



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Civil Appli 1260 of 2007**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT 2005 AND**  
**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS 2006**  
**AND**

**IN THE MATTER OF TENDER NO. KCCA/16/2006/2007:**

**MODERNISATION AND UPGRADING OF AIR NAVIGATION EQUIPMENT BY THE KENYA**  
**CIVIL AVIATION AUTHORITY**

**AND**

**IN THE MATTER OF A DECISION AND RULING BY THE PUBLIC PROCUREMENT**  
**ADMINISTRATIVE REVIEW BOARD IN APPLICATION NUMBER 59 OF 2007 DATED THE**  
**19<sup>TH</sup> DAY OF NOVEMBER 2007**

**AND**

**IN THE MATTER OF AN APPLICATION BY SELEX SISTEMEI INTERGRATI FOR ORDERS**  
**OF CERTIORARI, PROHIBITION AND MANDAMUS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

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

**AND**

**THE KENYA CIVIL AVIATION AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**THALES AIR SYSTEMS.....INTERESTED PARTY**

**EX-PARTE.....SELEX SISTEMI INTEGRATI**

**JUDGMENT**

Before me is a Notice of Motion dated 20<sup>th</sup> December 2007 filed by M/s Mohamed Muigai advocates on behalf of the ex-parte applicants **SELEX SISTEMI INTEGRATI**. The respondents are named as **THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD** (1<sup>st</sup> respondent) and the **KENYA CIVIL AVIATION AUTHORITY** (2<sup>nd</sup> respondent). The Notice of Motion was brought under section 8 of the Law Reform Act (cap. 26) and Order 53 rule 3 of the Civil Procedure Rules (cap. 21). It was brought pursuant to leave granted on 20<sup>th</sup> December 2007. After filing of the application, an interested party **THALES AIR SYSTEMS** was joined in the proceedings.

The orders sought in the application are as following-

1. *An order of certiorari be and is hereby issued removing to the High Court for the purposes of being quashed the record, proceedings, decision and Ruling of the 1<sup>st</sup> Respondent in Public Procurement Administrative Review Board Applicant No. 59 of 2007.*
2. *An order of prohibition be and is hereby issued against the 2<sup>nd</sup> Respondent precluding it, its officers, servants and or agents from awarding Tender No. KCAA/16/2006/2007: Modernization and Upgrading of Air Navigation Equipment to any person or entity other than the Applicant herein.*
3. *An order of prohibition be and is hereby issued against the 2<sup>nd</sup> Respondent precluding it, its officers, servants and its agents from revoking, canceling and or otherwise terminating Tender No. KCAA/16/2006/2007: Modernization and Upgrading of Air Navigation Equipment*
4. *An order of mandamus be and is hereby issued against the 2<sup>nd</sup> Respondent compelling it to award Tender No. KCAA/16/2006/2007: Modernization and Upgrading of Air Navigation Equipment to the Applicant herein in accordance with the provisions of section 68(1) of the Public Procurement and Disposal Act, 2005 and the terms of the Tender Document.*
5. *Such other or further orders, writs and or directions as this Honorable Court may deem just and expedient.*
6. *The costs of and incidental to this Application be provided for.*

The application has grounds on the face of the Notice of Motion. It was also grounded on the statutory **STATEMENT** filed with the application for leave, as well as the verifying affidavit also filed with the application for leave sworn by **MUTHONI THIANKOLU** on 3<sup>rd</sup> December 2007. The grounds of the application are as follows-

- (a) *The decision and Ruling of the 1<sup>st</sup> Respondent in Public Procurement Administration Review Board Application No. 59 of 2007 dated 19<sup>th</sup> day of November 2007 is vitiated by a fundamental error of law in particular a misdirection on the meaning of, inter alia, section 36(1), (6) and 93(2) (b) of the Public Procurement and Disposal Act, 2005.*
- (b) *The decision and Ruling of the 1<sup>st</sup> Respondent in Public Procurement Administration Review Board Application No. 59 of 2007 dated 19<sup>th</sup> day of November 2007 is vitiated by a fundamental error of law to the extent that the 1<sup>st</sup> Respondent failed to take into account guiding principles in the interpretation of ouster clauses.*
- (c) *The decision and Ruling of the 1<sup>st</sup> Respondent in Public Procurement Administrative Review Board Application No. 59 of 2007 dated 19<sup>th</sup> day of November 2007 is irrational and unreasonable to the extent that it purports to give the 2<sup>nd</sup> Respondent unlimited discretion in terminating Tender No. KCAA/16/2006/2007: Modernization and Upgrading of Air Navigation Equipment.*
- (d) *The decision and Ruling of the 1<sup>st</sup> Respondent in Public Procurement Review Board Application*

**No. 59 of 2007 dated the 19<sup>th</sup> day of November 2007 is contrary to public policy and intention of Parliament to the extent that it purports to allow the 2<sup>nd</sup> Respondent to arbitrarily start, terminate and restart tender proceedings.**

**(e) The decision and Ruling of the 1<sup>st</sup> Respondent in Public Procurement Administrative Review Board Application No. 59 of 2007 dated the 19<sup>th</sup> day of 2007 is unlawful to the extent that it purports to vindicate unreasonable and arbitrary acts of the 2<sup>nd</sup> Respondent as regards Tender No. KCAA/16/2006/2007: Modernization and Upgrading of Air Navigation Equipment.**

**(f) The decision and Ruling of the 1<sup>st</sup> Respondent in Public Procurement Administrative Review Board Application No. 59/2007 dated the 19<sup>th</sup> day of November 2007 is unlawful to the extent that it purports to vindicate acts of the 2<sup>nd</sup> Respondent done in contravention of the principles of the natural justice as regards Tender No. KCAA/16/2006/2007: Modernization and Upgrading of Air Navigation Equipment.**

**(g) The decision and Ruling of the 1<sup>st</sup> Respondent in Procurement Administrative Review Board Application No. 59 of 2007 dated 19<sup>th</sup> day of November 2007 is vitiated by bias to the extent that it totally disregards salient and weighty issues raised in the Applicants' oral and written submissions on interpretation of ouster clauses.**

**(h) Such other grounds as will be adduced and or canvassed at the hearing hereof.**

The verifying affidavit filed, annexes several documents to support or clarify the applicant's case. The said documents include, but are not limited to, correspondence on the subject Tender, the terms or conditions of tender, Minutes of the Tender Committee of the 2<sup>nd</sup> Respondent, and the proceedings and decision of the 1<sup>st</sup> Respondent relating to the said Tender.

