



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Judicial Review 451 of 2012**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**BIDVEST PAPERPLUS LTD (LITHOTECH EXPORTS).....1<sup>ST</sup> INTERESTED PARTY**

**SMARTMATIC INTERNATIONAL HOLDING.....2<sup>ND</sup> INTERESTED PARTY**

**FACE TECHNOLOGIES.....3<sup>RD</sup> INTERESTED PARTY**

**EX PARTE**

**AVANTE INTERNATIONAL TECHNOLOGY INC.....APPLICANT**

**JUDGEMENT**  
**INTRODUCTION**

1. By a Notice of Motion dated 24<sup>th</sup> December 2012, the *ex parte* applicant herein, **Avante International Technology Inc**, seeks the following orders:

- 1) That an order of Certiorari do issue to bring to this Honourable Court for purpose of being quashed the decision of the 1<sup>st</sup> respondent that: “The award of the tender to the successful bidder is upheld at the original tender sum which is quoted in the Form of Tender, the is USD 12,357,000.00.”
- 2) That an Order of Certiorari do issue to bring to this Honourable Court for purpose of being quashed the decision of the 2<sup>nd</sup> respondent to award Tender No. IEBC/14/2011 – 2012 to the 3<sup>rd</sup> Interested Party at the tender sum of USD 16,651,139.13.
- 3) That an Order of Mandamus do issue to compel the 1<sup>st</sup> respondent to decide and or determine Review No. 59/2012 without regard to the nebulous concept of public interest.
- 4) That an Order of Mandamus do issue to compel the 2<sup>nd</sup> respondent to award Tender No. IEBC/14/2011-2012 to the applicant.
- 5) That an Order of Prohibition do issue to restrain the 2<sup>nd</sup> respondent from

entering into any contract with the 3<sup>rd</sup> respondent or any other person or entity other than the applicant in respect of Tender No. IEBC/14/2011-2012 or the Supply, Delivery, Installation, Configuration, Training, Testing and Commissioning of Electronic Voter Identification Devices.

6) That the costs of this application be awarded the ex-parte applicant.

#### **EX PARTE APPLICANT'S CASE**

2. The application is based on the following grounds:

a) The 1<sup>st</sup> respondent made findings that the 2<sup>nd</sup> respondent with impunity breached various sections of the Public Procurement and Disposal Act 2005, The Public Procurement and Disposal Regulations 2006 and the requirement of the tender document in awarding Tender No. IEBC.14/2011-2012 to the 3<sup>rd</sup> Interested Party.

b) The 1<sup>st</sup> respondent nevertheless proceeded to uphold the tender award to the 3<sup>rd</sup> Interested Party on the basis of the nebulous concept of public or national interest.

c) The Public Procurement and Disposal Act 2005 and The Public Procurement and Disposal Regulations, 2006 have no provisions in respect of public or national interest.

d) The applicant was the most responsive tenderer and if the 2<sup>nd</sup> respondent had given due regard to section 2 of the Public Procurement and Disposal Act, 2005 then the applicant ought to have been declared the successful bidder.

3. The same application is based on Statutory Statement filed on 20<sup>th</sup> December 2012 and the verifying affidavit sworn by the *ex parte* applicant on the same day. According to the *ex parte* applicant, it was a bidder in the Tender No. IEBC/14/2011-2012 (hereinafter referred to as the Tender) for supply, delivery, installation, configuration, Training, Testing and Commissioning of Electronic Voter identification Devices (EVID) advertised by the 2<sup>nd</sup> respondent (hereinafter referred to as the Commission). The applicant accordingly submitted its bid for the same. However, it contends that the Commission unprocedurally and in contravention of the provisions of the Public Procurement and Disposal Act (hereinafter referred to as the Act), the Public Procurement and Disposal Regulations (hereinafter referred to as the Regulations) and the Tender Document awarded the said tender to the 3<sup>rd</sup> interested party, **Face Technologies**. In the applicant's view the said award was biased and that the whole process was a charade since 2<sup>nd</sup> respondent had recommended that the tender be awarded to the 3<sup>rd</sup> respondent well before the tender process was completed. As a result of the aforesaid contraventions, the applicant filed a review before the Public Procurement Administrative Review Board (hereinafter referred to as the Board) which Board heard the submissions of the parties and delivered its decision on the 11<sup>th</sup> December 2012 in which it made the following findings:

a)“....Secondly, it is clear from the language of Clause 2.9.2 that this requirement is mandatory. The clause uses the expression “shall”, thereby making it clear that the Procuring entity wanted the prices to be inclusive of all the items stated therein. A contrary interpretation to this clause would have led to some bidders quoting prices inclusive of all the items, like the Successful Bidder herein, quoting prices which excluded these items, thereby leading to a most chaotic evaluation process.

