REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 106 OF 2014

IN THE MATTER OF AN APPLICATION BY OLIVE TELECOMMUNICATIONS PVT LIMITED FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT

BETWEEN

REPUBLIC ……APPLICANT

VERSUS

PUBLIC PROCUREMENT

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

MINISTRY OF EDUCATION

SCIENCE AND TECHNOLOGY ……..……..1ST INTERESTED PARTY

HEWLET-PACKARD EUROPE BV,

AMSTERDAM MYERIN BRANCH ……..……2ND INTERESTED PARTY

HAIER ELECTRICAL APPLIANCES

CORPORATION LIMITED ……..……..…….3RD INTERESTED PARTY

EX PARTE

OLIVE TELECOMMUNICATION PVT LIMITED

JUDGMENT

Introduction

1. The proceedings the subject of this judgement were commenced by **Olive Telecommunication**

Pvt Limited, a limited liability company incorporated in the Republic of India, hereinafter referred to as the ex parte applicant.

2. The Respondent is the **Public Procurement Administrative Review Board** (hereinafter referred to as the Board), a statutory Board established under the provisions of the ***Public Procurement and Disposals Act*** (hereinafter referred to as the Act), tasked with reviewing disputes arising from disputes covered under the Act.
3. The 1st Interested Party is the Ministry of Education, Science and Technology which floated the tender, the subject of these proceedings. It will be referred to in these proceedings variously as the Respondent or the Procurement Entity or PE.
4. The 2nd and 3rd interested parties were participants in the tendering process the subject of these proceedings
5. Articles 43(f) and 53(1)(b) of the Constitution provide that every person has a right to education and that every child has a right to free and compulsory basic education. Geared towards the fulfilment of this Constitutional obligation, the Kenya Government through the Ministry of Education Science and Technology, the 1st Interested Party herein set in motion a process aimed at proving the children of Kenya with equal access to quality education irrespective of their socio-economic status in obvious recognition of the role education plays in the development of a society.
6. In order to achieve the said Constitutional mandate, the Procuring Entity, the 1st interested party herein advertised for applications for a tender in respect of the supply, delivery, installation and commissioning ICT integration in devices and solutions for primary schools in Kenya.
7. Among the companies which applied for the said tender were the ex parte applicant herein, the 2nd Interested Party and the 3rd interested party herein.
8. What triggered this application was a decision made by the Board on 11th March, 2014 by which the Board nullified the decision made by the Procuring Entity awarding the tender for the said project to the ex parte applicant herein.
9. The application is a Motion on Notice dated 21st March, 2014filed the same day expressed to be brought under Order 53 Rule 3 of the ***Civil Procedure Rules***, Section 3A of the ***Civil Procedure Act*** (Cap. 21 of the Laws of Kenya) and Section 8 of the ***Law Reform Act*** (Cap.26 of the Laws of Kenya) seeking the following orders:

1. ***An order of certiorari removing to the High Court for the purposes of being quashed the decision of the Respondent delivered on the 11th day of March, 2014 in application No. 3 of 2014 and Application No. 4 of 2014 and in particular the following orders:-***

a. ***The requests for review by the first and second applicants dated 12th February, 2014 and 14th February, 2014 and lodged with the Review Board on 13th February 2014 and 14th February, 2014 respectively be and are hereby allowed.***
b. ***The award of the Tender No. ICB/MOEST/7/2013-2014 for the supply, delivery, installation and commissioning ICT integration in devices and solutions for primary schools in Kenya LOT 1 to M/S Olive Communications PVT Ltd as contained in the procuring Entity's notification of award dated 7th February, 2014 be and is hereby annulled.***
c. ***In Exercise of the Board's powers under Section 98(b) the Board gives the following directions***

i. ***The Procuring Entity is directed to proceed with the Tender process from the point of the opening of the BAFO's and thereafter conduct due diligence in accordance with the criteria set out under Clauses 34.2, 34.3 AND 34.4 of the Tender document.***
ii. ***For the avoidance of doubt, the only parties that shall participate in the process in (i) above shall be M/s Hewlett – Packard Europe, BV Netherlands and M/s Haier Electrical Appliances Corporation Ltd, the 1st and 2nd Applicants in Application No.3 of 2014 and 4 of 2014 respectively.***
iii. ***The Procuring Entity shall complete the entire process including the making of an award within a period of 45 days from the date of this decision.***
iv. ***The Procuring Entity shall deduct any sum wrongly added onto the Tender sum of any of the two Applicants' best and final offers (BAFO's)***

v. ***The Procuring Entity shall take steps to extend the Tender validity period and extend the bid security for the two Tenderers for such period of time as is necessary to complete the process.***

2. ***Costs of and incidental to the Application be provided for***
3. ***Such further or other relief as the Honourable Court may deem just and expedient to grant.***

Brief Background of Application

10. The Ex parte Applicant tendered in Tender No. ICB/MOEST/7/2013-2014 (hereafter the Tender) for the supply, delivery, installation and commissioning ICT integration in devices and solutions for primary schools in Kenya LOT 1 by the Respondent, the Procurement Entity (PE). The Ex parte Applicant received a Notification of the Award dated 7th February, 2014 as the successful bidder. Following that announcement, the 2nd and 3rd interested parties filed separate Request for Review of the Award before the Respondent Board, being Nos. 3 of 2014 and 4 of 2014 respectively. The Requests for Review were heard on 5th March, 2014 and 6th March, 2014 and the Respondent Board delivered its decision on 11th March, 2014 allowing the two requests. The Respondent Board made several determinations of the issues before it in the decision and some of the significant holdings of the Respondent Board included;

    1) Annulment of the award of the Tender to M/S Olive Communications PVT Ltd;

    2) Directions that the Procuring Entity to proceed with the Tender process from the point of the opening of the BAFO's and thereafter conduct due diligence in accordance with the criteria set out under Clauses 34.2, 34.3 AND 34.4 of the Tender document;

    3) THAT the only parties that shall participate in the process in (2) above shall be M/s Hewlett – Packard Europe, BV Netherlands and M/s Haier Electrical Appliances Corporation Ltd; and

    4) The Procuring Entity shall complete the entire process including the making of an award within a period of 45 days from the date of its decision.

11. The Ex parte Applicant felt aggrieved by the entire decision of the Respondent Board and filed this judicial review application in this Court to remove the said decision to the High Court for purposes of being quashed. The Ex parte Applicant and the other parties filed pleadings and also submitted at length on the issues at hand, and those submissions shall be analyzed in great depth for their worth.

The ex parte Applicant's Case

12. In support of the application the applicant relied on the following grounds:

1. **That the Decision is contrary to the Rules of Natural Justice;**

a. It is based on grounds which were not pleaded by any of the applicants in the request for review applications that had been filed. As a consequence, the Ex parte Applicant was not afforded an opportunity to respond. This was particularly so with regard to the allegation that the Ex parte Applicant did not meet the financial criteria regarding turnover to qualify as an eligible tenderer. None of the applications contained any such allegation.

2. **That if such an allegation had been properly pleaded, and the applicant been given a proper opportunity to respond to it, it would have demonstrated that it did indeed meet the financial criteria regarding the turnover, hence its bid passed the preliminary stage, and therefore:**

a. In finding that the applicant lacked the necessary financial turnover the respondent made a gross error of law and of fact. It was an error of law because the matter was not properly before the Board for it to consider. And it was an error of fact because the Ex parte Applicant did in fact meet the financial criteria and the information substantiating that fact had been supplied to the Procuring Entity and was contained in its Bid Documents which were before the Board.

3. **The Board made an error of law and of fact in finding that the Applicant was not in a Joint Venture with another company.**

a. It was an error of law because the question was not properly before the Board, the same not having been pleaded with any degree of precision by either applicant in their respective Requests for Review.
b. It was an error of fact because the Applicant had in fact submitted its Bid jointly with another company. Moreover, the Ex parte Applicant had stated in the Response to the Request for Review that it had participated in the tender with another company. All the documents in support of that arrangement were contained in the Bid Document supplied to the Procuring Entity and filed before the Board.
c. If the Applicant had been given an opportunity to respond to the allegation that it had not presented its Bid together with another company, it would have done so and it would have directed the Board to the correct documents.

4. **By considering grounds that were not contained in the Requests for Review that were before it, the Board acted *ultravires*;**

a. The power of the Board to review a decision of the Procuring Entity is limited by the grounds of the Request for Review.
b. The Board, in purporting (*suo moto*) to frame issues and deal with fresh grounds not contained in the Request for Review, exceeded its mandate under the Act and the Regulations.

5. **In allowing both requests for review, the Board made a decision that is unreasonable and in defiance of logic;**

a. The requests for review did not seek the same orders
b. In application No. 3 of 2014, HP sought the following

i. That the procuring Entity's decision to award the Tender No. ICB/MOEST/7/2013-2014 for the supply, delivery, installation and commissioning ICT integration in devices and solutions for primary schools in Kenya to Olive Telecommunications be set aside and/or nullified.
ii. That subject to due diligence Tender NO. ICB/MOEST/7/2013-2014 for the supply, delivery, installation and commissioning ICT integration in devices and solutions for primary schools in Kenya be awarded to the applicant, being the most advantageous bidder in conformity with the provisions of the Public Procurement and Disposal Act, the Public Procurement and Disposal Regulations 2006 and in conformity with the e-valuation criteria set out in the tender documents.
iii. In the alternative and without prejudice to prayer number 2 above, the Procuring Entity do properly and correctly evaluate the bids submitted by the bidders in respect of Tender No. ICB/MOEST/7/2013-2014 for the supply, delivery, installation and commissioning ICT integration in devises and solutions for primary schools in Kenya in conformity with the Public Procurement and Disposal Act 2005, the Regulations and the Tender documents and using objective, transparent evaluation criteria and in particular by taking into account the value additions.
iv. The Procurement Entity be ordered to pay the costs of and incidental to these proceedings on a full indemnity basis.
v. This Honourable Board be pleased to issue such further or other Orders as it may deem just.

c. The applicant in No. 4 of 2014, on the other hand, sought the following orders;

i. The procurement award announced on 7th February, 2014 be annulled in its entirety.
ii. The procuring entity be ordered to transparently re-evaluate the tenders of only the compliant tenderers for purposes of the awarded of this tender.
iii. Alternatively, that the entire procurement proceedings herein, be annulled and the procuring entity be ordered to re-tender for the procurement afresh in full compliance with the law.
iv. Olive Telecommunications PVT Limited, be debarred from participating in any re-evaluation or re-tender relating to this procurement.
v. The Procuring Entity be ordered to pay the costs of this Administrative Review.

d. The prayers sought are different and competing. It defeats logic for the Board to allow both applications, seeking different prayers which cannot co-exist, as granted.

6. **The Board acted unreasonably in finding that the Applicant did not meet the experience criteria required under the Tender document.**

a. The Board did not consider any of the information submitted by the consortium partners.
b. All the information regarding the consortium partners was contained in the Applicant's Bid Document which was before the Board.
c. Instead, the Board erred in calculating the length of experience of the applicant using the date of the ISO certificate.
d. If the board had considered the information regarding the experience of the consortium, it would have found that the Applicant met and surpassed the experience criteria.

7. **The Board made an error of fact and of law in failing to distinguish between value added services and additional services.**

a. In particular, the Board failed to consider that other bidders had all made quotes for additional services.
b. The Board, in treating the additional services quote made by the Applicant as unjustifiable, yet additional services had been offered and quoted for by the other qualified bidders, treated the Applicant in a way that was discriminatory and showed bias.
c. The Board also failed to consider that provision of additional services was an integral part of the competitive negotiation stage.
d. The Board failed to consider that being a part of this stage, it was a lawful process in which all qualified bidders participated, that none of them objected to it and that because it was a legally sanctioned specially permitted procedure, it was not liable to challenge under the review process under the law.

8. **The Board took into account irrelevant considerations in deciding whether the Applicant was an OEM;**

a. The principal complaint before the Board was that the Applicant was not an OEM.
b. In finding that the Applicant was not an OEM, the Board relied upon a definition that was not offered by the Procuring Entity, whereas the Board had stated that the *'best way of determining this matter is by ascertaining whether the procuring entity had attempted to set out any definition of what an OEM is in any of its documents'.*
c. The Board then disregarded the definition it found in the Procuring Entity's documents, under which the Applicant qualified as an OEM, and instead reverted to a definition given by the 2nd Applicant, which definition was not even contained in the Request for Review.
d. The Board in any event did not have any definition under which the requirement of a factory was a necessary pre-requisite to being an OEM, yet insisted that a factory was a necessity nevertheless.

9. **As a result of the foregoing, the Board made a decision to annul the award of the tender to the Ex parte Applicant and to exclude it unlawfully from the procurement process.**
    a. It is just, fair and equitable that the orders sought herein be granted to the Ex parte Applicant.