On 1<sup>st</sup> February 2008, the 2<sup>nd</sup> respondent through their counsel M/s Walker Kontos filed a Notice of Preliminary Objection to the application. The said Preliminary Objection was dismissed by Nyamu J on 2<sup>nd</sup> May 2008.

As far as the present application is concerned, that is the Notice of Motion, the parties filed written submissions and lists of authorities. The 2<sup>nd</sup> respondent also filed a replying affidavit to the Notice of Motion sworn by **JANE MUTHONI KINUTHIA** a Legal Officer on 6<sup>th</sup> May 2008 and filed on the same date.

The applicant's written submissions were dated 5<sup>th</sup> May 2008 and were filed on 20<sup>th</sup> May 2008. It is averred in the written submissions that the 2<sup>nd</sup> respondent in April 2007 made an advert in the local and international press for Tender KCAA/16/2006/2007 0- Modernization and Upgrading of Air Navigation Equipment, which tender was international in character. The ex-parte applicant submitted its bid to the Tender. After an open, qualitative, scientific and competitive evaluation of the bids, the 2<sup>nd</sup> respondent sent a letter to the ex-parte applicant informing it (the ex-parte applicant) that it had passed the technical evaluation. After the evaluation of the technical and financial bids, the 2<sup>nd</sup> respondent again sent a letter dated 14<sup>th</sup> September 2007 notifying the ex-parte applicant that the contract for lots 1, 2, 4, 6, 8 and 9 had been awarded to the ex-parte applicant.

Though the 2<sup>nd</sup> respondent was, per the Tender Document clause 2.28.1 obliged to send the Contract documents to the ex-parte applicant for execution, it failed to do so. The 2<sup>nd</sup> respondent was also vide section 68(1) of the Public Procurement and Disposal Act, 2005; clause 2 of the letter of notification; and clause 2.28.1 and 2.28.2 of the Tender Document, obliged to formalize the contract subject of the notification within (30) thirty days (on or before 14<sup>th</sup> October 2007). In the present case, and though the ex-parte applicant accepted the award of contract as required by the letter of notification, the 2<sup>nd</sup>

respondent delayed in forwarding, the contract form until the (30) thirty days expired.

It is contended in the written submission that prior to the expiry of the thirty days for formalization of contract, the ex-parte applicant sent reminders to the 2<sup>nd</sup> respondent requesting it to forward the contract form to the ex-parte applicant for execution. However, instead of forwarding the Contract Form, the 2<sup>nd</sup> respondent purported to terminate the Tender, making a vague invocation of the Public Procurement and Disposal Act, 2005 by way of letter dated 8<sup>th</sup> October 2007, which was faxed to the ex-parte applicant on 16<sup>th</sup> October 2007. No reason was given for the termination of the Tender after it was awarded and accepted. It was contended that the purported termination of Tender was infact made after the expiry of thirty days, contrary to the letter and spirit of clause 2.28.2 of the Tender Document, and, part (2) of the letter of notification of award of Tender respectively.

It was averred in the written submissions that the ex-parte applicant contested the purported termination of Tender before the 1<sup>st</sup> respondent. Instead of the 2<sup>nd</sup> respondent raised making a substantive response to the weighty issues raised, 2<sup>nd</sup> respondent raised preliminary objections founded on sections 36(6) and 93(2)(b) of the Public Procurement and Disposal Act, 2005. That preliminary objection was heard by the 1<sup>st</sup> respondent. In utter disregard of the weighty issues raised in written and oral submissions on the part of the ex-parte applicant, the 1<sup>st</sup> respondent upheld the preliminary objection of the 2<sup>nd</sup> respondent vide a ruling delivered on 19<sup>th</sup> November 2007, thus resulting in the institution of the current proceedings.

It was contended that the ruling of the 1<sup>st</sup> respondent was based on fundamental errors of law. It was averred in the submissions that the decision of the 1<sup>st</sup> respondent was a nullity because it failed to appreciate the intention of Parliament under section 2 of the Public Procurement and Disposal Act 2005 which provides-

***“2. The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable obsolete or surplus stores and equipment by public entities to achieve the following objectives-***

- a) to maximize economy and efficiency;***
- b) to promote competition and ensure that competitors are treated fairly;***
- c) to promote the integrity and faithfulness of those procedures;***
- d) to increase transparency and accountability in those procedures;***
- e) to increase transparency and accountability in those procedures;***

***and***

- f) to increase public confidence in those procedures”***

Stress was placed in the written submission on what was stated by Lord Diplock in the case of Civil Service Unions and Others –vs- Minister for the Civil Service [1984]3 ALL ER 935 at page 950 last paragraph that judicial review remedies are available where the decision maker does not understand correctly the law that regulates his decision making power thus-

***“By illegality as a ground of judicial review I mean that the decision-maker must understand correctly the law that regulates his decision making power and give effect to it.”***

In reference to section 2 of the Act, it was contended in the written submissions that the 1<sup>st</sup> respondent was under a duty to ensure that the overriding principles set out under section 2 of the Act were observed in any public tendering process. It was also contended that there should be no termination of Tenders in

circumstances raising doubt as to the fairness, transparency or integrity of the tendering process. It was averred that a plain reading of section 93(2) of the Act showed that section 36(6) of the Act only protected decisions to “**reject all tenders, proposals or quotations**”. It was averred that section 36(6) of the Act was not available to the 2<sup>nd</sup> respondent because, having accepted the ex-parte applicants bid, the 2<sup>nd</sup> respondent could not reject all tenders, proposals and quotations as stipulated under section 93(2) of the Act.