It is very strange indeed that the Procuring Entity, having given these clear instructions, ignored them in evaluating the submission by the Successful Bidder, and has now disowned them in these proceedings, by claiming that they were merely errors and oversights which it could correct. The logic of this argument is easier to appreciate if made by an aggrieved bidder seeking to challenge the decision of a procuring entity, but difficult to understand when advanced by a procuring entity which should be anxious to defend the integrity of its decisions...”

b) **“...The board further notes that there is no valid reason for the Evaluation Committee allowing the Successful Bidder to the second demonstration on Proof of Concept using a different device from the one submitted with its bid...”**

c) **“... It is therefore evident from these facts that the Procuring Entity was bent on awarding the tender to Face Technologies, come what may. This conclusion is buttressed by the conduct of the Procuring Entity in relation to its decision not to disqualify the Successful Bidder when it submitted its tender without factoring in the items specified in clause 2.9.2 of the tender document. The tender document was clear that these items had to be included in a bidder’s tender sum and, therefore, failure by the Successful Bidder to include them should have led to automatic disqualification. Instead of taking this measure against Face Technologies, the Procuring Entity went out of its way to accommodate the bidder by pricing the items itself and including them in the tender sum of the Successful Bidder’s tender...”**

d) **“... In the circumstance, what criteria did the Procuring Entity apply in determining that the tender should be awarded to Face Technologies and not to Avante, especially in light of the fact that from the technical evaluation stage to the Proof of Concept demonstration stage, Avante beat Face Technologies. In the view of the Board, the criteria could only be one that was intended to achieve the objective of awarding the tender to Face Technologies, no matter what ...”**

e) **“... It further claimed to found its decision on the fact that the Successful Bidder offered the best price. It is a cardinal principle in our procurement law that the determination of price must be based on observance of the principles and objectives as set out in Section 2 of the Act, which underpin our procurement law. These principles and objectives are indivisible, and one cannot be arrived at by sacrificing fairness to bidders, as was the case in this matter. Accordingly, the Board is not persuaded that the price offered by the Successful Bidder, notwithstanding the fact that it was lower than that of Avante, was arrived at in a manner that was fair to the other bidders, having regard to the fact that the Successful Bidder’s tender did not comply with the requirements of the tender document ...”**

f) **“... As the Board had already pointed out in this decision, it is most unusual indeed for a procuring entity to be magnanimous in interpreting its tender document, especially in favour of some of the bidders. But even if it felt generous in this particular case, it can hardly be the case that failure to comply with mandatory instructions, especially one that is cast in mandatory terms, can be treated as an error that can be corrected without affecting the substance of the tender in terms of Section 64 (2) (b) of the Act. This raises the question as to why the procuring Entity acted in this manner. The Board is of the view that the motive of the Procuring Entity was to ensure that the Successful Bidder was awarded this tender...”**

4. In the applicant’s view the Board’s decision to uphold the award of tender to the 3<sup>rd</sup> interested party in light of the foregoing findings is both unreasonable and irrational. Given the said decision, the applicant also contends that the Commission’s decision to award the tender to the 3<sup>rd</sup> interested party is similarly unreasonable and irrational. It is therefore contended that the Board’s decision to uphold the award of the tender to the 3<sup>rd</sup> interested party in purported public or national interest is without jurisdiction as the applicant had indicated in its tender document that it was in a position to supply and deliver the EVID within 30 days and being an international company had spent large resources to participate in the tender herein and hence unless the orders sought are granted the applicant will suffer loss and damage.

