting its statutory jurisdiction under Section 93, represented a sound, logical &reasonable jurisdictional accommodation of the overriding objectives of Sections 2, 93, 98 & 100(3) of the Act as well as Articles 159(2) & 227 of the Constitution, and cannot therefore be impeached.

33. According to the deponent, it was both logically and legally untenable for the Applicant to that the Review Board introduced a 'new and extraneous' requirement of the highest minimum guaranteed concession fee yet this was the essence of the evaluation of the financial proposal on the concession fee in the tender document itself and not a requirement emanating from the earlier decision in **PPARB Application No. 16 of 6th May, 2014**. To him, this contention, as guided by the actual facts, finds no support under Sections 59 & 66 of the Act, and indeed cannot be relied upon as a means of a 'backdoor appeal' against the findings and directions set out in the initial decision of the Board which has long since become final and binding on the parties, under Section 100(1) of the Act. It was further contended that the earlier decision in **PPARB Application No. 16 of 6th May, 2014**, making reference to the need for a properly evaluated tender to ensure that the public did not lose out on money, was not an extraneous finding but one fully supported by both the tender document as well as the requirements of the law as set out in and subsequent contract under Sections 59, 66 & 68 of the Act, and had the Review Board acceded to the contention being made by the Applicant, it would have resulted in a manifestly illegal and irrational decision that would not only have resulted in an unacceptable risk of lost revenue to KAA but also made a complete mockery of the entire tender and statutory regime hence the allegation that the Review Board's ultimate decision was flawed by reason of failing to point out where the procuring entity failed to comply with the Board's previous decision is wholly without merit.

34. In the deponent's view, if at all the Applicant was aggrieved with the decision of the Review Board in **Review Application No. 16 Of 6th May 2014 Suzan General Trading JLT vs. Kenya Airports Authority**, an alternative remedy could have been pursued then under Section 100(1) of the Act, but with this decision having long been deemed final and binding in June, 2014, the Applicant cannot now be permitted, through this proceedings, to ventilate what would effectively be a 'backdoor appeal' against those findings and directions.

35. It was further asserted that the nature of the remedies available in judicial review proceedings being discretionary, even if the Court finds that the Review Board committed some wrong, this Court still retains the discretion not to grant any of the remedies sought, and is enjoined to consider various factors to determine what is the most efficacious, just and proportional in the context of the public interest. The Court was urged not to grant any of the orders sought by the Applicant, taking the following factors into account: first, the Review Board correctly understood the law that regulated its decision-making power and properly gave effect to it, and therefore, it is clear that the decision of the Review Board was the end result of a fair and open decision-making process that complied with the requirements of natural justice and is not tainted by any illegality, irrationality, arbitrariness, extraneous considerations or unreasonableness, as can be gleaned from the extensive submissions it took into account in the proceedings before it, and the exceptional facts of the case; secondly, it cannot be alleged, in good faith, that the Review Board's ultimate decision was unreasonable or so outrageous in its defiance of logic or of accepted evidentiary standards that no sensible administrative tribunal, faced with similar circumstances and which had applied its mind to the history of this procurement, the undisputed facts and was faced with the exceptional case of an errant procuring entity, could have arrived at it or exercised its statutory power as it did in accordance with its express powers under Section 98(c) of the Act; and thirdly, public procurement laws exist for the benefit of the public and not for the benefit of individual bidders, and the exercise of its statutory power as provided under Section 98(c) of the Act was undoubtedly done in good faith and in exceptional circumstances requiring appropriate orders that indeed advanced rather than frustrated the public interest.

36. It was Suzan's case that in the wider interest of integrity, fairness, transparency, objectivity and accountability as secured by Sections 2, 59, 66, 98 & 100 of the Act, and for sufficient cause as demonstrated, it is the prayer by Suzan General that the Motion by **Hoggers Limited** be dismissed with costs.

37. The 1st Interested Party submitted that the decision making process of the Review Board was not tainted by any illegality and/or want of jurisdiction by reason of its admission of the supplementary grounds of review dated 3rd July 2014 under Regulation 73. In its view, the Applicant did not have any jurisdictional issues with the supplementary grounds of review and indeed opted to respond to the substance of the issue raised in the supplementary grounds, therefore its allegation that the supplementary grounds introduced a totally new cause of action is wholly unmerited and that the actual party that disputed jurisdiction to consider the supplementary grounds was the Kenya Airports Authority but who did not lodge any challenge with regard to section 100 of the Act as it accepted the Board's decision.