13. The said application was supported by the Verifying Affidavit and Supplementary Affidavit sworn by **Ajay Jain**, a Director in Charge of Sales in the Ex parte Applicant Company.
14. Apart from amplifying the foregoing grounds, it was contended that contrary to the Respondent Board's finding that the combined average annual turnover for the Ex parte Applicant and its other consortium partner, **New Century Optronics Company Limited**, was below Kshs. 8 billion, the same was Kshs. 17.85 billion. It was deposed that the combined contractual experience of the Ex parte Applicant and its other consortium partner above was Kshs. 3.355 billion and not Kshs. 360,475,792.6957 and that that exceeded the tender threshold by more than six times and that despite exhibiting documents in support of its case, the Board but it did not consider them.
15. According to the deponent, the Board relied on the ISO Certificate which was for only one year and erroneously held that the Ex parte Applicant did not have 5 years' experience in providing similar services as those being tendered for. However, had the Respondent Board cared to look at the Bid Documents, it would have found that the Ex parte Applicant and its consortium partner had been in business since 2008 and 2007, respectively and that the Ex parte Applicant has shipped over 20 million devices to over 40 countries over the past 10 years while the consortium partner over 4.5 million high value ICT and electronic products to customers like Walmart, Best Buy, Sasuni and others. It was therefore averred that the contract manufacturer of the consortium had supplied over 20 million student laptops in over 70 countries.
16. On behalf of the Applicant, it was reiterated by **Mr. Ahmednasir Abdulahi**, Senior Counsel that the ex parte Applicant had a Memorandum of Understanding (MOU) with partners which constituted the consortium of joint venture with the other company as required by the tender which information was contained in the Tender Data Sheet and the MOU was part of the Bid Documents that were produced before the Respondent Board. However, care was not taken to peruse the said documents, which was responsible for the erroneous decision made on the consortium. There was no requirement in the tender that the consortium be a separate or special purpose vehicle. In furtherance of this argument, the Ex parte Applicant stated, the fact that the Notification of Award was sent to the Ex parte Applicant does not mean it bid alone. The MOU should have informed the Board's decision that there was a joint venture or consortium MOU since it is not logical to expect the Notification of Tender to have been sent to all the partners in the consortium but to the lead bidder.
17. By finding that there was no affidavit by the Ex parte Applicant to prove the existence of the joint venture, it was submitted that Board effectively shifted the burden of proof to the Ex parte Applicant in its said finding. However, it was contended that since the bid documents included those on the consortium, it was not necessary that this issue be contained in an affidavit.
18. According to the applicant, the Respondent Board relied on matters which were not pleaded and failed to look at all the Bid Documents despite stating in its ruling that it did, thereby making erroneous decisions that the Ex parte Applicant did not meet the financial as well as the experience criteria. In basing its decision on un-pleaded matters, the Respondent Board denied the Ex parte Applicant an opportunity to respond to such un-pleaded matters which was in breach of rules of natural justice.
19. According to the ex parte applicant's understanding of clause 17 addendum (NO 1), which dealt with the Original Equipment Manufacturer (herein referred to as the OEM), the fact that the Clause provided that the OEM should be the lead bidder implied that the OEM and the consortium should be separate entities, otherwise there would be no need for a lead bidder. This view, according to the applicant, was reinforced by the fact that clause 3.6 of the Tender Data Sheet required that '*the bidder and one of the consortium partners were to have the OEM of the proposed hardware'*.
20. It was further submitted that the Board decided the issue of OEM an extraneous definition, which was not provided for by the PE or addressed by the Ex parte Applicant, but had been provided before the Board and was not the one provided by the PE hence the definition of OEM which was provided by the PE was disregarded without any or justifiable reason.
21. According to the applicant the Board discriminated against it on the issue of additional services and value added services. It was contended that though all the bidders quoted for additional services as well as value added services, only one party, the ex parte applicant party was penalized for it. To the applicant, the former was at a cost which all bidders quoted while the latter was free of charge. The failure by the Board to make the distinction between these two services was, in the

applicant's view a gross error on the record of the Respondent Board. It was therefore contended that by discriminating against the applicant, the Board treated the Ex parte Applicant unfairly.

22. It was further asserted on behalf of the applicant that the PE engaged the bidders in a competitive negotiation at Windsor Golf and Country Club on 10th December, 2013. This, it was contended was a specially permitted procedure which confers benefits to the PE in that the PE is able to cost some items and use that information to request a bidder to exclude those items which the PE can obtain at better prices, and include those items the bidder will be able to provide free of cost. Using the template which was provided by the PE at Windsor, the Ex parte Applicant separated the quotation for additional services in an annexure to the price schedule and gave specific break downs of each item so as to make it easier for the PE to choose any of the item or all items based on its need or budget. In the original Bid, which was opened on 5th December, 2013, and which contained a global sum inclusive of cost of equipment and additional services as was required under the original tender specification and tender conditions, the ex parte Applicant did not, submit the quotation for additional services separately. In the ex parte Applicant's view its bid price excluded the additional services and was, therefore, the lowest bid.
23. With respect to the issue of its eligibility as a tenderer, the ex parte applicant's position was that the Board decided matters beyond the scope of the Grounds of Review as presented by the Applicants before it. The only objection to the Ex parte Applicant's eligibility raised in the Review before the Board was that it was not an OEM which was accordingly answered by the rejoinder by the PE in the review proceedings that all bidders including the Ex parte were qualified to bid. No one raised issues of absence of joint venture or financial turnover or lack of necessary experience on the part of the Ex parte Applicant. In any event, the parties applying for review could not have been expected to raise these issues as they did not have the documents relating to the issues as the documents are confidentially held by the PE by law. Therefore, such issues would not have been grounds for review in the first place. Also, the grounds for review of award could not have been made on speculation as to the qualifications of the Ex parte Applicant. However, had the issues been raised, it was the ex parte applicant's submission that it would have addressed them adequately.
24. In the applicant's view, the Board gets its mandate from the pleadings filed and the grounds cited for review. However, it contended that in this case, the Board seems to have formulated its own issues on matters which had not been pleaded by the parties and decided the applications before it on that basis. Given the circumstances of the case, the Board therefore reached the decision first then formulated reasons thereafter to support their conclusions and this is not the natural course of justice.
25. As the decision of the Board was reached on un-pleaded issues and was not based on any evidence of the parties, it was submitted that it was tainted by lack of logic bringing it within the test in the *Wednesbury Unreasonableness.*
26. All documents by the PE were placed before the Board and the advocate for the PE reminded the Board to look at and consider those documents but it chose not to, which makes its decision unreasonable. All the above matters complained of show that the Board was out to find an opportunity to disqualify the Ex parte Applicant.
27. With respect to the scope of court's jurisdiction in judicial review, **Mr. Ahmednasir** contended there is a paradigm shift in judicial review based on the fact that judicial review remedies now have constitutional underpinning and must be seen within the constitutional precincts. To the learned counsel, Article 47 of the Constitution is the game changer and deals with administrative actions by all public organs including the Board. This, according to him, raises the bar in judicial review and is in addition to or over and above the traditional or conventional grounds for judicial review as formulated within the common law tradition.
28. In learned counsel's view, the doctrine of natural justice has attained constitutional embodiment and Article 25 of the Constitution prohibits any derogation from the right to fair trial. Article 50 of the Constitution again reinforces the right of parties to have their disputes resolved in a fair and public hearing before a court or tribunal. These new dimensions therefore require a heightened judicial review scrutiny by the court when considering a decision by a tribunal. Learned counsel argued that this is the time to downgrade the conventional grounds for judicial review in favour of the constitutional benchmarks. According to him, based on Article 27 of the Constitution, merits of the decision of the tribunal can now be reviewed in a judicial review because the rights of the

parties are involved. Similarly, Article 10 on National Values and Principles of Governance also come into play as all state organs including a tribunal which is exercising public judicial or quasi-judicial power are bound by the said Article. In support of this position learned counsel relied on *inter alia* the decision of the Constitutional Court of South Africa in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99,** and submitted that that controls of exercise of judicial power should be as encapsulated in the Constitution which position, in his view, obtains in Kenya.

29. Based on the foregoing the Court was urged to quash the decision of the Board.

The 1st Interested Party's Case

30. Since the 1st Interested Party supported the ex parte applicant's case, we intend to deal with its case before dealing with the respondent's case.
31. The 1st Interested Party filed a Replying Affidavit with annexures. It also filed written submissions and made oral submissions through its learned counsel, **Mr. Kiragu**. After outlining the philosophy and the background of the subject project, Learned Counsel submitted that in order to ensure that the Government achieved value for money in any subsequent procurement, the 1st Interested Party carried out extensive review of the project and the process to determine the best way forward, including carrying out consultation with key stakeholders and sought and obtained approval to use a Specially Permitted Procurement Procedure (herein referred to as the "SPP") under section 92 of the Act as read with Regulation 64(1)(a) of the ***Public Procurement and Disposal Regulations, 2006*** (the Regulations). It was stated that the approval was granted by the Public Procurement Oversight Authority (PPOA) in a letter dated 29th October 2013 and the SPP was incorporated in the tender documents. Clause 29 of the Tender Data Sheet included processes not taken in a normal procurement such as competitive bidding and the submission of Best and Final Offers (BAFO) in line with Regulation 31(7) of the Regulations which allow procuring entities to use creative approaches to enhance efficiency of the procurement process and project implementation. To the 1st Interested Party, this is one of the very few public procurement projects in Kenya in which such procedures have been adopted.
32. According to the 1st Interested Party, the yardstick used in adjudicating disputes arising out of an SPP would not be the same as those applied in conventional procurements-a fact the Respondent failed to consider. The 1st Interested Party denied that it disregarded the provisions of the law and averred that the SPP incorporated in the tender document adhered to the letter and spirit of the Act and the Regulations since the SPP had been reviewed by PPOA before the tender process begun.
33. It was the 1st Interested Party's position that it acted timeously in the tender process and communicated promptly to the bidders of all necessary steps which process saw savings of a total of Kshs. 8,025,151,216.25 in the second tender as compared to the first tender.
34. The 1st interested party clarified that the bidding was done in 3 categories: Lot 1 **(**Laptops for learners and Laptops for teachers); Lot 2; (Printers) and Lot 3; (Projectors) and that the Ex parte Applicant was the successful bidder for Lot 1, having the least evaluated price after the competitive negotiations and the evaluation of the BAFOs pursuant to the procedure established for purposes of the SPP. To the 1st Interested Party, it went to great lengths to protect taxpayer's money by investing a lot of time and care into the tender process as is evident on the due diligence exercise carried out.
35. In its view, the Board was guilty of unreasonable exercise of power and irrationality**,** because its decision defies logic such that no sensible person or body could have reached the same decision considering the facts in the case and applicable law and relied on **Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation [1948] 1 KB 223.**
36. Further and based on **De Smith, Woolf and Jowell: *Judicial Review of Administrative Action,* 7th Edition** at paragraph 11-036 on page 602 it was contended that the decision was irrational.
37. In support of the interested party's case, it was submitted that the Respondent purported to exercise the powers conferred on it by the Act in reaching its finding and annulling the award of the tender by the 1st Interested Party to the Applicant. The 1st interested party however contended based on the decision of **Nyamu, J** (as he then was) in **Keroche Industries Limited vs. Kenya**

Revenue Authority [2007] KLR 240 that statutory powers and duty must be exercised and performed reasonably. Based on **R vs. Public Procurement And Administrative Board Ex-Parte Zhongman Petroleum & Natural Gas Group Company Ltd [2010] eKLR** which followed **Anisminic vs. Foreign Comp. Comm. (H.L.)** [1969] 147, it was contended that an unreasonable decision is a nullity and the instances in which a tribunal's decision may be a nullity include failing to comply with requirements of natural justice, deciding on matters not remitted to a tribunal, taking into account irrelevant matters as well as failing to take into account relevant matters, all of which exist in this case. The 1st interested party argued that the Respondent's decision should therefore be declared a nullity in the circumstances since it was unreasonable and irrational for the Respondent to fail to examine all the documents submitted to it for purposes of reviewing the award of tender. The 1st interested party averred that the Respondent was invited by the 1st Interested Party's Advocate to review all the documents before it for purposes of ***confirming the veracity of the claims made by the various parties*** (emphasis added) and that this was necessary because of the fundamental differences in the submissions made by the different parties before the Respondent. Despite this the Respondent not only failed to review all the documents before it to verify the claims made, but it also appears to have used the invitation to review the documents as an excuse to exceed its mandate. However, the 1st Interested Party averred that no reasonable tribunal would reach the conclusion that the invitation to review all the documents submitted to it in a matter amounts to a call to consider issues not properly before it and, without properly reviewing all the said documents, to base a finding on those issues.

38. It was, according to the 1st Interested Party, unreasonable and irrational for the Respondent to reach a decision that contradicted existing facts as set out in the tender documents as well as in defiance of logic and reason in the following instances: On Original Equipment Manufacturer, Clause 3.6 of the TDS (page 31 of the Affidavit of **Livingstone Indetie** sworn on 4th April 2014) stated that '*the bidder must be an Original Equipment Manufacturer (OEM) of the proposed hardware gadgets. The bidder must be in a position to provide support/maintenance/up-gradation of all items included in their offer to the purchaser during the period of the contract*.' This gave an indication of what qualifications the bidder should have as an OEM. As such, one of the key requirements for an OEM that was the "*bidder must be in a position to provide support/maintenance/up-gradation of all items.*" The Respondent quoted this in its decision at page 51 but does not appear to have considered the requirements. In order to demonstrate the qualification as an OEM, the bidders were required to provide an ISO certificate. Bidders also had an opportunity to demonstrate that they were OEMS by attaching relevant catalogues and other documents. The Applicant produced an ISO certificate (produced as exhibit P002 by the Respondent) trademark certificates (pages 106 to 108 of the exhibit annexed to the affidavit of **Kenneth Mwangi** sworn on 17th April 2014) and a catalogue indicating the model of the laptop they would supply (produced as exhibit P002 by the Respondent). These were to demonstrate that the bidder owned the brand which was a requirement to be an OEM. Under the Act, it is only a procuring entity that has the mandate to determine the technical specifications of a tender. The Respondent, therefore, exceeded its mandate by ousting the description given of these requirements and substituting with its own understanding to the effect that a bidder needed to own a factory in order to qualify as an OEM. This, in the 1st interested party's view was unreasonable and irrational. An OEM within the context of the tender was allowed to manufacture through Original Device Manufactures (ODMs). Like the other 2 bidders, the Applicant had agreements with ODMs including some who manufacture for the 2nd Interested Party.

