REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 2 & 11 of 2013

JIMMY MUTINDA.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

SMITH AND OUZMAN LIMITED.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE

SHAILESHKUMARNATA VERBAI PATEL.....INTERESTED PARTY

CONSOLIDATED WITH

MISCELLANEOUS CIVIL APPLICATION NO. 11 OF 2013

REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....1ST RESPONDENT

SMITH AND OUZMAN LIMITED.....2ND RESPONDENT

EX PARTE

KALAMAZOO SECURE SOLUTIONS LTD

REN-FORM CC.....APPLICANTS

RULING

INTRODUCTION

1. The present ruling arises from a Notice of preliminary objection filed on behalf of the 2nd respondent in High Court Miscellaneous Application No. 2 of 2013, **Smith & Ouzman Limited** who is also the interested party in Miscellaneous Application No. 11 of 2013. In the said notice the said party (hereinafter referred to as the objector) raises the following issues:

1. That the Application is grossly misconceived, incurably defective, totally incompetent, frivolous, vexatious and therefore an abuse of the process of this Honourable Court.

2. That this Honourable Court lacks jurisdiction to entertain and determine the Applicants' Application dated 16th January 2013 and filed in Court on even date by dint of Part VI Sections 93, 94, 95,96,97. 98, 99 and 100 of the Public Procurement and Disposal Act, CAP 41 C of the Laws of Kenya and the Application should therefore be struck out with costs to the Interested Party.

3. That the Applicants are not parties and therefore not privy to the contract executed between the respondent and the Interested Party and therefore lack locus standi to interfere with performance of the same by the Interested Party.

4. That the Application is overtaken by events in view of substantial performance on the part of the Interested Party.

SUBMISSION IN SUPPORT OF THE PRELIMINARY OBJECTIONS

2. In support of the objections, **Mr Nyachoti**, learned counsel for the objector submitted that the two Notices of Motion are brought under Order 53 of the Civil Procedure Rules and presumably the provisions of the Law Reform Act though the latter provisions were not expressly cited. According to him the two Motions are based on the grounds appearing on the face of the applications and are expounded both in the statutory statements and the verifying affidavits. In his view, the ex parte applicants' cases are in a nutshell that the 1st respondent which is the procuring entity under the Public Procurement and Disposal Act, Cap 412C, Laws of Kenya (hereinafter referred to as the Act) committed violations and breached statutory provisions of the Act. In counsel's view, it is not in dispute that the 1st respondent applied section 74 of the Act in respect of the impugned contracts and from the pleadings it is not in dispute that none of the applicants has invoked the review procedures set out under the Act. Further, counsel contends that it is not disputed that the first respondent opted for alternative mode of procurement in the form of direct sourcing rather than open tender. Therefore, it was submitted that under section 93(1) of the Act a party aggrieved should seek a review before the Public Procurement Administrative Review Board (hereinafter referred to as the Board) and not resort to Court. Subsection (2), thereof provides for the matters which are not subject to review and these include the choice of a procurement procedure and where a contract is signed in accordance to section 68. In this case it is common ground that a contract was signed between the 1st respondent, the Electoral and Boundaries Commission (hereinafter referred to as the Commission) and the 2nd objector and therefore the matter cannot be subject of challenge. Sections 95 to 99 of the Act, it is submitted sets out the procedure to be followed by the Board established under the Act and under section 100(1) and (2) thereof, the High Court has jurisdiction to deal with judicial review applications and appeals but only from a decision of the Board and not from a decision of the Procuring Entity such as the Commission. The applicants having therefore chosen not to pursue the administrative procedure for review of the decision of the Commission under the Act cannot invoke the jurisdiction of the Court in the name of judicial review or otherwise. In the objector's view the High Court's jurisdiction is not at large but is fettered and limited and since the Act provides for the manner in which disputes from a Procurement Entity ought to be dealt with which ousts the jurisdiction of the High Court, this Court has no jurisdiction to deal with the applications which are grossly premature. In support of his submissions counsel relied on **The Speaker of the National Assembly vs. Karume [2008] 1 KLR 426 (EP)** in which the Court of Appeal held that there was considerable merit in the submission that where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should have been strictly followed and that Order 53 of the Civil Procedure Rules could not oust clear constitutional and statutory provisions. He also relied on **Safmarine Container N V of Antwerp vs. Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010** in which **Mwera, J** (as he then was) held that it is not only the Constitution that can limit/confer jurisdiction of the Court and that any other law may by express or necessary implication confer that jurisdiction. The learned Judge went on to state that it is fit and proper and in the interests of justice that where specific statutes repose jurisdiction in some mechanism of dispute resolution other than in the High Court, that be the course to follow. Also relied upon were **Kisii High Court Constitutional**

Petition No. 3 of 2010 Peter Ochara Anam & Others vs. Constituencies Development Fund Board as well as **Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887** and **London Borough of Southwark vs. Williams and Another [1971] 2 All ER 175.** Therefore it was contended that this Court should find that it has no jurisdiction to entertain the two applications and that parties must first take steps under the Act.