It was also averred that the 1<sup>st</sup> respondent’s decision failed to take into account the immutable rule that ouster clauses had to be construed strictly and narrowly. Reliance was placed on what Lord Reid stated in the case of *Animistic –vs- Foreign Compensation Commission* [1969]1 ALL ER 208, at page 213 thus –

***“It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly meaning, I think, that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.”***

The second limb in the written submissions of the contention against the ruling of the 1<sup>st</sup> respondent was that it was contrary to public policy. This contention was based on the argument that, to the extent that the said decision purported to allow the 2<sup>nd</sup> respondent to arbitrarily start, terminate and restart tender proceedings, it was contrary to public policy. It was also averred here that if section 36 of the Act purported to give unlimited and whimsical power to the 2<sup>nd</sup> respondent, then it was unconstitutional, null and void.

The third limb of argument in the ex-parte applicant written submissions is that the decision of the 1<sup>st</sup> respondent was irrational and unreasonable. It was averred that the decision and ruling of the 1<sup>st</sup> respondent was irrational and unreasonable as it purported to give the 2<sup>nd</sup> respondent, public body, unlimited and/or whimsical discretion in terminating the Tender. Also the decision to terminate the Tender and restart afresh without reasons amounted to unreasonableness. Reliance was placed on the decision in the case of ***Associated Provincial Picture Houses Ltd -vs- Wednesday Corporation* [1947] 2 All ER 689** in which it was stated –

***“so outrageous in its defiance of logic or accepted morals standards that no sensible person who had applied his mind to the quest to be decided could have arrived at it”***

The fourth argument in the ex-parte applicant’s written submissions was on bias and bad faith. It was averred that the 1<sup>st</sup> respondent disregarded rules of interpretation of ouster clauses, which meant that the decision reached was actuated by either bias or bad faith because the issues of ouster of jurisdiction went to the core of the preliminary objection raised by the 2<sup>nd</sup> respondent. That displayed bias and bad faith rendered the decision of the 1<sup>st</sup> respondent a nullity. Reliance was again placed on the case of *Animistic -vs- Foreign Compensation commission* [1969] 1 All ER 208, at page 213 and 214 in which Lord Rein stated that, where a decision is made in bad faith, principles of natural justice not observed, and where there was failure to take into account what is required to be taken into account, such a decision will be a nullity.

The fifth argument in the ex-parte applicant’s written submissions is of legitimate expectations. It was averred that the ex-parte applicant, having fairly and competitively won the Tender, formed a legitimate expectation that the 2<sup>nd</sup> respondent would formalize the contract as envisaged under section 68(1) of the Act and clause 2.28.1 and 2.28.2 of the Tender document. In addition, the international nature of the Tender process and the fact that the ex-parte applicant went into considerable costs in participating in the Tender, meant that the ex-parte applicant expected to be treated fairly, transparently, honestly and in good faith especially because they were informed that they had won the Tender. Reliance was placed on the case of *Civil Service Unions and Others -vs- Minister for the Civil Service* [1984] 3 ALL ER 985, at page 949.

The ex-parte applicant’s written submissions also responded to matters raised in the 2<sup>nd</sup> respondent

replying affidavit. The response is in summary that paragraph 4, 5 and 6 of the replying affidavit were untenable. This was because, no notification and acceptance of the Tender, the 2<sup>nd</sup> respondent lost the right to terminate. That paragraph 7 of the replying affidavit was untenable because the standard terms of the contract had been predetermined through Tender Document Form of Tender and also on the ground that the 2<sup>nd</sup> respondent was using its own breach of clause 2.28.1 of its own failure to send the contract form as a defence. It was also contended that Nyamu J. had held in a ruling in this same case dated 2<sup>nd</sup> May 2008 that the immutable principles of fairness, integrity, transparency and accountability in public procurement could not be sacrificed at the alter of speed and efficiency; that section 36(1) of the Act is unconstitutional, null and void; that section 36 of the Act did not arise as the letter dated 8<sup>th</sup> October 2008 purportedly terminating the Tender did not invoke the said section; and lastly, that an order of prohibition could issue as the court had already granted a stay order on 21<sup>st</sup> April 2008 stopping re-advertisement of the second Tender.

The 1<sup>st</sup> respondent did not appear to have filed any written Notice of Motion. It appears that they relied upon legal arguments. The 2<sup>nd</sup> respondent filed a replying affidavit sworn on 6<sup>th</sup> May 2008 by Jane Muthoni Kinuthia, its Legal Officer. It is deponed in the said affidavit that the ex-parte applicant was aware that that award of Tender was subject to contract, and that though notification of award of Tender constituted the formation of contract, the same would have to await the final signing by the parties; that no contract incorporating all the terms of agreement was sent to ex-parte applicant. Further it was deponed that by letter dated 8<sup>th</sup> October 2007 the 2<sup>nd</sup> respondent sent a letter to the ex-parte applicant terminating the Tender under the exercise of discretion conferred on the 2<sup>nd</sup> respondent by section 36(1) of the Act; and that the said termination of Tender was done because the estimated cost of Tender was Kshs.2.628 billion. It was further deponed that a business case study was undertaken soon after termination of Tender and it transpired that the sum of Kshs.2.628 billion was not available.

In addition the budget (available) was insufficient without Board approval and also that funding had come from the Government. It was stressed in the said affidavit that the 2<sup>nd</sup> respondent had the responsibility to ensure that Kenya's airspace was safe, and that, after consultation with the Permanent Secretary Ministry of Transport, the project was re-advertised for Tender. The 2<sup>nd</sup> respondent therefore wanted to be permitted to proceed with the second Tender as a matter of grave national concern. It also deponed that the 2<sup>nd</sup> respondent objected to the proceedings filed by the ex-parte applicant with the 1<sup>st</sup> respondent and a ruling had already been given in the 2<sup>nd</sup> respondent's favour. It is also deponed that the applicant should not be granted the prayers sought as the applicant did not ask for the reasons to the termination of the Tender as required under section 36 of the Act. It is stressed in the affidavit that the 1<sup>st</sup> respondent correctly found that it did not have jurisdiction (to entertain the challenge to termination of Tender) so no certiorari orders should be granted. It is further deponed that prohibition had been overtaken by events as another Tender KCAA/64/2007/2008 had been commenced in which there were Judicial Review proceedings pending in Nairobi HCCC No. 115 of 2008, in which the ex-parte applicant herein is also the ex-parte applicant.