39. According to the 1st Interested Party, the 2nd Interested Party did not the foregoing though the 2nd interested party introduced some confusion by stating that the manner in which it uses ODMs is different from the manner in which the Ex parte Applicant does without even giving the distinction of the manner of use. It was contended that in any event, the 1st Interested Party was not interested in the manner in which an ODM is used by an OEM but that it was sufficient for a bidder to demonstrate *inter alia* the use of ODMs in the manufacture of laptops to qualify as an OEM within the requirements of the tender. To the 1st interested party, the 2nd Interested Party tried to conceal the fact that it used ODMs by altering the document it placed before the Board, but the Respondent did not to act on this. The contention by the 2nd Interested Party which was

accepted by the Respondent that an ISO Certificate did not constitute the Ex parte Applicant an OEM is incorrect as it fails to acknowledge the context in which the certificate was produced. To it, the said certificate is only one of several items of evidence showing that the Applicant was an OEM and is certainly not the only document that was considered by the 1st Interested Party in reaching the conclusion that the Applicant was duly qualified to bid for the tender. The decision of the Respondent was also unreasonable in that it found that the Applicant herein was not an OEM and yet the Applicant had demonstrated use of the same ODMs contracted by the 2nd Interested Party.

40. On Joint Venture, the 1st Interested Party submitted that a substantial part of the decision reached by the Respondent is hinged upon the finding that the Applicant did not bid as a joint venture. Clause 3.1 of the Instruction to Tenders (ITT) was however unequivocal in granting the eligible bidders an option to bid as either under an already established joint venture or consortium or to show the formal intent to enter into a joint venture which view is further buttressed by other clauses in the tender document. Apart from that there was in the tender documents submitted to the Board, the Ex parte Applicant's formal intent to enter into a joint venture arrangement as evident from the Memorandum of Understanding between the Applicant and its proposed Joint Venture Partner. Therefore the respondent's finding that it had examined the original Tender documents and had found *"no evidence to prove that the Interested Party participated in this Tender as part of a consortium or a joint venture with any other company"* was, erroneous, irrational and unreasonable.

41. To the 1st interested party, the Respondent ignored all those facts which were both cited in the submissions before it and also present in the documents submitted to it. The finding that the applicant bid as a single entity was wholly unfounded and therefore unreasonable and irrational. From the Respondent's decision, it selectively reviewed the tender documents. For instance, the Respondent made reference to the Due Diligence Report submitted by the First Interested Party but failed to consider the information obtained by the 1st Interested Party on the existence of Memorandum of Understanding between the Applicant and its joint venture partner.

42. The 1st interested party explained that the threshold for experience by the bidders for purposes of the tender was two-fold according to the tender documents. First, the bidders had to show that they had at least 5 years' experience in providing services and solutions similar to those required by the tender and secondly, that they had engaged in at least three contracts of at least the equivalent of Kshs. 500 million each. In its view, as the Ex parte Applicant demonstrated both these aspects of its experience and that of its joint venture partner in the tender documents it submitted, in finding that the Ex parte Applicant did not have the requisite experience, the Respondent took into account only the ISO certification of the Ex parte Applicant and erroneously stated that the 1st Interested Party had cited the said certification as the only evidence of experience considered in determining whether the Applicant was qualified to bid. Yet the tender documents submitted by the Applicant clearly showed that the Applicant and its joint venture partner had combined experience of much more than the average 5 years required. While the TDS was clear that the ISO Certificate was one of the documents required to be submitted, it did not specify the period in respect of which the ISO Certificate should have been issued to the bidder. An ISO Certificate, it was contended is a certification of quality of the goods or services provided and the efficiency of an organization as at the time of issue.

43. A certificate of incorporation on the other hand is what shows for how long an entity was in existence hence in the 1st interested party's opinion no reasonable tribunal would give an ISO Certificate the same treatment as a Certificate of Incorporation, especially where both documents were placed before it as part of the documents submitted in the tender process. However, the Respondent relied on the submissions by of the 2nd Interested Party to the effect that the ISO Certificate was the only evidence of the Applicants' experience and failed to examine the documents before it to verify this claim which makes the decision irrational and unreasonable since the documents submitted by the Applicant to demonstrate its experience were in full accord with the specifications of the tender documents.

44. In the interested party's view, the combined turnover of the two entities in the proposed joint venture agreement was Kshs. 18.2 billion which was much higher than the Kshs. 8 billion as required by the tender document.

45. Further, the documents before the Board demonstrated the manner in which the lowest evaluated price was to be reached and the same documents also showed that the lowest evaluated price awarded was reached in that manner. Contrary to the finding by the Respondent, there was no price variation. The Applicant's price as set out in the form of tender was USD 268,899,699 "*or any other sums as may be ascertained in accordance with the price schedule attached herewith PSA and made part of this tender*." The form of tender had a provision of ascertainment which is an aspect of bid evaluation in accordance with section 66 of the Act and Regulations 50. The standard tender document that was used had been approved by PPOA. There is no requirement in the Act, the Regulations and the tender document, requiring a procuring entity to award a tender at the price set in the form of tender without carrying out bid evaluation. The tender was evaluated in accordance with *inter alia* Section 66 of the Act and Regulation 50 and there was no requirement in the Act, the Regulations and the tender document for signing of the Applicant's schedule of additional services. According to the interested party, it was therefore outside the Respondent's mandate to find that the price was incorrect based on the fact that the schedule was not signed at the opening of the financial bids. Ascertainment of price of the tender by looking at the documents submitted by the bidders (including any annexure or schedules that properly form part of the tender documents and do not materially deviate from the requirements of the tender) is part of the evaluation of bids as provided by Regulation 50. Since the requirement under Section 60(5)(b) of the Act on reading out the total price of the tender needs to be considered with, *inter alia*, Regulation 50 which allows minor deviations during evaluation and Regulation 45(1) (a) which provides that the total price need not be read out if some items are to be quoted separately, the 1st interested party submitted that it was unreasonable for the Respondent to fail to take into account the foregoing provisions which led it to equate the total price of the bid with the least evaluated price of the tender.
46. The interested party asserted that it noteworthy that the prices indicated at the BAFO opening register did not include the Applicant's and the 2nd Interested Party's quotes for additional services/cost of delivery. It was therefore unreasonable for the Respondent to fail to recognize that the three bidders' quotes in the Form of Tender and the Price Schedule were given differently but were treated in the same manner. To demonstrate this, the 1st Interested Party would have for instance declared the 2nd Interested Party's price schedule as improper for failing to specify the cost of additional services. Though the 2nd Interested Party's bid did not show the cost of additional services, this was deemed included in its quote.
47. To the 1st interested party, the Respondent merely and casually gave a general statement at Page 46 of its ruling, that the 1st Interested Party contravened the Act and Regulations and tender documents without showing how the 1st Interested Party breached the Act and the Regulations, by reference to specific provisions.
48. In its view, distinction between value-added services and additional services was submitted on by the 1st Interested Party in exact terms as those by the Ex parte Applicant. Whereas value added services were to be offered free of charge, additional services were all the services outside the unit cost of the devices being procured which services were necessary for the operationalisation and functioning of the devices. Value added services were extra services sought by the 1st Interested Party through competitive negotiation based on the negotiation template incorporated in the BAFOs. The value added services aspect greatly enhanced value for money in this procurement proceeding, as part of SPP. The Respondent, it was submitted failed to distinguish between additional services and value added services, hence, the unreasonable decision. The only difference in the manner in which the bidders set out the prices was that the additional services were quoted separately in the Price Schedule as was done by the 3rd Interested Party, or they were deemed incorporated in a separate quote in the Price Schedule as was done by the 2nd Interested Party, or distinguished and itemized to give a clear breakdown of what constituted the services being charged as was done by the Applicant. Therefore, the Respondent statement in their ruling that *"Mr. Ajay from the interested party confirmed that these items had been provided for in the original tender document and amounted to a repetition"* is erroneous and demonstrated the failure by the Respondent to make the correct distinction between the two aspects of the bid. The fact that the Applicant gave that breakdown in a schedule annexed to the tender document is immaterial,

especially since the annexure was properly referred to in the Standard Form of Contract as well as the Price Schedule. For the Board to find that the prices set out in the annexure constituted an "astronomical inclusion…"was unreasonable. All the three bidders' Price Schedules were different but all the bidders were treated in the same manner. Had the Respondent properly reviewed the documents, it would have seen that the Applicant's Price Schedule did not change the substance of the tender and that there was no alteration of price. As recognized by Section 64(2) (a) of the Act, minor deviations that do not materially depart from the requirements set out in the tender documents are excusable. The itemization of the Applicant's additional services is a minor deviation which did not materially depart from the requirements of the tender. The 1st interested party therefore averred that it was unreasonable for the Respondent, having claimed to have reviewed the documents before it, to have concluded that the Applicant herein charged for services that should have been offered for free and for which the other bidders were not charging when the documents showed otherwise.

49. The conclusion by the Respondent that the Applicant was awarded at a price higher than that contained in the form of tender as accounted at BAFO was, according to the interested party; in contravention of the Act and the regulations thereunder as well as the tender document; was simplistic and showed a lack of understanding of the Act and its regulations.
50. The Board in its view took into account irrelevant considerations, and failed to take into account relevant considerations. In addition, the Board's finding that the 1st Interested Party had failed to file affidavits which was part of the basis in finding against the 1st Interested Party, it was submitted was misconceived since all the documents containing all the facts relied upon by the 1st Interested Party in setting out its case to the Board had been submitted to the Board. Further, it was irrelevant to consider standard procurement procedures since the import of Section 92 of the Act is that the SPP is to have its own procedure as prescribed. This was the first time that a procurement procedure involving competitive negotiation was employed successfully. In support of this submission the interested party relied on **Warsame, J's** (as he then was) in **Re: Kisumu Muslim Association Kisumu HC Misc Application No. 280 of 2003**, and **Padfield vs. Minister of Agriculture and Fisheries [1968] HL.**
51. The Board, it was contended referred to and applied irrelevant sections of the Act and its regulations by for instance changing the substance of a Tender.
52. In the 1st interested party's view, the Board breached the Principles of Natural Justice and exceeded its jurisdiction when it denied the parties a reasonable opportunity to be heard and also denied the Ex parte Applicant reasonable notice of the allegations made against it in order to prepare and make an adequate response. To support this position the cases of **R vs. Deputy Industrial Inquiries Commissioner, Ex parte Moore [1995] IQB 456 AT 490, Dennis vs. United Kingdom Central Council Nursing**, **Forrest vs. Brighton Justices[1981] AC 1038, 1045, Hugh Tomlinson, *Fair Trial*, 2nd Edition, Montgomery vs. HM Advocate [2003] 1 AC 641, 673** and **Mclean vs. Buchhanan [2001] 1 WLR 2425** were cited.
53. It was further contended that the Respondent's jurisdiction under Section 93(1) of the Act is limited to adjudication of alleged breaches of the duties imposed on a procuring entity by the Act and the Regulations thereunder. The Respondent, however, based its decision on grounds that had not been raised in the requests for review and notice of which had not been duly given to the parties. Citing **R vs. The Public Procurement Administrative Review Board Ex Parte Kenya Medical Supply Agency, Crown Agents, Deutsche Gesellschaft Fur Technishe Zusammenarbeit and John Snow Inc**. **[2010] eKLR,** it was submitted that the Respondent overstepped its mandate by dealing with issues that were not pleaded before it, and by doing so, reaching the wrong conclusion and exceeded its mandate as provided in the Act and acted unreasonably by *inter alia* framing issues that were not before it and cited **R vs. KRA Ex Parte Aberdare Freight Services Ltd. Misc. Application No. 946 of 2004** in support of the submission that new issues raised at the hearing amounted to an ambush and that failure to afford a party an opportunity to be heard amounts to an error on the face of the record requiring correction by way of *certiorari*. Further, support was sought in **Mahaja vs. Khutwalo [1983] KLR 553** at pages 554 and 555, **Onyango Oloo vs. Attorney General [1986-1989] EA 456,** as well as the decision by Lord Denning in **Kanda vs. Government of The Federation of Malaya [1962] AC 322.** The Respondent's consideration of matters that were not properly raised before it, it was asserted, was

against the 1st Interested Party's legitimate expectation of procedural fairness yet the duty to act fairly lies upon everyone who decides anything and for this position the 1st Interested Party relied on **Board of Education vs. RICE [1911] AC 179, R vs. Army Board of Defence P Anderson [1992] QB 169**, ***De Smith's Judicial Review*** 6th Edition paragraphs 7.050 to 7.058, **Stansbury vs. Data Pulse [2004] ICR 52** and ***Keroche Case*** (supra). Hence, the Respondent's finding was *ultra vires* since it considered issues not pleaded before it. Whereas natural justice demands impartiality and fairness and precludes bias the Respondent's conclusions show that it selectively formed its opinion without looking at all the documents placed before it. Its decision therefore, it was submitted offends the principles of natural justice, is outside its jurisdiction and should be quashed. See the case of **AG vs. Ryan [1980] AC 718**.

54. In the 1st interested party's view, a grant of the orders prayed for will ensure that the objects of the Act as set out in Section 2 will be upheld and that legitimate public interest shall be safeguarded. Whereas the Board referred to clause 26.4 of the ITT, it failed to consider that this clause is in conflict with Regulation 50 of the Regulations yet the provisions of the Act and its regulations are mandatory and supersede the provisions of the bid documents where there is any contradiction. The Respondent, it was submitted therefore should not have considered this clause in so far as it did not concur with Regulation 50.

