



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 399 OF 2014

**IN THE MATTER OF AN APPLICATION BY FURSYS (K) LIMITED FOR LEAVE TO APPLY
FOR A JUDICIAL REVIEW ORDERS OF CERTIORARI**

AND

**IN THE MATTER OF PROCEEDINGS BEFORE THE PUBLIC PROCUREMENT
OVERSIGHT AUTHORITY**

AND

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES AND THE PUBLIC
PROCUREMENT AND DISPOSAL ACT**

BETWEEN

FURSYS (K) LIMITED.....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

OVERSIGHT AUTHORITY..... RESPONDENT

BEVAJ FURNITURE LIMITED.....1stINTERESTED PARTY

KENYA SCHOOL OF MONETARY

STUDIES.....2ndINTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 30th October, 2014, the *ex parte* applicant herein, **Fursys Kenya Limited**, seeks the following orders:

1. Certiorari removing to this honourable court for the purposes of quashing the proceedings before the Respondent.

2. Prohibition by preventing future proceedings borne out of an application by the 1st Interested Party to bar the Applicant in taking part in the future procurement matters arising from the Tender N. KSMS/PROC/37/12-13 for the supply and assembly of furniture for the Academic Wing and Library of Kenya School of Monetary Studies.

3. Costs be paid by the Respondent and 1st Interested Party jointly and severally.

Ex Parte Applicant's Case

3. The application was supported by the verifying affidavit sworn by **Byung Tae Kim**, the *ex parte* Applicant's Managing Director on the 23rd October, 2014.
4. According to the *ex parte* Applicant, on 29th October 2014 the Respondent fixed for hearing the application filed by the 1st Interested Party as regards the Request for Debarment on Tender No. KSM/PROC./37/12-13 for supply and assembly of Furniture for the Academic Wing and Library of Kenya School of Monetary Studies.
5. It was deposed that by a letter dated 5th August, 2014, the Applicant was notified by the Respondent that the 1st Interested Party filed an application under Section 115(b) and (d) of the **Public Procurement and Disposal Act, 2005** (hereinafter referred as "the Act") requesting the Respondent to debar the Applicant from participating in public procurement proceedings on account of Tender No. KSMS/PROC/37/12-13 for supply and assembly of furniture for the Academic wing and library of Kenya School of Monetary Studies. However, the letter was neither copied to the procuring entity nor to the 2nd Interested Party.
6. The Applicant responded to the letter from the Respondent on 18th August, 2014 explaining the nature of the dispute between itself and the 1st Interested Party and the reason why the application before the Respondent was an abuse of the court process it being *res judicata* and by a letter dated 12th September, 2014 requested the Respondent to be supplied with copy of the application by the 1st Interested Party, as the latter had declined to supply any documents surrounding the complaint. To this the Respondent replied vide a letter dated 16th September, 2014 attaching the 1st Interested Party's complaint and supporting documents.
7. According to the applicant, from the complaints raised all the issues were considered before two decisions of the appeals board and the High Court and are now pending an appeal before the Court of Appeal as the notice of Appeal has not being withdrawn.
8. It was contended by the Applicant the Applicant has a Kenyan shareholder who was admitted on 11th January, 2013. It was further disclosed that on 29th September, 2014, the 1st Interested Party wrote to the Deputy Registrar of the Court of Appeal notifying him of its intention to withdraw the Civil Application No. 165 of 2014 **Bevaj Furniture Ltd vs. Republic** having been overtaken by events since the contract was executed in line with the decisions of the High Court in JR 401 of 2013. It was further asserted that the 1st Interested Party has in past filed two appeals arising out the same tender. Following the appeal, the Review Board delivered its Decision on 22nd August 2013 and directed, *inter alia*, that the award be annulled and that the procuring entity, pursuant to Section 98 (b) of the Act, re-evaluates the bids and awards the tender within 30 days by using the criteria set out in the Tender Documents; correcting of arithmetic error as envisaged by the Act; and applying the Margin of Preference as envisaged by the Act and Regulations.
9. According to the applicant, the salient issues determined by the Review Board in its decision of 22nd August, 2013 were that the procuring entity should have informed both parties of corrections it made on account of arithmetic errors in accordance with Section 63(2) of the Act and further that the procuring entity could not exempt itself from the provisions of Section 39 of the Act that requires dealing with the scheme of preferences.
10. Pursuant thereto, the 2nd Interested Party, in compliance with the Board's decision of 22nd August, 2013, re-evaluated bids and awarded the tender to the Applicant on 20th September 2013. However, the 1st Interested Party once again filed another review application on 25th September 2013 in which the differently constituted Review Board delivered its decision in **Review No. 35/2013 Bevaj Furniture Ltd v Kenya School of Monetary Studies** on 24th October 2013

