REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(JUDICIAL REVIEW DIVISION)

J.R. MISCELLANEOUS CIVIL APPLICATION NO. 289 OF 2014

IN THE MATTER OF TENDER NO. KAA/197/2013-2014 FOR THE DEVELOPMENT AND MANAGEMENT OF AN INTERNATIONAL BRANDED FAST FOOD OUTLET ADVERTISED BY THE KENYA AIRPORTS AUTHORITY AND SUBSEQUENT AWARD OF TENDER TO HOGGERS LIMITED

AND

IN THE MATTER OF THE DECISIONS OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD MADE IN PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW APPLICATION NO. 25 OF 19TH JUNE, 2014 AND AS SET OUT IN ITS DECISION ISSUED ON 16TH JULY, 2014

AND

IN THE MATTER OF THE SECTIONS 2, 31, 45(2)(e), 64, 66, 67, 93 & 100 OF THE PUBLIC PROCUREMENT & DISPOSAL ACT, 2005& THE REGULATIONS

AND

IN THE MATTER OF THE LAW REFORM ACT CAP. 26, LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC……..…….....……..APPLICANT

AND

1. **PUBLIC PROCUREMENT ADMINISTRATIVE**

REVIEW BOARD……..…….....1ST RESPONDENT

2. **KENYA AIRPORTS AUTHORITY…....…….…….2ND RESPONDENT**
3. **HOGGERS LIMITED……....…..…..…….3RD RESPONDENT**

EX-PARTE:

SUZAN GENERAL TRADING JLT

JUDGEMENT

1. By a Notice of Motion dated 24th July, 2014, the *ex parte* applicant herein, **Suzan General Trading JLT,** seeks the following orders:

1. **An of CERTIORARI do issue to remove into the High Court and quash:-**

a. **the entire decision of the Review Board (including the decision on the Supplementary Grounds made on 11th July, 2014) as set out in its ruling delivered on 16th July, 2014 in P. P. A. R. B. Application No. 25 OF 19TH June 2014 Suzan General Trading Limited Vs. Kenya Airports Authority;**
b. **The award of Tender No. KAA/197/2013-2014 for the Development and Management of an International Branded Fast Food Outlet to M/s Hoggers Limited as notified through it letter dated 10th June, 2014;**
c. **Any and all contracts or agreements entered into between Kenya Airports Authority and M/s Hoggers Limited consequential to KAA's award of Tender No. KAA/197/2013-2014 for the Development and Management of an International Branded Fast Food Outlet;**

2. THAT an order of MANDAMUS do issue directed and requiring Kenya Airports Authority to immediately award the Tender to the Applicant as:-

a. **the best evaluated bid with the highest combined technical and financial score, having achieved and/or substantially met all conditions for award of the tender under Clause 2.25 of the Instructions to Bidders, as now determined; and**
b. **the most economically advantageous bid, offering the best value for money at a concession rate of 7.5% of annual sales and subject to:-**

i. **payment of a minimum concession fee of Kshs. 139,643,889 for the 5 year period, prorated annually; and**
ii. **payment of a building rental fee at the prevailing rate of Kshs. 2,000/- per sq. ft per annum;**

3. THAT the Court be at liberty to make such further and/or alternative orders as it deems appropriate.

4. THAT Costs of this application be provided for.

Ex Parte Applicant's Case

1. The application was supported by a verifying affidavit sworn by **Arif Hafiz**, the applicant's General Manager on 23rd July, 2014.

2. In summary the applicant's case was that the Procuring Entity, the Kenya Airports Authority (hereinafter referred to variously as KAA or the Procuring Entity or PE), advertised the tender for Development and Management of an International Brand Fast Food Outlet at Jomo Kenyatta International Airport (JKIA), Nairobi, Kenya (hereinafter referred to as the tender), in the Standard newspaper on 17th January, 2014 and in the Daily Nation newspaper on 20thJanuary, 2014. The sad tender was closed and opened on 14th March 2014. Out of 15 bid documents purchased only 4 firms submitted their bids at the closing date, that is **Suzan General Trading Limited**, **Kuku Foods Kenya Limited**, **Yog Holdings** & **Hoggers Limited**. The Evaluation Committee of the Procuring Entity evaluated the bids for compliance with mandatory requirements, and pursuant thereto, **Yog Holdings Limited** was considered non-responsive as it had not only failed to provide documentary proof of an international fast food brand, and the list of 10 outlets it submitted specialized in yoghurts only and were situated in one country. Accordingly, with only three (3) firms out of the four (4) having fulfilled all the mandatory requirements, KAA's evaluation committee proceeded to complete its evaluation process, whose results were as set out in the exhibited Evaluation Report. As a result, the Procuring Entity's Tender Evaluation Committee

recommended that the said tender be awarded to Ms Hoggers Limited for having achieved the highest final score and substantially meeting all conditions for award. From the letter of award, Ms. Hoggers Limited was to pay the Procuring Entity a concession fee of Kshs. 500,000/= per annum as minimum annual guarantee and an annual concession rate of 8% of annual total sales; and a building rental fee at the prevailing rate of Kshs. 2,000/- per sq. ft. per annum. Thereafter, the Tender Committee of the Procuring Entity met on 23rd April, 2014 for its 310th meeting and approved the Evaluation Committee's recommendation for award of the contract to **M/s Hoggers Limited** as aforesaid and the bidders were duly notified of the results.

3. Aggrieved by the decision, the Applicant instructed its advocates on record, to obtain a copy of the notification sent to the successful bidder under Section 67(1) of the ***Public Procurement and Disposals Act*** (hereinafter referred to as the Act) together with a summary of the evaluation report as permitted under Section 44(3) as read together with Section 45(2)(e) of the Act, and any other information that was relevant to its decision making process which the advocates did and KAA, in timely compliance with the law, immediately availed a copy of the summary the same afternoon through the agent who had delivered the request. Having considered this summary, and being dissatisfied with the KAA decision, the Applicant, on 6th May, 2014, lodged the 1st Review Application being **Review Application No. 16 of 16th May, 2014 Suzan General Trading JLT vs Kenya Airports Authority** and after consideration the said 1st Review Application, the Public Procurement Administrative Review Board, the 1st Respondent herein (also referred to as the Review Board or the PPARB) annulled the award of tender to **Hoggers Limited**, and directed the KAA to re-evaluate the tender within 7 days from its ruling. In the applicant's view, in directing that a re-evaluation be undertaken, the Review Board was directing the procuring entity under Section 98(b) of the Act to remedy the shortcomings so as to meet the required legal threshold of fairness, integrity, accountability, objectivity and best value for money.

4. However, by 10th June, 2014, the Applicant had not been notified of the outcome of the re-evaluation process. Therefore, through a letter dated 11th June, 2014 (delivered on 12th June, 2014), and similar to the request leading up to P.P.A.R.B No. 16 of 6th May, 2014, the Applicant through its very same advocates requested KAA to provide copies of the notification letters under Section 67 of the Act, together with a copy of the summary of the evaluation report, for purposes of this review, as none had been received by the Applicant, whether physically or sent electronically via email, and time was of the essence. Though KAA acknowledged receipt of this letter, it verbally notified the Applicant's counsel that the summary would be provided in due course. Taken aback by this response, the Applicant again, through its advocates, followed up on its response through a 2nd letters dated 13thJune, 2014, explaining its position and the urgency involved. This time round, KAA received a copy of this letter but refused to stamp a copy in acknowledgement, instead informing the Applicant's counsel that the information requested had already been dispatched to the bidder, and it was only going to act on a request made by the bidder.