## **RESPONDENTS’ CASE**

5. In opposition to the application, the 1<sup>st</sup> respondent on 18<sup>th</sup> January 2013 filed grounds of opposition dated the same day in which it raised the following issues:

**1. The Applicant has not demonstrated any case against the Respondents and particularly the 1<sup>st</sup> Respondent herein and has no prima facie case to warrant the issuance of the judicial review**

**remedies in its favour.**

**2. Judicial review is only concerned with the decision making process and procedure but not on the merits of the decision.**

**3. Judicial review remedies are discretionary in nature and are not guaranteed.**

**4. Public interest can override individual interest.**

**5. The application is defective and an abuse of the court process as the Applicant has failed to pursue the available remedies hence the respondent's prayer for the same be dismissed.**

6. On the part of the 2<sup>nd</sup> respondent, **Mohamud Jabane**, it's Manager, Legal Services swore an affidavit on 4<sup>th</sup> January 2013 in which he admitted that the applicant was a bidder for the said Tender advertised by the 2<sup>nd</sup> respondent but was unsuccessful in its bid and was duly notified of the fact. According to him the 3<sup>rd</sup> interested party was the successful bidder. Being dissatisfied the applicant applied for review before the Board which legally and procedurally heard the parties, considered their submissions and rendered its decision thereon on 11<sup>th</sup> December 2012 which decision being final unless judicial review proceedings are commenced within 14 days of the date of the decision, the Commission went ahead to sign a contract with Fact Technologies (PTY) Limited after the lapse of the prohibition. According to the deponent, the Commission has since released part payment ahead of delivery of the devices within the contractual 30 days of the agreement or contract whose full performance is on or before 11<sup>th</sup> January 2012. Although the applicant has a right of appeal under section 100(2) of the Act, , it is deposed that the applicant has instead opted to apply for judicial review which application is not an appeal and no stay has been granted by the Court. In his view, this Court on judicial review may not substitute its own decision on the merits for that of the Board which has already considered and dismissed the request to direct the Commission to award the tender to the applicant, and or to annul the procurement proceedings in relation to the tender hence the challenge to the decision of the Board can only by way of an appeal. According to him the remedy of certiorari to quash the decision of the Commission to award the tender is not available under the Act and the Regulations. Hence prayers 4 and 5 in the Motion are not justifiable or available in law since there is no allegation of excess or abuse of power on the part of the Board to justify the invocation of the Court's supervisory jurisdiction in accordance with its Constitutional mandate. It is further contended that the application does not make allegations touching on the Board's decision making process which was honestly and diligently undertaken. Since the matter of procurement of election materials for election slated for 4<sup>th</sup> March 2013 is of profound public interest and concern, it was not unreasonable or irrational for the respondent to reach its decision based thereon as that was within its mandate and discretion and that failure to consider the same would have been abnegation of its duty. Since judicial authority is derived from the people collectively and vests in the Court under Article 59(1) of the Constitution, it is deposed that even this Court has jurisdiction to consider the interests of public as against those of individuals more so as the General elections are about 2 months ago hence it is neither reasonable nor practical that procurement proceedings be recommenced at this stage. In the absence of the exhibition of the Power of Attorney to the deponent of the verifying affidavit, it is contended that the said affidavits are incompetent and ought to be struck out together with the Motion which cannot stand without the said affidavit. Accordingly, the Motion should be dismissed.

#### **SUBMISSIONS IN SUPPORT OF THE *EX PARTE* APPLICANT'S APPLICATION**

7. While reiterating the contents of the Motion, the Statement and the affidavits, the *ex parte* applicant submitted that the despite having found that the Commission had breached the law, the Board, without jurisdiction and or excess of jurisdiction acceded to the Commission's prayer that that the latter's decision be allowed to stand in the public interest taking into account the approaching general elections. It is contended that the said decision was irrational, Wednesbury unreasonable and without or in excess of jurisdiction and ought to be quashed. Since the Board is a continuation of the Public Procurement Complaints, Review and Appeals Board, it is submitted, its function is to provide an administrative review of complaints and cases submitted to it for settlement in accordance with the Act and the