The Respondent's Case

55. **Mr Emmanuel Bitta**, Principal State Counsel in the Office of the Attorney General submitted on behalf of the Respondent. He relied on the Replying Affidavit sworn by the Respondent's secretary, **Pauline Opiyo** on 1st April 2014 in opposition to the application. The Respondent annexed a copy of its decision which included a record of the proceedings as transpired before it, which record, according to the deponent, has not been challenged. Reliance was placed on **Korir, J's** decision in **Republic V Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR.**
56. The Respondent was of the view, therefore, that High Court's jurisdiction in judicial review is circumscribed by the provisions of the ***Law Reform Act*** (Cap. 26) which also incorporates the provisions of Section 7 of the ***Administration of Justice (Miscellaneous Provisions) Act, 1938***, of the United Kingdom on power of the High Court in England to make an order of Mandamus, Prohibition or Certiorari. Since the High Court of Kenya has similar powers in judicial review, it was the Respondent's position that this has led to the development of fairly well settled criteria for issuance of the orders which include illegality, impropriety of procedure and irrationality as set out by **Korir J** in **Republic vs. Public Procurement Administrative Review Board & Another** (supra). According to the Respondent, a party seeking a judicial review of a decision of a tribunal must satisfy the above criteria in order to succeed.
57. In the Replying affidavit by **Pauline Opiyo**, it was deposed the 2nd and the 3rd interested parties filed separate Requests for Review before the Respondent challenging the award of the Tender No. ICB/MOEST/7/2013-2014. The Respondent heard all the parties, considered their submissions, and determined the application for review and delivered its ruling on 11th March, 2014 and at no point in time did the ex-parte Applicant challenge the jurisdiction of the Respondent to hear and determine the request for review. The Respondent, it was deposed notified the 1st Interested Party of the filing of the requests for review and subsequently the 1st Interested Party supplied to the Board a written memorandum of response together with all the original bid documents and the relevant minutes and reports on the tender to enable the Respondent consider them and make an informed decision on the two requests for review. All the parties to the request for review also filed their respective responses and skeleton submissions.
58. The Respondent submitted that under Section 93 of the Act an aggrieved candidate may request the Respondent to carry out an administrative review of procurement proceedings where the party alleges there was a breach of a duty imposed on a procuring entity by the Act or the regulations and which breach may result to loss or damage on the part of the said candidate and that the powers of the Respondent are under Section 98 of the Act
59. Further, in an application for judicial review, the Applicant's case is limited to the grounds set out in the statement of facts which are the basis upon which leave is granted (see **Khobesh Agencies**

Limited and Other vs. Minister for Foreign Affairs and International Relations and Others Nairobi JR No. 262 Of 2012 (2013) eKLR and Order 53, Rule 4(1) of the ***Civil Procedure Rules***. The Respondent classified the grounds of the application in three categories; 1) factual; 2) legal; and 3) merit review.

60. The first category of factual issues, according to it fall the issues of financial turnover and existence of joint venture and it was contended that at no point did the ex parte Applicant object to their being raised or sought for more time to respond to the said issues. Instead, it preferred to respond to the issues straight away. There was, therefore, joinder of issues on the question of financial turnover and existence or otherwise of a joint venture, thereby creating a legal obligation on the Respondent to give a determination of the issues. That fact was aptly captured in the record of proceedings before the Respondent tribunal. In accordance with the request by the Respondent made pursuant to Regulation 74(3) of the Regulations, the 1st Interested Party supplied the relevant documents stated therein for review by the Board. The other parties in the Request for Review also filed their respective responses and skeleton submissions. During the hearing of the Requests for Review, the 2nd and 3rd interested parties raised several issues touching on alleged breach of the Act and the Regulations made pursuant thereto and all of which, according to the Respondent are clear on the face of the Request for Review.
61. The second category of grounds, it was contended is an invitation to this Honourable Court to carry out merit review of the decision of the Respondent tribunal. The Respondent relied on the free online Black's Law Dictionary (http://thelawdictionary.org/merits-2/)] for the definition of "merit" and cited several judicial authorities which preclude the Court to carry out a merit review in judicial review such as **Republic vs. Kenya Revenue Authority Ex Parte Yaya Towers Limited [2008] eKLR.**
62. Similarly the High Court in **Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another [2014] eKLR** and **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** echoed the above position of law. As such, judicial review proceedings do not deal with the merits of the decision but the decision making process. The procedure for Request for Review is provided for in law and the exercise of jurisdiction by the Respondent has statutory anchoring as well. To that extent the Respondent averred that it had jurisdictional competence to determine the Requests for Review.
63. To the Respondent, what the ex-parte Applicant is really trying to do in this application is to have a hearing on the merits of the decision of the Respondent, yet this Honourable Court has no such jurisdiction. To it, it (the Respondent) made a determination only on issues that had been presented before it hence the claim that the Respondent considered extraneous matters is baseless and this is confirmed by reference to the record of the proceedings and decision of the Respondent where it is stated that the Board read all the documents submitted by all the parties to the two requests for review and having considered the oral and written submissions lodged with the Board, from which it framed the issues for determination. From the aforesaid, all the Parties were given a chance to respond to the pleadings and issues arising from the Requests for Review before the Board. In its view, issues for determination not only arise from pleadings but from evidence adduced, and submissions made by respective parties and the Respondent was, therefore, legally and duty bound to frame questions for determination based on the issues so arising. The Respondent associated itself with **Shields J's** decision in **Devjibhai Bhimji Sanghani & Another vs. National Bank of Kenya Ltd [1981] eKLR.**
64. To the Respondent the ground of unreasonableness as formulated in W*ednesbury unreasonableness"* does not apply here because the all the orders made by the Respondent were premised on a reasoned decision and were well within the mandate of the Respondent provided in Section 98 of the Act and further relied on **Korir, J's** decision in **Republic vs. Kenya Power & Lighting Company Ltd & Another [2013] eKLR** and on the **Wednesbury Corporation case (supra)** to the effect that the law places the onus on the ex-parte Applicant to demonstrate that the decision of the Respondent was so absurd that no sensible person could ever dream that it lay within the powers of the authority. On the contrary, there was a clear basis for the decision of the Respondent. The application, it was contended should fail on that score. Reliance was also placed on **Korir, J's** decision in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR,** and the Court of Appeal's

decision in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, Civil Appeal No. 145 of 2011.**

65. The Respondent made robust submissions on the tribunal's jurisdiction to make errors. It started by stating that misapprehension of the law or facts cannot be the basis for orders of certiorari, for those are grounds for appeal and not judicial review. The Respondents found support in the decision by **Odunga, J** in **Republic vs. Business Premises Rent Tribunal & 3 Others Ex-Parte Christine Wangari Gachege [2014] eKLR**, **Republic vs. Kenya Power & Lighting Company Ltd & Another [2013] eKLR,** and Court of Appeal in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR.**
66. As long as the ex-parte applicant is seeking to question the correctness of the Respondent's decision in a judicial review application, the Respondent submitted such application is misconstrued and unsustainable in law. The application without doubt deals with the issues of public interest and Courts should consider public interest when exercising their Judicial Review Jurisdiction even where a case has been made out for judicial review orders. See the case of **Republic vs. Judicial Service Commission Ex-Parte Pareno (2004) 1 KLR 203 at 219**, ***Halsbury's Law of England,* Volume 4, para 1508**, **Nairobi HCC Misc Application No. 86 of 2009** and **R vs. Kenya National Commission On Human Rights Ex-Parte Uhuru Kenyatta (2010) eKLR**.
67. The Respondent urged this Honourable court to be persuaded by the findings in **Republic vs. Kenya Revenue Authority & Another Ex-Parte Bear Africa (K) Limited** where **Majanja J.** quoted with approval the decision of **Githua, J** in **Republic vs. Commissioner of Customs Services Ex-Parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR.**
68. It was argued by the Respondent that for the reasons stated above, it will be against the public interest to issue the orders sought and urges this Honourable Court to exercise its discretion and disallow the prayers of the ex-parte Applicant. The Respondent prays that the ex-parte Applicant's motion be dismissed in its entirety with costs to the Respondent.

The 2nd Interested Party's Case

69. The 2nd Interested Party opposed the Application and relied on: the Affidavits sworn by **Livingstone Indetie** on 4th April 2014 and 9th May 2014; and the List and Bundle of Authorities dated 26th June 2014. The 2nd Interested Party has also filed a Digest of Authorities dated 26th June 2014. It is not in dispute the tender herein was issued and the method of procurement was a Specially Permitted Procurement Procedure under Section 92 of the Act with an additional stage of competitive negotiations aimed at ensuring that the 1st Interested Party obtained the lowest possible price. It was averred that all bidders participated in the competitive negotiations which negotiations were however subject to the usual requirements of maintaining and ensuring fairness and competitiveness as per the requirement under Section 2 of the Act and Article 227 of the Constitution.
70. It was contended that all bids were subjected to evaluation and were stated to have passed the technical and financial evaluation stages by the 1st Interested Party and all the said bidders were invited for the competitive negotiation meeting where they were requested to submit their best and final offers (**BAFO**) and were in addition, asked to indicate the value added services they were willing to supply at no cost.
71. It was deposed that at the opening of the BAFOs on 13th December 2013, the 1st Interested Party read out the total prices quoted by the bidders and on 7th February 2014, the 1st Interested Party announced that it had awarded the tender to the Ex-parte Applicant at the sum of USD 284, 813, 957.69 which amount was different from the USD 268,899,699.00 announced at the opening of the BAFO.
72. Aggrieved by the said decision, it was deposed the 2nd Interested Party filed Request for Review No. 3 of 2014 challenging the award of the tender to the Ex-parte Applicant which Request was consolidated and heard together with Request for Review No 4 of 2014 filed by the 3rd Interested Party in respect of the same tender.
73. According to the 2nd Interested Party, the challenge raised to the nullification of the award

revolves around:-

a. The jurisdiction of the Court in judicial review proceedings.
b. Whether the Respondent acted *ultra vires*.
c. Whether rules of natural justice were breached:-

i. by virtue of the process adopted by the Respondent during the hearing on 5th and 6th March 2014.
ii. by orders issued in the decision made on 11th March 2014.

d. Whether the Respondent acted unreasonably.
e. Whether the Respondent committed an error of fact.

74. The 2nd Interested Party submitted that a party aggrieved by the decision of the Respondent has the option of either filing an appeal or filing an application for judicial review. The option a party takes determines the scope of the jurisdiction of the Court in entertaining the challenge to the decision of the Respondent. However, the Ex-parte Applicant chose to apply for judicial review where role of the Court is circumscribed by the provisions of the ***Law Reform Act*** (Cap 26) and Order 53 of the ***Civil Procedure Rules***; a position well enunciated by the Court in **Shaban Mohamud Hassan & 2 Others vs. The Attorney General & 3 Others, Civil Appeal No. 281 of 2012.** In Kenya, it was submitted it is trite law that the jurisdiction of the Court in judicial review is limited to the facts and grounds in the Statutory Statement and Verifying Affidavit. This argument was fortified by reference to the reasoning of the Court in) (**Khobesh Agencies Ltd & 32 Others vs. Minister Of Foreign Affairs And International Relations, JR No. 262 of 2012.** The consistent position adopted by the Courts in this area is that only the grounds fully disclosed or raised by the Ex-parte Applicant in the Verifying Affidavit and Statutory Statement and on the basis of which leave was granted can be considered by the Court as was stated in **Republic vs. Chief Magistrate Court, Milimani & 2 Others Ex Parte John Moguche, Misc Application No. 201 of 2012.** Therefore, there is no room for a party to sneak in or try to advance an argument not disclosed in the Statutory Statement and in respect of which, therefore, no leave was sought or granted. The Ex parte Applicant, it was submitted is seeking to rely on additional grounds set out in the Replying Affidavit sworn by **Kenneth Mwangi** on 17th April 2014 for which no leave was sought or granted by the Court. According to the 2nd interested party, the new grounds being argued through the 1st Interested Party include; arguments that the award was made to the Ex parte Applicant not only because it had the lowest price but also because its bid was the best value for money; introduction of new evidence such as the *"World Bank's Standard Bidding Documents, Procurement of Goods"* to demonstrate that it is a globally accepted practice that bidders can be in a joint venture which is neither registered nor duly constituted; the contention (albeit incorrect) the 2nd Interested Party's price of USD. 765,603,822.55 was not read out is a new argument which was not advanced by the Ex-parte Applicant at the leave stage; the arguments that it was advantageous to separate/itemize the quote for additional services were not advanced by the Ex-parte Applicant at the leave stage or before the Respondent; that the 2nd Interested Party's bid ought to have been disqualified because of allegations of misconduct were also not in issue before the Respondent; and the attempt to now provide details of qualification and compliance with bid requirements which they failed to do at the hearing of the requests for review. This, in the 2nd interested party's view the Court cannot admit or permit new evidence to be adduced which was not before the Respondent at the time the decision was made since any material that was not before the Respondent did not form part of the decision making process and cannot therefore be considered by a judicial review court. The 2nd Interested Party in the premise urged the Court to ignore the additional grounds.

75. Secondly, 2nd Interested Party argued, in judicial review proceedings, the Court is called upon to review the decision of an administrative body based on the material presented before that body. The decision sought to be impugned must be considered in light of the actual material placed before the Board in order to ascertain whether it acted as required by law and arrived at the correct decision. One of the chief complaints is that the Respondent erred in finding the Ex-Parte

Applicant did not meet the financial and experience criteria set out in the tender documents. The Respondent determined that fact after examining the tender documents supplied to it by the 1st Interested Party and satisfying itself that the material provided by the Ex-parte Applicant was not sufficient to satisfy the criteria set out in the tender documents. The argument by the Ex-parte Applicant on that issue, is inviting the Court to engage in a merit review of the proceedings before the Respondent; a jurisdiction a judicial review Court does not have. This Court is also not an appellate court to re-evaluate the evidence presented before the Board. See the decision by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd, Civil Appeal No. 185 of 2001** and **Republic vs. Kenya Power & Lighting Company Ltd & Anor, JR No. 88 of 2013**. The Court's role is merely supervisory and is limited to ascertaining whether the decision maker acted lawfully. As long as the decision maker had jurisdiction to determine the issues in dispute, even if it was wrong, in the absence of any irregularity in the process, this Court will not interfere with the decision in an application for judicial review. This Court should adopt the reasoning in **Republic vs. Kenya Revenue Authority Ex-Parte Yaya Towers Limited, Misc. Civil Appl. No. 374 of 2006**.