5. To the applicant, it became apparent that KAA was seemingly intent on frustrating the Applicant's right to review by denying it information critical for purposes of the review. Accordingly, not willing to risk any further delay, another letter dated 16th June, 2014 was dispatched to KAA on the Applicant's letterhead, reiterating the request as earlier done through the said advocate's letters of 11th& 13th June, 2014, and the same was delivered to KAA the same afternoon. Surprisingly, and despite the letter being similar to that of 13thJune, 2014 and which KAA had refused to receive, KAA did indeed receive this letter and a follow up was made with KAA, eliciting a response that advance electronic copies of the documents sought had now been sent to the Applicant, though such information was not received prompting the Applicant's counsel to make one final attempt to get the document. Finally on the morning of 18thJune, 2014, a week after the initial request had been made, the Applicant's counsel went to KAA's offices, and it is on this morning that the Applicant, for the first time, got advance copies of both the notifications as well as the summary report of its re-evaluation. In the applicant's view, a cursory consideration of the summary that was provided was not in compliance with the requirements of Section 45(2)(e) of the Act, as guided by the aforesaid directions of the Board, as it did not disclose what new and objective method/criteria it used for comparing or grading or weighting the various bids based on the

content of the information asked for in the technical and financial criteria. Further, the scores for each criteria were provided in lump sum scores, and there was no corresponding scores for each sub-criteria provided, from which a like by like comparison could be made with the successful bidder, and therefore, there was a likelihood that there was something KAA did not want the Applicant to discover and make it the subject matter of the intended review application.

6. Due to the applicant's misgivings arising from the conduct of KAA, it decided to lodge a Review Application, and immediately thereafter seek an order from the Board, which would then be seised of jurisdiction, to compel KAA to furnish us with a summary report that fully complied with the requirements of Section 45(2)(e) of the Act as read together with the directions of the Board issued under Section 98 of the Act in Review Application No. 16 of 16th May, 2014 **Suzan General Trading JLT vs Kenya Airports Authority. A**ccordingly, on 19th June, 2014, the Applicant lodged Review Application No. 25 of 19th June, 2014 **Suzan General Trading JLT vs Kenya Airports Authority**. Thereafter, the Applicant, through its counsel, then addressed lodged a letter dated 20th June, 2014, seeking the aforesaid direction under Section 45(2)(e) of the Act but no response was forthcoming from the Board and instead, on the afternoon of 27th June, 2014, the Applicant was served with a hearing notice from the Review Board, indicating that the matter was scheduled for hearing on 11th July, 2014 at 2.30 p.m., and which notice was accompanied by the Reply by the procuring entity.

7. It was the applicant's case that left with no option, it was left to its own devices to try and identify why the KAA would be so reluctant to release details of its evaluation, and decided to do a speculative background check on the successful party's information, and stumbled upon a very significant discovery of material facts that only served to support its apprehension that there was something fundamentally wrong in the award of the tender to **M/s Hoggers Limited,** which KAA was intent on keeping away from the Applicant which according to the applicant led it to believe that there was a real possibility of an unlawful award of tender either occasioned by the willful negligence of KAA or through deliberate misinformation by the joint bidders

8. On the strength of these material discoveries with far reaching implications on the entire bid and subsequent award of tender to **Hoggers Limited**, the Applicant, through its counsel on record, filed copies of the Supplementary Grounds of Review on 3rd July, 2014 with the Review Board and indeed attached the information discovered. Being primary pleadings, and as the Applicant understood was the normal practice guided by Regulation 88 of the Public Procurement and Disposal Regulations, 2006, all such pleadings were to be served through the Review Board such that a clear record of service was maintained, and sufficient copies were duly delivered to the Board for purposes of effecting service and genuinely presumed that the Review Board had indeed made timely service of the Supplementary Grounds, since on 9th July, 2014, 2 days before the scheduled hearing, the interested party, **Hoggers Limited**, filed and served a Notice of Appointment of Advocates together with its Reply, which included its Reply to Grounds set out in the Supplementary Grounds. However in the submissions filed and served by the procuring entity on the applicant, it only restricted itself to the initial grounds, and more curiously, was accompanied by a Notice of Appointment of Advocates filed on 10th July, 2014. **B**arely one (1) hour to the scheduled hearing of the Review Application at 2.30 p.m. on 11th July, 2014, KAA, through its advocates, served the Applicant with a Notice of Preliminary Objection filed with the Review Board that morning directed to the Supplementary Grounds of Review, and was challenging the Board's jurisdiction on the grounds that the Review Board lacked jurisdiction to hear and determine the request, as it was filed out of time; and KAA had not been served with the aforesaid Supplementary Grounds of Review, and which it only came to learn about when it went to file its submissions in response to the Request for Review filed on 19thJune, 2014. It was contended that under Regulation 77 of the Procurement Regulations, 2006, a preliminary objection must be filed with the Board at least 5 days prior to the hearing, and the Applicant was entitled to file a response before the time of the hearing of the request, and which it could not do, owing to the lack of sufficient time to do so. Further, the Review Board was required to hear the parties on the preliminary objection prior to making a determination on whether to uphold or dismiss the same.

9. However, when the matter was called out for hearing, the Review Board, of its own motion, and through its Chairperson, notified the parties that it had identified 2 preliminary issues, res judicata and request by the Applicant to the Board to issue *ex-parte* orders to the Procuring Entity to provide additional information or documents to the Applicant as communicated through the letter filed on 20th June 2014 which it would deal with in a summary manner and without hearing the parties. In this regard, it was the Board's collective decision, that the principle of ***Res judicata,*** did not apply to the current request for review and the Board would therefore proceed to hear the matter as filed on its merits. **O**n the issue of the Applicant's request for assistance through the issuance of *ex-parte* orders to the Procuring Entity to provide additional information or documents to the Applicant as communicated through the letter filed on 20th June, 2014, the Board determined as follows:-

1. Under the Act, once a Request for Review had been filed, it acted as a stay against anything the Procuring Entity is supposed to do. On receipt of the Notification of the Request for Review from the Board, the Procuring Entity was under obligation to supply to the Board all the documents that were used in the tender process.
2. For the Board to make an *ex-parte order* as desired or sought for by the Applicant for it to be supplied with further details or information after the Board had already requested for all the documents used in the tendering process would have caused difficulties to the Procuring Entity as it could not possibly have been capable of carrying out the order at that particular time.
3. The Board also operated under very strict timelines given that it has only a 30 days window within which all parties must be brought on board and the matter determined. If *ex-parte* orders were to be issued, it would end up delaying the process and the strict timelines would not be met. The Board could not therefore issue the ex-parte orders sought by the Applicant.