- ordering that the award of tender to the Applicant was annulled; that the re-evaluation of bids conducted by the procuring entity pursuant to the Ruling of 22nd August 2013 was declared null and void; that pursuant to Section 98 (b) of the Act, the procuring entity should re-evaluate the bids and award the tender within 15 days and that the re-evaluation should only be limited to correction of arithmetic errors and the application of the margin of preference as envisaged by the Act and the Regulations in favour of the Applicant which was found to be the only party entitled to the margin of preference.
11. It was the Applicant's case that the decision of the Review Board dated 24th October 2013 frustrated the Applicant's legitimate expectation to be awarded the tender after successfully passing two consecutive tender evaluations. In view of that, the Applicant filed a judicial review application No.401 of 2013 on 5th November 2013 which was heard and determined this Court on 30th May 2014 when the Review Board's decision dated 24th October 2013 was quashed for among other reasons that the Review Board had no jurisdiction to sit on appeal or review the earlier Board's decision.
 12. It was therefore contended by the Applicant based on advice from the Applicant's legal counsel that the proceedings at the Respondent are an abuse of the process of court and are *res judicata* for the following reasons and should be quashed for the reasons that the matters raised in the application for debarment are *res judicata* having been addressed in the High Court Ruling dated 30th May 2014 and before the Review Boards; that the decision of the High Court is final and binding until set aside by the Court of Appeal; that the Contract between the Applicant and the 2nd Interested Party has been executed and is being performed; and that the complaint under Section 115 of the Act is vindictive, vexatious, frivolous and an abuse of the legal process. The 1st Interested Party cannot keep on frustrating the procurement process by any means possible.
 13. It was submitted on behalf of the applicant that the respondent failed to disclose to them all the material documents that the 1st interested party had filed in its request for debarment dated 19th June 12, 2014. Though the 1st interested party's complaint was as regards to breach of section 115(1)(d) of the **Public Procurement and Disposal Act**, the respondent added to the list section 115(1)(b) of the Act which was not the ground sought.
 14. It was further submitted that by delaying in presenting the 1st interested party's case to the applicant by the respondent, the applicant did not have the relevant documents from the complainant to know precisely what allegations the complainant had and which evidence supported those grounds. Furthermore, the respondent acted unfairly in requesting the applicant to answer to allegations not supported by documentary evidence, and when it did after being prompted, provided incomplete documents and information to the applicant. In support of its submissions, the applicant relied on **Republic vs. Commission of Investigation and Enforcement and Another Ex parte Eldoret Grain Ltd [2014] eKLR.**
 15. To the applicant, the 1st interested party's complaints were *res judicata* having been addressed in the High Court ruling 30th May 2014 and before the Review Board in its decision in Review No.24 of 2013 **Bevaj vs Kenya School of Monetary Studies.** The applicant relied on section 114 and 115 of the Act as well as **Nancy Mwangi T/A Worthin Marketers vs. Airtel Networks (k) Ltd (formerly Celtel Kenya Ltd) & 2 Others [2014] eKLR** and **E. T v Attorney General & Another (2012) eKLR** in support of its submissions.
 16. It was further submitted that the respondent cannot fulfil its mandate under section 115 without carrying out investigations by an investigator it appointed under section 102, which investigator is guided by section 103 and reports to the Director General of the respondent under section 104. Both sections are in Part VII of the Act and it is after such investigations that the respondent can debar an entity from procurement proceedings for violations stated in section 115. Section 115 of the Act, it was contended cannot be interpreted in isolation of Part VII of the statute to which section 114(1) lies.

