REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MILIMANI LAW COURTS

JUDICIAL REVIEW APPLICATION NO. 401 OF 2013

IN THE MATTER OF AN APPLICATION BY FURSYS (K) LIMITED FOR A JUDICIAL REVIEW ORDER OF CERTIORARI

IN THE MATTER OF A DECISION AND ORDER DATED 24TH OCTOBER 2013 OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

AND

IN THE MATTER OF ORDER 53 OF THE

CIVIL PROCEDURE RULES AND THE PUBLIC PROCUREMENT

AND DISPOSAL ACT

BETWEEN

REPUBLIC…….. APPLICANT

AND

THE PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD ……..……. RESPONDENT

KENYA SCHOOL OF

MONETARY STUDIES……...……...…. 1ST INTERESTED PARTY

BEVAJ FURNITURE LIMITED…...……..…… 2ND INTERESTED PARTY

FURSYS KENYA LIMITED…….. APPLICANT

JUDGEMENT

1. By a Notice of Motion dated 6th November, 2013, 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 Respondent's decision dated 24th October 2013 in Review No. 35/2013 between Bevaj Furniture Ltd v Kenya School of Monetary Studies.**
2. **Costs of the application be awarded to the applicant.**

Ex Parte Applicant's Case

2. The application is based on the following grounds:

a) In the second review, the Board had no jurisdiction to seat an appeal or review the earlier Board's decision dated 22nd August 2013 by giving a different interpretation to the directive that the tender had to be re-evaluated using the criteria set out in the Tender. This was a contravention of Section 2 of the Public Procurement and Disposal Act 2007, which demands; inter alia, a tendering process that:

i. Promotes the integrity and fairness of the tendering process.

ii. Increases transparency and accountability of the tendering process.

iii. Increases public confidence in the tendering procedures.

b) The decision of 22nd August 2013 required that the entire tender process had to be revaluated as per the tender requirements and each party was lawfully exposed to re-evaluation. This matter was therefore res judicata.

c) The Respondent acted *ultra vires* Section 66 (4) of the Public Procurement and Disposal Act by failing to appreciate that the 1st Interested Party had lawfully awarded the tender to the applicant at the corrected sum of Kshs. 249,434,381.24 which was the lowest evaluated price.

d) The Respondent contravened Article 227 of the Constitution that makes it mandatory that contracts for goods or services should be in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective. The 2nd Interested Party's bid of Kshs. 267,074,994.18 was not competitive or cost effective.

e) The respondent erred by failing to consider the evidence that the 2nd Interested Party did not qualify to proceed to the financial evaluation stage, and there was therefore no need to advise the 2nd Interested Party of any arithmetic errors or apply the margin of preference. This was a mandatory requirement of the tender requirements that the respondent failed to take cognizance off.

f) The Respondent failed to consider the Applicant's evidence set out in its letter of letter dated 4th September 2013 that the 2nd Interested Party had unlawfully passed obtained the Applicant's goods and purported to pass them off as its own.

g) The respondent erred by failing to take cognizance of the Applicant's evidence from the Assistant Registrar of Companies showing that it has a local shareholder and was thus entitled to enjoy the benefit of the margin of preference under Section 38(8) (b) (ii) of the Public Procurement and Disposal Act and thus could not be excluded from the legitimate and lawful benefit of the margin of preference on the face of the official search from the Companies Registry.

h) It is a waste of public resources and time to have the same tender re-evaluated a third time and deliberately issue directions on the margin of preference that would expressly disqualify the applicant that had the lowest evaluated bid and had passed the technical

evaluation and thus expose the tax payers to pay almost Kshs. 20 million more for the supply of the goods.