10. Having dispensed with these 2 issues in a summary manner, the Board noted that there were Supplementary Grounds of Review filed by the Applicant on 3rd July, 2014, and in respect of which the KAA had lodged a preliminary objection. The Board sought clarification from KAA's counsel on record whether they were disputing the entire request or the supplementary grounds only, and the KAA, through its counsel, clarified that they were only disputing the supplementary grounds as they were filed out of time, and therefore wanted to be heard on this objection, before the substantive hearing began. The Applicant's counsel similarly sought directions from the Board on how the matter would proceed. The Board then requested the parties to leave the room to enable it deliberate on appropriate directions to give, and after about 10 minutes or so, re-convened but instead of giving directions it proceeded to give a ruling on the objection without hearing the parties, in which it decided that the said supplementary grounds were lodged 13 days after period for doing so had lapsed and that they introduced new issues to the Request for Review should have been brought within the period of filing Request for Review. The Board proceeded to strike out the said supplementary grounds which according to the applicant were of critical importance to a fair determination of the procurement dispute giving the Applicant's counsel a substantive opportunity to be heard. According to the applicant, in addition to being a gross violation of the Applicant's right to be heard, in proceeding as it did without the benefit of hearing the Applicant's counsel on some of the factors it needed to consider prior to reaching a determination, the Review Board committed a fundamental jurisdictional error in wrongly declining jurisdiction, hence in failing to take such factors into consideration, the Board's decision making process was therefore patently flawed.

11. In the applicant's view, the balance of convenience as well as the overriding objectives of the Board to deal with the dispute justly and obtain a fair resolution thereof in accordance with the requirements of Article 227 of the Constitution as well as Section 2 of the Act, overwhelmingly required the Board to dispense justice without undue regard to technical **"grey areas"** in the Regulations, which ought to have been resolved in favour of the Applicant as well as the overriding intention of ensuring the law was upheld, and for these reasons, the decision of 11th July, 2014 must be quashed.

12. It was further contended that had the Review Board indeed taken into account or indeed appreciated the significance of the supplementary grounds in relation to its decision making process, then it would have been difficult for KAA or indeed the Board to legally and factually justify the ultimate award of tender to **Hoggers Limited**, which was what was being challenged on this newly discovered information, and which was only within the knowledge of KAA & the joint bidders. To the applicant, in failing to give

any and/or sufficient consideration to these submissions, the Review Board effectively failed to give effect to its previous decision, as well as the law as set out in Section 100(1) of the Act, requiring KAA to re-evaluate the bids in a manner that secured it best value for money, and this was simply not met by awarding graduated yet improperly subjective scores as the Board seemed to suggest in its decision. Further, in failing to give sufficient consideration to these submissions, the Review Board effectively disregarded the fact that there was a significant and illogical conflict between the issues arising from the financial scores awarded to the successful bidder and the scores awarded to it in the technical evaluation, a fact which took center stage when the Review Board, of its own motion, took KAA to task on its assertion that it undertook a proper and objective technical evaluation of the bids, by asking it to clarify how the evaluation was actually done. It was therefore the applicant's case that in the wider interest of integrity, fairness, transparency, objectivity and accountability as secured by Sections 2, 31 & 66 of the Act, and for sufficient cause provided and demonstrated by the Applicant, it is the Applicant's prayer that this Court allows the application, and grant orders sought. **O**n this clear showing that it was denied the highest combined technical and financial score, in such a manner as to amount to an unjustifiable denial of the Applicant's right to be declared the winning bidder, applicant sought that an order of *mandamus* be issued to KAA to immediately award the Tender to the Applicant. Further it was sought that an appropriate order be made as to costs, and the Court be at liberty to grant such additional or alternative orders as may be necessary and appropriate in the circumstances.

13. It was submitted on behalf of the Applicant that it is well established in law that the rule of *audi alteram partem*, which means "hear the other side" is a rule of natural justice and it is an indispensable requirement of justice that the part who has to make a decision shall hear both sides, giving each an opportunity of hearing what is urged against him and in support of this submission reliance was placed on **Pashito Holdings Ltd. & Another vs. Paul Nderitu Ndun'gu & Others Civil Appeal No. 138 of 1997 [1997] 1 KLR (E&L)** and **Republic vs. Public Procurement Coplaints Revie & Appeals Board ex parte Invesco Assurance Co. Ltd [2014] eKLR.**

14. It was submitted that while it remains within the review board's right to raise a jurisdictional issue *suo moto*, the Review Board has always recognized the need for the necessary jurisdictional facts to e investigated & ascertained, the affected party be given notice of the Board's issues, as well as substantive opportunity to be heard in a rejoinder prior to the review board reaching a decision on its jurisdiction.

15. It was therefore submitted that the striking out of the supplementary grounds without hearing the applicant was a breach of the rules of natural justice and procedural fairness more so as the same amounted to implicit allowing of a preliminary objection in breach of Regulation 77 of the Regulations and contrary to the decision of the Board in PPARB No. 46 of 2009 – **Cavalier Security Limited vs. Kenya Power & Lighting Company**.

16. It was also submitted that the Board arrived at its decision without the benefit of hearing the Applicant's Counsel on some of the factors it needed to consider prior to reaching a determination. In failing to take into consideration the said factors it was submitted that the Board's decision making process was therefore patently flawed and had it factored in such considerations it ought to have permitted the Applicant to rely on the said supplementary grounds. To the applicant, a purposive interpretation of jurisdiction under Regulation 73, the balance of convenience as well as the overriding objectives of the Board to deal with the dispute justly and obtain a fair resolution thereof in accordance with the requirements of Article 227 of the Constitution as well as section 2 of the Act, overwhelmingly required the Board to dispense justice without undue regard to technical "grey areas" in the Regulations.

17. It was submitted that the Review Board in its second decision disregarded its earlier findings and/or directions in the first review contrary to section 100(3) of the Act and hence committed a fundamental jurisdictional error as the law under sections 100(1) & (3) of the Act did not give it jurisdiction to vary the threshold. In support of this submission the applicant relied on **Republic vs. Public Procurement Administrative Review Board ex parte Fursys Kenya Limited [2014] eKLR**.

18. By ignoring relevant and material considerations or taking irrelevant considerations into account, it was submitted that the decision was tainted with procedural impropriety and was bias.

19. It was submitted that the decision of the Board declining jurisdiction and striking out the Applicant's supplementary grounds, though delivered on 11th July, 2014 as a preliminary issue, it was contained in the formal ruling delivered on 16th July, 2014 and therefor its technical filing deadline for purposes of section 100 was 25th July, 2014. The decision of the Board declining the review application on the other hand was delivered on 16th July, 2014 hence its technical deadline was 30th July, 2014, hence on 24th July, 2014, the applicant was granted leave to seek orders of certiorari to quash the entire decision of the Board including the decision of the supplementary grounds and the Motion was similarly filed the same day hence the proceedings were instituted within the 14 day period and this Court has jurisdiction to entertain these proceedings. In support of this submission the applicant relied on **Republic vs. Public Procurement Administrative Review Board ex parte Parliamentary Service Commission [2013] eKLR**.

20. It was submitted based on **Lawrence B Keitany vs. Retirement Benefits Tribunal & Another [2011] eKLR** and **Anisminic Ltd vs. Foreign Compensation Commission [1969] 1 All ER 208** that Courts may intervene through judicial review where a body acts *ultra vires*; where there is jurisdictional error; where the is an error of law; where there is an error of fact; when there is abuse of power; when irrelevant considerations governed the making of the decision; when there is bias; when there is unfair hearing; when there is a procedural flaw; when there is irrationality; and when there is bad faith. It was therefore submitted that it is only when the decision maker lawfully conducting the inquiry without committing any of these errors of law, that it is entitled to decide a question wrongly as it decides rightly. The question whether or not such vitiating factors exist however cannot be determined in abstract and must be considered in the context of the facts as presented and the nexus with the lawfulness of the decision making process. To the applicant, discharging the applicant's evidentiary burden through pointing out such facts and grounds cannot be equated with inviting the court to undertake a merit review.

