



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISC. APPLICATIONS NO. 17 OF 2015**

**IN THE MATTER OF AN APPLICATION BY THE TEACHERS SERVICE COMMISSION  
(TCS) SEEKING LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS FOR  
ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF TENDER No. TSC/T/044/2014-2015 FOR THE PROVISION OF  
PAINTING SERVICES FOR TSC HOUSE**

**AND**

**IN THE MATTER OF THE DECISION AND RULING MADE BY THE PUBLIC  
PROCUREMENT ADMINISTRATION REVIEW BOARD ON 18<sup>TH</sup> DECEMBER, 2014**

**AND**

**IN THE MATTER OF ARTICLES 47, 50, 201(d), 227(1) AND 232(1) (b) OF THE  
CONSTITUTION (2010)**

**IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT CAP 412C AND PUBLIC  
FINANCE MANAGEMENT REGULATIONS (2012)**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, CAP 412A AD  
PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS (2005)**

**IN THE MATTER OF THE LAW REFORM ACT, CAP 26 AND ORDER 53 OF THE CIVIL  
PROCEDURE RULES CAP 21**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**ZACS CONSTRUCTION CO. LTD.....INTERESTED PARTY**

## **EXPARTE: TEACHERS SERVICE COMMISSION**

### **RULING**

#### **Introduction**

1. By a Notice of Motion filed herein on 28<sup>th</sup> January, 2015, the *ex parte* applicant herein, **Teachers Service Commission**, seeks the following orders:

- 1. An order of Certiorari to bring into this honourable court and quash:-**

- (a) The entire decision and ruling of the Public Procurement Administrative Review Board as set out in its decision delivered on 18/12/2014 in Public Procurements Administration Review Board Application NO, 46 of 20<sup>th</sup> November 2014 between Zacs Construction Company Limited and Teachers Service Commissions; and**

- (b) The award of Tender No. TSC/T044/2014-2015 in respect of the provision for painting service of TSC House to H/S Zacs Construction Company Limited at a price of Kshs 17,959,260/= by the Review Board**

- 2. An order of declaration that the decision and ruling of the Respondents in Public Procurement Administration Review Board application No. 46 of 2014 dated 18<sup>th</sup> December 2014 awarding the tender No. TSC/T/044/2014-2015 in respect of the provision for painting services of TSC House to M/S Sacs Construction Company Limited at a price of Kshs 17,959,260/= was *ultra vires* the Constitution, the Public Finance Management Act and Public Finance Management Regulations, Public Procurement and Disposal Act and the Public Procurement and Disposal Regulations and is therefore invalid, void and of no effect.**

- 3. An order of declaration that the Respondent in arriving at its decision and ruling in Public Procurement Administration Review Board application No. 46 of 2014 dated 18<sup>th</sup> December, 2014 acted in excess of jurisdiction by taking into account matters it ought not to have taken into account and failed to take into account matters it ought to have taken into account.**

- 4. An order of declaration that the Respondent's decision and ruling in Public Procurement Administration Review Board application No. 46 of 2014 dated 18<sup>th</sup> December 2014 is unreasonable as it failed to consider the relevant constitutional and statutory provisions as well as the submissions made by the *Ex parte* Applicant in arriving at its decision.**

- 5. Costs of this application and the entire proceedings be awarded to the *Ex parte* Applicant.**

2. The said Motion was supported by an affidavit sworn by **Gabriel K. Lengoiboni**, the applicant's secretary on 16<sup>th</sup> January, 2015.
3. According to the deponent, on 14<sup>th</sup> August, 2014, the *ex parte* Applicant placed an advert in the Daily Nation Newspaper inviting tenders from eligible bidders for, inter alia, Tender No. TSC/T/04/2014-2015: Provision of Painting Service for TSC House. Upon closure of the tender on 28<sup>th</sup> August, 2014, and as per law, the Tender Opening Committee, appointed by the Commission Secretary of the *ex parte* Applicant, opened the Tender in the presence of the representatives of all the bidders and the bids were subjected to preliminary, technical and financial evaluation to determine compliance with the tender requirements; in this respect, the

