



IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JR MISC CIVIL APPLICATION NO 87 OF 2014

REPUBLIC.....APPLICANT

VERSUS

CENTRAL BANK OF KENYA.....RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....  
.....INTERESTED PARTY

EX PARTE

HORSEBRIDGE NETWORK SYSTEMS (E.A.) LTD

JUDGEMENT

The ex-parte Applicant (the Applicant), Horsebridge Network Systems (E.A.) Limited is a limited liability company incorporated in Kenya and is engaged in the supply, installation and maintenance of communication and intelligent security systems.

The Central Bank of Kenya (the Respondent) is established by **Article 231 of the Constitution**. It is responsible for formulating monetary policy, promoting price stability, issuing currency and performing other functions assigned to it by Parliament.

The Interested Party, the Ethics and Anti-Corruption Commission (EACC) is an independent commission established under **Section 3 of the Ethics and Anti-Corruption Commission Act, 2011 (EACCA)** pursuant to **Article 79 of the Constitution**. In addition to the functions of the EACC under **Article 252 and Chapter Six of the Constitution**, the EACC shall among other things, investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under the EACCA or any other law enacted pursuant to **Chapter Six of the Constitution**.

The application for the consideration of this Court is the Notice of Motion dated 10<sup>th</sup> March, 2014 in which the Applicant seeks orders as follows:

- “1. AN ORDER OF MANDAMUS compelling the Central Bank of Kenya to engage the Respondent (sic) herein so as to conclude the agreement in respect of TENDER NO. CBK/46 FOR SUPPLY, INSTALLATION AND COMMISSIONING OF AN INTERGRATED SECURITY MANAGEMENT SYSTEM (ISMS) FOR CENTRAL BANK OF KENYA as Directed by the Public Procurement Administrative Review Board on the 4<sup>th</sup> January 2013.**
- 2. AN ORDER OF MANDAMUS compelling the Central Bank of Kenya to execute the agreement in respect of TENDER NO. CBK/46 FOR SUPPLY, INSTALLATION AND COMMISSIONING OF AN INTERGRATED SECURITY SYSTEM (ISMS) FOR**

**CENTRAL BANK OF KENYA as Directed by the Public Procurement Administrative Review Board on the 4<sup>th</sup> January 2013.**

**3. The costs of this application.”**

The application is supported by the grounds on the statutory statement, a verifying affidavit sworn by the Applicant's Business Development Director, Mr Philip Kago on 28<sup>th</sup> February, 2014 and a further affidavit sworn by the same deponent on 18<sup>th</sup> July, 2014.

The Respondent replied to the application through an affidavit sworn on 28<sup>th</sup> May, 2014 by its Director of the Department of Estates, Supplies and Transport, Mr Cassian J. Nyanjwa.

The Interested Party opposed the application through the affidavits of its investigator, Mr Alex M. P. Kinyanjui, sworn on 16<sup>th</sup> May, 2014 and 8<sup>th</sup> July, 2014 respectively.

From a perusal of the pleadings and documents filed in this matter, some undisputed facts have emerged. In May, 2012, the Respondent advertised Tender No. CBK/46 for the Supply, Installation and Commissioning of an Integrated Security Management System (ISMS). Fifty eight entities bought the tender documents but only six submitted their bids. These were the Applicant, AUA Industrial, ORAD Limited, Indra Limited, Azicon Kenya Limited and Engineered Systems Solutions.

The tender was processed through various stages by the Respondent's Evaluation Committee. The Applicant and ORAD Limited were the only companies that reached the final evaluation stage. At the conclusion of the exercise the Applicant was found to have submitted the most technically responsive bid on top of being the lowest evaluated bidder. The Evaluation Committee recommended to the Tender Committee that the Applicant be awarded the tender.