3. In his submissions, **Mr Lubulellah**, learned counsel for the Commission while associating with the submissions made by **Mr Nyachoti**, contended that there is no doubt that the jurisdiction of this Court has been invoked pursuant to the Act and the Regulations thereunder. Whereas the Court has jurisdiction to entertain judicial review under the provisions of the Law Reform Act, the said provisions were not invoked in this case. While conceding that under Article 165 of the Constitution the Court is embodied with unlimited jurisdiction in both criminal and civil matters and that the Court has wide powers and jurisdiction to entertain judicial review on various aspects, the manner of entertainment is dependent upon the statute invoked. In this instance the inherent jurisdiction of the Court has not been invoked and it would not be right to do so in counsel's view since the Court cannot look for jurisdiction outside the relevant statute which provides for the mode and manner of dealing with the grievance. The Act is a statute discussed by the Legislative Assembly to deal with specialised matters relating to procurement pursuant to Article 1 of the Constitution under which sovereign power belongs to the people and is delegated to the judiciary and independent Tribunals. Those provisions therefore justify why it was necessary to come up with the provisions of the Act and hence the Court must respect other Tribunals so that there is no usurpation of the powers of the Tribunals. The Court's role is to supervise the Tribunals without taking over their roles hence the judiciary will restrain itself from appearing to be taking over the same. Under the supervisory role of the Court the Court looks at the process and the manner of Constitution of the Tribunal and how they exercise their mandate under the statutes. So where a party chooses to ignore the Tribunals and rushes to Court the right thing to do is to recognise that the Tribunal has jurisdiction as this is the right thing to do for the purposes of discipline. Counsel in support of his submissions referred to **Francis Gitau Parsimei vs. The National Alliance Party of Kenya and Independent Electoral and Boundaries Commission Petition No. 356 of 2012**. He also referred to **Kipkalya Kiprono Kones vs. Republic & Others Ex Parte Kimani Wanyoike Civil Appeal No. 94 of 2005 [2006] 2 EA 158; [2006] 2 KLR 226** in which it was held that The procedure of judicial review, like that of plaint or any such like procedure, is and was not available to the parties aggrieved by the acts or omissions of the Commission and the only valid way of challenging the outcome of the electoral process, and for that purpose nominating members to the National Assembly is part of the electoral process, is through an election petition as provided in the Constitution and the National Assembly and Presidential Elections Act by petition. In counsel's view, the right thing to do is to recognise the jurisdiction of the Board and uphold the preliminary objection and leave the parties to the recourse under the Act. Although the Court enjoys both appellate and judicial review jurisdiction, counsel submitted that because of the contravention of the provisions of the Act the applicant cannot be accommodated as Judicial Review as contemplated under the Act hence the Court ought to uphold the objection with costs to the respondent.

4. On behalf **Mrs Sirai**, learned counsel for the Attorney General submitted that sections 93 to 100 of the Act and more specifically section 100 provides the circumstances under which a party may file judicial review after a decision is made by the Board and only thereafter may the aggrieved party apply for judicial review. The applicants have not adduced any evidence that the applicants appeared before the Board but rather chose to come to Court for judicial review directly hence the Court ought to uphold the objection.