- Tender Processing Committee of the *ex parte* Applicant recommended that the tender be awarded to the Interested party at a cost of Kshs 17,659,260/=. Thereafter, the Tender Processing Committee forwarded its report to the Tender Committee. However, the Tender Committee did not award on the basis that there were large variations of scores and more significantly, the Tender Processing Committee had not referred to the price guidelines as required, from the Institute of Quantity Surveyors of Kenya Journal and the Ministry of Public Works- Construction Costs Handbook to ascertain the reasonableness of the price quoted.
4. It was contended that the Tender Committee subsequently, resolved that the Tender be re-evaluated afresh and price guidelines on painting works from the Ministry of Public Works be obtained to guide in price comparison and upon obtaining the price guidelines from the Institute of Quantity Surveyors of Kenya Journal and the Ministry of Public Works, the Tender Processing Committee was reconstituted to re-evaluate the tenders afresh and once again, recommended award of tender to the Interested Party as per its re-evaluation report. However, when the re-evaluation report was forwarded to the Tender Committee, it was noted that the price recommended for award and as quoted by the Interested Party was excessively high. In particular, the price quoted was in respect of 2 coats of paints, whereas the price guidelines obtained from the Institute of Quantity Surveyors of Kenya indicated a price of Kshs 250/= per square meter for 3 coats of paints, much lower than what the Interested Party had quoted for 2 coats of paints. In effect, the estimated market price for the service to be rendered was approximately Kshs 6,000,000/= hence the price of Kshs 17,659,260/= quoted by the Interested Party was way above the market rates hence not reasonable. It was further found that the price quoted by the Interested Party was extremely exorbitant as it was above the budgetary provision of the *ex parte* Applicant in respect of service tendered for; in particular, the estimated budget for the service was contained in the procurement plan and projected financial estimates for 2015/2015 at a global sum of Kshs 22,000,000/= which had been set aside for refurbishment of buildings and which entailed several works and services besides painting, to improve and maintain the *ex parte* Applicant's building infrastructure.
  5. In view of the foregoing, and in exercise of its mandate, the *Ex parte* Applicant's Tender Committee did not award the Tender as recommended by the Tender Processing Committee but instead, recommended termination of the tender proceedings and re-advertisement of the Tender and vide its letter dated 18<sup>th</sup> November, 2014 the *Ex parte* Applicant notified the Interested Party of the decision of the Tender Committee; in the said letter, the Interested Party was rightly notified that the basis under which it was not awarded the tender was the excessiveness of the price quoted.
  6. However, vide a Request for Review dated 20<sup>th</sup> November, 2014 and amended on 9<sup>th</sup> December, 2014, the Interested Party moved the Respondent seeking orders inter alia for substitution of the *ex parte* Applicant's decision and with an order to award it the tender and to compel the *ex parte* Applicant to sign a contract with it. Subsequently, the *ex parte* Applicant filed its response on 1<sup>st</sup> December, 2014 wherein it clearly stated that despite the Interested Party being the lowest evaluated bid, it could not be awarded the tender as the price quoted was too high and outside its budgetary provisions. On 17<sup>th</sup> December, 2014, the parties appeared before the Respondent where oral submissions were made by all parties with the *ex parte* Applicant reiterating its position that the price quoted by the Interested Party and recommended for award was above the market rates and that awarding the tender to the Interested Party would be contrary to the relevant constitutional and statutory provisions on prudent and economic utilization of public resources and more importantly, the objects of public procurement as contained in Section 2 of the **Public Procurement and Disposal Act** (hereinafter referred to as "the Act").
  7. It was averred that in total disregard of the *ex parte* Applicant's submissions, and the relevant constitutional and statutory provisions, the Respondent proceeded to award the tender in question to the Interested Party and vide the said decision, the Respondent further directed the *ex parte* Applicant to complete the procurement process within a period not less than 15 days of the order.
  8. It was deponent's averment that in the said decision the Respondent misdirected itself on several pertinent issues, in particular, when it set out the sole issue for consideration as being "whether the Procuring Entity's Technical Committee acted outside its legal mandate in recommending a re-

evaluation of the tender using a criteria not found in the tender document and in its recommendation for termination and re-advertisement of the tender No. TSC/t/044/2014-2015” for the following reasons:

- a. It was the *ex parte* Applicant’s Tender Committee and not the technical committee that recommended the Re-evaluation of tender;
  - b. Use of the price guidelines from the Institute of Quantity Surveyors and the Ministry of Public Works did not amount to introduction of a new criteria for purposes of tender evaluation but was a mere reference document meant to guide in price comparison to determine its reasonableness;
  - c. The Public Procurement Oversight Authority (PPOA) Market Index which contains the average price for items commonly procured did not contain the estimated price guidelines of painting work being procured in this case and further, given the technical nature of the works sought to be procured, the *ex parte* Applicant had to make reference to price guidelines from the Ministry of Public Works, a government department and the Institute of Quantity Surveyors which is the professional institute relevant in the circumstances; these institutions have experts and professionals and were thus the best source of information to ascertain the reasonableness of the price quoted by all the bidders *vis a vis* the market rates;
  - d. The Tender Committee is mandated under Regulation 10(e) of the **Public Procurement and Disposal Regulations** (hereinafter referred to as “the Regulations”) to ensure that the procuring entity does not pay in excess of prevailing market prices hence tender Committee was well within its mandate to ensure that the prices constituting the tender award was within the prevailing market rates and hence it acted prudently by seeking information from reference documents to ascertain the market price of the works to be tendered; and
  - e. The tender Committee was merely performing its role of oversight in the procurement process of a procuring entity hence it was not entirely bound by the report of the Tender Processing Committee recommending award of tender.
9. It was further contended that the Respondent failed to consider the *ex parte* Applicant’s submission that the price quoted by the Interested Party was excessively high in view of its procurement plan and budgetary provision. The deponent averred that:
- a. The Procurement plan annexed by the *ex parte* Applicant indicated a unit price of Kshs 22,000,000/= for “Refurbishment of buildings” as can be further confirmed by the Recurrent Expenditure Summary 2014/2015 and Projected Expenditure Summary for 2015/2016-2015/2017.
  - b. The item indicated as Refurbishment of Buildings entails many aspects and thus, it was erroneous for the Respondent to hold that it was only for painting works and that the quantity was one; Indeed, refurbishment entails many aspects including painting, partitioning, replacement of broken floor tiles, doors, etc. hence painting is only one component of refurbishment.
  - c. As a matter of fact in the projected estimate of Kshs 22,000,000/= a sum total of Kshs 4,664,941.20 has already been utilized in the financial year to cater for other aspects of refurbishment namely, partitioning of its building, repair of floors, construction of registry archive offices and repair of toilets.
  - d. Subsequently, the Respondent was therefore in error by holding that the *ex parte* Applicant would make a saving of Kshs 5, 000,000/= by awarding the tender to the

Interested Party at a sum of Kshs 17,659,260/=.