76. The 2nd Interested Party also emphasized that the power and jurisdiction of the Respondent is set out in Section 98 of the Act where it sits on appeal against the decision of the procuring entity. The said jurisdiction is, therefore, wide and encompasses re-evaluation of the entire material used by the PE in the entire process to see if it adhered to the law and the Constitution. The review in Section 98 of the Act is, therefore, inquisitorial in nature and PE is required in law to provide the Board with its entire file, documents and notes of all proceedings in connection with the procurement to the Respondent and not just in respect of the aspects referred to by the party seeking review. According to the 2nd interested party, that position was emphatically enunciated in the case of **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, Civil Appeal No. 145 of 2011.** The decision in **Selle vs. Associated Motor Beat Company [1968] EA 123** is the guide here. The intention in Section 98 of the Act is for the Respondent to audit the entire process and reliance was sought in **Republic vs. Public Procurement Administrative Review Board Ex-Parte Uto Creations Studio Limited, Misc Application No. 89 of 2012**. Contrary to the submission by the Ex-parte Applicant, the 2nd Interested Party submitted that the Respondent had the power to frame the issues after consolidation of the requests for review and after hearing all the parties. The Respondent, just like a Court of law, cannot be faulted for identifying what it deemed to be the real issues in controversy. By the answers to the requests herein denying the claim of illegibility, the 1st Interested Party and the Ex-parte Applicant, created an issue of fact which the Respondent was entitled to enquire into and make a finding on. All parties were given an opportunity to comment on all issues, including the documents submitted to the Respondent by the 1st Interested Party. The 2nd Interested Party took the view that the Respondent acted within its jurisdiction and did not exceed its powers. Thus the Ex-parte Applicant's claim that the Respondent acted *ultra vires* must fail.

77. Similarly, it was contended it is not correct for the Ex-parte Applicant to complain that the Respondent's decision was based on matters not pleaded in the Requests for Review. In its Request for Review, the 2nd Interested Party at Clause 1(h) expressly averred that the 1st Interested Party awarded the tender to a bidder who was not eligible to participate in the tender in the first place which constituted breach of Section 31 of the Act which section sets out the eligibility criteria a bidder is required to meet to be awarded a contract including among others, having the necessary qualifications, capability and experience to provide what is being procured. In addition, at paragraph 6 (b), (c), (d) & (e) of its response to Request for Review No. 4 of 2014, the 2nd Interested Party also pleaded that the Ex-parte Applicant did not meet the criteria set out in Clause 14.3 (b) of the ITT which required the tenderer to individually demonstrate the financial, technical and production capability necessary to perform the contract as set out in Clause 11 of the TDS. The 3rd Interested Party also pleaded at paragraphs 4.1.2 and 4.1.3 of its Request for Review, that the 1st Interested Party failed to ensure that the preconditions of the TDS were met including the requirements in respect of experience as a manufacturer and supplier of the proposed goods and services as set out in Clause 11 of the TDS. In the responses to the Requests for

Review, the 1st Interested Party asserted at paragraphs 12, 13 and 14 that the preconditions in the TDS were met by all the technically and financially qualified bidders. The Ex-parte Applicant responded to the allegation that it did not meet the minimum eligibility requirements and asserted that it was a qualified bidder at paragraphs 3, 6 and 8 of its response to the Requests for Review. These issues were pleaded and responded to by the parties and neither the Ex-parte Applicant nor its advocate objected to submissions being made on the question of whether the Ex-parte Applicant met the financial requirements or its bid was submitted as a joint venture. As such, the allegation that the Respondent's decision was based on un-pleaded matters is without basis. In any event, where it appears from the course followed at trial that an un-pleaded issue has been left to the Court for determination, the Court or tribunal has to make a finding on it. See **Odd Jobs vs. Mubia [1970] EA 476**. See also the case of **Justus Mongumbu Omiti vs. Walter Osebe & 2 Others Election Petition No. 1 of 2008**, where the Court opined that it could not lock out evidence which would help it determine whether a process was free, fair and transparent on the technical grounds that the issues addressed by such evidence were not pleaded.

78. To the 2nd interested party, the Ex-parte Applicant was duly informed and served with pleadings and had been afforded full opportunity to make oral submissions through its Counsel and director **Mr. Ajay Jain** at the hearing of the Requests for Review. All processes including consolidation were brought to the attention of the Ex parte Applicant as required by law. The Ex-parte Applicant did not seek additional time to prepare itself or object to any document filed and served upon it, or obtain copies of the requests for review under Regulation 74 (4) of the Regulations. Instead, it sat back and only expressed its intention to participate in the proceedings late, that is, on 28th February 2014. The Ex-parte Applicant, therefore, confirmed it was ready to proceed and did indeed proceed. It must be noted also that, the very nature of procurement of goods and services by public bodies makes time to be of the essence which explains why Section 97 of the Act imposed strict timelines within which challenges to an award of tender must be heard and concluded. The law is that since proceedings are time bound they must be concluded within thirty (30) days. By the time the hearing commenced on 5th March 2014, there were only nine (9) days left to the expiry of the period set in law and the Respondent did not have the luxury of time. The parties, therefore, had the duty to take all the necessary steps within the time available. Delay or failure by the Ex-parte Applicant in requesting for those documents, should not be blamed on the Respondent or the 2nd Interested Party. See the thought expressed in the decision of the Supreme Court in **Raila Odinga vs. IEBC & Others, Election Petition No 5, 3 & 4 of 2013** that where timelines for hearing has been set, the parties had a duty to comply with their respective timelines so that no extra burden is imposed on any party or the Court.

79. The other challenge by Ex-parte Applicant that the decision of the Respondent was unreasonable, in the 2nd interested party's view has no basis especially that: a) It was based on two Requests for Review which sought different and competing reliefs; b) The Respondent acted unreasonably in finding that the Ex-parte Applicant did not meet the financial and experience criteria whereas the same were clear in the tender documents; c) The Respondent ought not to have considered the notification of award in arriving at the decision that its bid was not submitted as a joint venture but instead ought to have taken into account the MOU; d) The Respondent did not take into account the definition of an OEM as provided by the 1st Interested Party; and e) The sequence with which the Respondent dealt with the issues was wrong. Notably, the 1st Interested Party proposed a definition of OEM which it seems to abandon now. All these challenges are inviting the Court to do merit review of the decision by the Board which is outside the jurisdiction of this Court.

80. The 2nd Interested Party disagreed with the submission by the 1st Interested Party that where the Specially Permitted Procedure is used, the yardstick used in adjudicating disputes arising therefrom is not the same as would apply in conventional procurements. To them this argument lacks merit and is not founded on any law or judicial authority. Part VII of the Act on Administrative Review of Procurement Proceedings does not draw a distinction between the various methods of procurement. The procedure set out in the Act and Regulations for determining Requests for Review is the same irrespective of methods of procurement. Whereas the Public Procurement Oversight Authority ("the **Authority**") approved the use of the Specially Permitted Procedure, it did not exempt the application of the provisions of Part IV of the Act. The 1st Interested Party cannot, therefore, use the fact that it used a special method of procurement to

justify its failure to comply with the statutory and constitutional requirements.

81. It was further submitted that the decision of the Respondent is not defiant of logic since it had the power under Regulation 82 of the Regulations to consolidate two or more requests for review arising from the same tender or procurement procedure. Additionally, it was contended that the 1st Interested Party has gone to great lengths of even challenging the validity of the 2ndInterested Party's bid at this stage yet it ought to have filed a challenge of the 2nd Interested Party's bid or prove it before the Respondent which burden it failed to discharge. The allegation that the 2nd Interested Party altered its documents, it was submitted was misleading because the 1st Interested Party confirmed it forwarded all documents to the Respondent. On the arguments around price variation, the 2nd Interested Party contended that Clause 16.1 of the ITT required the bidders to quote the prices and discounts in the Form of Tender and Price Schedule in conformity with the specifications in the tender documents. Clause 16.2 of the ITT expressly provided that items not contained in the Price Schedule would be assumed not to be included in the tender and the tender would be rejected as being substantially non-responsive. Clauses 16.3 and 16.6 of the ITT and Clause 12 of the TDS required that the tender price to be quoted be inclusive of the cost for inland transportation DDP (Duty Duly Paid) to Nairobi and Mombasa, insurance and other local costs incidental to the delivery of the goods to their final destination. Clause 16.8 of the ITT provided that the prices quoted by the tenderer would be fixed during the tenderer's performance of the contract and would not be subject to variation. The total bid price was to comprise of two elements being, (a) the cost of the laptops and (b) the cost of delivery of named destination.

82. To the 2nd Respondent, the bid by the Ex parte Applicant was non-responsive and the alleged variation of price done on 7th February 2014 by the 1st Interested Party to US$ 284,823,957.69 with an extra sum of about US$ 15,914,288.00 was illegal. The extra sum could not have been for additional services and the Respondent correctly found that the explanation given does not justify the irregular price variation for the following reasons:-

a. The cost of transportation to named destination together with insurance and other local costs incidental to the delivery of the goods to their final destination was to be included in the total bid price.
b. In addition, the tender documents and particularly the format of the Price Schedule was clear that in addition to the cost of the laptops, bidders were required to assign values in the Price Schedule for the cost of delivery to named destinations including incidental services in connection with the said delivery. In its BAFO at Page 268 of its bundle, the Ex-parte Applicant did not assign a value for the cost of delivery in the price schedule and instead amended the format of the price schedule by putting a prefix "PSA" against the additional services. It now alleges that it listed the purported additional services in a separate document.

83. The inclusion of the separate page on cost of alleged additional services in the 2nd interested party's view contravened Clause 15.2 as read together with Clause 16.1 of the ITT which required that the prices be quoted in conformity with the tender documents and that alterations would not be accepted. The 1st Interested Party also contravened Clause 26.8 of the ITT when it failed to request the bidders to sign the Tender Opening Register and it is signed only by its officials. The mischief intended to be cured by the aforesaid provisions of the ITT, was to avoid a situation where a bid could be altered after submission of prices. The Ex-parte Applicant's bid was manipulated so that its price fell just below the prices quoted by the 2nd and 3rd interested parties. Section 60(7) of the Act requires that each member of the Tender Opening Committee signs each tender on one or more pages as determined by the Tender Opening Committee and initials in each tender against the quotation of the price and any modifications or discounts. Peculiarly, in all three bidders, **all pages** of the Form of Tender and Price Schedules were stamped received on 13th December 2013 and signed by the 1st Interested Party's officials, except the Ex-parte Applicant's Annexure of additional services-a fact that was noted by and referred to by the Respondent in its Decision. It is similarly curious that the impugned Annexure of additional services that was placed before the Respondent is not attached to the Ex-parte Applicant's BAFO. Among the items included as additional services was the standard one year warranty and the Microsoft operating system which items, according to the tender documents and in particular

Clauses 3.1 and 3.2 of the Hardware Specifications, were among the minimum specifications all bidders were required to meet. As such they were included in the cost of the laptops. They did not constitute additional services and therefore could not qualify as items to be priced separately. The totality of the above is that the bid was substantially non-responsive and so was the Ex parte Applicant's BAFO and the same ought to have been rejected. According to the tender documents, additional services ought to have been included in the total bid price. On the other hand value added services were to be provided for free. The Respondent correctly distinguished these two items and there was no confusion whatsoever. This ground by the Ex-parte Applicant should therefore also fail. The 1st Interested Party has sought to justify the failure to read out the sum of US$ 15,914,288.00 on the basis that under Regulation 45(1) (a) of the Regulations, the total price of the tender need not be read out where a tender consists of numerous items that are quoted separately-that is not the correct position as Regulation 45(1) (a) only applies in tenders that consist of numerous items to be quoted for separately. Also, the attempt to lump the 2nd Interested Party with the Ex-parte Applicant as a justification for the irregularities in awarding the tender to the Ex-parte Applicant is, according to the 2nd interested party improper and mischievous. These variations, it was contended were not minor deviations which are allowed under Regulation 50 during the evaluation of tenders. There was no room for a further evaluation after the technical and financial evaluation. If indeed there was a further evaluation carried out by the 1st Interested Party after the submissions of the BAFO, this was irregular and the 1st Interested Party cannot now use the said irregularity to confer a benefit upon the Ex-parte Applicant. The minor deviations envisaged in Section 64 (a) of the Act are those that do not materially depart from the requirement in the tender documents or are intended to remove errors or make corrections without affecting the substance of the tender. The listing in the Additional services of the Operating System and Standard One year warranty which were essential components of the goods and then quoting them separately was a substantial contravention of the tender requirement. Equally, the exclusion of those items from the tender price for the goods clearly materially departs from the tender requirements and materially affected the tender. Since clause 16.8 of the ITT was clear that the prices quoted by the bidders were to be fixed during the performance of the contract and were not subject to variation, in awarding the tender at US$ 284,823,957.69 the 1st Interested Party irregularly varied the tender price.

84. It was contended by the 2nd Interested Party that only the Ex-parte Applicant submitted the bid and was not a joint venture as alleged. The tender documents clearly provided that the entity or entities submitting a bid were to be jointly and severally liable. There was need for both New Century Optronics and Olive Telecommunications PVT Ltd to have been jointly named as the bidders and to have jointly executed the Form of Tender. However, all Forms of Tender were executed by only Olive Telecommunications PVT Ltd. But this Court has no way of ascertaining in whose name the bid documents were. Indeed, the MOU did not create any legally binding obligations to expend funds or resources by either party (Clause 6) in so far as the tender was concerned on the part of New Century Optronics. The Respondent found no evidence to prove that the ex-parte Applicant participated in the tender as part of a consortium or a joint venture with any other company. The MOU was not sufficient to bind New Century Optronics under the contract of procurement. See the decision in **Canlan Investment Corp vs. Gettling, British Columbia Court of Appeal, 1997 CANLII 4126**, where the Court held that for legal consequences to arise between the parties and for a joint venture to be deemed to have been in existence, there must be a contractual underpinning.