1st Interested Party's Case

17. In response to the application, the 1st interested party filed a replying affidavit sworn by **Roselyne W. Mbugi**, its Managing Director on 26th January, 2015.

18. According to the deponent, following an earlier erroneous award of the tender to the Applicant herein, the 1st Interested Party filed a Request for Review at the Public Procurement Administrative Review Board (hereinafter referred to as “the Board”) in Application Number 24 of 2013 vide its request dated 23rd July, 2013 which request the said Board heard and rendered its decision on 22nd August, 2013. In the 1st Interested Party’s view, the Board made detailed findings relating to the entire tendering process, that both the Applicant and the 1st Interested Party had passed the first three stages of evaluation, being examination of mandatory requirements, technical evaluation and examination of samples and due diligence and that the Applicant scored 53.5 out of the possible 60 marks while the 1st Interested Party score 43 out of the possible 60 marks in the technical evaluation in which all the two had scored above the pass mark which was 40 out of the possible 60. The Board then ordered the 2nd Interested Party to re-evaluate the bids and award the tender within 30 days and factor in the margin of preference as envisaged under the Act and the tender documents after complying with the law in the correction of errors.
19. It was contended that by the 2nd Interested Party’s unreferenced letter dated 29th August, 2013, the Respondent sought submissions from the 1st Interested Party on various issues in a bid to purportedly comply with the Ruling of the Board dated 22 August, 2013 that required re-inspection, of furniture samples, extension of tender security, validation and confirmation of quoted prices and tender price, sources of furniture as well as ownership. The 1st Interested Party in its response to the 2nd Interested Party’s letter dated 3rd September, 2013 complained and/ or raised issues that there was a clear intention by the 2nd Interested Party to misinterpret the Board’s decision dated 22nd August, 2013 and start re-evaluation from the beginning yet the part that ought to have been re-evaluated was the financials at the financial evaluation stage. In addition, the furniture sample re-inspection was inappropriate as the same had been inspected and had remained in the custody of the 2nd Interested Party and re-evaluating the same could affect the 1st Interested Party’s technical evaluation and the same had no relationship with the Board’s ruling. The 2nd Interested Party vide a letter dated 20th September, 2013 notified the 1st Interested Party that their tender was unsuccessful having failed to meet the minimum 40 marks out of the possible 60 marks on the technical requirement and the 2nd Interested Party was notified vide the 2nd Interested Party’s letter dated 20th September, 2013 that it had only scored 36 marks out of the possible 60 marks, in total contrast of the earlier 43 marks yet there was no change of tender or tender documents submitted.
20. It was the 1st Interested Party’s case that the Applicant was re-awarded the tender irregularly and unprocedurally, and without any due regard to the Board’s ruling. It was disclosed that on 3rd September, 2013 while the deponent was delivering the 1st Interested Party’s submissions to the 2nd Interested Party, he found one of the Applicant’s Director, one **Mr. L. D. Sung** and the 2nd Interested Party’s designer, one **Mr. Noel Mutai** discussing the re-evaluation that had been ordered by the Board in total disregard to the processes of fairness, transparency and accountability. This act according to him, was a clearly conceived an illegal scheme with the sole intention of blocking the 1st Interested Party from winning the tender by purporting to re-evaluate and intentionally revise the 1st Interested Party’s evaluation marks downwards to make it fail. It was added that in its bid to further the illegality, the 2nd Interested Party invited **Fairdeal Superstores Limited** for the purported re-evaluation yet the party did not submit any samples in the first instance.
21. To the 1st Interested Party, the Public Procurement Administrative Review Board Application Number 35 of 2013 was filed as there was no compliance as ordered by the Board vide the ruling dated 22nd August, 2013. Its position was therefore that the Public Procurement Administrative Review Board’s decision dated 24th October, 2013 is neither unreasonable nor did it frustrate the Applicant’s legitimate expectation to be awarded the tender after allegedly successfully passing two tender evaluations which was not fair.
22. While denying that it filed an application under Section 115(b) and (d) of the Act, the 1st Interested Party averred that the said was letter requesting the Director of the Public Procurement