10. It was further contended that the Ex parte Applicant was not granted fair hearing during proceedings by the Respondent for the following reasons:
  - a. The Respondent refused to grant the *ex parte* Applicant an opportunity to provide specific particulars as regards its budgetary allocation for the works tendered for (painting) despite requesting for an opportunity to do so;
  - b. The *ex parte* Applicant's procurement expert present during the proceedings was blatantly shut out and was not allowed to answer the technical questions posed by the Respondent's members to the Applicant in respect of the budgetary allocations in respect of painting ; and
  - c. The *ex parte* Applicant was not accorded adequate time and equal opportunity as the Interested Party to fully ventilate its case.
11. To the applicant, the prejudice suffered by the *ex parte* Applicant as a result of the Respondent's decision and ruling lies in the fact that it draws its funds from the exchequer and thus is required to prepare a procurement plan and a budget setting out the projected financial estimates in respect of every financial period and further, must exercise prudence and cost effectiveness in utilization of public funds. Further, the Applicant as a public institution has a duty to utilize public funds in a prudent and cost effective manner that ensures fiscal sustainability.
12. Based on legal advice, the deponent averred that Section 66 of the **Public Finance Management Act**, Cap 412C requires the *ex parte* Applicant *inter alia* to prepare annual estimates of expenditures for submission to the National Treasury; these estimates to the National Treasury must guide in the preparation of the national budget and must be adhered to strictly by all government agencies to ensure prudent utilization of public funds and fiscal sustainability. Further, and in view of the fact the *ex parte* Applicant draws its funding from the exchequer all its expenditures must be audited against its projected financial estimates and budgetary allocation.
13. However as a result of the foregoing the *ex parte* Applicant was now faced with a decision which it was unable to implement as it was outside its budgetary provisions for the service in question and if implemented, will affect provision of other essential services.
14. It was submitted that there was a breach of Articles 201(d), 227(1) and 232(1)(b) of the Constitution, section 66 of the **Public Finance Management Act** and sections 2 and 30(3) of the **Public Procurement and Disposal Act** which provide for prudent and responsible utilization of public funds, procurement of public goods and services in a cost effective and efficient system as well as effective economic use of public resources. In disregarding Article 227(1) and Regulation 30(3) of the Regulations, it was submitted the Respondent committed a fundamental error constitutional and statutory provisions were breached.
15. It was therefore submitted based on **Anisminic Ltd vs. Foreign Compensation Commission [1969] AC 14** and **Halsbury's Laws of England** Vol. 1(1) that the Respondent committed a jurisdictional error. It was further submitted based on **Judicial Review Handbook** by **Michael Fordham** at para 38-39 which was cited by approval by **Nyamu, J** in **Republic vs. Public Procurement Administrative Review Board & Another [2008] eKLR** that by the Respondent misdirecting itself on factual matters, which it was not entitled to get wrong and by getting certain facts badly wrong, it erred gravely. Further reliance on the issue was placed on **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1947] 2 All ER 689**.
16. It was submitted based on **Republic vs. Public Procurement Review Administrative Board & Another ex parte Selex Sistemi Integrati [2008] KLR 728** that the decision went against public interest which informed the enactment of the Act.
17. By exhibiting bias and bad faith, it was submitted that the decision of the Respondent contravened the rules of natural justice and failed to adhere to the principles of fairness. In support of this position the applicant relied on **Pashito Holdings Ltd & Another vs. Paul Ndung'u & Others [1997] 1 KLR (E&L)** and **Republic vs. Public Procurement Administrative Review Board & 2 Others ex parte Suzan General Trading JLT [2014] eKLR**.

18. With respect to the time for filing the application, it was submitted the Respondent read out its decision on 18<sup>th</sup> December, 2014 but the same was not ready in hard copy instantly to enable the Applicant make an informed decision as to whether to review the orders before this Court and that the decision was not availed to the applicant till 29<sup>th</sup> December, 2014, 11 days after the impugned decision hence the applicant was only left with 3 days out of the statutory 14 days period, but which period fell within the Christmas vacation thereby complicating time limited in respect of this application. By virtue of Order 50 rule 4, it was submitted the application was not filed outside the statutory period since the statutory period under section 100 of the Act did not run from 21<sup>st</sup> December, 2014 to 13<sup>th</sup> January, 2015 hence the application was validly on record. In any case, it was submitted that the preliminary objection with respect to time did not meet the test in **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** and **George Oraro vs. Barak Eston Mbaja Civil Suit No. 85 of 1992**.
19. In any case, based on **Republic vs. Public Procurement Administrative Review Board & Another ex parte Hyosung Ebara Company Ltd [2011] eKLR** and **Republic vs. Kenya Airports Authority ex parte Suzan General Trading JLT [201] eKLR**, the Court was urged to consider the substantive justice as founded in Article 159 of the Constitution.