When the Respondent's Tender Committee met on 23<sup>rd</sup> August, 2012 to deliberate on the tender, it came to the conclusion that Indra Limited and Engineered Systems Solutions had been wrongly knocked out at the Technical Evaluation stage. The Tender Committee directed that the two companies be allowed to participate in the Technical Evaluation and be ranked with the Applicant and ORAD Limited who had already been evaluated on technical specifications. The Tender Committee further directed that if the two firms attained a score above the pass mark, then they were to be invited to demonstrate their products and services.

The two firms were also to be taken through the Financial Evaluation stage if they succeeded in those stages. Further, the Tender Committee directed the Evaluation Committee to commence the evaluation process as guided and submit a report on or before 7<sup>th</sup> September, 2012.

After the re-evaluation, Indra Limited did not pass the Comprehensive Technical Specifications stage while Engineered Systems Solutions passed the Comprehensive Technical Specifications stage but failed on Technical Competence. The Evaluation Committee once again submitted a report recommending the award of the tender to the Applicant.

The Applicant claims, but this is disputed by the Interested Party, that when it noted a delay in the conclusion of the tender process it filed **Request for Review No. 51 of 2012** on 8<sup>th</sup> October, 2012 with the Public Procurement Administrative Review Board (the Review Board) and sought orders *inter alia*:

- 1. The decision of the Tender Committee rejecting the recommendations of the Evaluation Committee and directing the evaluation of bids which did not satisfy the mandatory requirements be set aside.**
- 2. Direction that Tender Committee do adopt the decision of the Evaluation Committee and award the tender.**

A perusal of the decision of the Review Board shows that the parties who participated in the Request for Review were Horsebridge Network Systems (E.A.) Limited as the Applicant and the Central Bank of

Kenya being the Procuring Entity. The interested parties who were represented were ORAD Limited and Indra Limited.

At the conclusion of the proceedings, the Review Board directed that:

**“The Procuring Entity through its Tender Committee to consider the recommendation of the Evaluation Committee and proceed to finalize the award in accordance with the Act and the Regulations within the next thirty (30) days from the date of this decision.”**

The Respondent did not comply with the decision of the Review Board. The Applicant being once again aggrieved by the decision of the Respondent moved the Review Board, this time, by **Request for Review No. 65 of 2021** filed on **6<sup>th</sup> December, 2012** and prayed for orders that:

- a. **The decision of the Procuring Entity be declared illegal, unlawful and a nullity in law and be set aside.**
- b. **The Procuring Entity be directed to award the contract to the Applicant.**
- c. **Any further orders as the Board may find appropriate.**

In a ruling delivered on 4<sup>th</sup> January, 2013 the Board issued orders as follows:

1. **That the Request for Review succeeds.**
2. **The decision of the Procuring Entity made on 29<sup>th</sup> November and communicated under the letter dated 30<sup>th</sup> November 2012 is hereby set aside and in lieu thereof the Board substitutes the same with an Order that this tender be and is hereby awarded to the lowest evaluated bidder Horsebridge Networks Systems (EA) Limited.**
3. **Each party shall bear their own costs.**

The documents before the Court reveal that on 26<sup>th</sup> February, 2013 the Respondent invited the Applicant for negotiations before finalization of the contract. The negotiations were completed and the negotiations report was signed on 3<sup>rd</sup> April, 2013. Annexed to the report was a draft contract. At the signing of the report, it was agreed that the parties would assemble in three days with a view to signing the contract. The Respondent, however, failed to invite the Applicant for the signing of the contract. The Applicant wrote to the Respondent to find out why it had not been invited to sign a formal contract and that is when the Applicant was informed that the tender was the subject of investigations by the Interested Party.

The Interested Party subsequently recommended that the Governor of the Respondent be charged for offences allegedly committed in respect to the tender. The Director of Public Prosecutions acting on the recommendations of the Interested Party directed that the Governor of the Respondent be charged. The arrest of the Governor was, however, stayed by the Court in **Nairobi High Court Petition No. 73 of 2014** pending the hearing and determination of his petition. I will not make any comment about the Governor's case as the same is still pending hearing and determination by another Judge. I will therefore strictly confine myself to the merits of the application before this Court.