The 2<sup>nd</sup> respondent also filed written skeleton submissions. It is averred in the said written submissions that 2<sup>nd</sup> respondent relied on the replying affidavit sworn on 6<sup>th</sup> May, 2008 by Jane Muthoni Kinuthia.

On the request for orders of certiorari, it was averred that the orders sought should not be granted as the 1<sup>st</sup> respondent could not legally act outside its jurisdiction. It was averred that the 1<sup>st</sup> respondent could not determine the matter on its merits, as the said 1<sup>st</sup> respondent did not have jurisdiction to do so in terms of section 36 of the Act. This was because as the respondent found, the Tender was terminated in accordance with section 36(1) of the Act, and as there was no written contract entered under section 68 (3) of the Act, section (36)6 provided that a termination under the said section could not be reviewed by the Board or the court.

On prohibition, it was averred that since there was no stay granted by the court up to 21<sup>st</sup> April 2008, the 2<sup>nd</sup> respondent exercised its liberty to proceed with the tendering process under section 97(2) of the Act,

and did so by advertising a second Tender which was now also subject to **Miscellaneous Nairobi H.C. Application No. 115 of 2008**. Reliance was placed on the case of **Kenya National Examination Council -vs- Gathenji [1996] KLR 483** to support the argument that an order of prohibition could not issue to quash a decision which had already been made. Reliance was also placed on the care of **R -vs- Kenya Revenue Authority [2004] 2 KLR 530** for the argument that prohibition operates to prohibit future unlawful acts.

On mandamus, it was averred that the award of Tender was subject to contract, and since no formal contract with all the specific terms had been signed, mandamus could not issue as the court would not be able to supervise a contract whose terms had not been fully agreed upon. Reliance was placed on Halsbury's Laws of England, Volume 9 at paragraph 261. It was averred that the verifying affidavit to the application clearly deponed that VAT was not included and was to be paid by the 2<sup>nd</sup> respondent, and that according to Halsbury's Laws of England (above) an agreement which was subject of contract for sale of land cannot be accepted so as to conclude a binding contract. In any event, it was averred that in terms of the decision in **John Peter Mureithi -vs- the Attorney-General – Nairobi Misc. Application No. 158 of 2005** – it was held that where a statute which imposes a duty leaves discretion to the mode of performing of that duty, an order of mandamus cannot command the duty in question to be performed in a specific way.

On legitimate expectation, reliance was placed on the case of **R -vs- Kenya Revenue Authority ex-parte Aberdare Freight Services [2004] 2 KLR 350 at page 546**. Reliance was also placed on the case of **Council of Civil Service Union -vs- Minister for Civil Service (1995) AC 374** to support the contention that in our present case there was no legitimate expectation as the Tender was subject to contract, and that the ex-parte applicant did not comply with section 36(3) of the Act, in that they did not ask for the reasons why the Tender was cancelled before they rushed to the Appeals Board (1<sup>st</sup> respondent).

It was emphasized in the written submission that funding for the 2<sup>nd</sup> respondent came from the Government. Therefore the 2<sup>nd</sup> respondent could not possibly enter into contract with the ex-parte applicant when there were no funds to cover the kshs.2.56 billion Tender.

The interested party **THALES AIR SYSTMES** also filed written submissions. The written submissions were to the effect that the interested party relied on its filed grounds of opposition dated 20<sup>th</sup> December 2007 to the application. It was contended that the cancellation of tender was legal and proper in terms of section 36(1) of the Act, in that it is provided that the procuring entity may at any time terminate procurement proceedings without entering into a contract. This provision, it was submitted, varied the apparent mandatory provisions under section 68(1) of the Act. It was also contended that the interested party did not contest the termination though it won lots 3, 5 and 7 of the Tender, in view of the fact that the Act provided under section 36(6) that such a termination shall not be reviewed by the Review Board or a court. It was emphasized that this court has no jurisdiction to intervene and investigate the termination Tender, and that the 1<sup>st</sup> respondent was correct in upholding the preliminary objection to the effect that it did not have jurisdiction to hear and consider on merits the application contesting the termination of Tender. It was contended that no contract was created between the applicant and the 2<sup>nd</sup> respondent. Therefore the 1<sup>st</sup> respondent (the Public Procurement Administrative and Review Board) didn't have jurisdiction to review the termination of Tender.

It was also contended in the written submissions of the interested party that the Government (who are not a party to the proceedings) should be given special treatment by this court because there was no allegation of corruption or abuse of office. The argument put across by the interested party was that the interest of the public was represented by the Government and the same (public interest) takes priority. It was also contended that the application had been overtaken by events as fresh Tender proceedings had already been commenced by the 2<sup>nd</sup> respondent and the ex-parte applicant had in fact participated in the said fresh Tender proceedings and had even instituted fresh court proceedings in **Misc. Civil Application No. 115 of 2008**. In addition, it was contended, there was no prejudice, loss or damage claimed by the applicant.

Lists of authorities relied upon were also filed by parties who filed written submissions.

At the hearing of the application before me, Mr. Mohamed Nyaoga and Mr. Muthomi appeared for the ex-parte applicant. Mr. Gikera appeared for the 1<sup>st</sup> respondent. Mr. Ogunde appeared for the 2<sup>nd</sup> respondent, while Mr. Ngwele appeared for the interested party.

Mr. Muthomi for the ex-parte applicant made submissions and Mr. Nyaoga also made submissions.

Mr. Muthomi started his submissions by giving a brief history of the matter. He submitted that the subject Tender NO. KCAA/16/2006/2007 was an advertised open international Tender advertised by the 2<sup>nd</sup> respondent and the ex-parte applicant and others submitted their bids. The ex-parte applicant was later informed in writing by the 2<sup>nd</sup> respondent that they had fulfilled the technical requirements. After the financial evaluation, the ex-parte applicants were again informed in writing that they had won the Tender awards for lots 1, 2, 4, 6, 8 and 9. The ex-parte applicants were however not sent the contract document by the 2<sup>nd</sup> respondent with this letter as required by clause 2.28.1 of the Tender document. The ex-parte applicant accepted the award in writing and sent reminder to the 2<sup>nd</sup> respondent to forward the contract document for execution within 30 days of notification of award as required. However, no contract document was sent until the 30 days lapsed on 14/10/2007. However, on 16/10/2007, after the lapse of the legal 30 days, the 2<sup>nd</sup> respondent faxed a letter to the applicant dated 8/10/2007 purporting to terminate the Tender award citing generally the provisions of Procurement Act 2005. No reasons were however given for the said termination of the Tender award.