3. The same application is based on a Statutory Statement filed on 5th November, 2013 and the verifying affidavit sworn by **Byung Tae Kim**, the *ex parte* Applicant's Managing Director the same day.
4. According to the ex parte Applicant, 1st Interested Party advertised Tender No. KSMS/PROC/37/12-13 for the supply and assembly of furniture for its academic wing and library in the Standard and Daily Nation Newspapers of 26th and 27th February 2013. In the month of March 2013 the 1st Interested Party issued Tender Documents for the supply and assembly of furniture for its academic wing and library and some of the salient conditions of the Tender Documents were that eligible goods supplied should have their origin in eligible source countries; that the tender would be awarded to the successful tenderer whose tender had been determined to be substantially responsive and had been determined to be lowest evaluated tender; that no preference was allowed in the tender; and that the bids must meet the evaluation criteria which were in 4 stages.
5. On 28th June 2013 the 1st Interested Party awarded the tender to the applicant which was found to have the lowest evaluated bid of **Kshs. 249,434,381.24.** However, the 2nd Interested Party, which had the second lowest evaluated bid of **Kshs. 267,074,994.18**, lodged an appeal vide **Application No. 24 of 23rd July 2013** ***Bevaj Furniture Ltd v Kenya School of Monetary Studies*** (hereinafter referred to as the Appeal) on 29th July 2013. As a result of the said Appeal, the Respondent 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 using the criteria set out in the Tender Documents, the correction of arithmetic error as envisaged by the Act and applying the Margin of Preference as envisaged by the ***Public Procurement and Disposals Act*** (hereinafter referred to as the Act) and the Regulations thereunder (hereinafter referred to as the Regulations).
6. The salient issues of the said determined 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 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.
7. The 1st 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. In its evaluation, the 1st Interested Party awarded the Applicant 48.5 marks out of 60 and the interested party 36 marks out of 60 hence the interested party failed to attain the minimum score of 40 marks and was disqualified from the next stage of the evaluation. In the due diligence score chart, the Applicant scored above 30 marks and the Applicant, after taking into consideration the arithmetic error, had the lowest evaluated bid of **Kshs. 249,434,381.24** which decision was communicated to all bidders.
8. Following the above decision, by a letter dated 29th August 2013, the 1st Interested Party informed the Applicant that it was re-evaluating the tender pursuant to the decision of the Board and required, inter alia, statutory declaration affirming the local shareholding of the company. By a letter dated 4th September 2013, the 1st Interested Party notified the Applicant of the arithmetic error and asked for conformation of acceptance of the correction of Kshs. 249,434,381.24, which was duly accepted by the Applicant. Thereafter, the Applicant was duly informed by a letter dated 20th September 2013 that following the re-evaluation, it had won the tender at the corrected sum of Kshs. 249,434,381.24.
9. However, the 2nd Interested Party once again filed another review application on 25th September 2013 and in its documents filed at the said review the Applicant disclosed the fact that by a letter dated 4th September 2013, the procuring entity was informed that the 2nd interested party had present samples of furniture that were produced and distributed by the Applicant and that the furniture was under warranty and had been retrieved by the 2nd interested party from KNLS for alleged cleaning and repairs and a gate pass dated 13th April 2013 showing that the 2nd interested

party collected the Applicant's furniture. The Applicant also exhibited an official search dated 21st January 2013 from the Assistant Registrar of Companies confirming that the applicant had Kenyan shareholding.

10. However, the differently constituted Review Board delivered its decision in Review No. 35/2013 **Bevaj Furniture Ltd v Kenya School of Monetary Studies** (hereinafter referred to as the Review) on 24th October 2013 in which decision the Board ordered, inter alia, 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. The Applicant's case is that latest decision of the Review Board dated 24th October 2013 has frustrated the Applicant's legitimate expectation to be awarded the tender after successfully passing two consecutive tender evaluations and that the same is null and void for the reasons that in the second review, the Board had no jurisdiction to seat on appeal or review the earlier board's decision dated 22nd august 2013 by giving a different interpretation to the directive that the tender had to be re-evaluated using the criteria set out in the Tender as this was contravention of Section 2 of the ***Public Procurement and Disposal Act***, (hereinafter referred to as the Act) which demands, inter alia, a tendering process that promotes the integrity and fairness of the tendering process, increases transparency and accountability of the tendering process and increases public confidence in the tendering procedures; the decision of 22nd August 2013 required that the entire tender process had to be revaluated as per the tender requirements and each party was lawfully exposed re-evaluation yet this matter was res judicata hence the decision of 24th October 2013 was in contravention of Section 98 (b) of the Act; that the Respondent acted *ultra vires* Section 66 (5) of the Act by failing to appreciate that the 1st Interested Party had lawfully awarded the tender to the Applicant at the corrected sum of **Kshs. 249,434,381.24** which was the lowest evaluated price; that the Respondent contravened Article 227 of the Constitution that makes it mandatory that contracts for goods or services should be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective hence the 2nd Interested Party's bid of **Kshs. 267,074,994.18** was not competitive or cost effective; that the Respondent erred by failing to consider the evidence that the 2nd Interested Party did not qualify to proceed to the financial evaluation stage, and there was therefore no need to advise the 2nd Interested Party of any arithmetic errors or apply the margin of preference and this was a mandatory requirement of the tender requirements that the Respondent failed to take cognizance off; that the Respondent failed to consider the Applicant's evidence set out in its letter dated 4th September 2013 that the 2nd Interested Party had unlawfully obtained the Applicant's goods and purported to pass them off as its own, an express contravention of Sections 3 and 41 of the Act that forbids inter alia, a **"fraudulent practice**" to include a misrepresentation of fact in order to influence a procurement or disposal process; and that the Respondent erred by failing to take cognizance of the Applicant's evidence from the Assistant Registrar of Companies showing it has a local shareholder and was thus entitled to enjoy the benefit of the margin of preference under Section 39(9) (b) (ii) of the Act and thus could not be excluded from legitimate and lawful benefit of the margin of preference on the face of the official search from the Companies Registry.
12. Accordingly, the Applicant prayed that the application be allowed as prayed.