SUBMISSIONS IN OPPOSITION

5. On his part, Mr Owino, learned counsel for the applicant in Miscellaneous Application No. 2 of 2013 submitted that it is not disputed that the procurement of ballot papers and statutory result forms, the subject of these proceedings by the Commission is a procurement under which the Act applies. The respondent, it is submitted is a Procurement Entity under section 351 of the Act and section 29 of the Act gives choice of procurement procedures and if an entity like the Commission chooses an alternate procedure to open tendering then there are Conditions which the Commission must meet or satisfy under the Act. The ex parte applicants, it is submitted are challenging the decision of the Commission to use direct procurement procedure to procure the ballot from the interested party. The Board, according to counsel is a creature of the Act with jurisdiction donated by the Act and its mandate is limited by the Act. Section 93(1) of the Act which has been alleged to have been ignored in learned counsel's view talks of a "candidate" which is defined in section 3 of the Act as a person who has submitted a tender to the Procurement Entity (in this case the Commission). In the instant case, it is contended that the ex parte applicants have not submitted any tender and have not been given an opportunity to do so being procurement having been done by direct sourcing with the knowledge only of the interested party and the ex parte applicant became aware long after the contract had been signed. According to counsel the ex parte applicants therefore were not candidates as defined under section 3 aforesaid and could not avail itself of the provisions of section 93(1) of the Act. Further section 93(2)(a) and (c) of the Act excludes from review by the Board matters relating to choice of procedure and cases where a contract

has been signed and therefore even if the ex parte applicants were candidates, they could not go before the Board. Accordingly, the only available forum is the Court which is constitutionally mandated to deal with the disputes under its supervisory jurisdiction donated under Article 165(5) of the Constitution. As the Commission was exercising powers donated by the Act, it is submitted that it is amenable to supervisory jurisdiction of the Court especially where there is a lacuna like in the present case. Learned relied on the decision in Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728, Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008 and Council of Civil Service Union vs. Minister for the Civil Service (1985) AC 374. Counsel further submitted that since it is alleged that the Commission breached Regulations 6(2)(iii) and used direct procurement contrary to Section 74(2) and 74(3) of the Act in a discriminatory manner in breach of section 73(b) of the Act, the Act does not permit the Board to investigate the issues raised hence the Court has jurisdiction and ought to deal with the matter. In Counsel's view the authorities cited by the respondents are distinguishable because the Statutes in issue provided for remedies which remedies are not provided by the Act hence the Court has jurisdiction.

6. On his part Mr. Mahinda, learned counsel for the applicant in High Court Miscellaneous Application No. 2 of 2013while associating himself with submissions of Mr. Owino submitted that Article 165(3)(a0 of the Constitution gives the High Court unlimited original jurisdiction and in promulgating the said provision no qualification was made by the people of Kenya hence the ex parte applicants are justified in moving the Court both under the Law Reform Act and Article 47(1) of the Constitution as well as under the Civil Procedure Act. Section 99 of the Act, it is submitted states that the right to apply for review is in addition to other remedies hence the Act does not interfere with the right to invoke the Court's jurisdiction otherwise it would have been unconstitutional. Further by employing the word "may" in section 83(1) the Act gives parties options. Since there is an allegation of violation of rights, it is submitted that the matter is properly before Court hence the preliminary objection ought to be dismissed.

REJOINDER

7. In his rejoinder, Mr. Lubulellah submitted that judicial review applications ought not to be invoked if no violation of a right has been alleged, the manner in which the right has been violated and the remedy sought hence if the applicants were not candidates they cannot come to court.

8. On his part Mr. Nyachoti submitted that section 99 of the Act which talks of additional remedy only avails a person who qualify under section 93 thereof. In his view for one to move the Court, one must be a candidate.

ISSUES FOR DETERMINATION

9. In my view the issues that fall for determination are as follows:

(i) Whether the Court's jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament.

(ii) The effect of purported limitation and/or restriction of the Court's jurisdiction.

(iii) Whether in the present case the Court's jurisdiction has been limited and/or restricted in respect of the issues in dispute.

(iv) Whether the Court has jurisdiction to entertain the issues raised herein.

DETERMINATIONS

10. On the issue whether the Court's jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament, it is important to note that under Article 165(2)(a) as read with Articles 162(2) and 165(5) of the Constitution the High Court has unlimited jurisdiction in Criminal and Civil matters save for matters reserved for the exclusive jurisdiction of the Supreme Court and matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land. However as rightly submitted by **Mr. Lubulellah**, Sovereign power under this Constitution is delegated to *inter alia* the Judiciary and independent tribunals. The Constitution therefore clearly recognizes the role of independent tribunals in dispute resolution scheme. However, it is now well settled that judicial review applications are neither criminal nor civil in nature. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.** It follows that in determining judicial review applications the High Court is exercising powers conferred upon it under Article 165(3)(f) which confers upon it "any other jurisdiction, original or appellate, conferred on it by legislation". In this instance the relevant legislations are the Law Reform Act and the Public Procurement and Disposal Act Cap 412C, Laws of Kenya. The Law Reform Act in section 8 while recognizing the fact that the High Court has no jurisdiction either in its criminal or civil jurisdiction to issue prerogative orders of mandamus prohibition or certiorari, provides that in any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order. It must, however, be noted that under section 3(1)(c) of the Judicature Act, Cap 8, the High Court applies the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12thAugust, 1897, and the procedure and practice observed in courts of justice in England at that date subject inter alia to the Constitution and all other written laws. In my view, where there is a particular procedure provided under the Constitution or any written law the provisions of