Regulations which according to the applicant do not permit the Board to take into account public or national interest in its determination. In relying thereon, it is submitted that the Board took into account an irrelevant matter or consideration and acted without jurisdiction and or in excess thereof. Having found that the Commission breached the provisions and hence acted illegally, the Board ought not to have sanctioned the said illegality under any guise hence its decision was irrational and unreasonable. Citing Black's Law Dictionary, 9<sup>th</sup> Edn. It is submitted that "public interest" is the general welfare of the public that warrants recognition and protection and that it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation. Since laws are passed in the public interest and the Act and Regulations were enacted to establish, inter alia, procedures for efficient public procurement, their objectives are in the public interest. Since the Commission had power to grant the tender to the applicant which had indicated that it was ready to supply the devices in 30 days, it is submitted that the ground relied on by the Commission of fixed time for election cannot be allowed to stand. In the applicant's view, the 3<sup>rd</sup> interested party's devices are bound to fail with the result that the so-called public interest would not have been served and it would then be too late to do anything. Without exhibiting the signed contract, it is submitted that there is no such contract and that in light of the provisions of section 100(1) of the Act any such contract would be illegal since these proceedings were commenced within 14 days of the decision. Pursuant to section 94 of the Act the decision is not final and the tender proceedings stand suspended until determination of the judicial review under section 100(4). With respect to the issue of the Power of Attorney it is submitted that deponent is an agent and witness of the applicant and evidence can be given orally and by an affidavit and a party cannot be barred from calling a witness he desires and that the Constitution bars determination of matters on technicalities. Finally, it is submitted that there is still time to carry out the procurement of the tender herein. In highlighting the submissions, **Mr. Owino**, learned counsel for the applicant emphasised the issues raised in the written submissions and contended that the Commission was aware of the election and the timelines and having breached the law cannot ask the Court to sanction an illegality. This being a judicial review application, the Civil Procedure Rules are inapplicable hence the issues raised with respect to the Power of Attorney are inconsequential. In support of the application the applicant relied on **Republic vs. Public Procurement Administrative Review Board and 2 Others ex parte Hyosung Ebara Company Limited [2011] eKLR**, **Republic vs. Public Procurement Administrative Review Board Ex Parte Zhongman Petroleum & Natural Gas Group Company Limited [2010] eKLR**, **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1947] 2 All ER 680**, **Council of Civil Unions vs. Minister for Civil Service [1985] AC 374**, **[1984] 3 All ER 935** and **Republic vs. Pest Control Products Board & Another Ex Parte Orion East Africa Ltd [2011] KLR**.

### **1<sup>ST</sup> RESPONDENT'S SUBMISSIONS**

8. On the part of the 1<sup>st</sup> respondent Board, it is submitted that judicial review is concerned with the decision-making process rather than the merits of the case. It is submitted that it has not been demonstrated that the Board adopted a procedure that was marred with impropriety in arriving at its decision, committed an illegality or acted *ultra vires* its jurisdiction but to the contrary the Board found that there were breaches in the tendering process and only upheld the Commission's decision on public interest. Since the applicant does not question the procedure but only the finding it is submitted that by interfering with the decision the Court will be going into the merits of the matter and will be seeking to replace the decision of the Board with that of its own which will amount to sitting on appeal on the decision yet this is not an appeal. In support of this submission the case of **Republic vs. Commissioner of Customs Services Ex Parte Africa K-Link International Ltd [2012] eKLR**. It is further submitted that public interest in the instant case overrides individual rights since the Court in granting the orders sought would inconvenience the Commission and frustrate its efforts in carrying out its functions more so as the public interest of Kenyans takes precedence. The grant of the orders would lead to the disruption of the elections yet the applicant has not demonstrated the loss or injury it will suffer if the public interest is upheld. Citing **Republic vs. The Kenya National Commission on Human Rights Ex Parte Hon. Uhuru Muigai Kenyatta HCMCA No. 86 of 2009**, it is submitted that the Court has the task of balancing between public and individual rights and based on Article 24(1)(d) it is submitted that there is a need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others. Judicial Review orders being discretionary, it is submitted they are not guaranteed and citing **Republic vs. Judicial Service Commission Ex Parte**

**Pareno [2004] KLR 2203**, it is submitted that even if a case falls into one of the categories where judicial review will lie the court is not bound to grant it and that what orders the Court will make depends on the circumstances of the case. Relying on *Halsbury's Laws of England 4<sup>th</sup> Edition Vol. II page 805 paragraph 1508*, it is submitted that the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. Citing **Geoffrey Gathenji vs. Kenya National Examinations Council [1997] eKLR**, the Board submits that having made its decision within its jurisdiction in accordance with the rules of natural justice, in the absence of allegation of procedural impropriety the orders sought herein cannot be granted and the application should be dismissed with costs to the respondent. **Mr Chilaka**, learned Counsel for the Board in his oral highlights emphasised the foregoing.