1st Interested Party's Case

13. In response to the application, the 1st interested party filed a replying affidavit sworn by **Kishanto Suuji**, its Assistant Director in charge of Finance and Administration on 30th January, 2014.
14. According to the deponent, the First Interested Party advertised the Tender for Supply and Assembly of Furniture for the Academic Wing and Library, Tender No. KSMS/37/12-13, in two national newspapers named, "*The Daily Nation*" and "*The Standard*" besides the website of the Kenya School of Monetary Studies. Thereafter, a mandatory pre-bid meeting/conference was held

at the premises of the First Interested Party on 8th March, 2013 the attendance of which was required of all prospective tenderers and whose purpose was to brief the prospective tenderers on the tender documents requirements and to afford an opportunity to the participants to review and clarify any aspect of the tender requirements. All prospective tenderers attended the pre-bid meeting/conference and none of them raised any objection to any aspect of the proposed procurement procedures.

15. That the prospective tenderers duly submitted their bids for Supply and Assembly of Furniture for the Academic Wing and Library for evaluation and consideration pursuant to the invitation by the First Interested Party with regard to Tender No. KSMS/37/12-14 of March 2013. These tenderers were **Victoria Furniture Ltd**, **Fairdeal Superstores Ltd**, **Fursys (K) Ltd** and **Bevaj Furniture Limited.**
16. During the evaluation, **Victoria Furniture Ltd** and **Fairdeal Superstores Ltd** fell out at the mandatory stage. However, the bids of **Fursys (K) Limited** and **Bevaj Furniture Limited** were subjected to Examination of mandatory requirements, Technical Evaluation, Examination of samples and due diligence and Financial Evaluation stages. The Applicant's bid and that of the Second Interested Party were successful to the extent that they had met all the mandatory requirements, the technical evaluation test and the examination of samples and due diligence or the bid evaluation criteria or stages 7(a), 7(b), and 7(c) of the said evaluation criteria. Accordingly, the two bids proceeded to the final stage of financial evaluation. The Second Interested Party had quoted Kshs. 262,177,213.97 which was corrected for arithmetic errors of Kshs. 4,843,843.69 to read Kshs. 267,021,057.66 whereas the Applicant had quoted Kshs. 244,585,573.58 which was corrected for arithmetic errors of Kshs. 4,848,807.66 to read Kshs. 249,434,381.24. Thereafter, the award of tender to the Applicant was made by the Central Bank of Kenya's Tender Committee on 28th June 2013 and approved by the Governor of the Central Bank of Kenya on 12th July 2013 and the same was communicated to the First Interested Party via a memo dated 15th July 2013. The notification of all the participating bidders, including the Applicant, was made in writing via letters, each of which was dated 17th July 2013 and each of which was delivered by hand and signed for the respective participant on the following day on 18th July 2013.
17. Following the award of tender to the Applicant, the Second Interested Party filed and sought a review of the decision of award from the Respondent and in a decision delivered on 22nd August 2013, the Respondent ordered that the award of the tender to the successful bidder **M/s Fursys Kenya Ltd** is hereby annulled; that pursuant to Section 98(b) of the Act the procuring entity re-evaluates the bids and awards the tender within 30 days using the criteria set out in its tender documents, correction of arithmetic error as envisaged by the Act and apply the margin of preference as envisaged by the Act and the Regulations.
18. Pursuant to the orders of the Respondent, the First Interested Party re-evaluated the bids as ordered by the respondent and made an award which was challenged by the Second Interested Party. By a decision rendered on 24th October 2013, the respondent annulled the latter award stating inter-alia that the re-evaluation as ordered by it on 22nd August 2013 was limited to financial evaluation.
19. It was therefore the 1st interested party's case that in making this second decision, the Respondent proposed to review its order of 22nd August, 2013, a jurisdiction it did not have.

2nd Interested Party's Case

20. The 2nd Interested Party in response to the application filed a Replying Affidavit sworn on 11th December, 2013 by **Rosaline Mbugi**, the 2nd interested party's Managing Director.
21. According to the 2nd interested party, the Kenya School of Monetary Studies, the 1st Interested Party herein, invited tenders for the supply and assembly of furniture for the academic wing and library for the institution. Pursuant thereto, the 2nd interested party duly submitted its bid for evaluation and consideration. Besides the 2nd interested party, other persons who applied included **Rosewood Furniture Manufacturers**, **Victoria Furniture**, **Budget Furniture Ltd**, **Ashut Engineers**, **Actsure Office Solutions**, **Fast Choice Ltd**, **Fairdeal Superstores Ltd** and **Fursy's (K) Ltd**.