Having outlined the history of the matter, I will now proceed to state the positions taken by the parties. The Applicant's case is that the Respondent being a public entity is bound by the provisions of the **Public Procurement and Disposal Act, 2005 (PP&DA/the Act)**. In accordance with **sections 66(4) and 67 of the Act**, the Respondent is required to award the tender to the lowest evaluated bidder. The PP&DA also requires the Respondent to comply with the decisions of the Board unless the decisions have been overturned by the High Court by way of judicial review or appeal. The Applicant contends that in line with **Section 68(2) of the PP&DA**, the Respondent is under an obligation to sign a contract within the period specified in the notification of the award of the tender.

The Applicant asserts that the failure or refusal by the Respondent to sign the contract is *ultra vires* the **PP&DA**. The Applicant submits that in disregarding the provisions of the Act the Respondent is acting in violation of the Constitution. The Applicant therefore concludes that the only remedy available to it is

a judicial review order. It argues that although judicial review orders are discretionary, the Court must exercise the discretion judiciously.

The Applicant argues that it has a legitimate expectation for a formal contract given that the Respondent had informed it that it was the lowest evaluated bidder and had even commenced negotiations with it.

The Applicant contends that the Respondent's claim that it cannot sign the contract as the matter is subject to investigations by the Interested Party has no basis and is untenable in law. The Applicant contends that **Part VIII of the PP&DA** provides for investigations of complaints arising from procurement proceedings and that **Section 102(2)** in particular directs that “[a]n investigation shall be conducted by an investigator appointed for the purpose by the Director General.”

The Applicant contends that the investigations commenced by the Interested Party were instigated by a sore loser and such cannot be the kind of investigations envisaged by the **Act**. Further, the Applicant submits that the Interested Party has no role to play in the investigation of procurement matters as **Section 5 of the PP&DA** clearly provides that whenever there is a conflict between the **PP&DA** and any other Act, the provisions of the **PP&DA** shall prevail. Therefore, the Applicant's position is that investigations under the **PP&DA** can only be done at the behest of the Director-General and investigations by the Interested Party or any other person cannot form the basis of interfering with a procurement process.

Further, the Applicant contended that the subject of investigations relate to a matter that the Review Board decided on, to wit, the purported termination by the Respondent of the procurement process. The Applicant asserts that the Review Board made a finding that it had jurisdiction to handle the matter and the said decision cannot be subjected to investigations by the Interested Party.

The Applicant stated that the basis given by the Interested Party for the investigations and resulting criminal proceedings is that the Respondent ignored its advocate's advice to appeal the Review Board's decision. It is the Applicant's case that even if an appeal had been preferred such an appeal would not have stopped the Respondent from executing the contract since **Section 97(2) of the PP&DA** provides that “[i]n no case shall any appeal under this Act stay or delay the procurement process beyond the time stipulated in the Act or Regulations.” Further, the Applicant contends that an investigation cannot form a basis of refusal to comply with the provisions of the **PP&DA** as **Rule 89** provides that “[a]n investigator appointed pursuant to S. 102 of the Act shall not, in the course of investigations, advise a procuring entity on any matter relating to a procurement proceeding.”

The Applicant asserts that it is not the subject of any investigations and it is unreasonable to subject the execution of the contract to the investigations by the Interested Party. The Applicant contends that the behaviour of the Respondent throughout the procurement process shows that it is acting capriciously.

The Respondent's simple response to the application is that there is indeed an order in place from the Review Board that the contract be enforced, but it is unable to comply as there is pending investigation by the Interested Party concerning allegations against its Governor who is the authorised officer under the **Central Bank Act** to execute contracts on behalf of the Respondent.