## **2<sup>ND</sup> RESPONDENT'S SUBMISSIONS**

9. On behalf of the 2<sup>nd</sup> respondent, the Commission, it is submitted that the right to request for Administrative Review under the Act is under section 99 thereof in addition to any other legal remedy a person may have, hence availability of an alternative remedy is not a bar to Administrative Review under the Act. Whereas under section 100 of the an aggrieved party has the option of appealing or applying for judicial review, by dint of section 100(4) of the Act, if judicial review is not declared by the High Court within 30 days from the date of filing, the decision of the Board takes effect. While an appeal is concerned with the merits, judicial review is concerned with the decision-making process. Judicial review, it is submitted is procedural in nature and is concerned with whether the Authority has exceeded its powers, committed an error of law, committed a breach of the Rules of natural justice, a duty to act fairly, reached a decision which no reasonable tribunal could have reached or abused its power. In support of these submissions the Commission cites **Republic vs. Judicial Service Commission Ex Parte Pareno** (supra), **R vs. Boundary Commission Ex Parte Foot [1983] QB 600 at 623** and **Commissioner of Lands vs. Hotel Kunste Ltd [1995-98] EA 62**. It is, however, appreciated based on **David Muto T/a Manyatta Auctioneers vs. Republic Civil Appeal No. 265 of 1997**, that the availability of an alternative remedy is not a bar to judicial review.

10. Under Order 53 rule 4(1) of the Civil Procedure Rules, it is submitted that no ground can be relied upon or any relief sought at the hearing of the Motion for judicial review save the grounds and relief set out in the statement accompanying the application for leave to apply for judicial review. From the Motion, it is submitted the applicant is challenging the decision of the Board and not that of the Commission. Therefore prayer 2 in the motion in so far as it seeks orders of certiorari to quash the decision of the Commission is misplaced and does not lie. It is submitted that judicial review contemplated under the Act is in respect of the Board and not bodies such as the Commission. Citing **The Speaker of the National Assembly vs. Karume [2008] 1 KLR 426 (EP)**, **Francis Gitau Parsime vs. The National Alliance Party of Kenya and Independent Electoral and Boundaries Commission Petition No. 356 of 2012** and **Kipkalya Kiprono Kones vs. Republic & Others Ex Parte Kimani Wanyoike Civil Appeal No. 94 of 2005 [2006] 2 EA 158; [2006] 2 KLR 226**, it is submitted that where there is a specific constitutional or statutory method or procedure for the redress of any grievance prescribed or specified for the invocation of the Court's jurisdiction that procedure must be strictly adhered. It is submitted that the Act does not govern the High Court's procedure in judicial review, but is the substantive legal basis upon which judicial review may be sought and it is the provisions of the Act that are to be used to determine whether the Board has jurisdiction or has acted within its jurisdiction. Relying on **Republic vs. Municipal Council of Mombasa, Ex Parte an Employee Civil Appeal No. 248 of 2001**, it is submitted that since judicial review has no application whatsoever to disputes arising out of contractual relationships, where a contract has already been executed between the Procuring Entity and a bidder, in the absence of an order preventing the same, the matter is thereby taken beyond the scope of judicial review and a party aggrieved thereby would have to proceed through a regular suit. Since the Act does not donate a legal basis for impeaching the decision of the Commission through judicial review prayer 2 of the Motion is unsustainable since that decision can only be challenged through a review and hence that decision cannot be a basis for a judicial review application. Since there is no vacuum, in this case, the inherent jurisdiction of the Court similarly cannot be invoked. Since no stay was granted and the contact between the Commission and the 3<sup>rd</sup> interested party has been entered into, any interference with

the contract will culminate in losses to the Commission and the 3<sup>rd</sup> interested party in proceedings where the said parties cannot, due to the peculiarity of judicial review proceedings, claim damages.