22. Of the companies that submitted their bids, the 2nd interested party met all mandatory requirements and its bid proceeded to full evaluation alongside that of **Fairdeal Superstores Ltd** and **Fursy's Ltd**. By a letter dated 17th June 2013 from the 1st Interested Party herein, the 2nd interested party was informed that its bid was unsuccessful, and later learnt that the same was purportedly awarded to the Applicant herein. Being aggrieved by the decision of the 1st Interested Party, the 2nd interested party acting pursuant to the provisions of Sections 93 of the Act, filed at the Public Procurement Administrative Review Board Application Number 24 of 2013 in which it sought the annulment of the award of Tender No. KSMS/PROC/37/12-13 to the ex parte Applicant on the grounds that the tender and the process thereof was a sham and the 1st interested party failed to utilize fair procedures and/or criteria and further violated the provisions spelt out in the Act and the regulations thereto. The 2nd interested party further prayed for orders that the board do substitute the decision of the 1st interested party awarding the tender to the ex parte Applicant or any other person with an order awarding the said tender to the 2nd interested party and that in the alternative and without prejudice to the orders already asked the board do cancel and nullify the award of the tender to the ex parte Applicant or any other person and direct the respondent to re-tender in accordance with the laws of Kenya. In the said proceedings, the Applicant did not participate either as a direct party or an interested party and no such application for joinder was made.
23. By its ruling of 23rd July 2013, the Public Procurement Administrative Review Board allowed the application for review by the 2nd interested party and annulled the award of tender to the ex parte Applicant and ordered pursuant to Section 98(b) of the Act that the procuring entity re-evaluates the bids and awards the tender within 30 days as follows using the criteria set out in its tender documents, correction of arithmetic error as envisaged by the Act and apply the margin of preference as envisaged by the Act and Regulations
24. Thereafter, the 1st interested party through unreferenced letter dated 29th August 2013 wrote to the 2nd interested party seeking various issues in a bid to purportedly comply with the ruling of the Review Board dated 22nd August 2013 which included, re-inspection of furniture samples, extension of tender security, validation and confirmation of quoted prices and tender prices, sources of furniture and ownership. The 2nd interested party in response thereto vide a letter dated 3rd September 2013, Ref BFL/KSMS/2/2013 complained to the 1st Interested Party on grounds that the latter was wilfully misinterpreting the Board's ruling dated 22nd August 2013 by starting the re-evaluation afresh instead of re-evaluating financial stage only. It also complained that sample re-evaluation was also inappropriate as the same had been inspected and had remained in the custody of the 1st Interested Party and re-evaluating the same could affect the 2nd interested party.
25. However, by way of its letter dated 4th September 2013, the 1st Interested Party dismissed all the concerns raised by the 2nd interested party and proceeded to evaluate the bids afresh, failing the 2ndinterested party on the technical evaluation by reducing her marks to 36 marks despite having evaluated her above the 40 pass mark in the first technical evaluation and by its letter dated 20th September 2013, the 1st Interested Party informed the 2nd interested party that its bid was unsuccessful, and awarded the same again to the Applicant.
26. Being dissatisfied with the second evaluation, the 2nd interested party for the second time filed an application for review at the Public Procurement and Review Board being Review Application Number 35 of 2013 seeking annulment of the purported award to the Applicant. Once more the Applicant neither any submissions against the application for review nor filed any papers in opposition thereto. On 24th October 2013, the Review Board delivered its ruling allowing the application by the 2nd interested party and nullified the award of the tender to the Applicant, ordered that the re-evaluation of bids conducted by the procuring entity purportedly pursuant to the Board's Ruling dated 22nd August 2013 in Review No. 24 of 2013 is declared null and void and pursuant to the provisions of Section 98(b) of the Act ordered that the procuring entity shall re-evaluate the bids and award the tender within 15 days limited to the correction of arithmetic error as envisaged by the Act, the application of the margin of preference as envisaged by the Act

and the Regulations in favour of the applicant which the Board has found to be the only party entitled to the margin of preference and ordered the 1st interested party to take appropriate steps to extend the validity of the bids for a period necessary for it to comply with these orders.

27. According to the 2nd interested party, the Review Board acted within its mandate as provided under Section 98 of the Act and that the actions by the applicant and the 1st Interested Party herein are only calculated to lock out the 2nd interested party yet it is the one deserving to be awarded the tender. Further the 2nd interested party's view was that Section 93(1) of the Act provides that any candidate who claimed 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 hence the actions of the Respondent were not in contravention of Article 227 of the Constitution or indeed of any law. To the 2nd interested party, this application is made in bad faith and should be dismissed in limine by the court.

Applicant's Submissions

28. It was submitted on behalf of the Applicant that Article 227 (1) of the Constitution is the guiding light in matters of procurement. The said provision provides:

***When a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective*.**

29. It was submitted that all procurement matters in Kenya must, as a matter of public policy, set to achieve the goals of competitive bidding which is also competitive and cost-effective. In other words, the tax payer should get value for money and not be exposed to the more expensive tender. In the present case, the 2nd interested party insists on burdening the tax-payer with a bid that is more than Kshs. 17 million more expensive after it failed the technical evaluation stage.