Consequent upon receipt of that letter, the ex-parte applicant was constrained to file proceedings in the Review Board, in which, the 2<sup>nd</sup> respondent did not offer any substantive response but instead filed a preliminary objection contending that the termination of Tender was not subject to challenge by the Review Board or court of law, relying on section 36 and 93(2) (b) of the Act.

Counsel contended that the invocation of section 36 of the Act was an afterthought and that in any event, ouster clauses must be read strictly and narrowly, Counsel contended that in terms of section 93(2) (b) of the Act, the only termination that was not subject to review was where the procuring entity had rejected all tenders. Counsel contended that the case of **ANIMISIC** (*supra*) was relevant with regard to ouster clauses. However, the Review Board (the 1<sup>st</sup> respondent) in disregard of the law and arguments put before it, upheld the preliminary objection of the 2<sup>nd</sup> respondent. In these proceedings as well, the 2<sup>nd</sup> respondent raised a preliminary objection which was dismissed by Nyamu J.

Mr. Nyaoga, also appearing for the ex-parte applicant addressed me on the legal aspects. Counsel submitted that looking at section 93(2) (B) of the Act, it was clear that the decision of the procuring entity not subject to review, was where tenders or proposals or quotations are rejected. In the present case, that stage of rejection had been passed as the Tender already had been awarded. Counsel contended that cancellation of Tender which had already been awarded was subject to review. Counsel contended that the Review Board (1<sup>st</sup> respondent) clearly misapprehended the law in deciding that it did not have jurisdiction to review the cancellation of the awarded Tender. Therefore, the 1<sup>st</sup> respondent's decision was null and void, as the 1<sup>st</sup> respondent failed to apply the intention of parliament under section 2 of the Act, and in the process made a fundamental error of law. The termination of the awarded tender, without reasons, also meant that there was no fairness, transparency and integrity. In the termination letter the 2<sup>nd</sup> applicant indicates that they wanted to restart the process, which itself showed bad faith, counsel emphasized and asked the court to consider and apply the decision in the case of **Civil service Union** (*supra*).

Counsel also submitted that the exercise of powers by public authorities were limited and must be exercised fairly and rationally. Counsel argued that the decision of the 1<sup>st</sup> respondent was irrational and emphasized what was stated in the case of **Associated Picture Houses Ltd** (*supra*) on rationality of decisions. It was also argued that the decision of the 1<sup>st</sup> respondent contravened the principles of natural justice, and that it exhibited bias and bad faith as it ignored the very weighty issues and arguments which were raised before the 1<sup>st</sup> respondent.

Lastly, counsel submitted that the decision of the 1<sup>st</sup> respondent breached the principle of legitimate expectation as the applicant won the Tender competitively and fairly after incurring enormous costs. The decision of the 1<sup>st</sup> respondent was also unfair as the prices quoted had now been revealed to competitors, and therefore there will be no fair competition any more, as such.

Mr. Muthomi then submitted on the replying affidavit. He submitted that the averment in the affidavit of the 2<sup>nd</sup> respondent that award of Tender was subject to contract was not tenable as, in the present case, the signing of a contract was merely a formality as the terms of contract actually arise from the Tender documents. Counsel also submitted that the letter of termination of Tender did not cite section 36 of the Act. In addition, the lack of funds could not be a defence as it would be defeated by the doctrine of Estoppel. In any event, counsel argued, the issue of lack of funds was neither raised in the termination letter, nor in the processing before the 1<sup>st</sup> respondent, and was being raised for the first time in the High Court.

Mr. Gikeara for the 1<sup>st</sup> respondent submitted that these being Judicial Review proceedings, the important question was whether the Review Board (1<sup>st</sup> respondent) followed the procedure under the Act. Counsel submitted that when the procurement proceedings were terminated by the 2<sup>nd</sup> respondent no written contract had been signed between the ex-parte applicant and the 2<sup>nd</sup> respondent. The termination of tender, counsel contended, was under section 36 of the Act, though the said section was not mentioned in the termination letter. Counsel argued that under section 36(1) of the Act, a procuring entity could terminate the proceedings at any time without giving reasons. Counsel also argued that, under section 36(6) of the Act, such termination could not be reviewed by the Review Board (1<sup>st</sup> respondent) or by the court.

Therefore the secession by the Review Board (1<sup>st</sup> respondent) that it did not have jurisdiction to entertain the complaint of the ex-parte applicant was correct. That decision could not be challenged in this court. Counsel contended that the 1<sup>st</sup> respondent correctly read and correctly interpreted the law. Counsel sought to rely on the case of **Miscellaneous Application No. 50 of 2004 Republic –vs- Public procurement complaints and Appeals Board [2005] KLR 628 and Miscellaneous Application No. 1160 of 2004 – VOHRA & CO. LTD. –VS- PUBLIC PROCUREMENT Complaints Review & Appeals Board**. Counsel urged me to find that the 1<sup>st</sup> respondent acted within the law and to dismiss this Notice of Motion.

Mr. Gichuhi for the 2<sup>nd</sup> respondent on the other hand, relied on the filed written submissions. Counsel submitted that at the time when leave to file Judicial Review proceedings was granted by Visram, j., the judge declined to grant stay orders because the learned Judge considered the Civil Aviation Industry concerns. Counsel submitted that the principal reason for the termination tender by the 2<sup>nd</sup> respondent was that contract between the parties had not been executed. Because contract had not been executed at termination, the 1<sup>st</sup> respondent did not have jurisdiction to entertain the matter. Counsel submitted that this position was clearly stated in the two judge decision in Misc. Application 50 of 2004 (supra) in which the Judge brought out the spirit of the Act. Counsel also submitted that the decision in Misc. application No. 1150 of 2004 (supra) was relevant to the present case. That decision also applied the principles in the case of *Animistic* in which the court decided that once issues of jurisdiction were raised, the court must put down its tools and determine the same.