11. It is submitted that in public law litigation public or national interest is not a nebulous concept but is recognised in Article 1 of the Constitution wherein it is stated that all sovereignty belongs to the people of Kenya collectively and is delegated by virtue of Article 1(3)(c) to the Judiciary and Independent Tribunals hence any mandate being exercised by the Boars is exercised for and on behalf of the people of Kenya collectively. Citing **Baseline Architects Limited & 2 Others vs. NHIF Board Management [2008] eKLR**, **Konway vs. Limmer [1968] 1 All ER 874**, **John Peter Mureithi & Others vs. Attorney General & 4 Others [2006] KLR** and **Kenya Guards Allied Workers Union vs. Security Guards & 38 Others (IP) High Court Misc. 1159 of 2003**, it is submitted that there is a need for the competing interests to be balanced one against the other by the Courts and indeed Quasi Judicial Tribunals hence in this case the Court must balance the rights accruing to bidders in procurement proceedings against the general right of Kenyans to participate in General Elections hence where there is any conflict between the general public interest and the interests of a private individual such as the ex parte applicant the general public interest must prevail. Public interest, it is submitted, must be discussed in context and circumstances of each case and like judicial review itself, cannot be circumscribed or placed in a straight jacket but must be left to expand to meet the demands and circumstances of the sovereignty of the people of Kenya collectively. In this case the sovereignty of the Kenya people demands that they are allowed to exercise their political rights under the Constitution by participating in the general elections without hindrance. Since the decision to enter into the contract is dictated by the strict timelines in holding the elections, that decision is lawful and valid. With respect to the prohibition it is submitted that as the contract has been entered into the grant of the said order would be in van based on the decision in **Stanley Githunguri Criminal Application No. 271 of 1988**. By granting orders as sought in prayers 3 and 4 of the Motion, the Court would have taken over the role of the respondents and decided the procurement dispute on its merits. With respect to mandamus it is submitted that since the Board has already rendered its determination, the orders of mandamus which are issued in order to perform a statutory duty cannot be granted.

12. It is submitted that a decision made based on public interest cannot be said to be unreasonable. Based on **Mumias Sugar Co. Ltd vs. Oniango [2005] 1 KLR 373** and **Elite Earthmovers Ltd vs. Krishna Behal & Sons [2005] 1 KLR 379**, it is submitted that the affidavit sworn by **Godfrey Owino** without authority ought to be struck out and the entire application dismissed. These submissions were largely repeated by **Mr Lubulellah**, learned counsel for the Commission in his oral address to Court.

### **DETERMINATIONS**

13. Having considered the foregoing, this is the view I form of the matter.

14. The first issue for determination is the competency of the application. It is not in doubt that what triggered the filing of this application was the decision of the Board made on 11<sup>th</sup> December 2012. It is also not in doubt that the said decision arose from an application by the applicant for review of the Commission's decision to award the tender to the 3<sup>rd</sup> Interested Party. The first issue for determination is whether despite the application for review made pursuant to the provisions of section 93 of the Act it would still be open to the applicant to challenge the decision of the Commission by way of judicial review. Whereas under section 99 of the Act it is provided that the right to request a review under this part is in addition to any other legal remedy a person may have, it is my view that for a party who has opted to apply for review of a decision of a Procuring Entity to invoke the supervisory jurisdiction of the Court challenging the decision of the said Entity subsequent to the delivery of the Board's decision, would amount to gambling with the Court process and ought not to be entertained by the Court. As the decision whether or not to grant judicial review orders is an exercise of discretion, the Court ought not to grant orders where its process is being abused. Accordingly I agree that the orders sought in prayers 2, 4 and 5 of the Motion ought not to be granted as independent prayers unless the grant thereof is consequential to the grant of prayers 1 and 3 of the Motion.

15. The next issue is whether the contract having been signed between the Commission and the

interested party herein the orders sought are still capable of being granted. 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 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 11<sup>th</sup> December 2012 and these proceedings having been instituted on 20<sup>th</sup> 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. Whereas the Court is cognisant of the fact that the Election process is time dictated and hence the Commission has to adhere to the set timelines, where the Commission decides to wait until the last minute to commence its process, it should expect little if any sympathy from the Courts of law.

16. With respect to the failure to exhibit the Power of Attorney by the deponent of the verifying affidavit, the position is well settled that since judicial review proceedings are neither criminal nor civil the provisions of the Civil Procedure Act and the Rules made thereunder are inapplicable to judicial review proceedings. It is however important to note that any party instituting legal proceedings before a Court of law on behalf of a corporation save in cases where the party on whose behalf is unable to do so, ought to have the authority of the aggrieved party to do so and where it is established that such authority is lacking the Court will not hesitate to terminate such proceedings notwithstanding the provisions of Article 159 of the Constitution for the reason that parties ought ordinarily to take responsibility for the consequences of instituting court proceedings including the payment of costs if the proceedings fail. In this case, however, there is no evidence that these proceedings have been instituted without the applicant's authority and in my view it would be better to err on the side of caution. Accordingly, I decline to decide the Motion based on that objection.