30. It was further submitted that section 2 of the Act provides inter alia that a procuring entity must ensure maximum economy and efficiency and that in this regard, one of the factors to be considered in maximising economy as contained in **section 66(4)** of the Act is that the successful tender shall be the tender with the lowest evaluated price hence it therefore beats logic for the 2nd interested party to impose itself on tax payers with a more expensive bid. This principle is similarly reflected in the tender documents at clause 2.74.4. In support of this submission the Applicant relied on **Royal Media Services Ltd & 2 others vs. Attorney General & 8 others [2013] eKLR,** and **Millennium Waste Management (Pty) Ltd vs. The Chairperson of the Tender Board: Limpopo Province & Others Case No. 31/2007.**

31. It was submitted based on Article 47 of the Constitution that the 2nd Review Board had no jurisdiction to review the earlier Board's decision dated 22nd August, 2013 by giving a different interpretation to the directive that the tender had to be re-evaluated using the criteria set out in the tender and hence rendered a decision that was unlawful, unreasonable and procedurally unfair as will be demonstrated below.

32. According to the Applicant, under section 100 of the ***Public Procumbent and Disposal Act, 2005*** the Procurement Review Board has jurisdiction to entertain a review once and any aggrieved party by the Review Board's decision has to lodge an appeal to the High Court within 14 days from date of Review Board's decision and the court's decision will be final. The 2nd interested party did not appeal against the first decision. It was submitted that since the 2nd Interested Party in its prayers in the first Review sought to compel the 1st Interested Party re-tender the process in accordance with the law, it only logical that a retender must confine itself to the two highest responsive bidders for the sake of economy and time. It was submitted that since the 2nd interested party did not pass the financial evaluation stage, the issue of margin of preference did not come into play and the 2nd Review Board had absolutely no jurisdiction to seek to impose new terms so as to specifically favour a loser and discriminate against a winner by imposing terms in contravention of Articles 47 and 227 of the Constitution. It was therefore contended that the Review Board's power to re-review another board's decision was bad in law as it has no power under the Act to re-review another board's decision that has exercised its mandate judicially, the only lawful course

being to appeal to the High Court under section 100 of the Act.

33. It was submitted that in the 2nd Review, one issue that the Board was called to determine was whether the procuring entity did comply with the decision of the board on 22nd August, 2013. The Respondent, however, had no power to review 1st Board's decision because the matter had been fully concluded. Since the board's decision on 22ndAugust, 2013 directed that the procuring entity re-evaluates the bids and awards the tender within 30 days using the criteria set out in its tender documents, it was contended that for the tendering process to be said to have been exhausted, then the procuring entity has to follow all the stages of the procurement and since the stages of the bid evaluation in the tender documents, a party can thus not go to the next stage unless the party has fulfilled the requirements under the previous stage since the stage offers specific filters that are supposed to be met. It was submitted that after the Board's review, the 1st Interested Party carried out an evaluation as per the tender documents and the Applicant was awarded the tender after scoring more than the 2nd interested party. To the Applicant, the matter was res judicata at that time and the 2nd Review Board could not purport to exercise jurisdiction.
34. In support of this submission, the Applicant relied on **Republic vs. Minister for Agriculture & 6 others, Milimani J.R 78 of 2012 (2013)eKLR,** and **Edwin Thuo vs. Attorney General, Nairobi Petition No. 212 of 2012** and submitted that when the Board delivered its decision on 22nd August 2013, the matter become *res judicata*. A board with concurrent jurisdiction could thus not competently be seized of the mater. It could not purport to overturn a decision by another board of the same jurisdiction.
35. The Applicant further submitted based on **Francis Chachu Ganya & 4 Others vs. Attorney General & Another [2013] eKLR**, that the Court in judicial review proceedings deals not with the merits but with the decision making process and 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. To the Applicant, the decision of the 2nd Review Board that is sought to be impugned failed the above tests propounded above in that it acted in excess of jurisdiction by imposing new conditions when purporting to review the decision of the earlier board; it acted unfairly when it sought to lock out the applicant on the issue of margin of preference; and the decision making process was tainted with illegality when it failed to consider the spirit of articles 47 and 227 of the Constitution.
36. In conclusion it was submitted that this review application raises important issues of public importance in light of Article 47 and more importantly Article 227 of the Constitution and that it is important to set out the law that the public interest in matters of procurement must be guided by the spirit Article 227 where the public benefits from a competitive and cost-effective system of procurement that arrives at the best bargain to the public. The Applicant hence prayed that the application be allowed as prayed.