Counsel submitted that prohibition was not available in the present case, as such an order could not be issued to quash a decision which had already been made. In any case, initially, no stay orders were granted and the 2<sup>nd</sup> respondent had already gone ahead to retender. Counsel sought to rely on the case of **John Peter Mureithi –vs- Attorney General 2006 eKLR** and the case of **Republic –vs- Kenya Revenue Authority ex-parte Abedare Freight Services Ltd [1004]2 KLR 546**.

On mandamus, counsel argued that there was no contract executed, therefore mandamus could not issue. Counsel also argued that the terms of the contract, including terms on payment of VAT, had not been agreed. Counsel relied on Halsbury's laws of England to support his contention that where an agreement

was reached subject to contract, no contract could be said to have been concluded. In any case, counsel contended, it would be impossible for the court to supervise such an anticipated contract. On this counsel sought to rely on the case of John Peter Mureithi (supra).

Counsel also submitted that there was no legitimate expectation as the award of Tender was contingent upon the signing of contract. Counsel submitted that, through the interested party was affected by the cancellation of Tender, they did not take the 2<sup>nd</sup> respondent to court or to the 1<sup>st</sup> respondent because of the provisions of section 36 of the Act. Counsel also submitted that, in view of the provisions of section 36 of the Act, this court did not have jurisdiction to entertain the present application. Therefore the application should be dismissed.

Counsel agreed with the submissions of the counsel for the ex parte applicant that ouster clauses should be interpreted narrowly. He contended that, only with regard to the issue of jurisdiction, could the court intervene where there was an ouster clause. On this he sought to rely on the opinion of Lord Reid in this case of Asminic (supra). Counsel submitted that a fundamental error of law on the part of the 1<sup>st</sup> respondent was not a jurisdiction issue. Counsel emphasized that bad faith, bias, unreasonableness, irrationality and the fact of a decision being contrary to public policy, were not jurisdictional issues. Therefore counsel contended, the application did not have merits and should be dismissed.

In response, Mr. Muthomi submitted that none of the respondents or the interested party made any response to prayer (a) with regard to section 93(2) (b) of the Act, also counsel argued, none of the other parties addressed the issue whether the 1<sup>st</sup> respondent took into account the interpretation of outer clauses. Counsel also contended that there was no response as to whether principles of natural justice were breached and whether section 36 of the Act was unconstitutional as well as the issue of the intention of parliament with reference to section 2 of the Act.

On the argument that the ex-parte applicant should have sought reasons for cancellation, counsel submitted that section 36 of the Act did make it mandatory for the applicant to request for reasons for cancellation of Tender. Counsel also submitted that judicial Review proceedings were not merely concerned with jurisdiction, but also illegality, unreasonableness and procedural impropriety.

On Hon. Justice Visram's ruling counsel submitted that after that ruling Nyamu J granted stay orders. On signing of the contract, counsel contended that these proceedings were in respect of statutory obligations imposed by section 68(1) of the Act, not on whether or not there was a signed contract.

Counsel submitted that there were existing stay orders, therefore orders of prohibition were relevant.

Counsel also submitted that a contract came into effect and if there were to be any negotiations, they would be of a minor nature as the contract came into effect under the provisions of section 68(1) of the Act.

On the issue of budgetary provision, counsel submitted that Government made its budget of June of every year. Therefore budgetary provisions should have been known at the time of calling for the bids. In any case, the doctrine of estoppel would apply.

I have considered the application, documents filed and submissions both written and verbal as well as authorities cited, I am of the view that several issues arise, which I will deal with hereafter.

## **1. JURISDICTION OF THE 1<sup>ST</sup> RESPONDENT AND THIS COURT**

The first issue which I have to deal with is the issue of jurisdiction. Extensive submissions have been made before me on the issue of jurisdiction. The thrust is that both the 1<sup>st</sup> respondent and this court do not have jurisdiction to investigate and make a substantive decision on the termination of the Tender by the 2<sup>nd</sup> respondent.

I agree with the submissions of counsel for the respondents and counsel for the interested party that once the issue of jurisdiction is raised in proceedings, that issue has to be determined first before going to other issues.

The argument on lack of jurisdiction to investigate the termination of Tender by the 2<sup>nd</sup> respondent is predicated on section 36 of the Public Procurement and Disposal Act 2005 (the Act). The relevant parts of the said section provides –

***“36(1) A procuring entity may, at any time, terminate procurement proceedings without entering into a contract***

***(3) A termination under this section shall not be reviewed by the Review Board or the court.”***

It is a well established principle that statutory provisions purporting to oust jurisdiction of the court should be construed strictly and narrowly. This position was clearly expounded in the famous English case of **ANIMISTIC –VS- FOREIGN COMPENSATION COMMISSION [1969]1 ALL ER 2008** where Lord Reid stated –

***“ it is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly, meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court”.***

In our Kenyan situation the jurisdiction of this court, the High Court, in Judicial Review matters arises from the constitution and the Law Reform Act (cap26). The relevant constitutional provisions are sections 65(2) and section 123(8). On the other hand, section 8 and 9 of the Law Reform Act (cap 26) confers judicial Review jurisdiction to the High Court. The jurisdiction of this court in judicial review matters is not conferred by the Public Procurement and Disposal Act.

From the decisions of court I have considered, courts can actually construe in a particular situation that their jurisdiction has been ousted by statute. However various considerations have to be taken into account in view of the paramount consideration that the courts have an obligation to dispense justice and not to sit down and let injuries occur due to clauses that tend to ouster the court’s jurisdiction.

This brings to the fore the interpretation and meaning of the word “**proceedings**”. The word proceedings which was used in section 36(1) of the Act has not been defined in the Act. There is also no interpretation of the word under the interpretation and General provisions Act (cap. 2).