21. By not considering the applicant's submissions, it was contended that the Board committed a procedural impropriety.

22. With respect to the signing of the tender, it was contended that the same was allegedly signed 12 days before the statutory period under section 100(1) of the Act had lapsed. In any case, it was contended that the said contract was executed in complete disregard of the tender documents. According to the applicant, once the Board rendered its decision on 16th July, 2014 section 100(1) & (4) of the Act effectively provides for an automatic statutory suspension of any steps towards concluding the procurement or the giving effect of its decision for a minimum 44 days. In support of this position, the applicant relied on **Republic vs. Public Procurement Administrative Review Board and 2 Others ex parte Noble Gases International Limited [2013] eKLR**.

1st Respondent's Case

23. In opposition to the application the 1st Respondent while conceding that on 19th June 2014 the Applicant filed a request for review before the 1st Respondent challenging the award of the Tender No. KAA/197/2013-2014 for Development and Management of an International Brand Fast Food Outlet at JKIA, Nairobi to the 3rd Respondent, averred that immediately after receiving the request for review, the 1st Respondent served a copy on the 2nd Respondent notifying it of the pending review and the suspension of the procurement process in accordance with Regulation 74(1) and 74(3) of the ***Public Procurement and Disposal Regulations, 2006***, herein referred to as, "the Regulations." On 20th June 2014 the Applicant filed a request for issuance of ex parte directions to the 2nd Respondent under Section 44(3) as read together with Section 45(2)(e) of the Act, requiring the 2nd Respondent to provide the Applicant with a compliant and objective summary of its re-evaluation report. On 3rd July, 2014 the Applicant filed Supplementary Grounds for Review consisting of totally new grounds which had not been part of the Request for Review filed on 19th June 2014.At the commencement of the hearing on 11th July 2014, the 1st Respondent resolved to hear and determine the preliminary issues first before delving into the merits of the request for review and amongst the preliminary issues the 1st Respondent heard and determined

were the applicant's request to the 1st Respondent to issue *Ex parte* orders and the filing of supplementary grounds for review by the Applicant. Upon considering the submissions of the parties and the documents before it on the two issues the 1st Respondent declined to issue the *ex parte* orders as sought by the Applicant and struck out the supplementary grounds for review.

24. According to the 1st Respondent, in deciding the two preliminary issues, it only took into consideration facts contained in relevant documents that were presented before it by the parties to the review in accordance with the legal requirements specified in the Act and the Regulations. In its view, the board reviewed the tender based on the original request for review filed on 19th June 2014 and resolved to dismiss the request for review based on its finding that the 2nd Respondent, in re-evaluating the tenders complied with the board's directions/orders in review No. 16 of 2014 hence there was no breach of Section 100(3) of the Act by the Procuring Entity; that the 2nd Respondent conducted the technical and financial re-evaluation in accordance with Section 66(2) of the Act and the board's orders under review No. 16 of 2014; and that although the Applicant offered the best concession fee to the Procuring Entity at Kshs 143,185,675 as against the Successful Bidder's 3rd Respondent's concession fee of Kshs 133,339,170 on the cash flow projections, it still did not emerge the highest ranked bidder when the technical and financial scores were put together as per the evaluation criteria set out in the Tender Document.

25. It was therefore the 1st Respondent's case that the board's decision was rational reasonable, logical, lawful, just and in line with the rules of natural justice and that the Applicant's allegation that the board acted to the contrary is baseless and unwarranted; and is a ploy by the Applicant to revive a matter that has been legitimately adjudicated in line with the avenue provided by the Law. The 1st Respondent therefore urged the court to dismiss the Applicant's application for judicial review as it lacked merit.

26. It was submitted on behalf of the 1st Respondent that the Board had the powers to issue the orders it did after the applicant was given an opportunity to make submissions thereon. It was therefore submitted that a air hearing was afforded to the parties. It was further submitted that upon hearing the parties the Board duly gave reasons for its decision.

27. Since the applicant has not shown how the Respondents acted ultra vires, in excess of or without jurisdiction, the orders sought cannot be granted. It was further submitted that there was no irrationality in the decision made by the Respondents.

28. In the 1st Respondent's view, the grounds on which the application were premised were contested facts which are not amenable in judicial review and this position was hinged on **Republic vs. Judicial Service Commission ex parte Pareno [2007] 1 KLR** and **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**.

2nd Respondent's Case

29. According to the 2nd Respondent, it advertised in print media, as from 17th January 2014 and closing on 14 March 2014, the Tender for the development and management of an international brand fast food outlet at Jomo Kenyatta International Airport, Nairobi, Kenya and in total, fifteen (15) bid documents were purchased out of which only four (4) bids were submitted by the closing date. The bidders who submitted their bid documents by the closing date were Suzan General Trading JLT **(Ex parte Applicant)**, **Kuku foods (K) limited (KFC)**, **Yog Holdings Limited** and **Hoggers Limited** (Successful Bidder/3rd Respondent).The bids were subjected to a preliminary, technical and financial evaluation as applicable to determine compliance with the Tender requirements. The Ex Parte Applicant's bid was evaluated up to the financial Evaluation stage and was, on 29th April 2014 notified by the Procuring Entity that its bid was not successful through a letter dated the same day.

30. On 6th May 2014 the Applicant filed an Application for Review being Review No. 16 of 6th May

2014 which was duly heard and a decision by the 1st Respondent rendered on 3rd June, 2014 in which decision the Review Board identified 5 issues for determination and proceeded to render the findings thereon. In the said Decision, the Review Board directed that the award of the Tender to the Successful Bidder, **M/S Hoggers Limited** be annulled; the Procuring Entity to re-evaluate the tenders of the three most responsive bidders for both technical and financial aspects in accordance with the criteria set out in the Tender Document and take into account the findings of the Board.

31. In Compliance with the order of the Board, the 2nd Respondent undertook a re-evaluation of the three most responsive tenders **Suzan General Trading JLT** (Ex parte Applicant), **Kuku Foods (K) limited (KFC)** and **Hoggers Limited** (Successful Bidder/ 3rd Respondent) which re-evaluation was done as per the evaluation criteria set out in the Tender Document and the 2nd Respondent adopted a methodology which meets the necessary threshold of objectivity, fairness and transparency and which complied with the Decision of the Review Board covering technical and financial evaluation. In so doing, the 2nd Respondent took into consideration the Review Board/ 1st Respondent's Decision of 3rd June 2014 and weighted the bids of all the three bidders based on their individual strengths using an objective, quantifiable and transparent criteria. In carrying out the financial evaluation, the 2nd Respondent complied with the Tender Document by carrying out re-evaluation and comparison using the procedures and criteria set out in the Tender Document with due regard given to the Board's directions issued in the Decision of 3rd June 2014.