38. In its view, he thrust of the Applicant's challenge on the admission of the supplementary grounds was one to the Review Board's interpretation of Regulation 73; the precise issue not being an issue of enlargement of time but rather whether supplementary grounds filed in time were admissible under Regulation 73. However, all decisions cited by and relied upon by the Applicant in this regard were distinguishable from the current circumstances and statutory framework under which this issue was being considered. The 1st Interested Party cited **JR No.289 of 2015, Republic vs. PPARB & KAA Ex parte Suzan General Trading JLT** in support of his position.

39. Further, being an administrative interpretation of law in respect to the Review Board's own operations, principles of judicial deference require that a considerable amount of deference be accorded to the Review Board's interpretation of the ambiguous terms of Regulation 73, unless it can be demonstrated that the same amounted to an unreasonable, irrational and/or impermissible construction of regulation 73. The interpretation was to preserve rather than oust the Review Board's statutory jurisdiction under sections 93, 98 and 100(3) of the Act with a balanced need for expediency under section 97 and Article 159(2) of the Constitution.

40. The Review Board's decision, it was submitted cannot be faulted in its finding that KAA failed to comply with its earlier directions in PPARB Review No.16/2014 of 6th May 2014 and this decision cannot be impeached on grounds of being arbitrary, unreasonable or irrational.

41.The allegation that the Review Board, in its decision making process, introduced and relied upon a requirement of "minimum guaranteed concession fee" and which was extraneous to both its earlier orders rendered on 3rd June 2014, as well outside the tender document, was according to the 1st interested party completely without merit since the earlier Review Board's decision did not alter the criteria to be used for financial evaluation, which were and still remain the concession fees and the cash flows. The Applicant's contention in this regard therefore was not supported under section 59 and 66 of Act and cannot be relied upon as a means of a "backdoor appeal" against the findings and directions set out in the initial decision of the Board.

42. The 1st Interested Party further submitted that the Review Board is properly mandated with various powers under section 98 of the Act. When faced with the Applicant's allegations and submissions on the cash flow evaluation, neither KAA nor the Applicant could offer any rational or reasonable justification for the marks allocated to **Hoggers Ltd**.

43. In any event, assuming that the Applicant can establish any ground for review, the public interest, balance of convenience and the requirements of an orderly administration of the public procurement laws weigh heavily in favor of the court refusing to grant any of the orders sought by the Applicant. The Applicant has not and cannot assail the fact that the Board's ultimate decision did not amount to an abuse of discretion in the circumstances and represents a rational, reasonable and good faith judgment that has secured the best value for money requirement of the tender in the wider interest of the public.

2nd interested party's Case

44. The 2nd interested party on its part supported the application.

45. According to it, the Respondent in allowing the 1st Interested Party's application on the basis of its supplementary grounds of review filed two weeks after its Request for Review and certainly out of time acted illegally, unlawfully and without jurisdiction. It was its view that the mode of filing requests under Regulation 73 was not followed and the said supplementary grounds were new and introduced a new cause of action, different from the one filed on 19th June 2014. It was therefore its position that the Respondent extended the time within which a Request for Review and its statements in support can be filed, which jurisdiction it does not have either under the Act or the Regulations and relied on **Wavinya Ndeti vs. The IEBC Civil Appeal No. 322 of 2013** and **Floris Pierro vs Giancarlo Falasconi Civil Appeal No. 145 of 2012**.

46. To the 2nd Interested Party, matters of limitation of time are not merely procedural technicalities but are substantive matters of law and hence cannot be cured under Article 159(2)(d) of the Constitution.

47. It was contended that in its decision on 3rd June 1014, the Respondent directed the 2nd Interested Party to reevaluate the tenders of the three most responsive bidders for both technical and financial evaluation which was properly done in accordance with the Respondent's orders and the Request for Proposal for the tender. Therefore for the Respondent to go back and decide that the 2nd Interested Party did not follow its orders was unreasonable and irrational. The 2nd Interested Party further contended that the Respondent in coming to its decision of 18th December 2014 relied on extraneous evaluation requirements not provided f or in the Tender Document and outside the scope of section 66 of the Act.

Determinations

48. I have considered the Notice of Motion, affidavits, the written submissions and judicial authorities herein and this is the view I form of the matter.

49. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

> **"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."**

50. In **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 R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285 and ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

51. In its decision on the Supplementary grounds, the Respondent was of the view that the Supplementary Grounds for Review were neither new /fresh grounds nor did they seek to introduce new cause of action as argued by the Applicant. The Court can only interfere with this finding if on evaluating the said grounds, the Court was of the view that that finding was incorrect. However to reverse such a finding, this Court would have to determine the merits of such a finding by interrogating the original grounds vis-à-vis the supplementary grounds. That course, however, is not available to a court exercising its judicial review jurisdiction. Whereas in arriving at the said decision the Respondent may well have misconstrued the import of the Supplementary grounds, such a decision can only be reversed on an appeal as that is not a ground for judicial review.

52. The Applicant has however contended that the said Supplementary grounds ought not to have been admitted at all. Without making a finding on the issue, it must always be appreciated that the decision whether or not to grant judicial review is an exercise of judicial discretion. Since they are not guaranteed a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is nolonger necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

53. Even if the Court was to find that the Supplementary grounds ought not to have been entertained on the ground that they were filed out of time, the finding by the Respondent that Supplementary Grounds for Review were neither new /fresh grounds nor did they seek to introduce new cause of action would not take the applicant's case any further. If the supplementary grounds did

not introduce any fresh matters, it would follow that even without the Supplementary grounds the Respondent would have arrived at the same decision all things being equal. Accordingly, it would serve no useful purpose quash the decision merely on that score unless the Court was to proceed and find that the supplementary grounds raised totally fresh matters not covered in the initial grounds.

54. With respect to the other issues raised by the applicant, it is clear that what is being contested by the applicant is that the Respondent's decision was misconceived. The House of Lords in the case of **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935**, rationalized the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. See also **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479**

55. Irrationality as fashioned by **Lord Diplock** in the **Council of Civil Service Unions Case** takes the form of *Wednesbury* unreasonableness explicated by Lord Green and applies to a decision which is so outrageous in its defiance to 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.

56. What the applicant calls irrationality in my view may amount to mere unreasonableness. However, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable 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. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the *Wednesbury* test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of *Wednesbury* unreasonableness.

57. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

> **"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."**

58. Having considered the issues raised herein it is my view that the grounds of illegality and procedural impropriety are inapplicable. I am also not satisfied that the Respondent's decision is so grossly unreasonable that that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision.

59. As was appreciated by this Court in **Republic vs. Business Premises Rent Tribunal & 3 Others Ex-Parte Christine Wangari Gachege [2014] eKLR**:

> **"…In this case it is not in doubt that the decision which is being challenged in these proceedings was the subject of an application for setting aside which decision was disallowed by the Respondent. Whether that decision was right or not the Applicant ought to have appealed against the same instead of challenging the decision in respect of which attempt to set aside had failed. In judicial review proceedings the mere fact that the Tribunal's decision was based on insufficient evidence, or misconstruing of the evidence which is what the applicant seems to be raising here 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 statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327, it was held:**
>
> > **"It has been recognized for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgment for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly...And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise...Even if it were alleged that the Commission or authorized officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction...Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of certiorari on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."**

In *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003,* Omolo JA stated as follows;

"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."

60. Whereas in some quarters it may be construed that the Court of Appeal by employing such a flamboyant language was encouraging impunity on the part of judicial officers, what I understand the Court of Appeal to be saying is that the mere fact that a judicial officer errs in his or her judgement it does not necessarily follow that the said officer acted without or in excess of jurisdiction. In other words, the issue for judicial review is not whether the decision is right or wrong, nor whether the Court agrees with it, but whether it was a decision which the authority concerned was lawfully entitled to make since a decision can be lawful without being correct. The Courts must be careful not to invade the field of policy entrusted to administrative and specialized organs by substitute their own judgement for that of the administrative authority. They should judge the lawfulness and not the wisdom of the decision. If the decision was wrong, it should be remedied by an appeal which allows the appellate court to engage in an intrusive analysis of evidence by the trial tribunal and review the merit of the decision in question. See **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd** (supra).

61.In my view the Respondent was entitled to find that the supplementary grounds did not contain fresh issues or otherwise. The mere fact that it made one decision and not the other does not justify this Court in the exercise of its judicial review jurisdiction in interfering therewith. Similarly, the Respondent's finding that the 2nd interested party did not comply with its directions issued in the respondent's earlier decision is a matter which would go to the merit rather than the process.

62. In the result I find no merit in the Notice of Motion dated 31st December, 2014 which I hereby dismiss with costs to the Respondent and the 1st Interested Party.

Dated at Nairobi this 18th May, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Nganga for the ex parte applicant

Mr. Ngacha for the 1st Interested Party

Cc Patricia