The Respondent's case is that the allegations against the Governor are now the subject of **High Court Constitutional Petition No. 73 of 2014** in which the Governor is challenging the recommendation of the Interested Party to have him charged with the offence of abuse of office following a complaint on the tender which was received by the Director of Public Prosecutions alleging that the Respondent had irregularly awarded the tender to the Applicant.

That in light of the above circumstances it is unable to execute the contract. It is the Respondent's case that executing the contract when the Governor has a case in Court would cast doubt on the propriety of the entire tendering process and the same would go against the public interest.

The Interested Party's case is that it received a letter from the Office of the Director of Public Prosecutions requesting investigations into the tender in question. After investigations, it emerged that

the Respondent's Tender Committee had terminated the tender on the 26<sup>th</sup> September, 2012 after the evaluation exercise. The investigations also revealed that the Applicant in this case had challenged the decision of the Tender Committee at the Review Board and asserted at that point in time that there had been no communication of the decisions of the Tender Committee to any of the bidders, including the Applicant in this case.

It was the Interested Party's case that the Applicant moved to the Review Board acting on confidential information received from the Respondent and this amounted to disclosure of confidential information which was in breach of **Section 44(1) of the PP&DA**. The Interested Party asserts that the Applicant launched **Request for Review No. 51 of 2012** not because of delay of the procurement process but due to the fact that it had accessed confidential information from the Tender Committee of the Respondent. The Interested Party's case is that the Review Board ignored the issue of the manner in which the information was obtained and went ahead to make a decision in favour of the Applicant thereby exceeding its jurisdiction. The Interested Party revealed that the matter is under investigation to determine whether a criminal offence was committed.

The Interested Party contended that the jurisdiction of the Review Board to review the decision of the Tender Committee to terminate the procurement process was ousted by **sections 36(6) and 93(2)(b) of the PP&DA** hence the decision that the Applicant seeks to enforce is a nullity and amounts to nothing. The Interested Party argued that once the Tender Committee terminated the tender it could not be revived by an order of the Review Board. It is the Interested Party's case that the finality clause set out in **Section 100 of the PP&DA** is ineffective as there is an error that goes to jurisdiction of the Review Board and the said provision only protects *intra vires* decisions.

The Interested Party asserted that investigations had revealed that although the Governor of the Respondent was aware that the Tender Committee had terminated the tender, he failed to pass this information to the Review Board and also wilfully ignored the advice of in-house counsel and that of counsel involved in the matter, who had recommended an appeal against the decision of the Review Board.

The Interested Party asserted that investigations further revealed that the Governor of the Respondent wilfully failed to comply with the procedures relating to procurement by public entities.

The Interested Party averred that whereas the Respondent had only budgeted Kshs. 800 million for the tender, the tender awarded to the Applicant is worth Kshs. 1.2 billion shillings and this confirms that the entire process was tainted with illegality.

The Interested Party stated that the entire procurement process was compromised as at one point the Tender Committee recommended re-evaluation as it was not satisfied with the evaluation process, as the amounts quoted had exceeded the set limit.

The Interested Party asserts that the Respondent is now saddled with a contract obtained through a process in which it has no confidence in and with an entity it has not chosen and public interest is bound to suffer if the application is allowed.

It is the Interested Party's case that prerogative orders are issued at the discretion of the Court. The Interested Party contends that the Court cannot be used to enforce an illegality or anything obtained through a process in breach of public policy and morality. The Interested Party therefore urges this Court not to allow the application.

Having heard the parties and gone through the pleadings and submissions, I find that the only issue for the determination of the Court is whether the Respondent's action is *ultra vires* the **PP&DA**. Any other issues are sub-branches of this main issue.

The starting point is to establish the role of judicial review. Judicial review is a tool of fairness. It ensures that those who have been subjected to the authority of public bodies are treated legally,

reasonably and in compliance with the rules of natural justice. A judicial review court only checks the process leading to the making of a decision and since it is not an appellate court, it is not concerned whether the decision is right or wrong. Judicial review therefore targets the decision-making process and not the merits of the decision.