85. The 2nd Interested Party concluded that the Ex-parte Applicant has not shown the manner in which the Respondent contravened the due process in hearing and determining the Requests for Review. The Ex-parte Applicant agreed to and freely participated in the procedure adopted by the Respondent. On this see **Republic vs. Public Procurement Administrative Review Board Ex-Parte Gibb Africa Ltd & Anor., JR No. 92 of 2011**, that where parties were represented at the hearing and no complaints were raised on the procedure adopted by the decision maker, they cannot accuse the decision maker of breaching the rules of natural justice. The Ex-parte Applicant and the Interested Party are deemed to have waived their right to challenge the validity of the proceedings. The Ex-parte Applicant has not proven any of the grounds challenging the decision of the Respondent to the required standard or at all to warrant the issuance of the orders sought.

For the reasons set out above, the 2nd Interested Party beseeched the Court to dismiss the application with costs.

Submissions by the 3rd Interested Party

86. The 3rd Interested Party supported the arguments urged by the Respondent and the 2nd Interested Party and substantially echoed all that the 2nd Interested Party and the Respondent submitted.
87. In addition, it emphasized that, the Court in the exercise of judicial review jurisdiction should not entertain any merit review or be tempted to substitute the decisions of the Court for those of the tribunal. It also laid great stress on the fact that no rule of natural justice was breached as alleged, for, the Ex parte Applicant fully participated in the proceedings before the Review Board without any complaint, and that was after being served with all pleadings in a timely manner. The Review Board framed the "Issues for Determination" from the pleadings and submissions of the parties themselves and these matters cannot therefore be described as extraneous or *ultra vires* at all. In its view, the record reveals that the Review Board carried out a thorough scrutiny of the tender documents presented before it and as it had been rightly been reminded by the parties to do. The Review Board did not exceed its jurisdiction and mandate as alleged herein.
88. The 3rd Interested party also took issue with the conduct of the Applicant after the Review Board Ruling in that it placed a full-page advertisement in the national newspapers on 14th March 2014, where it savagely vilified the Board.
89. The 3rd Interested Party was of the view that the action by the Ex parte Applicant was a distasteful and emotional attack aimed at casting aspersions, without basis, on the integrity of the statutory Tribunal. It was also against the adverse outcome of the statutory review process which was based on merit. The Review Board is a creature of the Act and its process is anchored in law. Its membership is regulated by the statute and cannot be made the subject of media vitriol nor can they be made the subject of judicial review. The Applicant was all too willing to participate fully the in the Review Board proceedings for the said two days, but only became enraged when the outcome of the review did not favour it.
90. In the 3rd Interested Party's view, the very fact that the Tribunal made reasoned findings adverse to the Applicant does not render the proceedings or their outcome unfair or unjust. The Tribunal's discretion was not rendered arbitrarily but it was exercised with disclosed reasons.
91. In its view, a "mistake of fact" argument cannot be raised as a ground for Judicial Review where that fact was itself contentious in the proceedings before the Tribunal. Accepting such a submission would effectively transform the judicial review process into an appeal against the merits of the Tribunal's reasoned decision. It was stated in the Hong Kong case of **Nguyen Ho vs. Director of Immigration; (1991) 1 HKLR 576 (CA)** that *"Courts must in no circumstances allow themselves to be enticed into the evaluation of a fact which is properly within the exclusive jurisdiction of the Tribunal"*. The 3rd Interested Party also referred to the statement in **New Zealand Fishing Industry Association Inc. vs. Minister of Agriculture and Fisheries** to the effect that *"…it cannot be said to be a mistake to adopt one of two differing points of view of the facts, each of which may be reasonably held"*. This jurisprudence is especially relevant to the heavily contested issue of the definition of what constituted an Original Equipment Manufacturer in the Tender.
92. Just as the 2nd Interested Party and the Respondent submitted, the 3rd Interested Party was of the view that the Board did not reach a finding or decision that no reasonable Tribunal applying its mind to the issues could have reached. The decision was based on reasons and evidence on proper analysis of all the Tender Documents and the issues before it. There was nothing mistaken, irrational or unreasonable about the findings by the Board on additional services, eligibility and responsiveness of the bid by the Ex parte Applicant. The Board gave effect to Clauses 26.3 and 26.4 of the ITT which were stated in mandatory terms and that every Tender has very clear specifications of what is to be supplied, how it is to be supplied and where it is to be supplied. These specifications are applicable to all parties and cannot be varied because any variation would change the substance of the Tender and would thus fall foul of the Act, especially Section 34 and Section 59 (2) and (3), which prohibits change of specifications and tender once submitted respectively. The Ex parte Applicant and the PE flouted the law in including a price on additional

services which was not read out during the opening of the bids. Such practice negates Section 2 of the Act, which emphasises the objectives of the Act: 1) to maximize economy and efficiency in public procurement: 2) to promote integrity and fairness; 3) to increase transparency and accountability; and 4) to increase public confidence in procurement procedures. The 3rd Interested party therefore urged this Court to decline the application for judicial review.

The Court's Determination

93. We have considered the foregoing. Before delving into the merits of the application we wish to emphasis that the matter the subject of this application and judgement is a very important project for this country. The matter revolves around what is popularly known in this country as the "Laptop Project". It is a project of the Government of Kenya by which the Government undertook in part fulfilment of the requirements of Articles 43(f) and 53(1)(b) of the Constitution which provide that every person has a right to education and that every child has a right to free and compulsory basic education. The role played by education in the development of a nation cannot be overemphasized. In our view the rights and freedoms guaranteed under the Constitution cannot be realized and meaningfully enjoyed unless the society is properly, efficiently and sufficiently informed and in this era of information technology, access to global sources of information such as internet and other related forms of information is nolonger a luxury but a necessity.
94. In order to fulfil this noble Constitutional mandate, it is our view that the process through which the tools necessary for the achievement of the said goal ought to be sourced and secured through a process that is beyond reproach. It is with this in view that the processes relating to the procurement of such materials and equipment ought to strictly comply with the provisions of Article 227 of the Constitution which 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.

95. For the purposes of achieving the Constitutional objective Parliament enacted the ***Public Procurement and Disposals Act*** (hereinafter referred to as the Act) which in view of **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728:**

"…to maximize economy and efficiency as well as to increase public confidence in those procedures…..The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved...The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant."

96. In determining the issues raised herein we shall therefore be alive to the foregoing aspirations and give effect to them as far as the law permits and we shall equally take into account the provisions of Article 53(2) of the Constitution to the effect that a child's best interests are of paramount importance in every matter concerning the child.
97. From the pleadings, submissions of parties and the tempo with which counsel presented their oral arguments, undoubtedly, the real controversy in these proceedings may be summed up in the following issues:

a) ***Whether the Court in the exercise of judicial review jurisdiction should entertain merit review of the decision complained of. This encompasses other strands such as; the scope of judicial review jurisdiction and the test which an applicant must satisfy in order to receive the remedy of judicial review;***

b) Whether the Ex parte Applicant was denied an opportunity to be

heard. Under this issue we shall also determine whether the Respondent decided the review before it on un-pleaded points or issues;

c) Whether the Respondent exceeded its jurisdiction and acted ultra vires. Here, the question of jurisdiction of the Respondent under the Public Procurement and Disposal Act will be discussed too; and

d) Ultimately, whether the orders sought should issue.

e) Who should meet the costs of the application?

Merit Review in Judicial Review

98. **Mr. Ahmednasir Abdulahi**, counsel for the Ex parte Applicant, made robust submissions that the scope and exercise of judicial review jurisdiction should be seen within the broader constitutional structure of our nation rather than from the point of view of the narrow traditional grounds of common law. The argument is attractive as well as of great jurisprudential value and likewise, it should receive a more robust discussion within the judicial, legal as well as other disciplines in real practical and scholarly tones. This issue bears preliminary importance, as it will cut the path we shall follow in determining the issues at hand. We propose to settle it first. We are fully aware of the dynamic nature of the law; it is always speaking and develops as new legal problems emerge in society or the old ones metamorphose into complicated and coloured problems. As was held in **R vs. Panel on Take Over and Mergers Ex Parte Datafin [1987] QB 815**, judicial review is developing fast and extending itself beyond the traditional targeted areas and grounds.
99. This is a position which this Court was well aware of even before the advent of the current Constitution. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....**The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."**

100. Similarly in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya), Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Nyamu, J** (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the "3 I's" namely illegality, irrationality and

impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.

101. Again in **Kuria& 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

"So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions..... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law."

102. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that:

"… like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue vs. Stephenson* in the last century…"

103. And so, one understands what the Constitution of Kenya, 2010, especially Article 259 meant when it placed a constitutional obligation on courts of law to develop the law so as to give effect to its objects, principles, values and purposes of the Constitution. We will, therefore, consider the argument by **Mr. Ahmednasir** that judicial review should now involve heightened scrutiny of the decisions made by judicial or quasi-judicial bodies in a more public-spirited approach.

The Constitution as self-reinforcing

104. It bears repeating what counsel for the Applicant **Mr Ahmednasir** submitted and as was captured by the Court. Learned Counsel started by stating that there is a paradigm shift in judicial review such that judicial review remedies have constitutional basis now. It must be seen, therefore, within the constitutional precincts. Article 47 of the Constitution of Kenya, 2010 is the game changer and deals with Administrative Action by all public organs including the Board. In learned counsel's view, that raises the bar in judicial review in addition to or over and above the traditional or conventional grounds for judicial review as formulated within the common law tradition.

105. Learned Counsel continued that natural justice has attained constitutional embodiment and Article 25 of the Constitution prohibits any derogation from the right to fair trial. Article 50 of the Constitution again reinforces the right of parties to have their disputes resolved in a fair and public hearing before a court or tribunal. These new dimensions require a heightened judicial review scrutiny by the court when considering a decision by a tribunal. Counsel was of the view that this is the time to downgrade the conventional grounds for judicial review in favour of the constitutional benchmarks. According to him, merits of the decision of the tribunal can now be

reviewed in a judicial review because the rights of the parties are involved. Article 27 of the Constitution relates to rights of parties and once they are so involved, merit review is permissible. Article 10 on National Values and Principles of Governance also kicks in as all state organs including a tribunal which is exercising public judicial or quasi-judicial power are bound by the said Article. He posits, therefore, that controls of exercise of judicial power should be as encapsulated in the Constitution. He also stated that the same position obtains in Kenya. Counsel cited a plethora of judicial authorities in the list of authorities filed on behalf of the Ex parte Applicant in support of his avowed position. Much reference was, however, made to the case of **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health** (supra). In that case, the Constitutional Court of South Africa (**Chaskalson, P**) expressed itself as follows:

"The 1961 Constitution provided in specific terms that Parliament was supreme and that no court had jurisdiction to enquire into or pronounce upon the validity of an Act of Parliament, other than one relating to the entrenched language rights. The 1983 Constitution also entrenched the supremacy of Parliament, though it made provision for courts to have jurisdiction in respect of questions relating to the specific requirements of the Constitution. This, however, has been fundamentally changed by our new constitutional order. We now have a detailed written Constitution. It expressly rejects the doctrine of the supremacy of Parliament, but incorporates other common law constitutional principles, and gives them greater substance than they previously had. The rule of law is specifically declared to be one of the foundational values of the constitutional order, fundamental rights are identified and entrenched, and provision is made for the control of public power including judicial review of all legislation and conduct inconsistent with the Constitution. Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution… Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was "the main crucible" for the development of these principles of constitutional law.[71] The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control."

106. On our part we wish to state that the view taken by the Constitutional Court of South Africa in the above case rings true in our current Constitutional dispensation.

107. According to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public

authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

108. It was however submitted by **Mr Ahmednasir** that judicial review remedies presently have a constitutional basis in Kenya by virtue of Articles 10, 25, 27, 47 and 50 of the Constitution and that the conventional grounds for judicial review take a secondary role after the constitutional benchmarks and therefore courts should be prepared to downgrade the conventional grounds of judicial review. The Constitution of Kenya, 2010, according to him, is the game changer in judicial review and the Court can now review the merits of a decision by a quasi-judicial tribunal such as the Respondent, especially where there has been an allegation of breach of rights by the tribunal. We with due respect beg to differ. Even the position taken by the Constitutional Court of South Africa does not seem to support this view wholesomely. According to the said Court at paragraphs 49, 50 and 51:

"What section 35(3) and section 33(3) of the interim Constitution make clear is that the Constitution was not intended to be an exhaustive code of all rights that exist under our law. The reference in section 33(3) of the interim Constitution and section 39(3) of the 1996 Constitution is to "other rights", and not to rights enshrined in the respective Constitutions themselves. That there are rights beyond those expressly mentioned in the Constitution does not mean that there are two systems of law. Nor would this follow from the reference in section 35(3) of the interim Constitution and section 39(2) of the 1996 Constitution to the development of the common law. The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights." This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is "lawful administrative action," "procedurally fair administrative action" and administrative action "justifiable in relation to the reasons given for it," cannot mean one thing under the Constitution, and another thing under the common law.… Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court "makes the final decision whether a matter is a constitutional matter". This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction."

109. In our view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review is seen in our context. But care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the *Law Reform Act* and Order 53 of the ***Civil Procedure Rules*** have been discarded or its scope has left the airspace of process review to merit review except in those cases provided in the Constitution; and this we have discussed elsewhere in

this judgement. In other words the categories of judicial review grounds are not heretically closed as opposed to their being completely overtaken or that the Court's jurisdiction under Order 53 of the ***Civil Procedure Rules*** should include merit review. Once that distinction is made, there shall be little difficulty for this Court to maintain that it should and shall be concerned with process review rather than merit review of the decision of the Respondent Board given the statutory circumstances of this case.

110. We are therefore of the view that the decision in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd** (supra) is still relevant in so far as it held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

111. The House of Lords in the case of **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935**, rationalized the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. Irrationality as fashioned by **Lord Diplock** in the **Council of Civil Service Unions Case** takes the form of Wednesbury unreasonableness explicated by Lord Green and applies to a decision which is so outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

112. However, as we have stated hereinabove, like all legal remedies, judicial review continues to enlarge the categories of its sphere of influence.