### **Respondent's Case**

20. In response to the application, the Respondent filed a replying affidavit sworn by **Henock A. Kirungu**, the Respondent's secretary on 13<sup>th</sup> March, 2015.
21. According to him, on 20<sup>th</sup> November, 2014, in the matter of Tender No. TSC/T/044/2014-2015 for the provision of Painting Services for TSC House, **M/S Zacs Construction Company Limited** (the Interested Party herein) filed a Request for Review before the Public Procurement Administrative Review Board (the Respondent herein) to review the above tender. On the same day upon receiving the Request for Review, the Respondent's secretary served a copy on the Applicant herein and notified it of the pending review in accordance with Regulations 74(1) and 74(2) of the Regulations and on 1<sup>st</sup> December, 2014, the Applicant herein filed a response to the Request for review in accordance with Regulations 74(3) of the Regulations, as amended in 2013.
22. It was deposed that at the commencement of the hearing on 10<sup>th</sup> December, 2014 the Interested Party herein sought leave of the Respondent to file its Amended Request for Review dated 9<sup>th</sup> December, 2015 together with its supplementary verifying affidavit sworn by one **Joshua Mwita Mwai** and there being no objection to the application for an amended Request for review by the Applicant herein the Respondent allowed the amended Request for Review and the same was deemed to have been properly filed and formed part of the record of the Request for Review.
23. The deponent disclosed that the Interested Party herein requested the Respondent for the following orders on the basis of the amended request for review:
- a. An order directing and or compelling (*sic*) the Procuring Entity (the Applicant herein) to forthwith award the tender No. TSC/T/044/2014-2015 to the successful Bidder;
  - b. The board do annul the Procuring Entity's decision not to award the tender to the Interested Party herein and to declare that the recommended termination and re-advertisement of the tender was in breach of the ***Public Procurement & Disposal Act, 2005*** (hereinafter referred to as "the Act") and the Regulations hence illegal, null and void;
  - c. Consequent to prayer (b) above the Respondent do substitute the decision of the Procuring Entity by awarding the tender to the Interested Party and do direct and compel the Procuring Entity to sign a contract with the Interested Party;
  - d. The Board to make such other/further orders and/or directions as it deemed fit with a view to sanction the apparent breach of the law on the part of the Procuring Entity.
  - e. The costs of the review be awarded to the Interested Party herein;

f. Any other orders as applicable as the board may deem fit to grant in the circumstances.

24. Upon considering the submissions of the parties and the documents before it, the Respondent identified one issue for determination, namely whether the Procuring Entity's (the Applicant herein) Technical Committee acted on criteria not found in the tender document and in its recommendation for termination and re-advertisement of the tender No. TSC/T/04/2014-2015. The Respondent consequently made the following orders:

a. That the Request for Review dated and filed on 20/11/2014 and amended on 9/12/2014 in respect of tender No. TSC/T/044/2014-2015 in respect of the provision for painting services for TSC House be allowed.

b. The Procuring Entity's decision terminating and or purporting to terminate the procurement process the subject matter of the Request for Review and is hereby declared illegal, null and void and is set aside;

c. Pursuant to the provisions of Section 98(b) and (c) of the Act, the Board awarded the Tender No. TSC/T/044/2014-2015 in respect of the Provision for Painting Services for TSC House to M/s Zacs Construction Company Limited at the tender price of Kshs. 17,659,260 and directed the Teachers Service Commission to complete the procurement process within a period of not less than fifteen (15) days from the date of the Board's decision;

d. The board made no orders as to costs as the issue was not pursued by counsel for the Interested Party at the hearing;

25. According to the deponent, the Respondent only took into consideration facts that were presented before it and were relevant in deciding the above issue and its decision was based on its findings that:

a. The recommendation by the Procuring Entity's Tender Committee to the Evaluation Committee to re-evaluation the tenders afresh and compare the prices against the Ministry of Public Works' price guidelines and the Institute of Quantity Surveyors' manuals was not a criteria contained in the Tender Document and that indeed the Procuring Entity acted *ultra vires* in its recommendation for re-evaluation;

b. The letters issued by the Procuring Entity to all bidders cannot be construed to amount to termination of the tender process and were therefore mere notifications in accordance with Section 65 of the Act, and not Section 36 of the Act as required by law.

c. a budget item of Kshs 22 Million was provided for in the Procuring Entity's budget to be used for refurbishing one building and not all 47 TSC buildings in the 47 Counties.

26. In the deponent's view, the decision was arrived after considering all documents of evidentiary value placed before the Respondent by the parties and the submissions of the parties on each of the issues in the Request for Review hence the Respondent's decision was rational, reasonable, logical, lawful, impartial and in line with public policy and public interest and the intention of parliament in enacting the Act.