The scope and reach of judicial review is now well settled. Lord Diplock in the famous case of **COUNCIL OF CIVIL SERVICE UNIONS v MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935** summarized the purpose of judicial review thus:

**“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety.”.....**

**By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.**

**By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"**

**(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.**

**I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”**

The core principle is that a judicial review court does not seek to substitute its opinion for that of the decision-maker. The judge may disagree with the decision but that alone cannot form the basis for the grant of judicial review orders.

In the case of **MUNICIPAL COUNCIL OF MOMBASA v REPUBLIC & UMOJA CONSULTANTS LIMITED, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** the Court of Appeal stated that in judicial review:

**“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider 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 – and that, as we**

**have said, is not the province of judicial review.”**

The circumstances under which orders of judicial review can issue were elaborated by Justice Kasule in the Ugandan case of **PASTOLI v KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS [2008] 2 EA 300** at pages 303 to 304 thus:

**“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service [1985] AC 2*; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club [1963] EA 478* at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876*).**”

I have already stated the undisputed facts of the case and the standpoints of the parties. When this matter came up for highlighting of submissions on 23<sup>rd</sup> July, 2013, it became apparent from the submissions of Mr. Waweru Gatonye for the Respondent that the Respondent has not refused to comply with the decision of the Review Board. This is how he opened his submissions:

**“The Respondent is prevented by the Interested Party from doing what it ought to have done. The Procurement Board made an order for the contract to be awarded to the lowest evaluated bidder in accordance with the PP&DA. The lowest evaluated bidder was the Applicant. When the order was made all the interested parties were given an opportunity to make representations to the Board and they did so. It is upon the consideration of this material that the order was made.**

**Section 100 of the PP&DA gives every unsuccessful bidder a right to prefer judicial review or an appeal to the High Court. None of the bidders took this option. Why should CBK appeal or prefer judicial review proceedings where the person ordered to be given the contract is the lowest bidder?”**

He went ahead and informed the Court that the Respondent takes a neutral stand in this matter. What I therefore need to consider in detail is the position of the Interested Party.

When one closely looks at the arguments of the Interested Party, it becomes apparent that it disagrees with the findings of the Review Board. Knowing that the decision of the Review Board had not been escalated to an appellate body, the Interested Party sought to attack it on the ground that it was an illegal

decision which was made without jurisdiction.

It was submitted on behalf of the Interested Party that by the time **Request for Review No. 51 of 2012** was filed by the Applicant, the tender had been terminated by the Respondent and the Review Board did not therefore have jurisdiction to hear the matter. In support of this proposition counsel for the Interested Party cited the words of Nyarangi, JA in **OWNERS OF MOTOR VESSEL "LILLIAN S" v CALTEX OIL (KENYA) LTD, [1989] KLR 1** to the effect that:

**"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 continuation of proceedings pending other evidence. A court of law down tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction."**

Urging the Court not to enforce the decision of the Review Board, the Interested Party submitted that the same was a nullity and amounted to nothing. The Interested Party buttressed this argument with the decision in **MACFOY v UNITED AFRICA COMPANY LTD, (1961) 3 ALL E.R. 1169** where Lord Denning stated at page 1172 that:

**"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

On the Applicant's contention that matters falling under the **PP&DA** can only be investigated at the behest of the Director-General, the Interested Party urged this Court to follow the footsteps of Wendoh, J in **REPUBLIC v KENYA ANTI-CORRUPTION COMMISSION AND 4 OTHERS EX PARTE JACKSON GICHOHI MWANGI & 5 OTHERS [2010] eKLR** where after considering **Section 102 of the PP&DA** the learned Judge opined that:

**"From a reading of the above Section, the investigations by the Director General do not include criminal investigations because even if the director makes any preliminary findings which are criminal in nature, he would still refer the same to KACC which is charged with investigations relating to Corruption and Economic Crimes. In the instant case, a report of an alleged crime having been made directly to KACC, in my view, that would not limit the powers of the KACC to investigate."**

What is the opinion of this Court on the presented arguments? One of the submissions forcefully put forward by the Applicant is that the Interested Party is a busybody as it does not have jurisdiction over complaints arising from procurement proceedings. Counsel for the Applicant submitted that any attempt by the Interested Party to investigate complaints arising from procurement proceedings would be in conflict with **Section 5 of the PP&DA** which shields procurement by public entities from interference by any other law.

I will start by making a finding on the arguments surrounding **Section 5**. Such an argument was advanced before Wendoh, J in **EX PARTE JACKSON GICHOHI MWANGI & 5 OTHERS (supra)** and she stated that:

**"The issue at hand does directly relate to procurement and disposal but there is nowhere in the Act that makes provision for the manner in which an alleged criminal Act will be dealt with. If it is a Criminal Act, it will end up being dealt with under the Criminal Justice System which involves investigations and prosecution of crimes."**

I agree with the learned Judge. What **Section 5** does is to ensure that all procurements and disposals by public entities are conducted under the **PP&DA**. In my view, the provision does not take away the powers of EACC or any other agency to investigate crimes that may occur in the course of procurement.

It is noted that **Section 102** gives investigative powers to the Director-General by stating that:

- “(1 **The Director-General may order an investigation of procurement proceedings for the purpose of determining whether there has been a breach of this Act, the regulations or any directions of the Authority.**
- )
- (2) **An investigation shall be conducted by an investigator appointed for the purpose by the Director-General.”**

The Director-General is the Chief Executive Officer of the Public Procurement Oversight Authority (the Authority) established under **Section 8 of the PP&DA**. The Director-General is in essence the superintendent of procurement by public entities. The office has wide powers when it comes to handling any complaint relating to procurement proceedings.

At the conclusion of investigations, the Director-General has options on what to do with the report. **Section 105 of the Act** states:

**If, after considering the report of an investigator, the Director-General is satisfied that there has been a contravention, the Director-General may, by order, do any one or more of the following—**

- (a) **direct the procuring entity to take such actions as are necessary to rectify the contravention;**
- (b) **cancel the procurement contract, if any;**

- “(1 (c) **terminate the procurement proceedings; or terminate the procurement**
- ) (d) **prepare and submit a summary of the investigator’s findings and recommendations to the procuring entity under the Anti-Corruption and Economic Crimes Act, 2003 ([No. 3 of 2003](#)).**

**Before making an order under subsection (1), the Director-General shall give the following persons an opportunity to be heard:**

- (2) (a) **the procuring entity; and**
- (b) **any other person whose legal rights the Director-General believes may be adversely affected by the order.”**

One can therefore argue, like the Applicant has done, that the Director-General is the overseer of all things related to procurement by public entities. This argument is, however, not entirely correct. Where a crime is committed in procurement proceedings, those charged with the responsibility of fighting crime can step in. Parliament did recognise the limit of the Director-General when it comes to investigation of crimes and that is why the Director-General was given the option of submitting the report of an investigator to KACC, the predecessor of EACC. I would therefore agree with Wendoh, J that the Interested Party has a role to play when it comes to investigation of suspected corruption and economic crimes committed in procurement projects. I therefore hold that the Applicant’s submission that the Interested Party has no part to play in the investigation of crimes arising in procurement proceedings has no merit.