113. There is no dispute that judicial review is a constitutional remedy and has its basis in the supervisory jurisdiction of the Court which has always been enshrined in all the previous constitutions in Kenya. It is, therefore, in our view not entirely correct to argue that it is with the Constitution of Kenya, 2010 that judicial review gained constitutional basis. The said supervisory jurisdiction is specifically anchored in Article 165(6) of the Constitution and it is a power vested in the Court in order to ensure the subordinate courts, tribunals, persons, body or authority exercise their judicial or quasi-judicial function within the legal bounds. But our Constitution has a fundamental phenomenon in that judicial review has been specifically listed in Article 23(3)(f) as one of the reliefs a court may grant in a constitutional petition where it is alleged that a right or fundamental freedom has been denied, infringed, violated or is threatened to be violated. We are alive to the fact that before Article 23(3) (f) of the Constitution was enacted by the people of Kenya, judicial opinion was divided as to whether judicial review remedies could be combined with other reliefs such as injunction and constitutional declarations. But that perhaps was due to the level of the development of the judicial review jurisprudence in Kenya; it had been left behind by development in England on the subject, and doubtless, Article 23(3) of the Constitution was speaking to that jurisprudence and it provided a complete departure therefrom.

114. In that context, a proceeding under Article 22 of the Constitution for enforcement of the Bill of Rights must be understood to take the form of an inquiry which entails intense and in-depth investigation by the Court of the matters complained of. In the said proceeding, evidence is called for and admitted through elaborate affidavits and other mediums authorized by the Court. And even when judicial review is one of the reliefs sought in a proceeding under Article 22 of the

Constitution, the Court is not prohibited from carrying out a merit review of the impugned decision which violated, infringed or threatens to violate a right or fundamental freedom of a person. Therefore, the nature of the said proceeding is a constitutional petition and is squarely governed by the provisions of the Constitution and specifically Chapter Four, which requires proper inquiry to be made by the Court in order to determine whether a right or fundamental freedom of a person has been violated, infringed, denied or threatened to be infringed, and fashion the appropriate remedy thereto. For instance, a Court of law is under a constitutional obligation in Article 20 of the Constitution to develop the law to the extent it does not give effect to a right and to adopt the interpretation that most favours the enforcement of a right. These explanations help an understanding that by its very nature, a constitutional petition allows merit review of a decision of a tribunal if such decision is said to have violated a right or the Constitution. And it is now generally stressed within the legal, judicial as well as scholarly circles that in all cases raising human rights issues, proportionality is the appropriate standard of review. Much debate has been undertaken on that subject but the understanding which seems to emerge is that proportionality is more precise, fastidious and more apt to gauge decisions by state organs and administrative bodies which violate human rights or are inconsistent with the Constitution. In Kenya, Courts in handling such decisions in constitutional petitions have utilized the test of proportionality in addition to the traditional grounds of review. This position is the one prevailing in England as was highlighted by **Lord Steyn** in **R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532 where it was held that**: ***(1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.***

115. A further illuminating discourse on heightened judicial scrutiny in the human rights arena is found in **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited** (supra).

116. However, it is our view that the common law and practice by the High Court of England on judicial review still recognize and apply the conventional grounds for judicial review except within enlarged categories of intervention by the Court. In Kenya such expansion on a case to case basis is permitted by the Constitution as a way of ensuring a complete remedy is availed by the Court as a Court of law. Matters of fair trial and administrative action under Article 47 and 50 of the Constitution are proper grounds for judicial review and are a codification of what is generally known as principles of natural justice.

117. In our view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

118. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

119. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

120. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

121. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

122. With respect to the ground of Wednesbury unreasonableness, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In our view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

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

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

124. It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be

adversely affected by a decision-maker; secondly, that no one ought to be a judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

125. The preliminary hurdle has been surmounted and we have set the legal dimensions in which we shall determine this application in accordance with the procedural rectitude in the Constitution and the law. We now proceed to determine the other specific issues raised herein by the parties.

The question of natural justice: un-pleaded issues

126. The question of alleged denial of natural justice is a perfect ground for judicial review and is embodied in the constitutional provisions especially Articles 25, 47 and 50 of the Constitution. It must, however, be established by the Ex parte Applicant to the required standard that the Respondent denied it fair trial. The Ex parte Applicant made two averments in that behalf; the first one is that issues which were not properly pleaded by the parties formed the basis of the decision of the Respondent. The other aspect was in relation to the allegation that, those issues were raised in the course of the proceedings and the Ex parte Applicant was not afforded proper opportunity to respond to them. It is in these two instances that the Ex parte Applicant reads breach of natural justice, hence denial of right to be heard.

127. Before dealing with the issues raised it is important for the Court to deal with the scope of the request for a review undertaken by the Respondent under the Act. In our view a review is not an appeal. Under Section 93(1) of the Act provides:

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

128. "Administrative review" is defined by ***Black's Law Dictionary***, 9th Edition at page 1434 inter alia as *"review of an administrative proceeding within the agency itself"* while ***Ballentines Law Dictionary*** at page 13 defines "administrative proceeding" as "*a proceeding before an administrative agency, as distinguished from a proceeding before a court. Compare judicial proceeding"*. What then is expected of the Respondent in exercising its jurisdiction on a request for review? A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court of Canada in **Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

> "**The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."**

129. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.

130. "Review" is defined in ***Black's Law Dictionary***, 9th Edition at page 1434 *inter alia* as *"Consideration, inspection, or reexamination of a subject or thing."* ***Ballentines Law Dictionary*** on the other hand defines the same word at page 482 *inter alia* as *"A reevaluation or reexamination of anything."* Clearly a review is much wider in scope than an appeal. However, being an administrative action, it is our view that the provisions of Article 47 of the Constitution applies to the proceedings, just like any other administrative action, pursuant to a request for review. That provision deals with fair administrative action which ought to be expeditious,

efficient, lawful, reasonable and procedurally fair. In our view the catchword is "fairness". It is therefore our view that so long as the issue has been put forward by the Respondent Board to the parties and the parties are given a fair opportunity of adequately addressing the same, this Court would not be entitled to interfere with the decision merely because the issue was not properly pleaded. As was held in **Railways Corporation vs. E A Road Service Ltd [1975] EA 128**, where an issue though not properly pleaded or asserted by a party, but in the court's opinion became a general issue at the trial without objection on the part of the other side, the objection that the issue was not pleaded must fail if there is evidence to support the finding thereon.

131. It was contended that the decision in **Odd Jobs vs. Mubia [1974] EA 476** where it was held that a Court may base its decision on an issue, where it appears from the course followed at the trial that the issue has been left to the Court for decision, is no longer good law in light of the decision of the Court of Appeal in **Nairobi City Council vs. Thabiti Enterprises Ltd [1995-1998] 2 EA 231**. The latter decision was delivered on 7th March, 1997. However, the former case was followed in **Abdi S Rahman Shire vs. Thabiti Finance Co. Ltd. [2002] 1 EA 279** which was delivered by the same (Court) on 8th March, 2002. Similarly the case was considered with approval by the Court in **Marco Munuve Kieti vs. Official Receiver And Interim Liquidator Rural Urban Credit Finance & Another Civil Appeal No. 164 of 2002** which was a decision delivered on 28th May, 2010 by a bench composed of judges, one of whom decided the **Thabiti Case**. The same course was followed in **Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657**, a decision decided on 6th November, 2009 by the same Court. It is therefore clear that even after the **Thabiti Enterprises Case** the Court of Appeal continued to cite with approval the **Odd Jobs Case**.

132. The four main issues that the Ex parte Applicant claimed were not pleaded by any of the parties and yet the Board went ahead to consider and determine included;

1. **Whether the Applicant was a consortium, joint venture or not?**
2. **Whether the Ex parte Applicant met financial eligibility, i.e. the minimum financial turnover; and**
3. **Whether the Ex parte Applicant had the requisite experience as required by the Tender Documents; and**
4. **Whether the Ex parte Applicant was an OEM.**

133. The concern of this Court is whether these issues were pleaded, or arose in the course of proceedings and were responded to by the Ex parte Applicant and the 1st Interested Party. We note the Ex parte Applicant, in relation to the issues complained of, used phraseology such as ***''if such an allegation had been properly pleaded, and the applicant [had] been given a proper opportunity to respond...''*** as the basis of the queries on the observance of the demands of natural justice by the Respondent. Those words portend admission that there was a form or semblance of pleading of the issues complained of except, according to the Ex parte Applicant, it was not to the full standard of the law. That notwithstanding, we have scrutinized the decision of the Respondent and the documents presented before it and make the following observations and conclusions on the matter;

a. The Request for Review filed by the 2nd Interested Party at paragraphs 1 and 3 pleaded illegibility of the Ex parte Applicant on account of not being an OEM, failure to meet the technical and financial qualifications.
b. The Request for Review filed by the 3rd Interested Party in paragraph 4 pleaded that there was non-compliance with the Act and the Regulations therein. Specific paragraphs i.e. 4.1, 4.1.1, 4.1.2, 4.2 and 4.3 raised the issues of whether the Ex parte applicant was an OEM, whether it was joint venture, whether it had the requisite experience of not less than 5 years in the manufacturing and distribution of ICT related services as outlined in the Tender Data Sheet.
c. Further, the Response to the 3rd Interested Party's Request for Review, at paragraphs 6 and 7, the issue of financial turnover of the Ex parte Applicant, experience in undertaking similar contracts and whether the Ex parte Applicant was a consortium, joint venture or not were addressed. Similarly, the entire Ex parte Applicant's Response to the Request for Review by the 2nd

Interested Party and specifically paragraphs 3, 4, 5, 6, 7 and 8 addressed similar issues including that of OEM.

d. The Procuring Entity's Response to the Request for Review by the 3rd Interested Party at Page 3 and 4, responded to the grounds of non-compliance with the tender requirements, evaluation criteria and non-disclosure. The Procuring Entity categorically stated that the Ex parte Applicant (successful bidder) had the necessary qualifications and met all the conditions of the tender on technical and financial tests. It made specific averments on the qualifications of the Ex parte Applicant as it showed existence of joint venture or consortium; was an OEM; had ISO certification; had the necessary experience. It also referred the Review Board to the documents it had provided and which appeared at pages 155 to 305 of the Ex parte Applicant's bid document on these issues. For precise location of these averments see paragraphs 12, 15, 16, 17, 18 and 19 of the Response that was filed by the PE.

134. From the foregoing, we conclude the issues complained of were pleaded by the parties and were responded to by the Ex parte Applicant as well as the Procuring Entity. Even going by the case of **Odds Jobs (supra),** if the issues had not been specifically pleaded, they arose in the course of proceedings and were canvassed by the parties. They were, therefore, properly before the Board for determination. Consequently, the framing of issues by the Respondent for determination upon those matters raised in the pleadings and in the trial was in order. Similarly, we wish to state that the adequacy of a party's response to an issue is determined by the party making the response, and is incumbent upon such party to apply for more time to make more elaborate response if he so desires. It is undesired of the law that the tribunal or court should pronounce that a party's pleadings contains adequate material before close of pleadings unless it descends to the arena to assist the parties plead their respective cases: certainly it will be engulfed in the dust blown out of the litigants' positioning themselves in the duel. The work of the tribunal is to allow parties sufficient time to plead their cases, but of course, within the bounds of the applicable law on the matter. As was held in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

135. In view of the time limitation for review by the Respondent in Section 92 of the Act, it is not true that the Ex parte Applicant and the 1st Interested Party were not afforded an opportunity or sufficient time to rebut the issues in contention herein. They were served with the requests and the necessary documents to which they responded; they also canvassed the issues and submitted on them. At this juncture we must point out that a party who deliberately makes submissions in doses will not be allowed to rely on its own omission as a basis for further challenge of the decision of the Tribunal in any subsequent proceeding including judicial review unless it can show that the matter consists in a discovery of new and important matter which, after the exercise of due diligence, was not within his knowledge at the time of the primary submissions before the Tribunal. And in such rare cases, the stringent test for new or additional evidence will apply. That is not the case here as all the things the Ex parte Applicant and the 1st Interested Party are talking about were already before the tribunal and nothing stopped them from making what they are calling elaborate submissions.

136. As was held in **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958, [1958] EA 450:**

"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."

137. We also note that in the course of the hearing, the Review Board sought to know whether there was any objection to the Request for Review and all the parties indicated none had any objection even to the Board referring to the documents as long as they were given an opportunity to peruse the documents and likewise comment on them. The examination of documents therefore proceeded by the agreement of all parties.
138. The Board therefore was within the law to deal with the aforesaid issues and did not act in excess of its mandate.

Consolidation: Claim that Request for Review were different

139. The next issue was the propriety of dealing with both reviews when the same were allegedly mutually irreconcilable. It was contended that as the two requests for review did not seek the same orders, the decision by the Board was unreasonable and in defiance of logic. We presume the Ex parte Applicant is arguing that the consolidation of the two requests was improper or the requests were irreconcilable in their totally different tenor and substance. First of all, the consolidation was by consent of all the parties, and the reason for the consolidation was because ***"...the issues raised in both applications were substantially similar''.*** A close scrutiny of both Requests for Review, reveals that save for the 2nd interested party which sought in its review that it be awarded the tender after the annulment thereof, both sought for nullification and setting aside of the award made to the Ex parte Applicant and on such nullification or setting aside, a re-tendering or re-evaluation of the tender. It also included an alternative prayer (iii) for re-evaluation of the tender. The only other prayer by the 3rd Interested Party which was not in the other request was for an order of debarment against the Ex parte Applicant. Despite those few differences, the issues underpinning the requests for review were bound to be and were substantially similar and capable of being tried together. We appreciate that the Board made a specific finding that ''***...although the two Requests for Review were filed by two different Applicants [,] there were several points of concurrence between the Applicants''.*** The Board also used the words ''***...and be heard together...''*** which are useful if a consolidation is found not to have been possible. However, in our view the consolidation was in order. In the premises, the decision of the Respondent cannot be said to be unreasonable or in defiance of logic on that score.