32. On the alleged failure by the 1st respondent to accede to ex parte request for documents from the 2nd respondent, 2nd Respondent stated that it provided the Ex Parte Applicant with a summary of the Re-evaluation Report, and that by letter dated 10 June 2014, the Ex-Parte Applicant was informed of the outcome of the Re-evaluation Process and further on 13th June 2014, the Applicant's Counsel was informed of this fact. In any event as conceded by the Applicant, they physically visited the 2nd Respondents offices and obtained copies of both the notifications of award and summary report of the re-evaluation process on 18 June, 2014 on which day the Re-evaluation report was sent to the Applicant by Registered Post. It was contended that the Report of the Re-evaluation Process which the Applicant received on 18 June 2014 contained sufficient information on which to lodge its Request for Review which Report clearly stated the criteria used in both the technical and financial evaluation hence the Applicant suffered no prejudice at all and the attempt to hide behind purported breach of the rules of natural justice is a red herring meant to mislead the Court.

33. To the 2nd Respondent the applicant has neither demonstrated that the 2nd Respondent went outside the Tender Document in conducting the re-evaluation nor that the 1st Respondent in its decision of 16 July 2014 considered matters that were outside the Tender Document. To it, the Applicant's grievance regarding the alleged failure by the 1st Respondent to provide Ex parte assistance in accessing documents from the 2nd Respondent is therefore baseless and without merit. Moreover, the 1st Respondent did not render the decision without jurisdiction or breached the rules of natural justice or indeed act irrationally. The Applicant in its request made detailed submissions and the 1st Respondent gave a detailed Decision explaining the reasons for not granting the request hence the Decision was not irrational. To the 2nd Respondent, the 1st Respondent did not commit a jurisdictional error in failing to appreciate that it had jurisdiction to issue ex-parte directive requiring the 2nd Respondent to provide it with an objectively informative summary of the Re-evaluation Report. In any case, the Applicant could not purport to have the Board issue ex-parte orders for the summary of the Re-evaluation exercise which was already in its possession and the 1st Respondent could not have logically directed the 2nd Respondent to supply the said document as at the time the Request was sought (20 June 2014), all the documents used in the tendering process had already been forwarded to the Board as per Regulation 74 (3) and were not in the possession of the 2nd Respondent. To the 2nd Respondent the Ex Parte Applicant made general statements over the alleged jurisdictional errors which were not backed by any evidence or law and such cannot be a ground for issuance of the orders sought. Furthermore the Applicant did not adduce any evidence to show that the 1st Respondent acted without or in excess of its jurisdiction or irrationally in order to trigger Judicial Review intervention.

34. On the alleged error by the 1st respondent in striking out purported supplementary grounds for review, it was contended that it was not necessary for the Applicant to use "its own devices" to obtain information that was irrelevant to a concluded tendering and re-evaluation process and that the said irrelevant information obtained through the Applicant's "own devices" could not therefore be a legitimate basis for introducing "Supplementary grounds" for its Review request. It was contended that the issues raised by the Applicant in the its Verifying Affidavit touched on the substance and merits of the ultimate Decision of the 1st Respondent and therefore fell outside the remit of the Judicial Review jurisdiction. Furthermore, the alleged supplementary grounds were not what they were stated to be, but substantive grounds that ought to have been filed as such in compliance with the Statutory timelines for filing Review Applications. However, the Ex parte applicant filed its "supplementary" grounds for Review 13 days after the stipulated 7 days for filing a Request for Review and therefore such a Request for Review was time barred. The alleged supplementary Grounds for Review set forth new issues which did not form part of the original application for review and cannot therefore be said to form part of the existing application for review hence they not at all supporting material for the existing application for review but were new grounds introducing new issues to the Request for Review thus governed by the provisions of Regulation 73 and the 1st Respondent was within its powers to strike out the grounds as it did, as it lacked the jurisdiction to entertain the same. To the 2nd Respondent, the 1st Respondent was entitled to decide on its jurisdiction *suo motu* and the contention that parties should have been heard before such decision is without merit. The 1st Respondent therefore committed no error that would warrant the invocation of a Judicial Review remedy. According to the 2nd Respondent, its Preliminary Objection was not admitted for hearing. Indeed as the 1st Respondent's Decision on this point does not at all make reference to the 2nd Respondent's Grounds of Objection, the Ex Parte Applicant's attempt to cast aspersions on the integrity of the Respondents herein by general, speculative and unsubstantiated statements is unfair, irresponsible and made in bad faith. It was contended that it is a cardinal principle of law in any jurisdiction that any dispute resolution proceedings including a review and litigation must come to end. The board is governed by strict timelines in its operations which should be adhered to and the applicant's contention that timelines should not be adhered to is self-serving, misleading and untenable. To it, Regulation 73 on time lines for filing requests for Review is framed in mandatory terms and the 2nd respondent could not purport to amend the regulations because the applicant did not want to be bound by the set down laws and regulations meant to assist in the proper, smooth, transparent and expeditious dispensation and resolution of disputes.

35. On the other allegations, it was the 2nd Respondent's position that they touched on the merits of the process and cannot be the subject of Judicial Review proceedings. Therefore if the Applicant felt aggrieved with decision of the Board based on its merits, then nothing would have been easier than for the Applicant to file an appeal under section 100 (2) of the Act. In its view, the 2nd Respondent adopted a methodology which meets the necessary threshold of objectivity, fairness and transparency and the Review Board looked into the said methodology and was satisfied that the 2nd respondent adhered to the law in the re-evaluation of the technical scores. The Applicant has not demonstrated that the 1st Respondent acted without jurisdiction, or in excess of jurisdiction or irrationally or breached rules of natural justice. It was averred that an evaluation criteria to be used by a procuring entity is that contained in the bidding document and no other criteria can be introduced. Further the 2nd Respondent addressed itself to the directions given by the Board in its decision of 3rd June 2014, complied with the Tender Document and strictly adhered to the provisions of the Act hence the Re-evaluation process was objective, fair and transparent. To it, the Board in its decision of 16 July, 2014 made an in-depth inquiry into the re-evaluation process and confirmed that the 2nd Respondent had complied with all directions issued by the Board and subsequently this ground has no merit.

36. It was asserted that the ex-parte applicant had not demonstrated how the 2nd Respondent failed to adhere to the Board's directions on the issue of the concession rate. The Board in its Decision of 3 June 2014, made reference to the need for consideration of the concession fee together with the concession rate and that this was adhered to. The 2nd Respondent's position was that the Ex parte applicant was inviting the Court to engage in a merit review exercise and was under the misconceived and ill-advised notion that the format of decision or judgment should be as per its preferred subjective prescription. The fact that the

Board did not replicate the Applicant's arguments word for word in the decision of 16 July 2014 cannot mean that these arguments were not considered. Just because a Court or Tribunal has not reproduced a verbatim "transcript" of a party's submissions within the decision has never been, and cannot be a ground for finding that the submissions were not considered or that the decision is therefore a nullity.

37. In the 2nd Respondent's view, the re-evaluation process was fair, competitive, transparent and cost effective and that competition was promoted by the issuing of an international tender whereby international and national firms were invited to bid for the project and no firm was prevented from bidding. The process fulfilled all the other elements under section 2 of the Act and the Ex-parte Applicant has not demonstrated how the elements have been breached. The Ex-parte Applicant, in its view had not demonstrated any reason(s) why any of the Orders sought should be granted and its assertion that it is indeed the best evaluated bidder is completely mistaken and is an invitation to the Court to engage in a merit review of the issues raised by the Applicant. Further it was averred that this application is an abuse of the Court process meant solely to disrupt a properly conducted procurement process herein, is bad in law and against the public interest.