27. It was therefore the Respondent's case that the Applicant's allegation that the Respondent acted to the contrary was baseless and unwarranted; and was a ploy by the Applicant to revive a matter that had been legitimately adjudicated in line with the avenue provided by the law.

28. It was submitted that the application as drafted does not meet the criteria for judicial review as it is an appeal. It was further submitted that contrary to the provisions of section 8 of the Law Reform Act and Order 53 of the **Civil Procedure Rules** which only envisages orders of prohibition, certiorari and mandamus, the applicant seeks various declaratory orders as well.

29. To the Respondent, the decision under challenge was delivered on 18<sup>th</sup> December, 2014 and pursuant to section 100 of the Act a challenge to such a decision by way of judicial review can only be challenged within fourteen days of the date of the decision. In the instant case, the judicial review proceedings were commenced well outside the said period hence was clearly out of time. In support of the submission the Respondent relied on **Republic vs. Public Procurement Administrative Review Board & 2 Others [2013] KLR.**
30. According to the Respondent these being judicial review proceedings, constitutional provisions ought not to be invoked in order to assist the applicant.

### **Interested Party's Case**

31. According to the Interested Party, these proceedings are incompetent, fatally defective and bad in law for contravening section 100(1) of the Act with respect to the stipulated period for commencing the same. It was submitted that whereas the Review Board's decision was rendered on 18<sup>th</sup> December, 2014, the application seeking leave to apply for judicial review orders was filed on 21<sup>st</sup> January, 2015 which was a period of about thirty four days from the date of the Respondent's decision and thus twenty (20) days after the expiry of the fourteen days period prescribed under section 100(1) of the Act.
32. The Court was therefore urged to strike out this application on the ground that it was lodged out of time since there is no provision for extension of time. According to the Interested Party the filing of the application outside the stipulated time breached the objectives, purpose and spirit of the Act as provided under section 2 thereof. In support of these submissions the Interested Party relied on **Republic vs. Kenya Revenue Authority, & Another ex parte Europa Health Care Limited HCJR Misc. Appl. 248 of 2013, Republic vs. The Commission of Customs Services ex parte SDV Transami HC Misc. Appl. 81 of 2011 and Republic vs. Ministry on Interior and Coordination of National Government ex parte ZTE Corporation & Another JR No. 441 of 2013 [2014] eKLR.**
33. It was submitted that the tenor and import of the application is to seek re-evaluation of the evidence tendered before the Board and consequently interfere with the decision on the merits, a proposition which is untenable. In support of this contention the Interested Party relied on **Republic vs. Ministry on Interior and Coordination of National Government ex parte ZTE Corporation & Another** (supra), **Republic vs. Public Procurement Administrative Board & 2 Others ex parte Saitram Services (EA) Ltd [2013] KLR** and **Republic vs. Kenya Revenue Authority, & Another ex parte Europa Health Care Limited** (supra).
34. It was contended that the applicant had demonstrated that the Board committed any error of law or acted without jurisdiction or ultra vires or contrary to the provisions of a law or its principles and had hence not fulfilled the conditions precedent for the grant of the judicial review orders sought.

### **Determinations**

35. I have considered the application, the affidavits sworn both in support of and in opposition to the application as well as the submissions made and the authorities relied upon in support thereto.
36. Before delving into the substantive issues there are two issues I would like to comment on. The applicant as stated hereinabove relied on **Pashito Holdings Ltd & Another vs. Paul Ndung'u & Others** (supra) and reproduced the following quotation purporting that it was from the said decision:

**“An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision.”**

37. I have perused the said decision and it is clear that the said citation is not from the said decision.

My research on the same has led me to the decision of **Msagha vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] 2 KLR 553** in which the said quotation appears. Counsel ought to take care to see that whatever quotations they reproduce in their submissions are correct and relate to the decision in question in order not to mislead the Court.