- Oversight Authority (hereinafter referred to as “the Authority”) to conduct investigations on the conduct of the Applicant in this tender and if satisfied that unethical conduct ensued debar the Applicant. Accordingly, it was its view that it was under no obligation to serve the Applicant with the documents concerning the investigation, as the same was the duty of the Authority, which to its knowledge duly served the Applicant.
23. Since the investigation is not *res judicata* in the 1st Interested Party’s view, the Court does not have the jurisdiction to suspend and/ or interfere with the said investigation which rests on the Authority.
24. The 1st interested party therefore prayed that the Notice of Motion Application herein be dismissed with costs to the 1st Respondent (sic) as the same lacks merit and is an abuse of the court process solely intended to defeat the interests of justice and fairness.
25. According to the 1st interested party in its submissions, section 115 of the Act empowers the respondent to deal with debarment proceedings. Within the ambit of this law, the 1st interested party submitted that the respondent has the requisite authority and statutory jurisdiction to deal with the debarment proceedings as provided for in the foregoing legislation. It was therefore the 1st interested party’s case that as the duty to handle debarment proceedings is statutorily provided for the court ought not to interfere with such statutory functions of a body authorized to carry out those functions. To it the respondent was within its mandate to handle the debarment proceedings and ought to be allowed to perform its duties as per the law. In support of its case the 1st interested party cited **Bogonko vs. National Environment Management Authority (2006)1 KLR (E & L)** and **Githu Mugai & Another v Law Society of Kenya [2015] eKLR.**
26. On *res judicata*, it was submitted that it is a principle of ***Civil Procedure Rules*** which has no place in judicial review proceedings and in support of this contention the 1st interested party relied on **Nancy Mwangi T/A Worthin Marketers v Airtel Networks (K) Ltd (formerly Celtel Kenya Ltd) & 2 Others [2014] eKLR** and **Benard Mugo Ndegwa v James Nderitu Githae & 2 Others (2010) eKLR.**
27. To the 1st interested party, it has not at any one time raised any issue for determination that has already been determined by a court of competent jurisdiction since all the applications in place have different issues to be determined. What was before the Board in the first two occasions, in its view was review and clarification of the orders given at the review on 22nd August 2013, the result of which could interfere with the contract between the *ex parte* applicant and the 2nd interested party. However, the debarment proceedings do not in any way interfere with the award of the tender nor the performance of the contract executed by the two parties but is aimed at ensuring that the bidders who participate in the procurement proceedings do so in an ethical manner. Therefore *res judicata* was inapplicable to these proceedings.

2nd Interested party’s Case

28. It was submitted on behalf of the 2nd interested party in support of the application that the complaint to and the consequential summons issued by the 1st respondent are both an abuse of process. To it, it was an abuse to bring vexatious proceedings, that is, two or more sets of proceeding in respect of the subject matter which amount to harassment of the applicant in order to make him fight the same battle more than once. As a general rule, it was submitted, a party should not be allowed to litigate issues which have already been decided by a court of competent jurisdiction, otherwise to do so would amount to an abuse of the process which depends upon all circumstances.
29. It was the 2nd interested party’s case that a broad merit based judgment should be adopted taking into account all public and private interest involved and all the facts and reliance was placed on **Johnson vs. Gore Wood & Co. (No.1) [2001] 2 AC 1, H.L.** and **Hunter vs. Chief Constable of West Midlands Police & Others [1981]3 WLR.**

Determinations

30. 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.