Respondent's Submissions

37. On behalf of the Respondent, it was submitted that the second application for review was not an appeal otherwise the 2nd interested party would not have raised the issue of violation of the first decision.
38. It was submitted that what the 2nd interested party sought in the second review was a proper interpretation and execution of the first review decision hence raised a completely different issue and the Respondent in its second decision was merely affirming the validity of the first decision and ensuring that the same was interpreted and obeyed as directed.
39. It was therefore submitted that the Respondent is entrenched with inherent jurisdiction to interpret its own decision and being so vested it would be absurd for the Respondent to turn a blind eye on a party who in execution of the said orders has blatantly disregarded the same and does that which it was not ordered to do in a manner not so ordered hence the Respondent is vested with jurisdiction to interpret its orders. In support of this submission, the Respondent relied on **Rev. Evan Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005**, **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780;**

[1986-1989] EA 593 and **Republic vs. The Chairman Retirement Benefits Authority Appeals Tribunal ex parte The Local Authorities Pensions Trust Nairobi HCMA No. 403 of 2012** and asserted that it had jurisdiction.

40. It was further submitted that from the pleadings exhibited it is clear that the Respondent considered all the evidence adduced before it hence the applicant has not raised any issue that will succeed in judicial review but is grounded on facts that do not reveal any procedural impropriety, illegality or irrationality and the application ought to be dismissed.

1st Interested Party's Case

41. On behalf of the 1st interested party it was submitted that the Board in its earlier decision directed pursuant to section 98(b) of the Act a re-evaluation be done and hence the procedure that ought to be followed was that found in the Tender Documents, that is the procedure that was used to carry out the evaluation at the initial stage which procedure encompassed examination of mandatory requirements, technical evaluation, examination of samples and due diligence and financial evaluation.

42. It was submitted that the powers of the Review Board under section 98 are exclusively within its powers at first instance. Thereafter, pursuant to section 100 of the Act the Review Board ceases to have any jurisdiction as to the same matter as the only option available is judicial review. It was therefore submitted that the Review Board lacked the jurisdiction to hear and determine Application No. 35 of 2013 having heard the Application No. 24 of 2013 involving the same parties and dealing with the same issues. In support of this submission the 1st interested party relied on **Anisminic vs. Foreign Compensation Commission [1969] 1 All ER 208**, **Owners of Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1**, **Narok County Council vs. Trans Mara County Council [2000] 1 EA 161** and submitted that as the Review Tribunal having acted outside the provisions of section 100 of the Act, the court should not hesitate in setting aside its decision in Application No. 35 of 2013. Based on **State of Victoria and Others vs. Narelle McKennan [1999] VSC 310** and **Weka Industries Limited vs. John Chagilawa & 5 Others [2009] eKLR**, it was submitted that there is no jurisdiction under the Act or under any statute in which an administrative review Board can purport to review, vary or otherwise depart from its previous orders as the power to review a Tribunal's decision is solely vested in the High Court.

43. Under section 7 of the ***Civil Procedure Act*** Cap 21 Laws of Kenya, it was submitted a Court can only attend to a suit with similar parties and facts once and the case of **Karia & Another vs. Attorney General & Others [2005] 1 EA 85** was cited in support of this line of submission and it was contended that by making the second application for review to the Review Board and the Board giving a ruling on the same, the matter can be declared res judicata and that the Review Board erred in entertaining a matter that had already been brought before it and determined by it.

2nd Interested Party's Case

44. On behalf of the 2nd interested party it was submitted that the Respondent had jurisdiction under section 98 of the Act to review the procurement process in the first application for review and properly exercised its said powers when it nullified the procurement process conducted by the 1st interested party. Without a challenge arising therefrom as envisaged under section 100 of the Act, the parties to the initial review affirmed the said decision which decision is binding on the parties. Based on **R vs. Public Procurement Administrative Review Board ex arte Kenya Medical Supplies Agency & 3 Others High Court Judicial Review Misc. Application No. 491 of 2009**, it was submitted that the Respondent acted with jurisdiction by allowing, hearing and determining the second review as the 1st interested party had misinterpreted the decision given by the first Review when it awarded the Tender to the ex parte applicant for a second time hence the Respondent had jurisdiction to hear and determine the second application for review as the same was not an appeal but an interpretation of the orders issued by the first review Board and a determination of whether the 1st interested party had strictly complied with the said orders. In support of this submission the 2nd interested party relied on **Republic vs. Chairman Retirement**

Benefits Authority Appeals Tribunal ex parte Local Authorities Pensions Trust (Laptrust), Misc. Appl. No. 403 of 2012 [2013] eKLR.