38. The 2nd Respondent further asserted that a contract has already been signed between the 2nd and 3rd respondents.

39. On behalf of the 2nd Respondent, it was submitted that the ex parte applicant was seeking under the guise of judicial review for the exercise of an appellate jurisdiction of re-evaluating the facts and the law a fresh hence was seeking a merit review yet judicial review is only concerned with the decision making process and procedure rather than the merits of the decision which ought to have been canvassed by way of an appeal under section 100(2) of the Act. The 2nd Respondent accordingly relied on **Republic vs. Commissioner of Customs Services ex parte Africa K-Link International Limited [2012] KLR**.

40. It was submitted that the issues being raised in these proceedings are substantially the same issues that were considered by the 1st Respondent and a proper decision rendered thereon. In order for the Court to be justified in dealing with an issue on merits the decision must be so outrageously unreasonable that the said decision is simply laughable and hence it is not open to an applicant to simply argue that a particular decision is factually or legally wrong but must be a decision which defies logic. In support of this contention, reliance was sought in **Republic vs. Kenya Power & Lighting Company & 3 Others [2013] eKLR** and **Republic vs. Public Procurement and Administrative Review Board and Another ex parte MFI Leasing Ltd JR 210 OF 2011**. Based on **Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] KLR**, it was submitted that an issue of jurisdiction can be taken by the Court *suo moto*.

41. On the authority of **Republic vs. Court Martial & 5 Others ex parte Phinhas Mugo [2014] KLR** and **Kenya Pipeline Company Limited vs. Hyosung Ebara Company, Public Procurement Administrative Review Board and Another Civil Appeal No. 145 of 2011 [2012] eKLR**, it was contended that the mere fact that the decision was based on insufficient evidence, or misconstruing of the evidence is not a ground for judicial review.

3rd Respondent's Case

42. According to the 3rd Respondent, the Application as drawn and filed is misconceived and the prayers sought cannot issue for the reasons that to the extent that the Application seeks to quash an alleged decision made on 11th July 2014, that decision has not been brought before the court as required by the provisions of Order 53 Rule 7(1) of the ***Civil Procedure Rules***, 2010; to the extent that the Application seeks orders of Mandamus, the same cannot issue as the 2nd Respondent as a procuring entity is under no statutory or public duty to award a tender to the Applicant or to any other Tenderer; the entire Application as framed is a veiled Appeal on merits against the decision of the Review Board which remedy is not available under Judicial Review; and the merits/correctness of a decision of the PPARB can only be interrogated through the avenue set out under Section 100(2) of the Act which the *Ex parte* Applicant has not invoked.

43. According to the 3rd Respondent, the decision of PPARB delivered on 16th July 2014 and which forms the basis of the Application herein was a culmination of proceedings that conformed to the dictates of natural justice as the *Ex parte* Applicant, the Procuring Entity and **Hoggers** were all represented by Counsel and made their submissions. It was contended that the preliminary issues of law relating to the plea of res - judicata raised by **Hoggers**, the objection to the Supplementary Grounds for Review filed by the Procuring Entity and the Request for Exparte Orders by the Applicant were the basis of reasoned findings of PPARB and to which parties made representations.

44. It was further contended that in addition to the reasons given by PPARB for declining to give *Ex parte* orders for the Procuring Entity to provide additional information, Section 44(3) and 45(2) (e) of the Act does not confer on the PPARB with any jurisdiction to grant *Ex parte* orders since the jurisdiction of the PPARB is clearly set out under Section 93 of the Act and is limited to dealing with a Request for Review and making of appropriate orders under Section 98 of the Act. In its view, in recognition of the statutory requirement to conclude procurement proceedings expeditiously and the limited timeline within which a determination on the Request for Review must be made, interlocutory applications are deliberately excluded in the Act or the Regulations. Therefore, the complaint by the *Ex parte* Applicant regarding refusal for an *Ex parte* order is a red herring and an afterthought as the *Ex parte* Applicant proceeded to argue its Request for Review on merits without any protest and only revisits the issue after a substantive determination dismissing its Request for Review was made.

45. It was contended that the *Ex parte* Applicant had a right of redress under section 100 of the Act to challenge PPARB's decision on the said refusal for an *Ex parte* order, which it did not pursue hence the *Ex parte* Applicant is clearly estopped from contesting the decision after it participated fully in the hearing. Since under Regulation 74(3) of the Regulations, PPARB may on its own motion request to be furnished with any document touching on the procurement process from the Procuring Entity, no prejudice would have been suffered by the *Ex parte* Applicant since the PPARB had all the information and documents necessary before making its determination on merits.

46. It was contended that it is not in dispute that the supplementary grounds of review which clearly introduced new issues were filed out of time and the PPARB rightly struck them out. Even in the absence of a formal notice of preliminary objection, the issue of jurisdiction can be raised any time since jurisdiction is everything and without it, a court or tribunal must down its tools and the moment the attention of PPARB was drawn to the possible lack of jurisdiction to consider the supplementary grounds of review filed in contravention of the Act and the Regulations, with or without a formal notice, it had to down its tools, the moment it held that it lacked jurisdiction.

47. The position taken by the 3rd Respondent was that the *Ex parte* Applicant cannot purport to argue the merits of its purported Supplementary Grounds for Review in these Judicial Review proceedings since as pointed out they did not file an appeal and besides those grounds were struck out/expunged from PPARB record. It was therefore averred that within the powers conferred on the PPARB by Section 98 of the Act, it acted within its mandate in its decision and there is no allegation that it exceeded its jurisdiction under the Act. In its view, the decision by PPARB was reasonable and/or rational and in keeping with the powers it enjoys under Section 98 of the Act. The reasons for PPARB decision were clearly set out in the body of decision.

48. It was submitted that whereas the applicant made reference to an allege decision of the Board made on 11th July, 2014, that decision was not exhibited as required under Order 53 rule 7 of the ***Civil Procedure Rules*** and cannot therefore form the basis of judicial review application and **Hon. Martin Wambora & Others vs. Attorney General & Others Kerugoya High Court Pettion No. 3 of 2014** was cited in support thereof.

49. Citing the Court of Appeal decision in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company, Public Procurement Administrative Review Board and Another Civil Appeal No. 145 of 2011 [2012] eKLR**, it was submitted that judicial review is not concerned with the decision but the decision making process and the Court in exercising that jurisdiction does not sit on judgement on the correctness of the decision since it is not an appeal. It was submitted that the applicant's case herein

amounts to an appeal.

50. On the authority of the same Court in **Republic vs. Kenya National Examination Council ex parte Njoroge Civil Appeal No. 266 of 1996**, it was submitted that since it had not been demonstrated which provision of the Act imposes an obligation or duty on the Procuring Entity to award the tender to the Ex Parte Applicant hence no mandamus can issue.

51. It was the 3rd Respondent's contention that based on the decisions in **Peter Gichuki King'ara & Indepenence Electoral & Boundaries Commission & 2 Others Civil Appeal No. 23 of 2013** and **Lilian 'S' [1989] KLR 1** that the tribunal or court can on its own motion decline jurisdiction even without seeking any representations from a party when it finds that it has no jurisdiction.

52. According to the 3rd Respondent the contract having been entered into before the stay was granted, these proceedings have been overtaken by events and reliance was placed on **Kileleshwa Service Station Limited and Kenya Shell Limited Civil Appeal No. 84 of 2008**.