31. In this Court's judgement in **R vs. Public Procurement Administrative Review Board & Others ex parte Fursys JR Misc. No. 401 of 2013**, delivered on 30th May, 2014, the Court held *inter alia* as follows:

“In the first decision of the Review Board, the Board found that the action of the 1st interested party of correcting arithmetical errors and unilaterally basing its decision to award the tender without notifying the affected bidders, in this case the Applicant and the 2nd interested party, amounted to a change in the substance of the tender in terms of section 59(3) of the Act. That in my view was the basis upon which the said Board ordered that the 1st interested party complies with the procedure for correction of arithmetic error as envisaged under the Act. The second ground for allowing the review was the failure by the 1st interested party to take into account the margin of preference stipulated under section 39(8) of the Act and Regulation 28(2) as interpreted in Miscellaneous Civil Application No. 540 of 2008 – De Larue vs. The Kenya Revue Authority, Application No. 24 of 2008. As a result the 1st interested party was ordered to apply the margin of preference as envisaged by the Act and the Regulations. The Board however went further and directed the 1st interested party to re-evaluate the bids and award the tender within 30 days using the criteria set out in its Tender Documents. Accordingly, the award of the tender to the Successful bidder, the Applicant herein was annulled. It is not in dispute that this decision was not challenged. The 2nd interested party's interpretation of this decision was that the 1st interested was only entitled to undertake the financial evaluation and not to reopen the whole tender. The Applicant and the 1st interested party contend that the earlier tender having been annulled and the Board having ordered a fresh re-evaluation based on the tender documents, the 1st interested party was not restricted to the financial evaluation. With due respect to the Board, it ought to have been clearer in its determination in order to avoid any ambiguities. The word “*annulment*” is defined by *Black's Law Dictionary*, 9th Edn. at page 106 as “The act of nullifying or making void” and with respect to a marriage it is the establishment that the marital status never existed. “*Annulment of judgement*” on the other hand is defined as “A retroactive obliteration of a judicial decision, having the effect of restoring the parties to their pre-trial positions.” *Balentine's Law Dictionary* on its part defines “*annul*” as “To erase; to nullify; to wipe out; to make void; to reduce to nothing.” Therefore where a judgement or a decision is annulled it means the hearing of the matter starts *do novo* and if the Tribunal proceeds to, simply reproduce the annulled judgement, the Court would interfere. The law is that where an earlier decision is quashed or set aside and a re-hearing ordered the Tribunal is enjoined to conduct a fresh hearing and the quashed decision cannot be deferred to by the Tribunal in reaching its subsequent decision and ought not to influence the said subsequent decision. See Peter Okeyo Ogila vs. Rachuonyo Farmers Co-Operative Union Ltd. Civil Appeal No. 79 of 1992. In my view the effect of the annulment of the award of the tender to the Applicant and the order that the bids be re-evaluated in accordance with the tender documents required the 1st interested party to go back and examine the tender documents and ensure that the re-evaluation was conducted in accordance therewith while taking into account *inter alia* the margin of preference provided in the Act and the Regulations. I do not therefore agree that the re-evaluation was only restricted to financial re-evaluation otherwise the board would have expressly stated so. Under section 100(2) of the Act that decision was final and could only be revisited, as I have stated hereinabove to the limited extent that the 1st interested party failed to comply therewith. Otherwise if the 1st interested complied with the decision, under section 100 the Respondent had no powers to revisit the same. By its decision dated 24th October, 2013, the Respondent seems to have in effect varied the decision made by the Review Board on 22nd August, 2013. For example whereas the Review Board in its decision of 22nd August 2013 expressly held that the re-evaluation and award of the tender be in accordance with the criteria set out in the Tender Documents, the Respondent curiously in its decision of 24th October, 2013, left out this direction which in my view was an important direction. Whereas I agree as was held by this Court in Republic vs.