In the Concise Oxford English Dictionary 11<sup>th</sup> Edition Revised the word proceedings is defined thus –

***“1. An event or a series of activities with a set proceeding.***

***2. Law action taken in a court to settle a dispute.***

***3. A report of a set of meetings or a conference.”***

The 1<sup>st</sup> respondent in deciding that it did not have jurisdiction to determine the complaint of the exparte applicant on the termination of Tender highlighted some relevant sections of the Act. It stated that the Tender process included steps as follows –

1. ***invitation to tender***

**2. Tender opening**

**3. Evaluation**

**4. presentation of evaluation to the Tender Committee**

**5. Rejection of all Tenders pursuant to (section) 93 (2) (b)**

**6. Notification and the 14 days windows for appeal to be lodged by dissatisfied bidders pursuant to section 67 of the Act. This in essence meant that Tender proceedings are alive upto signing of contract.**

**7. Where the successful bidder fails to sign the contract pursuant to section 69 of the act, the Tender Committee is to award the Tender to the second lowest evaluated bidder.**

**8. (a) Where within 14 days of notifications of award an appeal is lodged by an unsuccessful bidder the Board can substitute the procuring Entity's award with its own pursuant to section 98 (c). Thereafter the Tender Committee would meet and award as per the orders of the Board. This means that the Tender proceedings would (be) alive upto the signing of the contract. In a nutshell proceedings would be alive to 14 days after notification and 30 days within which an appeal should be heard and determined.**

**(b) Evaluation be done pursuant to section 98(b). The proceedings would again remain alive up to the signing of the contract. In any case after evaluation ordered by the Board another appeal may be lodged with the Board thereby lengthening the life of the proceedings of the Tender. This was the case that arose after the decision this Board (Kitek –vs- Ministry of Youth Affairs) – Application No. 27 of 2007 of 1<sup>st</sup> May 2007.”**

I am in agreement with most of the above observations of the 1<sup>st</sup> respondent. Looking at the provisions of the Act, each step has an operating person or persons. The interpretation of the 1<sup>st</sup> respondent was a broad and liberal one. Contrary to the principles laid down in the Anisminic case. It is apparent to me that the more natural interpretation is that the jurisdiction of the 1<sup>st</sup> respondent and this court is ousted only when termination unilaterally by a procuring entity is before Tender award and communication to bidders. The further reactivation of the proceedings, according to the Act, has to arise due to other events and parties, other than the procuring entity.

Though the word proceedings has not been defined in the Act, in my view, the procurement proceedings before a procuring entity and after the award of tenders has been communicated to the successful tenderers. This is what appears to be emphasized under the provisions of section 68(1) of the Act which provides –

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

In our present case the purported termination was done after award of Tenders was communicated as confirmed by both the applicants and the interested party, and even the 2<sup>nd</sup> respondent. This cannot be a situation covered by the ouster clause under section 36(1) of the Act. It is my finding and decision that the ouster clause under section 36(1) of the Act does not apply to the present case as the tender was already awarded. There is no subsequent event from parties other than the procuring entity that actuated the proceedings. I therefore hold that both the 1<sup>st</sup> respondent and this court has jurisdiction to consider and review the decision of the 2<sup>nd</sup> respondent, the procuring entity, to terminate the awarded Tender.

## **2. WHETHER SECTION 36(6) OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT IS UNCONSTITUTIONAL**

Section 36(6) of the Act provides as follows-

***\*36 (6) Termination under this section shall not be reviewed by the Review Board or a court.\****

Counsel for the applicant has argued that the said section is unconstitutional. I presume this is because of the provisions of section 60 and 65 of the Constitution of Kenya which confer jurisdiction on the High court. The relevant part of section 60 of the Constitution of Kenya provides as follows –

***“60 (1) There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution or any other law”.***

The relevant part of section 65 of the constitution, on the other hand, provides as follows:-

***“65 (2) the High Court shall have jurisdiction to supervise any civil or criminal proceeding before a subordinate court or court martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts”.***

It has been held severally by the Kenya courts that judicial Review proceedings are neither civil nor criminal proceedings. Judicial review proceedings are some sort of special proceedings conferred by the Law Reform Act (cap 26) section 8 and 9. under section 8 of the Law Reform Act the jurisdiction to grant orders of mandamus, prohibition and certiorari is conferred upon the High Court. However, under the Act, the High Court is prohibited from issuing prerogative writs of mandamus, prohibition and certiorari in its exercise of civil or criminal proceedings.

Having considered the arguments and the law, I find nothing unconstitutional about section 36(6) of the Act. There is no contradiction between the constitution and section 36(^) of the Act. That section does not remove the jurisdiction of the High Court in matters that have been determined by the procuring entity to the detriment of any tenders. It only seeks to limit the jurisdiction of the court with regard to certain justified actions by a procuring entity. I find no basis for the argument that the section of the Act is unconstitutional. I dismiss that argument.

## **4. WHETHER THE APPLICANT SHOULD HAVE SOUGHT FOR REASONS OF TERMINATION BEFORE GOING TO THE REVIEW BOARD (1<sup>ST</sup> RESPONDENT)**

Counsel for the 2<sup>nd</sup> respondent has argued that the ex-parte applicant should have asked for reasons for the termination of Tender before rushing to the 1<sup>st</sup> respondent with their application. The rationale of this

argument seems to be that the applicant went to the 1<sup>st</sup> respondent prematurely. Therefore, the 1<sup>st</sup> respondent was correct in dismissing the application of the ex-parte applicant on a preliminary objection.

I do not think that argument can be sustained. First of all, that is not the reason why the 1<sup>st</sup> respondent dismissed the applicant's complaint or appeal. Secondly, and more importantly, section 36 (3) of the Act which appears to be relied upon by the 2<sup>nd</sup> respondent's counsel, does not impose a duty on the applicant to have asked for the reasons for termination of Tender before going to the 1<sup>st</sup> respondent with their complaint. Infact subsection (7) of section 36 imposes a mandatory duty to the procuring entity to give the reasons for termination to the public procurement Oversight Authority not be ex-parte applicant.