17. It is clear that the applicant has not challenged the process that led to the decision. In fact the findings of the Board were largely in favour of the applicant since the Tribunal found that the Commission was acting with impunity while waving the card of public interest as its defence in the various breaches of the Procurement law and that although the Board in normal circumstances would have had no hesitation to annul the tender, to do so in this case would certainly jeopardise the holding of the forthcoming general elections. While upholding the award of the tender, the Board, taking into account the irregularities noted, directed the Director General of the Public Procurement Oversight Authority to carry out an investigation pursuant to section 102 of the Act and take appropriate action. It is therefore clear that had it not have been for the consideration of the public or national interest the Board would have annulled the tender.

18. That brings me to the issue whether the Court is entitled to reverse a decision of the Board where there is no irregularity in its decision-making process but the order made by itself is irrational and unreasonable. Where for example the Board finds that the Procuring Entity was wrong in its decision but concludes that it would not interfere because that was the first time the Procuring Entity erred it would be an abdication of the Court's supervisory powers to allow such irrational decision to stand. I therefore disagree with the stand taken by the respondents that as long as the decision-making process is proper the Court ought to close its eyes to the actual decision arrived at. What amounts to the 3I's (that is irrationality, illegality and procedural impropriety) was dealt with in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In which the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** held:

**“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural**

**impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”**

19. From the foregoing it is clear that where the authority whose decision is challenged displays gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision such as where the decision is in defiance of logic and acceptable moral standards, the Court will interfere even if there is no illegality or procedural impropriety. I therefore find this Court is properly entitled to make a determination on the irrationality of the decision made by the Board.

20. That brings me to the question whether the Board was entitled in the circumstances to base its decision on the said public interest. In arriving at its decision the Board appreciated the fact that in the past it had been reluctant to grant prayers based on the claim for public interest. I am in agreement with the Board that the Commission ought not to be allowed to create a crisis and rely on the same to justify illegalities and irregularities in the procurement process. I agree that the enactment of the Act itself was informed by consideration of public interest. In **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728, Nyamu, J** (as he then was) recognised the public interest in the enactment of the Act when he stated as follows

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

21. It is important to note that the Act does not specify the grounds upon which a review may be allowed. Section 95 of the Act, however, provides that the Review Board may dismiss a request for a review if the Review Board is of the opinion that the request is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceedings or the procurement. The question is whether the Board would be entitled to consider other grounds in declining review other than those outlined above. I do not understand the parties to contend that the foregoing are the only grounds upon which the Board may decline to review a decision made by the Procuring Entity. In **Pastoli vs. Kabale District Local Government Council and Others** (supra) it was held:

**“When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be “substantial compliance” with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision of the appropriate category. The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the Court is for any reason disinclined to interfere with the act or decision that is impugned. In a nutshell, the above principles indicate that to determine whether the legislature intended a particular provision of Statute to be mandatory, the Court must consider the whole scope and purpose of the Statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory.”**

22. The applicant’s contention is that public or national interest is so nebulous that it ought not to be the basis for a determination in judicial review. As is stated in *Black’s Law Dictionary, 9<sup>th</sup> Edn.* “public interest” is the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution while under Article 1(3)(c) sovereign power under this Constitution is delegated *inter alia* to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664**, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer** (supra) that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

23. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

24. The question then is whether this Court would be warranted in determining whether or not in the circumstances of this case the Board was justified in taking into account public interest. To determine that issue necessarily involves an interrogation of the merits of the decision of the Board. However, it is old hat that that is not the role of the Court in judicial review application as opposed to an appellate

court.

25. However, the decision whether or not to grant judicial review orders is an exercise of discretion. As stated in *Halsbury's Laws of England 4<sup>th</sup> Edition Vol. II page 805 paragraph 1508*, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. Sound legal principles would dictate where to grant the orders of judicial review even if merited is likely to affect the general elections in such a magnitude that it is likely to substantially and materially and adversely affect the electoral process, the Court would be reluctant to accede to the applicant's prayers.

### **ORDER**

26. In the result I find no merits in the Notice of Motion dated 24<sup>th</sup> December 2012 which I hereby dismiss but with no order as to costs since it is my view that these proceedings were not altogether misplaced, in light of the findings made by the 1<sup>st</sup> respondent.

**Dated at Nairobi this day 29<sup>th</sup> of January 2013**

**G V ODUNGA**  
**JUDGE**

*Delivered in the presence of:*

*Mr Owino for the applicant*

*Mr Mutubwa for Mr Lubullelah for 2<sup>nd</sup> respondent*