section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom ought not to be invoked if the invocation would amount to contravention of the provisions of an Act of Parliament passed by out Legislature. Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. Accordingly I agree with the decision in **Pasmore vs. Oswaldtwistle Urban District Council** (supra) that where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement. As was observed by the Court of Appeal in **Speaker of the National Assembly vs. Karume** (supra) Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions. However, as was stated in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati** (supra), ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. In the said case the learned Judge recognised that the Court's jurisdiction may be precluded or restricted by either legislative mandate or certain special texts. Where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable. I therefore agree with **Mwera, J** (as he then was) in **Safmarine Container N V of Antwerp vs. Kenya Ports Authority** (supra) to the extent that it is not only the Constitution that can limit/confer jurisdiction of the court but that any other law may by express provision confer or limit that jurisdiction. In his decision the learned Judge relied on Article 159 of the Constitution. Clause (2)(c) of the said Article provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. Courts and Tribunals cannot be said to be promoting alternative dispute resolution mechanisms when they readily entertain disputes which ought to be resolved in other legal forums. Accordingly I agree that where there is an alternative remedy and procedure available for the resolution of the dispute that remedy ought to be pursued and the procedure adhered to. Nevertheless any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act. In **Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000,** the Court of Appeal expressed itself as follows:

"Although section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty; it is otherwise where the statute is silent on what is to be done in the event of a disagreement...Where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit... If the Court acts without jurisdiction, the proceedings are a nullity... The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the constitution but also, that which the constitution or any other law, may by express provisions or by necessary implication, so confer or limit...The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister... Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon...Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute".

11. In the result, I, however associate myself with my learned brother **Justice Majanja**, in his view expressed in **Dickson Mukwelukeine vs. Attorney General & 4 Others Nairobi High Court Petition No. 390 of 2012** that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realising, promoting and protecting certain rights. Accordingly the Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy. In the result I am of the view and I hold that the Court's jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament.

12. It was, however submitted on behalf of the applicants that since the Act employs the use of the word "may" in section 93(1), the applicants were not obliged to apply for review before the Board but could invoke the supervisory jurisdiction of the Court without applying for review before the Board. In my view the mere fact that an Act uses the word "may" rather than "shall" does not necessarily connote that the requirement is not mandatory. The intention of the legislature has to be examined before a determination is made as to whether the procedure is mandatory or merely directory. In **Velji Shahmad vs. Shamji Bros. and Popatlal Karman & Co. [1957] EA 438** it was held:

"Such expressions as "may", "shall be empowered", "may be exercised", in certain circumstances are to be construed as having a compulsory or imperative force. The test is whether there is anything that makes it the duty on whom the power is conferred to exercise that power. Where a statute confers an authority to do a judicial act, in a certain sense there would be such a right in the public as to make it the duty of the justices to exercise that power: to put it another way where the exercise of an authority is duly applied for by a party interested and having a right to make the application, the exercise depends upon proof of the particular case out of which the power arises...The word "may" in Order 46 rule 9 must be used in exactly one of those senses indicated in the passages quoted above and it means one thing only and that is that any appeal from a subordinate court outside Nairobi must be filed in the appropriate district registry. To hold otherwise would simply subvert the whole rule, for it would mean that an advocate or appellant to suit their own convenience could file an appeal in Mombasa from a subordinate court in Kisii or Nairobi: the proposition has only to be stated to show its profound absurdity."

13. It was also contended that since under section 99 of the Act the right to request a review under this Part is in addition to any other legal remedy a person may have and hence the applicants were not restricted to the procedure for review. Such interpretation, in my view would defeat the whole purpose of having a procurement dispute determined by the Board. In other words as was held by the Court of Appeal in **Kimutai vs. Lenyongopeta & 2 Others [2005] 2 KLR 317** it is necessary, in order to arrive at the real meaning, to get to the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief. Whereas the review route does not necessarily lock out other available remedies, the review route being a route provided under the relevant Act ought to be adhered to unless circumstances militate against that route.