#### **4. POWER TO TERMINATE THE TENDER GENERALLY AND SPECIFICALLY AFTER COMMUNICATION OF AWARD**

Several arguments have been made before me on powers of one party to terminate an agreement before all the terms are agreed. Common law principles have been highlighted. There were also arguments on unavailability of funds as justification for the termination of tender. The ex-parte applicant has not asked form this court orders of certiorari to quash the termination of Tender by the 2<sup>nd</sup> respondent. In my view, It will be premature to deal with these issues in view of the orders sought and the decisions which will make hereafter. These issues have to be canvassed in the proper forum which will determine the merits of the complaint of the applicant.

#### **5. WHETHER THIS COURT CAN GRANT THE ORDERS SOUGHT**

At the risk of repetition, the orders sought in the Notice of Motion are as follows –

- 1. An order of certiorari be and is hereby issued removing to the High Court for purposes of being quashed the record, proceedings, decision and ruling of the 1<sup>st</sup> Respondent in Public Procurement Administrative Review Board Application No. 59 of 2007.***
- 2. An order of prohibition be an is hereby issued against the 2<sup>nd</sup> Respondent precluding it, its officers servants and or agents from awarding Tender No. KCAA/16/2006/2007: Modernization and Upgrading of Air Navigation Equipment to any person or entity other than the applicant herein.***
- 3. An order of prohibition be and is hereby issued against the 2<sup>nd</sup> respondent precluding it, its officers servants and agents from revoking, canceling and or otherwise terminating Tender No. KCAA/16/2006/2007: Modernization and Upgrading of Ai Navigation Equipment.***
- 4. An order of mandamus be and is hereby issued against the 2<sup>nd</sup> respondent compelling it to ward Tender No. KCAA/16/2006/2007: Modernization and upgrading of Air Navigation Equipment to the applicant herein in accordance with the provisions of section 68(1) of the public procurement and Disposal Act, 2005 and Terms of the Tender document.***
- 5. Such other or further orders writs and or directions as this Honourable Courts may deem just and expedient.***

## **6. *The costs of and incidental to this application be provided for.***

The counsel who appeared before me addressed me on the above sought orders. But not in great depth. They addressed me more on the jurisdiction, powers to terminate a tender, as well as constitutionality of the section 36(6) of the Act.

The first prayer is for certiorari to quash the proceedings and decisions of the 1<sup>st</sup> respondent in Public Procurement Administrative Review Board Application No. 59 of 2007. I have found that though the 1<sup>st</sup> respondent decided that it had no jurisdiction, in fact it had jurisdiction to entertain and determine the complaint of the ex-parte applicant on its merits. Therefore, the decision of the 1<sup>st</sup> respondent that did not have jurisdiction was a fundamental error of law. It has to be quashed. I will grant this prayer.

The second prayer is that prohibition be issued against the 2<sup>nd</sup> respondent, its offices, servants and agents from awarding Tender KCAA/16/2006/2007 to any person other than the applicant. The tender had already been awarded to the applicant with respect to certain lots in that Tender.

This order sought as well as the next two orders sought have given me a lot of anxiety.

For this particular order I am requested to prohibit award of tender by the 2<sup>nd</sup> respondent to other parties. The 2<sup>nd</sup> respondent has however, terminated or purported to terminate the tender which was awarded. The applicant has curiously not asked for orders quashing the purported termination or cancellation of tender, but now seeks for prohibition orders. I find it difficult and impossible to prohibit something which has already been done, and which has no way to prohibit award of the subject tender to third party would be after quashing the purported termination. The application, not having specifically asked me to quash the termination of the awarded Tender, I cannot so quash the same, in my view, it cannot have been an oversight that the applicant did not ask for the quashing of the decision of the 2<sup>nd</sup> respondent terminating the awarded Tender. However, in my view, prohibition can be granted for a limited period if the matter is going to be considered by the 1<sup>st</sup> respondent. I will grant this prayer to a limited extent because having found that the 1<sup>st</sup> respondent erred in holding that it did not have jurisdiction, I will order that this matter be heard and determined by the 1<sup>st</sup> respondent on its merits.

The third prayer specifically cannot be granted by this court. It seeks for orders of prohibition against the 2<sup>nd</sup> respondent, its servants and agents from revoking, canceling and or otherwise terminating the subject tender. This prayer cannot be granted because the termination of tender has not been quashed nor has the applicant asked for the same to be quashed.

The fourth prayer seeking for mandamus to compel the 2<sup>nd</sup> respondent to award the subject tender to the applicant in accordance with section 68(1) of the public procurement Act 2005 and the Tender Document cannot also be granted. This is because the purported termination of tender has not been quashed by the court nor has the applicant sought for such quashing of the termination of Tender. Even if the cancellation of Tender was quashed, this prayer would still not be of value because, in the event the award of tender would still stand as already awarded.

The prayer for further orders does not add anything to the application, as parties are required to be specific on the prayers sought from court. In addition, I have not been addressed by any of the parties counsel on any additional or alternative remedies that I could grant in the matter.

As for costs, I will award costs the same to the applicant consequently, I order as follows-

- 1. An order of certiorari be and is hereby issued removing into the High Court for purposes of***

*being quashed the record, proceedings, decisions and Ruling of the 1<sup>st</sup> Respondent in Public Procurement Administrative Review Board Application No. 59 of 1007, and the same is hereby quashed.*

- 2. An order of prohibition be and is hereby issued precluding the 2<sup>nd</sup> respondent, its officers, servants and or agents from awarding Tender no. KCAA/16/2006/2007: Modernization and Upgrading of Air Navigation Equipment to any person or entity other than the Applicant herein, for the period within which the 1<sup>st</sup> Respondent will determine the application of the applicant (already filed by the ex parte applicant with the 1<sup>st</sup> respondent) substantively in accordance with the law. The 1<sup>st</sup> respondent will hear and determine the complaint of the applicants on its merits.*
  
- 3. The 2<sup>nd</sup> respondents and the interested party will pay the costs of the applicant, on pro rate basis.*

**Dated and delivered at Nairobi this 28<sup>th</sup> day of August, 2008.**

**George Dulu**

**Judge**

**In the presence of –**

Mr. Muthomi for ex parte application.

Mr. Ngurele for interested party.