Determinations

53. I have considered the Notice of Motion, affidavits, the written submissions and judicial authorities herein and this is the view I form of the matter.

54. The applicant herein contend that the 1st Respondent in its decision on the Supplementary Grounds made on 11th July, 2014 as set out in its ruling delivered on 16th July, 2014 struck out the applicant's said supplementary grounds without affording the applicant an opportunity of being heard on that issue. The Respondents have contended that that decision cannot be challenged without a copy thereof being exhibited as required under Order 53 rule 7 of the ***Civil Procedure Rules***. However, in **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** it was held that the decision to alienate land or to allocate is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and the question of attacking it under Order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. The Court further held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law. Accordingly, in light of the fact that there is no allegation from the Respondents that the decision in question did not exist, nothing turns upon that issue.

55. It is however contended that since the issue in question was an issue of jurisdiction, the Tribunal could take up the matter *suo moto*. In principle this submission is correct. In **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the Court of Appeal expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

56. What I understand the Court to have been saying is that it is not mandatory that an issue of

jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded. I however did not understand the Court to be saying that the Court ought not to hear the parties on the issue of jurisdiction before determining an issue raised *suo moto*. In fact in the said decision the Court held that as soon as the issue arises, the court should hear and dispose of that issue without further ado. It is therefore incorrect to contend that where a Court or Tribunal raises a matter *suo moto* the right to hear parties is thereby dispensed with.

57. Mwera, J (as he then was) in **Nagendra Saxena vs. Miwani Sugar Company (1989) Limited (Under Receivership) Kisumu HCCC No. 225 of 1993** while citing **Habig Nig Bank Limited vs. Nashtex International Nig Ltd Nigeria Court of Appeal Kaduna Division CA/K/13/04** and ***Playing God: A Critical Look At Sua Sponte Decisions By Appellate Courts*** **By Adam M Milani and Michael R. Smith, Tenessee Law Review {VOL. 69 XXX 2002}** dealt with the *suo moto* procedure extensively as follows:

"The term *suo moto* is a Latin term meaning "on its own motion" and it is approximately an equivalent of the term "*sua sponte*" (Latin) which means, "of one's own accord". The term defines one acting spontaneously without prompting from another party. *Blacks Dictionary* defines "*sua sponte*" as "of his or its own will or motion, voluntarily and without prompting or suggestion". In our jurisdiction action "*suo motu*" or "*sua sponte*" for the two mean the same thing, a judge or court in a given case takes a course or decision without prior motion or request from the parties. Usually the matter being decided *suo motu* or *sua sponte* is not in the pleadings, briefs, submissions, issues and evidence placed before the court for determination. For that is the essence of the adversarial systems where the parties direct the course of the litigation that brought them to court while the judge plays the referee. He/she hears them and makes a decision. In matters *suo motu* the court usually on perusing the file before it comes by a matter that is of the essence of the case but not raised by the parties. It could be a matter of law or procedure or other. Then that is considered by the judge who rules on it. *The better course in matters dealt with sua sponte is to notify the parties to the cause of the point(s) in question, inviting them to submit on it, before a ruling/finding is arrived at. There is no dispute that the fundamental premise of the adversary process is that the advocates do uncover and present more useful information and arguments to the decision-maker than would be developed by a judicial officer acting on his own in an inquisitorial system*. Accordingly most lawyers probably never think about a possibility that a court will decide a case or an issue that the court itself raises and which was neither briefed nor argued by the parties. But it happens and it is known as *sua sponte.* Once a court raises an issue *sua sponte* the court can go about deciding it in one of two ways. First, it can involve the parties and request that they submit briefs on the issue to assist the court in reaching a decision. In this context, while the issue may be raised *sua sponte* the decision on the issue is made in accordance with the principles and traditions of the adversarial system. Alternatively, the court can decide the issue on its own without the input from the parties. In this context, the issue is not only raised *sua sponte,* but is also decided *sua sponte. The proper approach to decide sua sponte issues is the former approach – the approach that involves the parties in the decision-making process…It is not in doubt that hearing parties on issues sua sponte or suo motu is better favoured since the parties have been heard before a decision…Even when a court raises a point suo motu the parties must be given an opportunity to be heard on the point particularly the party that may suffer a loss as a result of the point raised. The law is well settled that on no account should a court raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without hearing the parties…If it does so, it will be in breach of the parties right to fair hearing*." [Emphasis mine].

58. It is the Respondent's position that the decision by the tribunal was not made on the basis of the preliminary objection that was pleaded before it and that it was on the Tribunal's own motion. Either way, if the parties desired to be heard on the issue, the Tribunal ought to have afforded them an opportunity of being heard before arriving at a decision whose effect was to lock the applicant from advancing its position.

59. The issue of determining matters raised *suo moto* without hearing parties was also alluded to by the Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] EKLR**

where the Court expressed itself as follows:

"In the present case it was the Superior Court which put the appellant in the predicament it finds itself in. It was mistaken on the applicable law. The appellant acted promptly and sought an order reviewing the erroneous order. The court declined jurisdiction with the result that the limitation period expired. If that decision is not reviewed it would not have any remedy. It is hardship of that nature which the review jurisdictions should be exercised to obviate, more so if it is shown that the applicant did not contribute to that state of affairs. The case of *Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others vs. Kilach [2003] KLR 249*, does not hold that review is not available under Order 53 of the Civil Procedure Rules. It would be oppressive and an affront to common sense in a case like the one before the court where the court precipitated a situation for the same court to turn round and say it lacks jurisdiction to correct what is obviously a wrong decision, more so where, as here, the court was not addressed on the merits or otherwise of the application for leave. The court *suo moto* raised the jurisdictional issue without asking the applicant's counsel to address it on the matter."

60. It is irrelevant whether the Tribunal would have arrived at the same decision even if it had afforded the parties an opportunity of being heard before making its decision. It must always be remembered that where a party has a right to be heard that right cannot be taken away by the mere fact that the Tribunal considers that the said party's contribution is unlikely to affect the decision. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.....Denial of the right to be heard renders any decision made null and void ab initio."

61. Similarly in **Pashito Holdings Ltd. & Another vs. Paul Nderitu Ndun'gu & Others** (supra) the Court of Appeal expressed itself as follows:

"An essential requirement for the performance of any judicial or quasi-judicial unction is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision…The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under duty to 'act judicially'.