45. It was submitted that whereas the first Review Board ordered the 1st interested party to re-evaluate the bids by factoring in the margin of preference while going through the financial evaluation stage which was the fourth and final stage in the entire evaluation process, in a purported attempt to comply herewith the 1st interested party misinterpreted the ruling of the first Board by starting the re-evaluation of the bids from the first stage instead of the financial evaluation stage. Since there was no change of the tender or tender documents submitted for re-evaluation, it was submitted that the Respondent was correct in annulling the second award of the tender since the 1st interested party found that the less marks than during the first evaluation.
46. According to the 2nd interested party the applicant is challenging the merits of the 1st interested party and not the decision making process. In support of this submission the 2nd interested party relied on **Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another Judicial Review Case No. 112 of 2011 [2014] eKLR**, **Republic vs. Commissioner of Customs Services ex parte Africa K-Link International Limited [2012] KLR**, **Republic vs. Public Procurement Administrative Review Board & Another ex parte Uto Creations Studio Limited [2013] eKLR** and **Republic vs. The Public Procurement Administrative Review Board & Another ex parte Avante International Technology Inc. [2013] eKLR** and submitted that the Applicant ought to have appealed instead of applying for judicial review.
47. In the 2nd interested party's view, the application is not well founded and none of the prayers sought ought to be allowed.

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. In my view the determination of this Applicant rests on two issues. The first issue is whether the decision arising from the second review by the Respondent amounted to a review of the first decision and secondly, whether the Respondent had the jurisdiction to review its earlier decision. The second issue is intertwined with the issue of whether the doctrine of res judicata was applicable in the circumstances of the case.
50. It is important in my view to deal with the circumstances under which the doctrine of res judicata applies.
51. In the case of **Lotta vs. Tanaki [2003] 2 EA 556** it was held as follows:

"The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit".

52. In the case of **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958 [1958] EA 450** the former East African Court of Appeal stated as follows:

"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought

forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, 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 of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved…In the instant case, in the first action brought by the respondent the fact which it would be necessary for the appellant to prove was that no work had been done under the contract by the defendant while in the second action the fact which it would be necessary for the plaintiff to prove was that though the work had been begun it had not been completed and inferior materials had been used. Clearly these are distinct, inconsistent and mutually destructive allegations. Inconsistent or mutually destructive pleas cannot be said to be such as ought to have been raised in the former suit. It follows that the fact that the respondent had previously brought an unsuccessful action based upon an allegation of nonfeasance, did not stop him from bringing a second action based on misfeasance, which, in the circumstances of the case, could not have been joined with the first."

53. However, if it is true that the matters complained of in the latter case arose subsequent to the delivery of the earlier ruling and could not therefore be the subject of that earlier application, the plea *res judicata* would not be available. In **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28** it was held that:

"However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:

> **"The principle of estoppel per *rem judicatam* may apply to a decision made in the course of execution proceedings and not in a suit. It may be assumed that the principle would apply to other interlocutory applications. The binding force of the previous judgement depends not upon the provision of the Indian Act (which corresponds to section 7 of the Kenya Civil Procedure Ordinance); but upon general principles of law...The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first**

application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application. The admission by the appellant that he was without assets and could not pay the cost was a fact which entirely changed the aspect of the case, and the respondent could not, by reasonable diligence, have discovered that fact when he made the first application for security for costs because the appellant could not then be found: the officers of the court had failed to find the appellant and the respondent did not know where he was. It has not been suggested, or if it has, there is no evidence to support the suggestion, that the respondent could have discovered whether the appellant had or had not assets sufficient to pay the costs without interrogating the appellant. There was no receiving order in bankruptcy or anything of that kind which a search would have brought to light. The circumstances at the date of the first application were that the appellant's whereabouts were unknown and it was not known to the respondent and could not by reasonable diligence be ascertained whether he could or would not pay the costs: the circumstances at the date of the second application were that he had been traced and had admitted on oath that he had no assets and could not pay. That was an entire change in circumstances and the principle of res judicata did not prevent the learned Vice-President from making the order which he made on the second application...The power to order security for payment of costs under rule 60 of the Court of Appeal Rules is a discretionary power which, under the rule, may be exercised at any time. It is, of its nature, a discretion intended to be exercised according to the circumstances existing at the time of the hearing of the application and can be exercised again if the circumstances change materially".

54. In **Kanorero River Farm Ltd. & 3 Others vs. National Bank of Kenya Limited Nairobi (Milimani) HCCC NO. 699 of 2001 [2002] 2 KLR 207,** the defendant chargee had initially sought to exercise its statutory power of sale over the properties belonging to the plaintiffs and the plaintiffs filed a suit challenging the validity of the statutory notices and sought an injunction restraining the defendant. The parties later recorded a consent by which they agreed to have the application settled and the defendant be at liberty to issue fresh notices. The defendant thereafter issued fresh notices of their intention to exercise its statutory power of sale and the plaintiff once again filed suit challenging the validity of those statutory notices, claiming that the statutory power of sale had not arisen and that the intended sale was in contravention of the mandatory provisions of the Auctioneers Rules. The defendant opposed the application on the grounds that the issue was *res judicata* and that the application was incompetent. **Ringera, J** (as he then was) held as follows:

"The question is whether in those circumstances the plaintiffs could institute a fresh application for interlocutory relief. In the Court's judgement provided the fresh application is grounded on new facts, which could not have been relied on in the earlier application, it would not be precluded by the doctrine of *res judicata*. That is precisely the case here. The consent order allowed the defendant to serve fresh statutory notices… A new factual situation was created. It could not have been the intention of the parties when they recorded the consent and the law itself could not possibly contemplate that those fresh notices and other consequential steps taken pursuant to them could not be challenged on proper legal grounds. If the opposite were the case, the defendant would have in effect been given *carte blanche* to realise its security without necessarily complying with all the necessary and pertinent legal requirements provided it had issued fresh notices. It would have been permissible for it, for example, to issue defective notices or flout with impunity the provisions of the Auctioneers Rules, 1997. No court of equity would countenance that. A fundamental assumption of the consent order was that competent statutory notices would be served and the defendant would comply with the law. In the circumstances of this case, the doctrine of *res judicata* does not preclude the application now before the court".

55. What comes out from the foregoing is that where a Court or Tribunal has nullified the first process and ordered that either a fresh process be undertaken or that the process be undertaken in

accordance with specified directions, the body or authority to which the directions are directed is not entitled to ignore the law or directions in its fresh undertaking. If it does so a party aggrieved would still be properly entitled to move the body which made the directions or gave the orders for the nullification of a process not undertaken in compliance with the directions or orders and would not by that mere fact fall foul of the doctrine of *res judicata*. See also **Kibundi vs. Mukobwa & Another Meru HCCC No. 390 of 1992 [1993] KLR 777**.

56. Therefore, if in the first decision made by the Review Board, the decision of the 1st interested party was nullified and directions given on how to carry out the Tender and the 1st interested party in purporting to comply therewith fell foul of the said directions, the 2nd interested party would not be barred from moving the Respondent once again to have the second decision by the 1st interested party nullified since the second challenge arose out of the changed circumstances given rise to by the decision of the Board which circumstances arose after the first decision of the 1st interested party. To contend therefore that the 2nd interested party ought to have appealed against the second decision of the 1st interested party is to miss the point.

57. It is therefore my view that taking into account the contentions made by the 2nd interested party the Respondent was properly entitled to and had jurisdiction to entertain the second challenge. Jurisdiction however is twofold. It may arise at inception in that the Tribunal concerned is barred from entertaining the dispute *ab initio* or it may be lost in the course of the proceedings. As was held by **Ochieng, J** in **Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 Of 2003,** a Tribunal may have jurisdiction to hear and determine issues, but it may give orders, which were in excess of its powers. In effect, if a tribunal made orders beyond its powers, that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute in the first place. Where, however, the Tribunal lacks the moment it dawns on it that the jurisdiction does not exist, it ought to down its tools before taking one more step as was held in **Owners of The Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd [1989] KLR 1**.

58. An issue of jurisdiction may therefore arise in one of two instances or both. This clarification was made succinctly by **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC NO. 1546 of 1971 (HCK) [1972] EA 525** where he held:

> **"Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction. What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make…….The phrase "to make such order thereon as it deemed fit" giving powers to a statutory tribunal must be strictly construed. Powers must be expressly conferred; they cannot be a matter of implication."**

59. Similarly, in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** it was held that a limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics and that if the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction. Where the Tribunal has made a factual finding, it is not for this Court in judicial review proceedings to interfere with such finding since such a decision would go to the merit of the decision and by interfering with such a finding this Court would be acting as an appellate court rather than a judicial review court.

60. Therefore whereas I have found that the Respondent's jurisdiction in the first context cannot be faulted, its jurisdiction in the second context is still open to challenge. That leads me to to next issue for determination and that is what the first decision of the Review was and its effect.

61. 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.

62. 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.
63. With due respect to the Board, it ought to have been clearer in its determination in order to avoid any ambiguities.
64. 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*."
65. 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.**
66. 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.
67. With respect to the issues whether the respondent failed to consider that the Applicant's bid was the lowest, the scope of judicial review was dealt with by the Court of Appeal in **Municipal**

Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 in which the Court held:

"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."

68. Accordingly I am not prepared to and in fact barred from venturing into the merits of the impugned decision.

Order

69. In the result, an order of certiorari is hereby issued removing to this Court for the purposes of quashing the Respondent's decision dated 24th October 2013 in Review No. 35/2013 between ***Bevaj Furniture Ltd v Kenya School of Monetary Studies*** which decision is hereby quashed. The Applicant and the 1st interested party are awarded the costs of this application to be borne by the Respondent.

Dated at Nairobi this 30th May, 2014

G V ODUNGA

JUDGE

In the presence of:

Mr Okoth for Mr Allen Gichui for the Applicant and Mr Chacha Odera for the Interested Party.

Mrs Muhoro for Mr Achach for 2nd Interested Party

Miss Cheruiyot for the Respondent

Cc Kevin