Chairman Retirement Benefits Authority Appeals Tribunal ex parte Local Authorities Pensions Trust (Laptrust) (supra) that there is nothing in a Tribunal entertaining proceedings whose effect is to ensure its orders are given effect to, it is my view and I hold that the Respondent had no power to in effect vary a decision made final by the law under the guise of interpreting the same.”

32. In the letter dated 19th June, 2014, the complaints raised by the 1st interested party were that there was lack of impartiality, integrity, transparency and accountability in the procurement process as conducted by the 2nd interested party as demonstrated by the conspiracy between the applicant and the said 2nd interested party. It was further contended that despite the pendency of an appeal to the Court of Appeal, the said parties clandestinely executed the contract. According to the letter this was done despite the previous concession that the entire procurement was a sham and was marred with unscrupulous conduct on the part of the 2nd interested party’s staff and the applicant. It was further contended that the 2nd interested party’s conduct was discriminative, unfair, unjust and defeats the objects of the Act.

33. Section 115 of the Act provides as follows:

(1) The Director-General, with the approval of the Advisory Board, may debar a person from participating in procurement proceedings on the ground that the person—

(a) has committed an offence under this Act;

(b) has committed an offence relating to procurement under any Act;

(c) has breached a contract for a procurement by a public entity;

(d) has, in procurement proceedings, given false information about his qualifications; or

(e) has refused to enter into a written contract as required under section 68.

(2) The Director-General, with the approval of the Advisory Board, may also debar a person from participating in procurement proceedings on a prescribed ground.

(2A) Debarment under this section may be imposed by the Director-General on the recommendation of a law- enforcement agency with an investigative mandate.

(3) A debarment under this section shall be for a period of time of not less than five years, as may be specified by the Director-General.

34. There is no evidence that grounds (a), (b), (c) and (e) are available for consideration by the Director of the Authority. The only possible ground upon which the 1st interested party’s complaint could have been based is ground (d) that the applicant in procurement proceedings gave false information about his qualifications.

35. In considering whether or not that ground is available for consideration by the Director, this Court must ask itself whether that ground was available to the 1st interested party in the previous legal proceedings. In my view if the ground was available and was not utilised, then, it may well be caught up by the principle of *res judicata* in the sense of the explanation to (4) of section 7 of the **Civil Procedure Act** under which the plea of *res judicata* applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject, and which the parties, exercising reasonable diligence, might have brought forward at the time. Section 93(1) of the Act provides:

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

36. As is clear from the complaints made by the 1st interested party, the allegations made not only touch on the conduct of the applicant but touch on the conduct of both the applicant and the 2nd interested party, the procuring entity. In my view those allegations apart from the allegation of the entry into a contract during the pendency of the appeal could have been raised before the Board. With respect to the pendency of the appeal, without a stay, nothing barred the said parties from entering into a contract hence the mere pendency of the appeal cannot reasonably be a ground for imputing misconduct on the applicant.
37. Taking into account the fact that the decision of the Director is subject to a review before the Board, where a party has requested for a review but has not put forward its whole case, it ought not to be allowed to start the whole process afresh by purporting to request for debarment of a party to the procurement process. To do so would lead to a situation where the spirit of the procurement process as envisioned both in the Constitution and the Act would be defeated by allowing such convoluted proceedings. 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.
38. To adopt a procedure by which procurement processes are unduly delayed would in my view defeat the very object of procurement. It is clear that the allegations made against the ex parte applicant cannot be dealt with in isolation without investigating the role of the 2nd interested party. As the 1st interested had an opportunity to raise the issues against the 2nd interested party before the Board, it is my view and I so hold that to allow the 1st interested party to in effect commence the process of challenge of the decision of the 2nd interested party under the guise of debarment proceedings would be an abuse of the process of the Court. It would defeat the finality clause in the Act.
39. It has been contended that *res judicata* is inapplicable to judicial review proceedings. *Res Judicata*, strictly speaking is provided under section 7 of the **Civil Procedure Act** which in the preamble to the Act is “An Act of Parliament to make provision for procedure in civil courts”. However, it is now well settled that judicial review applications are neither criminal nor civil in nature. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1**.
40. In **Commissioner of Lands vs. Hotel Kunste Ltd** (supra) and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**, it was held that Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the **Civil Procedure Act** does not apply since it is governed by sections 8 and 9 of the **Law Reform Act** being the substantive law and Order 53 of the **Civil Procedure Rules** being the procedural law. Therefore strictly speaking section 7 of the **Civil Procedure Act** does not apply to judicial review proceedings. In fact in **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that *res judicata* does not apply to judicial review. See also **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47**.
41. This, however, does not mean that the Court is powerless where it is clear that by bringing proceedings a party is clearly abusing the court process. Whereas *res judicata* may not be invoked in judicial review the Court retains an inherent jurisdiction to terminate proceedings where the same amount to an abuse of its process. One of cardinal principles of law is that litigation must come to an end and where a court of competent jurisdiction has pronounced a final decision on a matter to bring fresh proceedings whether as judicial review proceedings or otherwise would amount to an abuse of the process of the court and would therefore not be entertained. The Court in terminating the same would be invoking its inherent jurisdiction which is not a jurisdiction conferred by section 3A of the **Civil Procedure Act** as such but merely reserved thereunder. In **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743** it was held:

“It is trite law that an *ex parte* order can be set aside by the judge who gave it or by any

other judge. The Civil Procedure Rules provide for this. Our Constitution does assume the existence of supportive Civil Procedure regime in so far as the same is not inconsistent with the Constitution. There is nothing inconsistent with the Constitution in the act or principle of setting aside of *ex parte* orders for good reasons. If an order obtained in a Constitutional application is incompetent or improperly obtained there cannot be any valid reason why the court would not have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy...Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called “inherent”. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside *ex parte* orders, which by their very nature are provisional.” See *The Reform of Civil Procedure Law and Other Essays in Civil Procedure (1982) By Sir Isaac J H Jacob* and *WEA Records Limited vs. Visions Channel 4 Limited & Others (1983) 2 All ER 589; R vs. Land Registrar Kajiado & 2 Others Ex Parte John Kigunda HCMA No. 1183 of 2004.*

42.As was stated by Kimaru, J in *Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009:*

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.

43.I associate myself with the holding in *Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235,* that nothing can take away the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application and that baptising such matters constitutional cannot make them so if they are in fact

- plainly an abuse of the court process.
44. Accordingly the Court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of *res judicata* would be applicable.
45. Under Article 10 of the Constitution, all State organs, State officers, public officers and all persons are bound by the national values and principles of governance whenever they apply or interpret the Constitution, enact, apply or interpret any law or make or implement any policy decision. One of the said values and principles of governance is the rule of law and as stated hereinabove one of cardinal principles of law is that litigation must come to an end. Accordingly, the Respondent was obliged to observe to the rule of law and ensure that its process was not made the subject of abuse by the 1st interested party.
46. In the premises I find merit in the Notice of Motion dated 30th October, 2014.

Order

47. In the result, I grant the following orders:

- 1. Certiorari is hereby issued removing to this court for the purposes of quashing the proceedings before the Respondent which proceedings are hereby quashed.**
- 2. Prohibition is hereby issued restraining future proceedings borne out of an application by the 1st Interested Party to bar the Applicant in taking part in the future procurement matters arising from the Tender N. KSMS/PROC/37/12-13 for the supply and assembly of furniture for the Academic Wing and Library of Kenya School of Monetary Studies.**
- 3. Costs of this application are awarded to the ex parte applicant to be borne by the Respondent and 1st Interested Party jointly and severally.**

48. Orders accordingly.

Dated at Nairobi this 16th June, 2015

G V ODUNGA

JUDGE

In the presence of:

Mr Awele for Mr Chacha Odera for 2nd Interested Party and holding brief for Mr Achach for the 1st Interested Party

Cc Patricia