62. In **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** this Court held:

"The term natural justice, the duty to act fairly and legitimate expectation have no such difference but are generally flexible and interchangeable depending on the circumstances and the context in which they are used. The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons, or bodies that are under a duty to act judicially. They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable. All that is fundamentally demanded of the decision-maker is that his decision in its own context be made with due regard for the affected

parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. Whereas some judges prefer to speak of a duty to act fairly rather than a duty to observe the rules of natural justice, often the terms are interchangeable. But it is now perhaps the case while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual interests, the rules of natural justice apply only when some sort of definite code of procedure must be adopted. However flexible that code of procedure may be and however, much the decision-maker is said to be master of his own procedure, the rules of procedure are generally formulated as the rule against bias *(nemo judex in sua causa)* and in respect of the right to a fair hearing *(audi alteram partem)."*

63. Similarly, in **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006** this Court held:

"Rule 5(1)(b) and rule 2 of the Fifth Schedule that the Disciplinary Committee is not bound by the rules of evidence, or that the proceeding of the Disciplinary Committee shall be held in camera does not come to the Respondent's succour in the Applicant's accusation against it of procedural impropriety. What the Respondent ought to have done, after having informed the Applicant's Advocate that the Committee had decided (wherever the direction came from and quite also illegally), to refer the complaint for expert's opinion, is to recall a sitting of the Disciplinary Committee together with the expert, and the expert's report and subject the report to inquiry by the Applicant or the Applicant's Counsel. Having excluded the Applicant and his Counsel from the decision to refer the matter to an expert, the very least the rules of natural justice expected would have been a notice to the applicant of the expert's finding and a request for a response from the Applicant's Counsel. In the absence of both notice to and hearing of the Applicant, the Respondent was not only in violent breach of those cardinal rules of natural justice but was also in a violent and reckless abuse of statutory power, an entirely irrational and perverse decision. It was a violent breach of the rules of natural justice they are also called because in the absence of some statutory provision as to how the persons who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. The decision maker is not a judge in the proper sense of the word but he must give the parties an opportunity of being heard, before him and stating their case and their view. He must give notice that he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom authority is not given by law. There must be no malversion of any kind. There could be no decision within the meaning of the statute if there was anything of that sort done contrary to the essence of justice – that phrase carries what is generally regarded as "natural justice" and not even the Constitution ousts the principle of natural justice."

64. It is therefore my view that not only should tribunal conduct its proceedings in a fair manner but must be seen to have been fair to the parties before it. It must avoid all appearance of partiality and adhere to the provisions of Article 50 of the Constitution which provides that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body

65. Similarly, Article 47(1) of the Constitution provides:

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

66. One of the cardinal tenets of procedural fairness is the adherence to the principles of natural justice.

67. It was however argued and halfheartedly in my view that challenge to the preliminary determination cannot be taken in these proceedings. The preliminary decision was made on 11th July, 2014 and these proceedings were instituted on 24th July, 2014 within 14 days of the decision as stipulated under the Act. It follows that in terms of the time these proceedings are properly before the Court notwithstanding that

the proceedings were commenced after the final decision on review had been made.

68. The Respondents further contended that as the contract had been signed, these proceedings have been overtaken by events. As held by this Court in **Republic vs. Public Procurement Administrative Review Board Ex Parte Noble Gases International Limited & 2 Others [2013] EKLR**:

"In my view where judicial review proceedings are commenced within fourteen days from the date of the Respondent's decision, the said decision is neither final nor binding and hence ought not to be implemented. In other words there is a statutory stay of the decision and no further stay is necessary under Order 53 of the Civil Procedure Rules. As I held in Republic vs. Public Procurement and Disposals Review Board ex parte Avante International Technology Inc. (supra):

"Section 100(1) of the Act provides that a decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision. The respondents contend that since there was no stay granted by the Court and the said contract was entered into the orders sought herein are incapable of being granted. This action is justified on the ground that the Commission's action is dictated by the timelines for the conduct of the elections and therefore it had to proceed with the contract. That may be so, however, if the Commission decides to enter into a contract during the pendency of judicial review proceedings filed within the stipulated period, it does so at the risk that the Court may nullify the process leading to the tender and it would be no excuse that the tender had been entered into since it is clear that where the judicial review proceedings are commenced within 14 days, the decision of the Procuring Entity is not final in which event the Court could be properly entitled to nullify the procurement. The decision of the Board having been made on 11th December 2012 and these proceedings having been instituted on 20th December 2012, the same were instituted within time hence the mere fact that the contract had been awarded and part payment made is in my view inconsequential."

69. I also associate myself with the decision of **Majanja, J in Republic v Public Procurement Administrative Review Board & 2 others exparte Noble Gases International Limited [2013] eKLR** that:

"…the fourteen days period is a window availed to serve the purpose of limiting the time frame within which a review against the Board's decision can be lodged in the High Court for purposes of expediency and conclusiveness of the Board's decision as these activities are time bound and the procurement process ought not be held hostage to indefinite proceedings. More importantly, subsection (4) of section 100 indirectly requires the High Court to pronounce itself within thirty days from the date of filing of the judicial review. For emphasis, the subsection states, "(4) If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect." Although this section has been declared unconstitutional, in the case of R2epublic v Public Procurement Administrative Review Board and Another ex-parte Selex Sistemi Integrati Nairobi Misc. Appl. 1260 of 2007 [2008] eKLR, in so far as it limits the time in which the High Court is to render a decision, the decision of the Board after the application for review has been filed remains subject to the Court directions and decision. This provision answers the core question in contention, that is, whether the filing of judicial review proceeding before the High court within the prescribed 14 day-period acts as an automatic stay. I take the position that section 100 of the Act implies that the Board's decision is to be kept in abeyance until the court makes its final decision. The use of the term, "shall take effect" discloses the legislative purpose and intent. For all practical purposes, the Board's decision was 'frozen' so to speak until such a time as the High court issued an order of judicial review contemplated under the section over the decision or after the lapse of the 14 day period whichever comes first. I find and hold that the provision is a statutory stay."

70. The Respondents cannot therefore hide under an illegality perpetrated by itself to escape from the statutory provisions which are meant to protect those who are aggrieved by the decisions of the Tribunal. 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. 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.**

71. In this case, I am satisfied that the Tribunal's decision to strike out the supplementary grounds was arrived at without hearing the parties. In light of the decisions cited hereinabove, if indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision as denial of the right to be heard renders any decision made null and void ab initio. Such a decision is a nullity. Such a decision as opposed to one which is voidable, in law, does not exist and it is trite that where an act is a nullity, it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken pursuant thereto must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993.**

72. It follows that any proceedings which took place pursuant to the decision to strike out the supplementary grounds must similarly give way.

73. This being my decision it is nolonger necessary to deal with the other issues raised in this application in light of the order I am about to make. To deal with the other issues raised herein is likely to prejudice any proceedings which may be commenced pursuant to the order I am about to make.

Order

74. In the result, an of certiorari is hereby issued removing into this Court for the purposes of being quashed and quashing:-

a. **the entire decision of the Review Board (including the decision on the Supplementary Grounds made on 11th July, 2014) as set out in its ruling delivered on 16th July, 2014 in P. P. A. R. B. Application No. 25 of 19th June 2014 Suzan General Trading Limited vs. Kenya Airports Authority which decision is hereby quashed;**
b. **The award of Tender No. KAA/197/2013-2014 for the Development and Management of an International Branded Fast Food Outlet to M/s Hoggers Limited as notified through the letter dated 10th June, 2014 which award is hereby quashed.**
c. **Any and all contracts or agreements entered into between Kenya Airports Authority and M/s Hoggers Limited consequential to KAA's award of Tender No. KAA/197/2013-2014 for the Development and Management of an International Branded Fast Food Outlet which contracts or agreements are hereby quashed.**

75. The 1st Respondent is directed to commence the hearing of the review *de novo* in compliance with the rules of natural justice as expounded hereinabove.

76. As **Hoggers Limited** was joined to these proceedings as a Respondent rather than an interested party, in line with the holding in **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779,** each party will bear own costs.

Dated at Nairobi this 19th November, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Ngacha for the Applicant

Miss Nyonje for Mr Ogeto the 2nd Respondent

Mr. Mgugua Nganga for the 3rd Respondent

Cc Patricia