14. That leads me to the issue of the effect of purported limitation and/or restriction of the Court's jurisdiction. Whereas the existence of the alternative remedy and procedure may not necessarily oust the jurisdiction of the Court as rightly submitted by **Mr. Lubulellah**, the Court is perfectly entitled to take into account the existence of such a remedy and its efficacy in deciding whether or not to entertain the dispute and may decline to do so not only on the ground of want of jurisdiction but also in order to avoid the abuse of its process where the process is being invoked to achieve some collateral purpose not recognized by the law as genuine. If therefore abuse of the Court process is shown to have happened, it would be wrong to allow the misuse of that process to continue. There is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it. See **The King vs. the General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington Ex Parte Princess Edmond De Polignac [1917] KB 486 at 495.**

15. That leads me to whether in the present case the Court's jurisdiction has been limited and/or restricted in respect of the issues in dispute. It is correct that under section 93(1) of the Act 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 the Act or the regulations, may seek administrative review as in such manner as may be prescribed. The crucial phrase here is "any candidate". Therefore for one to be entitled to apply for review under the aforesaid section the applicant must be a candidate. A candidate is defined under section 3 of the Act as "a person who has submitted a tender to a procuring entity". The ex parte applicants' case is that they are not candidates since they never submitted any tender for the simple reason that they were never given an opportunity to do so. A strict reading of section 93(1) clearly locks out the ex parte applicants from the purview of the review by the Board for the simple reason that if they are not candidates as defined under the Act they cannot invoke the jurisdiction of the Board under section 93 for the resolution of their disputes. Apart from that the ex parte applicants are challenging the choice of a procurement procedure and contend, a contention which has not been disputed that a contract has been signed. They contend that they were unaware of the signing of the contract since the same was between the Commission and the interested party. Under section 93(2)(a) and (c) of the Act it is expressly stated that these two matters are not subject to review by the Board under subsection (1) thereof. It would therefore seem that the ex parte applicants are locked from disputing the decision of the Commission due to lack of locus standi and further on the ground that their disputes do not fall within the jurisdiction of the Board. Can it therefore be said that the ex parte applicants have an effective remedy under the Act? In my view I do not think so. Where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's 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 is achieved. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya** (supra) it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament through the procedure provided under an Act of Parliament an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

16. The law is a living thing and a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which causes damage to the property of another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

17. The law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. In the present case the ex parte applicants contend that they cannot move the Board in order to have their grievances solved for the simple reasons that they do not have locus before the Board and their grievances do not fall within the jurisdiction of the Board and their contention is not without merit. The court in the modern society in which we live cannot deny them a remedy. The courts have recognised that unlawful interference with a citizen's rights give rise to a right to claim redress and if the ex parte applicants have a right they must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. Whether or not they will be able to prove that their rights have been contravened or infringed is another matter altogether. See**Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

18. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya** (supra) it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and proceeded to uphold the jurisprudence that helps to "illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law". I fully agree and only wish to add that to allow the preliminary objection based on jurisdiction is likely to render the ex parte applicants remediless and would lead to a situation where in order to avoid transparency in procurement procedures the Procurement Entities would simply award tenders clandestinely and when challenged claim that the Court has no jurisdiction knowing very well that at that stage the aggrieved party would not be able to obtain any remedy from the Board. Accordingly I find that the taking into account the issues for determination herein the Court's jurisdiction is not limited and/or restricted by the Public Procurement and Disposal Act.

19. The respondents have, however contended in the rejoinder that if the ex parte applicants were not candidates then they have no basis for instituting these proceedings. Suffice it to say that that ground was not properly pursued before the Court when the objections were raised. Whereas the institution of judicial review in respect of matters which ought to be subject of ordinary civil suits or Constitutional matters is deplorable I am not at this stage in a position to make a conclusive finding with respect to the ex parte applicants' locus and that issue will have to await a determination at a later date.

20. That brings me to the issue whether the Court has jurisdiction to entertain this application. Taking into account the foregoing determination I hold that this Court has jurisdiction to entertain the issues raised herein.

ORDER

21. Accordingly, the preliminary objections raised are dismissed with costs to both ex parte applicants.

Dated and Delivered at Nairobi this day 30th of January 2013

G V ODUNGA
JUDGE

Delivered in the presence of
Mr. Owino for applicant in HCMA No. 11/13

Mr. Nyachoti for Interested Party in HCMA No. 11/13

Mr. Mahinda for Exparte application in HCMA No. 2/13

Mr. Mutubwa for Respondent