The arguments of the Interested Party in response to the application were substantially addressed by the Review Board. The issue as to whether the Respondent had terminated the tender at the time **Request for**

**Review No. 51 of 2012** was filed was addressed in **Request for Review No. 65 of 2012**.

The Review Board considered the issue at length and at the end of it all stated at pages 26 to 28 of its decision that:

**“(iv) We have set out the detailed background in respect of this matter as it is clear that the minutes of the Tender Committee Meeting of 26<sup>th</sup> September 2012 purported to rely on in the meeting of 29<sup>th</sup> November 2012 are suspicious and could indeed be fake or an instrument made to subvert the course of justice. (sic) We say so because the following questions come to mind:**

- i. The said minutes of 26<sup>th</sup> September 2012 were signed on 12<sup>th</sup> October 2012. The Procuring Entity forwarded its Response to the Board on 26<sup>th</sup> October 2012. The hearing of the Request for Review was on 2<sup>nd</sup> November 2012. Why were the minutes not submitted to the Board then?**
- ii. The Procuring Entity submitted Form 5 that has several parts to be filled. The Procuring Entity categorically stated that no tenders had been rejected pursuant to Section 36. Further, it indicated no award had been made. If a decision to terminate the tender had been made, why was that information not disclosed?**
- iii. At the hearing on 2<sup>nd</sup> November 2012, the Procuring Entity through the Advocate and the Officers present never mentioned that the tender had been terminated or that a termination was being considered.**
- iv. The reasons given in the said impugned minutes for the termination are that the technical specifications are not clear and that there was need for further consultations with the other Government Agencies. As earlier observed, the Tender Committee had earlier ordered a re-evaluation and directed that two bidders who had not submitted mandatory documents be re-admitted into the tender process. At that time the issues of the technical specifications or the evaluation criteria were not raised.”**

Without commenting on the reasonableness or otherwise of the findings of the Review Board, it is clear that the Review Board gave reasons for reaching the conclusion that the procurement had not been terminated by the time **Request for Review No. 51 of 2012** was filed by the Applicant. The Review Board also gave reasons as to why it thought the Respondent had doctored the minutes for a meeting allegedly held on 26<sup>th</sup> September, 2012.

It must be remembered that two unsuccessful bidders namely ORAD Limited and Indra Systems participated in **Request for Review No. 51 of 2012**. At that time it was clear that the tender was to be awarded to the Applicant. None of the interested parties appealed or sought a review of the decision.

The bottom line is that the decision of the Review Board was not appealed. The merit of that decision is not the subject of these proceedings. It is important to note that the Review Board is not under investigations for making the decision in favour of the Applicant.

The invitation by the Interested Party that the Court should find that the decision was a nullity is an invitation to the path of lawlessness. The submission by the Interested Party amounts to telling parties to cases that they can look at decisions of courts or tribunals and declare them null and void without seeking a review or appealing. Even Lord Denning in **MACFOY (supra)** cautioned that sometimes it was convenient to have the court declare an act to be a nullity. Parties aggrieved by decisions of courts or tribunals are entitled to appeal or seek a review. Without recourse to appeal, I doubt whether an aggrieved party or anybody else can declare the decision of a court or tribunal a nullity.

A reading of the **PP&DA** shows that the procurement process is self-propelling. The process is self-executing. The **PP&DA** directs what should be done, laying out the step by step procedure of what should take place. If the procurement is not terminated, at the conclusion there is only one outcome: the signing of a contract.

Section 68 states:

**“(1 The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63.**

**(2) The written contract shall be entered into within the period specified in the notification under section 67 (1) but not until at least fourteen days have elapsed following the giving of that notification.**

**(3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into.”**

Any person aggrieved by a procurement process can ask for a review by the Review Board. **Section 100** is clear on this and it declares at **sub-section 3** that any party who disobeys the decision of the Review Board or the High Court is in breach of the **Act** and any act arising from such disobedience is null and void. It is important to reproduce **Section 100** for record purposes. It reads:

#### **Right to judicial review to procurement**

**(1 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.**

**(2 Any party to the review aggrieved by the decision of the Review Board may appeal to the “100.) High Court, and the decision of the High Court shall be final.**

**(3 A party to the review which disobeys the decision of the Review Board or the High Court shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court shall be null and void.**

**(4 If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect.”**

It follows therefore the decision of the Board or the High Court unless set aside on appeal is equivalent to a statutory command. An order of mandamus will therefore issue to command compliance with such a decision.