38. However, it was not only the applicant who was guilty of failing to properly assist the Court. The Respondent, in its submissions cited **Republic vs. Public Procurement Administrative Review Board & 2 Others [2013] KLR**. However a copy of the said authority was not exhibited. Parties, particularly whenever they rely on unreported decisions, ought to supply copies of the same.
39. An issue of time bar was raised in these proceedings. Section 100(1) of the Act 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.***

40. Section 9(3) of the ***Law Reform Act*** Cap 26, Laws of Kenya provides:

***In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.*** [Emphasis mine].

41. Therefore for the purposes of judicial review, an enactment may perfectly provide the time within which challenge to a decision of the Review Board may be taken and if not taken that decision would be final. That is exactly what section 100(1) of the Act provides. A provision limiting the time for making an application for judicial review cannot therefore be termed as being unconstitutional. Accordingly the decision in **Republic vs. Public Procurement Review Administrative Board & Another ex parte Selex Sistemi Integrati** (supra) is distinguishable. Where Parliament has provided for a period within which judicial review proceedings may be commenced, this Court cannot by craft or innovation go round such a legislative edict. As was held in **Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482:**

***“Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules...The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court's duty is to give effect to the law as it exists...Thus an application for judicial review, may it be for an order of mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose...”***

42. In this case the decision being challenged was made on 18<sup>th</sup> December, 2014. The judicial review proceedings ought to have been commenced within 14 days from the date thereof, the last date being 1<sup>st</sup> January, 2015. Pursuant to section 57 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya, these proceedings ought to have been commenced by latest 2<sup>nd</sup> January, 2015. They were however not so commenced until 21<sup>st</sup> January, 2015 which was 20 days out of time.
43. The applicant has however relied on *inter alia* Article 159 of the Constitution. In my view Article 159(2)(d) of the Constitution cannot be a panacea for all ills. It cannot be relied upon to revive a claim which is expressly extinguished by statute. It does not give rise to a cause of action. In my

view it is not meant to destroy the law but to fulfil it. It is meant to ensure that the path of justice is not clogged or littered with technicalities. Where, however, a certain cause of action is disallowed by the law, the issue of the path of justice being clogged does not arise since in that case justice demands that that claim should not be brought. Justice, it has been said time without a number, must be done in accordance with the law. Dealing with the said Article of the Constitution, the Supreme Court in Petition No. 5 of 2013, **Raila Odinga versus Independent Electoral and Boundaries Commission & Others [2013] eKLR** expressed itself as follows:

**“.....Our attention has repeatedly been drawn to the provisions of Article 159(2)(d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law. In the instant matter before us, we do not think that our insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a procedural technicality; it is a constitutionally mandated technicality.”**

44. An issue that goes to jurisdiction cannot, in my view be termed a mere technicality. To the contrary the issue goes to the root of the matter since without jurisdiction the Court has no option but to down its tools. As was held in **Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1** Nyarangi, JA expressed himself as follows:

**“Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.**

45. That limitation goes to the jurisdiction of the Court was held in **Pauline Wanjiru Thuo vs. David Mutegi Njuru Civil Appeal No. 278 of 1998** where it was held by the Court of Appeal that a preliminary objection based on limitation can be taken for the first time on appeal because it goes to jurisdiction.

46. The applicant has however justified its failure to comply with section 100(1) of the Act on the basis that it was unable to secure a hard copy of the decision in order to make a decision whether to apply for judicial review or not and that by the time it got the decision there were only three days left. Section 100(1) however provides that a decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days **from the date of the Review Board’s decision**. It does not say that the time starts running from the date when a copy of the decision is supplied. Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve millions and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. See **Republic vs. The Minister for Lands & Settlement & Others**

**Mombasa HCMCA No. 1091 of 2006 and Republic vs. Public Procurement Administrative Review Board & 2 Others ex parte Knocks Krane GmbH [2013] eKLR.**

47. In **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006** it was held that legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders.
48. The applicant also relied on Order 50 rule 4 of the ***Civil Procedure Rules***. That provision provides:

*Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:*

***Provided that this rule shall not apply to any application in respect of a temporary injunction.***

49. It is however clear that Order 50 rule 4 only applies to situations where computation of time is provided under the said Rules or by an order of the Court. In this case, the limitation is neither provided by the ***Civil Procedure Rules*** nor by an order of the Court but by section 100(1) of the ***Public Procurement and Disposal Act*** which Act however does not provide for extension of time. This position was appreciated **Mokombo Ole Simel & Others vs. County Council of Narok & Others Nairobi HCMA No. 361 of 1994** where the Court expressed itself as follows:

**“If the limited time is prescribed under the Civil Procedure Rules or by an order of the court or by summary notice, the court could enlarge the period. But here the absolute period of six months has been laid down by a different statute namely the Law Reform Act. Order 49 rule 5 of the Civil Procedure Rules cannot be invoked to supersede the express provisions of the Act...Order 49 rule 3A is similarly a piece of delegated legislation and cannot have the effect of amending the express provisions of section 9(2) and (3) of the Act. The said provisions can only be altered or amended by an Act of the Parliament...The long established tradition in commonwealth countries is that we look in the main to the legislature rather than to the courts for the development of our law. Moreover it is a different thing if a statute is ambiguous and capable of different interpretations. Here in this case the legislation is clear and certain and not open to any conflict on interpretations. The duty of the court is to expound what the law is and not what in view of social changes it should be. To change the law according to social dictates of society is the function of legislature. The court cannot strike down or disregard the express provisions of section 9 of the Act and therefore the applicant’s application for leave to apply for an order of judicial review to quash the resolution is rejected...But a copy of the ruling should be forwarded to the Honourable the Attorney General since the provisions of section 9 should be amended so that the court is given jurisdiction to enlarge the period of six months in deserving cases.”**

50. Since the facts with respect to when the decision was made and when these proceedings were commenced are not in dispute, I do not see why a preliminary objection could not be taken. In any case, this determination is not on the preliminary objection but the application itself. Accordingly the ***Mukisa Biscuits Case*** and ***George Oraro Case*** cited above are of no assistance to the applicant. With respect to ***Ex Parte Hyosung Ebara Case, Musinga, J*** (as he then was) was dealing with the constitutionality of section 100(4) of the Act which had the effect of restricting the period within which the court is to determine matters before it and that provision was, rightly in my view, held to be unconstitutional. In ***ex Parte Suzan Case*** (supra), **Korir, J** was called upon to determine the effect of delay on the exercise of discretionary powers to grant judicial review reliefs. That case is distinguishable from the present case where the law provides the timelines and there is no room for application of equitable principles. Principles of equity, it is trite, cannot be invoked to override written law or even common law since equity follows the law. **Waki, J** (as he then was) considered the relevancy of equitable principles to limitation provisions with respect to

orders of certiorari in **Republic vs. County Council of Kwale & Another ex parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** and expressed himself as follows:

**“Equity follows the law however and there is a law prohibiting the grant of orders of certiorari after a period of six months, which have in this matter admittedly long expired. The court has no discretion in the matter and the application on that score will have to fail.”**

51.As already held hereinabove there is nothing wrong with legal provisions limiting the timelines for applying for orders of certiorari within a period of less than six months from the date of the decision sought to be challenged. This Court has been urged to save these proceedings on the ground of public interest. Public interest however is just like public policy. Whereas the Courts have recognised that the latter may be a factor to be considered in the exercise of discretion, it is an indeterminate principle or doctrine which has been branded an unruly horse, and when you get astride it, you never know where it will carry you. See **Kenya Shell Limited vs. Kobil Petroleum Limited Civil Application No. Nai. 57 of 2006 [2006] 2 KLR 251.**

52.It is now trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute as was held in **Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR** thus:-

**“There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the constitution and the law as the rule of law is one of the national values of the constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public consistently with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision.”**

53.A reading of section 2 of the Act clearly reveals that one of the objects of the procurement process is speed hence public policy and interest is geared towards expeditious resolution of procurement disputes. See **Republic vs. Public Procurement Review Administrative Board & Another ex parte Selex Sistemi Integrati** (supra).

54.It follows that this application is fatally incompetent. It cannot be resuscitated by breathing life into it. It is beyond the intensive care unit.

## **Order**

55.It follows that the application herein must fail and as the issue goes to the jurisdiction, this Court must down its tools without further ado.

56.In the result this application is struck out with costs to the Respondent and Interested Party.

57.It is so ordered.

**Dated at Nairobi this 29<sup>th</sup> day of September, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Odhiambo for the Respondent**

**Mr Njuguna for the Interested Party**

**Cc Patricia**