Jurisdiction of the Respondent

140. On the issue of the jurisdiction of the Board, we wish to deal with the statutory jurisdiction of the Respondent Board. In our view, the Board did not determine or base its decision on extraneous matters as claimed. There is also no doubt the Respondent has jurisdiction to conduct an administrative review of procurement proceedings upon a Request for Review filed under Section 93 of the Act.
141. Under Section 98 of the Act, the Respondent has power to:-

a. ***annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety;***
b. ***give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings;***
c. ***substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and***
d. ***order the payment of costs as between parties to the review.***

142. We must emphasise that it is not every "wrong" decision that an inferior tribunal makes that

renders it amenable to judicial review as opposed to an appeal. Whereas, it may be true that had this Court been hearing the request for review it might have arrived at a different decision, the various arguments advanced by the parties herein with regard to the unreasonableness and irrationality of the decision amount to inviting the Court to undertake a merit review or appeal on the decision of the Board. In line with the approach we have taken, the Court would, in such instance, be usurping the statutory function of the Board because it will be forced eventually, if it sustains the arguments, to supplant its own view in place of that of the Board. Our view is reinforced by the decision of the Court of Appeal in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR** where the Court expressed itself as follows:

"The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with. Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1st Respondent's tender had met the mandatory conditions. The issue whether or not the 1st Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it. In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly. The High Court erred in essence in treating the judicial review application as an appeal and in granting judicial review orders on the grounds which were outside the scope of Judicial Review jurisdiction."

143. We also reproduce the decision of **Odunga, J** in **Republic V Business Premises Rent Tribunal & 3 Others Ex-Parte Christine Wangari Gachege [2014] eKLR** where it was held that:

"…In this case it is not in doubt that the decision which is being challenged in these proceedings was the subject of an application for setting aside which decision was disallowed by the Respondent. Whether that decision was right or not the Applicant ought to have appealed against the same instead of challenging the decision in respect of which attempt to set aside had failed. In judicial review proceedings the mere fact that the Tribunal's decision was based on insufficient evidence, or misconstruing of the evidence which is what the applicant seems to be raising here or that in the course of the proceedings the Tribunal committed an error are not grounds for granting judicial review remedies. In reaching its determination, it must however, be recognized that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In EAST AFRICAN RAILWAYS CORP. VS.ANTHONY SEFU DAR-ES-SALAAM HCCA NO. 19 OF 1971 [1973] EA 327, it was held:

"It has been recognized for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgment for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise..... Even if it were alleged that the Commission or authorized officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong.Neither an error in fact nor an error in law will destroy his jurisdiction.....Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of certiorari on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."

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

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

144. Whereas in some quarters it may be construed that the Court of Appeal by employing such a flamboyant language was encouraging impunity on the part of judicial officers, what we understand the Court of Appeal to be saying is that the mere fact that a judicial officer errs in his or her judgement does not necessarily follow that the said officer acted without or in excess of jurisdiction. In other words, the issue for judicial review is not whether the decision is right or wrong, nor whether the Court agrees with it, but whether it was a decision which the authority concerned was lawfully entitled to make since a decision can be lawful without being correct. The Courts must be careful not to invade the political field and substitute their own judgement for that of the administrative authority but they should judge the lawfulness and not the wisdom of the decision. If the decision was wrong, it should be remedied by an appeal which allows the appellate court to engage in an intrusive analysis of evidence by the trial tribunal and review the merit of the decision thereto. See **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd** (supra).
145. However, while we reiterate that this Court in exercise of its supervisory jurisdiction by way of judicial review ought not to usurp the powers of the Board, where the Board fails to consider relevant evidence and considers irrelevant ones this Court must intervene where the failure to do so renders the decision so grossly unreasonable as to render it irrational. In our view, this is the ex parte applicant's case.

146. According to the Board, the ex parte applicant failed the eligibility test because it did not show that it had experience in the provision of the services sought for over a period of 5 years. In the Board's view, the ISO certificate was only for one year and there was no other evidence to support this test. The question here is whether ISO Certification can be construed as the same thing as experience. The applicant's view was that the Board in its decision failed to consider that there was also a certificate of incorporation on the record. At this stage we cannot state with certainty the decision which the Board would have arrived at had it considered the Certificate of Incorporation. We however are of the view that the failure to consider the same was a failure to consider a relevant factor. Whether that factor would have swayed the Board's mind is not for us to delve into.
147. It was also decided by the Board that there was no evidence that the ex parte applicant participated in the Tender as part of a consortium or a joint venture and this finding was based on the fact that the Tender was solely submitted by the Applicant and that the letter of notification was similarly made to the applicant. However, there seem to have been a Memorandum of Understanding between the ex parte applicant and an entity known as **New Century Optronics Co. Ltd** and it was not contended that the Tender barred a consortium from bidding. As rightly pointed out on behalf of the ex parte applicant the employment of the word "lead" contemplated such an arrangement.
148. It was the Board's decision that the ex parte applicant's inclusion of sum of 1.4 Billions Shillings was unjustified and contrary to the parameters agreed by the parties at the BAFO. This figure was in respect of additional services. According to the Board:

"The Interested sought to justify this astronomical inclusion into its Tender sum by arguing that the items giving rise to this figure were for additional services. When the Board took him through several of the items set out in the list of additional services such as the item on the one year, warranty, the cost of transport and many other items, M Ajay from the Interested Party confirmed that these items had been provided for in the original Tender document and amounted to a repetition…In view of the foregoing, the Boar finds and holds that the inclusion of the figure of 1.4 Billion Shillings was unjustifiable and also contrary to the parameters set out and agreed upon by the parties at the BAFO negotiations namely that the value of added services was to be free of charge and any services were to be offered at no extra cost to the Procuring Entity."

149. From the record, it is clear that all the parties herein made provisions for additional services. We have noted that the 3rd interested party, for example, in its Price Schedule for Goods and Related Services dated 13th December, 2013 quoted additional services in the sum of USD 14,211,094.88.
150. To rely on the applicant's provision of the same in order to disqualify it while not doing the same to the other parties who made similar provisions in our view was contrary to the constitutional principle in Article 227 of the Constitution which requires competitiveness and went contrary to one of the aims of the Act as provided in section 2 thereof which is to promote competition and ensure that competitors are treated fairly. Competitors cannot be said to have been treated fairly when they are subjected to different standards.
151. The applicant contends that the decision of the Board was bias and discriminatory. In **Nyarangi & 3 Others vs. Attorney General [2008] KLR 688**, it was held:

"The *Blacks Law Dictionary* defines discrimination as follows: "The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." *Wikipedia, the free encyclopedia* defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as follows:- "A particular form of differentiation on illegitimate ground."… The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs vs. Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found "to disqualify Negroes at a substantially higher rate than white applicants".

152. It is clear that with respect to the issue of additional services the applicant was unjustifiably treated differently from the other parties. In **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge [1997] eKLR, Omolo, JA** he that once it is accepted that a judge was in fact biased against a party, then the question of any notional fairness in the eventual outcome of the dispute becomes merely academic. Similarly, in **Legal and Human Rights Centre and Others vs. Attorney General [2006] 1 EA 141**, it was held that so long as the law is framed in a way which can result in a differential treatment there cannot be equality before the law in respect of that law. Once the provisions are discriminative, the intention of the doer is irrelevant. We agree.
153. Whereas, we are not in a position to hold that the Board was in error in finding that the applicant ought not to have included additional services in its quotation we hold that view ought to have been applied to all the parties which made provision for the said additional services and having found that all the parties herein did so, there was no justification in picking out the applicant and applying that criteria to disqualify the applicant from the process.
154. The Board further found that the ex parte applicant was not an Original Equipment Manufacturer. From the decision of the Board it is clear that this term which became so crucial in the Board's determination was defined by the PE in the Tender Document. However the Board in its decision adopted a definition other than the one in the bid document. The Board therefore provided its own definition based on the submissions of one of the parties. Whereas we appreciate that the Board's latitude in applications for review is wide, such latitude ought not to be expanded to such an extent that it renders the idea conceived by the PE totally useless. In providing its own definition of what an OEM is the Board in essence altered the bid documents which can only be done as provided by the Act and by the PE.
155. The Board may have indeed found a shortcoming in the definition of an OEM provided by the PE. We are of the view, that in order to achieve a transparent system of procurement as required under Article 227 of the Constitution, it is important that procuring entities should set out to achieve a certain measure of precision in their language in the tender documents and not leave important matters for speculation and conjecture as was the case in this matter.

Debarment

156. We now wish to deal with the contentious issue of debarment. It was alleged that the Board exceeded its jurisdiction in debarring the Ex parte Applicant from participating in the procurement proceedings ordered by the Respondent. The impugned order reads:

> ***(i) The Procuring Entity is directed to proceed with the Tender from the point of the opening of the BAFO's and thereafter conduct due diligence in accordance with the criteria set out under Clauses 34.2, 34.3 and 34.4 of the Tender Document.***
>
> ***(ii) For the avoidance of doubt, the only parties that shall participate in the process in (ii) above shall be M/S Hewlett-Packard Europe, BV Netherlands and M/S Haier Electrical Appliances Corporation Ltd, the 1st and 2nd Applicants in Application No 3 and 4 of 2014 respectively.***

157. The Request for Review No 4 in prayer (iv) prayed that the Ex parte Applicant be debarred from participating in any re-evaluation or re-tender relating to the procurement in question. Debarment is a technical as well as legal process under Part IX of the Act. Under Section 115, power to debar a person is vested in the Director General of the Public Procurement Oversight Authority (PPOA)

with the approval of the Advisory Board. Debarment is a whole process by itself with in-built safeguards such that investigations are done and the person concerned must be given an opportunity under section 116 to make representations to the Director-General. Debarment will then be imposed only after the grounds set out in section 115 have been established. Even where debarment is imposed under section 115(2A) on the recommendation of a law-enforcement agency with an investigative mandate, section 116 still applies. Therefore, debarment must be done strictly in accordance with the provisions of the Act because it attracts serious sanctions and serves an important purpose of maintaining the integrity of the process of public procurement.

158. The role of the Review Board in debarment is at different level as outlined in sections 117 and 122 of the Act. Section 117 and 122 states that;

"117. (1) A person who is debarred under section 115 may request the Review Board to review the debarment.

(2) A request for a review may only be made within twenty-one days after the person was debarred.

(3) A request for a review shall be accompanied by the prescribed fee."

"122. Upon completing a review the Review Board may do any or both of the following —

(a) confirm, vary or overturn the Director- General's debarment of the person; and

(b) order the payment of costs as between parties to the review."

159. Therefore, the way the law is tailored, the Review Board has no power to debar a person in a proceeding for administrative review under section 92 and 98 of the Act, since it is not a power expressly conferred upon it. In our view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others and based on **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** the courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.

160. Therefore where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. However, if Parliament gives great powers to them, the courts must allow them to it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090, Padfield vs. Minister of Agriculture, Fisheries and Food [1968] AC 997; Secretary of State for Employment vs. Associated Society of Locomotive Engineers and Firemen (No 2) [1972] 2 QB 455, Secretary of State for Education and Science vs. Tameside Metropolitan Borough Council [1977] AC 1014.**

161. It is therefore our view that in granting the order whose effect was to debar the Applicant from participating in the procurement process the Respondent exceeded its jurisdiction and made an illegal order. An illegal Court order is a nullity and the court cannot sanction what is illegal.

162. We are of the view and hold that the Board not only exceeded its jurisdiction by debarring the applicant from the tendering process but did so on the basis of extraneous considerations and

misdirected itself on glaring factual matters.

163. As we conclude, both sides of the divide argued, albeit on different stand points, that the Tender herein bears immense public importance. As was held in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex SistemiIntegrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**, **Nyamu, J** (as he then was) recognised the public interest in the enactment of the Act when he stated as follows:

> **"Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public. Indeed, sections 36(6) and 100(4) of the Act which are ouster clauses, were tailored to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant. Adjudication of disputes is a constitutional mandate of the Courts and the Court cannot abdicate from it."**

164. The rule of law, it has been stated outweighs inconvenience/chaos hence administrative convenience cannot justify unfairness. However, the issue of fairness always takes place in a practical setting. All public procurements are for the public good except, we wish to register great deprecation towards the insatiable interest that surrounds lucrative government procurements which is not really public interest. It is an open secret that major financial leaks in Kenya have been in public procurement. We only emphasize that nothing would serve public interest better than adhering to the law on procurement and its objectives, as well as keeping delay in public procurement at the bare minimum.

165. We have considered the instant application and the importance of the subject project to future generations. We have also taken into account the fact that the PE did not in its tender documents define what the Original Equipment Manufacturer meant as well as the place of the additional services in the contract. If it turns out that by making provisions for additional services all the parties who are before this Court and who tendered for the project ought to have been disqualified, by awarding the tender to any of them, this Court would have abetted an illegality. This Court cannot countenance illegalities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role to do so.

166. It is our view that in order to strive towards the achievement of the constitutional principles and values enunciated in Article 227 of fairness, equity, transparency, competitiveness and cost-effectiveness as well as the statutory aim in section 2 of the Act of increasing public confidence in procurement procedures, the tendering process which was conducted by the 1st interested party herein ought to be and is hereby annulled and the tendering process is set aside in its entirety. The 1st interested party if minded to undertake a similar project should do so *de novo* in accordance with the Act and Regulations.

167. Each party will bear the costs of this application.

Dated, signed and delivered in Court at Nairobi this 24th day of September, 2014

W. KORIR

JUDGE

G V ODUNGA

JUDGE

F. GIKONYO

JUDGE

In the presence of:

Mr. Guto Mogere for the Applicant

Miss Kashindi for Mr. Kimani Kiragu for the 1st Interested Party

Mr. Kamau Karori for the 2nd Interested Party

Mr. Musangi for the 3rd Interested Party