The Applicant herein seeks an order of mandamus. Explaining the reach of judicial review orders, the Court of Appeal in the case of the **KENYA NATIONAL EXAMINATION COUNCIL v REPUBLIC, EXPARTE GEOFFREY GATHENJI & 9 OTHERS**, Nairobi Civil Appeal No. 266 of 1996 described the purpose of an order of mandamus as follows:

**“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**

**“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may**

**be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”**

**At paragraph 90 headed “the mandate” it is stated:**

**“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”**

**What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.....”**

The Interested Party submitted that issuance of orders in favour of the Applicant would be contrary to public interest. It has therefore urged this Court to exercise its discretion and decline to issue the orders sought.

Counsel for the Interested Party is indeed correct when he submits that judicial review is a discretionary remedy. Support for this proposition is found in **Republic v National Environmental Management Authority [2011] eKLR** where the Court of Appeal stated that:

**“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge.”**

The decision of the Court of Appeal essentially captures the position of the law in relation to denial of judicial review where an alternative remedy is available. The factors to be considered were stated by the learned authors of **Halbury’s Laws of England** at Paragraph 67 (Page 141) of the Fourth, 2001 Reissue, as follows:

**“The courts in their discretion will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal or where some other body has exclusive jurisdiction in respect of the dispute. However, judicial review may be granted where the alternative statutory remedy is ‘nowhere near so convenient, beneficial and effectual’ or ‘where there is no other equally effective and convenient remedy’. This is particularly so where the decision in question is liable to be upset as a matter of law because it is clearly made without jurisdiction or in consequence of an error of law. Factors to be taken into account by a court when deciding whether to grant relief by judicial review when an alternative remedy is available are whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than the procedure by way of judicial review; and whether the matter depends on some particular or technical knowledge**

**which is more readily available to the alternative appellate body. Further, a court should bear in mind the purpose of judicial review and the alternative difference between appeal and review.”**

The discretion must be exercised judiciously. It would indeed defeat the purpose of judicial review to deny an applicant judicial review remedies where it has established that orders ought to issue and that there is no viable alternative remedy. Those are the circumstances prevailing in this case and orders of mandamus will issue as prayed in the application. The Respondent is directed to immediately proceed with the signing of a contract. This should be done not later than thirty days from the date of this judgment.

Before deciding on the issue of costs it is important to state that after submissions were highlighted on 23<sup>rd</sup> July, 2014 it emerged that the Interested Party was conducting investigations into the Applicant's conduct in regard to the tender herein. I did ask Mr. Ruto for the Interested Party to enquire from the investigator how long the investigations would take. On 30<sup>th</sup> July, 2014 Mr. Ruto informed the Court that the investigator required forty five days to conclude investigations. Forty five days have since gone but the fruits of the investigations have not been disclosed. The Court cannot speculate on why investigations have not been concluded. I will therefore not make any further comment.

From the pleadings and the submissions in this matter, it is apparent that the Respondent was in the process of implementing the decision of the Review Board but only failed to do so upon learning of the investigations by the Interested Party. It would therefore be unfair to penalize it with costs.

On the other hand, it would not be in the public interest to order the Interested Party to meet the costs of the Applicant. The vigilance of the Interested Party against corrupt practices should not be blunted by awarding costs against it. This is a matter touching on use of public funds and it is presumed that in commencing the investigations, the Interested Party was acting in good faith. The Applicant will therefore not get costs from the Interested Party.

Therefore, the best order on costs is to ask each party to meet its own costs and it is so ordered.

Dated, signed and delivered in Nairobi this 25<sup>th</sup> day of September, 2014

**W. KORIR,**

**JUDGE OF THE HIGH COURT**