



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

Misc Civil Appli 540 of 2008

REPUBLICAPPLICANT

VERSUS

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....1ST
RESPONDENT**

**THE KENYA REVENUE AUTHORITY.....2ND
RESPONDENT**

JUDGEMENT

The Notice of Motion dated 5.9.08 filed by the applicant De la Rue Company and Security Print Ltd seeks the following Judicial Review orders;

1. An order of certiorari to move into the court and quash the decision of the Public Procurement Administration Review Board dated 22/8/2008 dismissing the request for review No.24/2008 of 29th July 2008 by the applicant and directing the Kenya Revenue Authority to proceed with the tender process in respect of the Tender NO. KRA/HQS/INT -002/2007-2008 (Re-Advertisement).
2. An order of certiorari to move into this court and quash the decision of the Kenya Revenue Authority as set out in the letter dated 15th July 2008 to award Tender No. KRA/HQS/INT-002/2007-2008(Re-Advertisement) to Madras Security Printed Ltd.
3. An order of certiorari to move into this court and quash the contract if any, signed pursuant to the decision of the Public Procurement Administration Review Board dated 25th July 2008 and the decision of the Kenya Revenue Authority communicated to the Applicant by a letter dated 15th July 2008.
4. An order of prohibition to prohibit the Kenya Revenue Authority from signing any contract in relation to the tender No. KRA/HQS/INT-002/2007-2008 (Re-advertisement) pursuant to the evaluation process without compliance with the provisions of Public Procurement and Disposal Act, the Public Procurement and Disposal Regulations and the tender documents issued by the Kenya Revenue Authority.
5. An order of Mandamus directed to the Kenya Review Authority to evaluate the Tender KRA/HQS/INT-002/2007-2008 (Re-advertisement) and award the tender in compliance with the provisions of the Public Procurement and Disposal Act, the Public Procurement and Disposal Regulations and the tender documents issued by the Kenya Revenue Authority.
6. In the alternative to the order 5 above, an order of Mandamus directed to the Public Procurement

Administrative Revenue Board to re-evaluate and consider request for Review No.24/2008 of 29th July 2008 and render an Award in compliance with the provisions of the Public Procurement and Disposal Act, the Public Procurement and Disposal Regulations and the tender documents issued by the Kenya Revenue Authority.

The applicant's case included, inter alia, that the evaluation of the tender appears to have taken substantially longer than the legally prescribed period considering the closing date for the tender was 26th March 2008 and the opening of the financial bids took place on 2nd May 2008 and therefore the procurement process breached the provisions of Regulations 46 of the Public Procurement and Disposal Regulations Section 66 (6) of the Public Procurement and Disposal Act and paragraph 2.24 of the Tender Documents issued by the Procuring entity.

The applicant contends that the Procuring Entity notified the Applicant of the non award of the tender to it by a letter dated 15th July 2008, pursuant to a telephone call received from the Procuring Entity at the Applicants office on 23rd July 2008 asking the applicant to have the letter collected. The said letter upon collection was noted to contain punch holes, indicating it had been filed away prior to the notification to the applicant. The applicant therefore claims that the notification of the Applicant 8 days after the presumed date of notification, as indicated in the letter, is contrary to section 67(2) of the Act and gives rise to the presumption the Procuring Entity by notifying the Applicant late, was seeking to have the decision insulated from the scrutiny of the Revenue Board.

The applicant further claims that the Procuring entity failed to make any information about the award of the tender available to the Applicant despite the information being requested as is the Applicants entitlement under section 45 (3) of the Public Procurement and Disposal Act and that the Procuring Entity by its action sought to render the award and the process by which it was arrived at opaque, secretive and immune from scrutiny.

The applicant finally claims that its tender was fully compliant with the tender requirements and therefore the notification dated 15th July 2005 by the Procuring entity is erroneous baseless and factually incorrect consequently the applicant asserts that it was denied the tender award in a manner contrary to the provisions of the Public Procurement and Disposal Act and that the denial has compromised the integrity and process of the tender process contrary to the specific objectives of the Act as stated in section 2 of the Act.

The grounds relied on by the Applicant are:-

1. The Authority failed to apply the preference applicable to the applicants bid, in contravention of section 38(b) of the Act, Regulation 28(2) (a) of the Regulations, and paragraph 2.25 of the tender documents issued by the Authority itself.
2. The Board failed to consider the submissions of the Applicant that it was entitled to a margin of preference under the Authority's own tender documents.
3. The Board erred in law by concluding that the Applicant was not entitled to a margin of preferences by basing its conclusions purely on the provisions of section 39(8) of the Public Procurement and Disposal Act, and failing to consider the provisions of sections 39(8) (b) of the Act which had been cited to it during the hearing of the request for review.
4. The Board erred in law by misinterpreting and misconstrued section 39(8) (a) to be a prerequisite to the application of the margin of preference under section 39(8) (b) of the Act especially in light of the provisions of paragraph 2.25 and the appendix to instructions to tenderers found in the authority's own tender documents.
5. The Board erred in law by holding that the breach by the Authority of the mandatory provisions of section 66 (6) and Regulation 46 of the Regulations could be excused on the basis that the breach caused

no prejudice to the bidders.

6. The evaluation of the tender in tender No. KRA/HQS/INT-002/2007-2008 (Re advertisement) was undertaken without paying heed to the provisions of the tender documents, the Act and the Regulations and as such in breach of section 66 of the act.

7. The applicant had a legitimate expectation that the Authority would apply the criteria for evaluation as advised in the tender documents and as required under the law. This is a basic tenet of the rule of the law and good governance. The expectation was breached by the authority and by the Board in failing to consider the Applicants entitlement to a margin of preference under the law of Kenya.

On the other hand the Respondent and the Interested Party contend:-

1. Regulation 28 of the Public Procurement and Disposal Act Regulations 2006, as read together with section 39 (8) of the act provide for exclusive preference to be accorded to citizens where the contract value is less than 50 million (KSHS) and the contract value was estimated above this figure.

2. The applicant was not entitled to margin of preference because it operated within an Export Processing Zone (EPZ) and that the goods from the Export Processing Zone are regarded in so far as import duty and taxes are concerned as being outside the customs territory and that under section 24 (b) of the Export Processing Zone Act Cap 517 (LOK) provides that goods bought out of an EPZ are deemed to be imported.

3. In its financial bid the Applicant had indicated so as not to be disadvantaged an option would be to supply through another De La Rue Company based outside Kenya.

4. That technical evaluation was properly done and both the successful bidder and the Applicant emerged as the two evaluated bidders.

5. That Section 66(4) of the Act provides that the successful tender shall be the tender with the lowest evaluated price and also clause 2.27.4 of the tender document issued by the Respondent had made it clear that the KRA will award the contract to the successful tenderer(s) whose tender had been determined to be the lowest evaluated tender provided further that the tender is decided to be qualified to perform the contract satisfactorily. In other words the successful tender would give the best value for money.

The financial evaluation was therefore done using the scenario of both bidders importing goods to the country and also the criteria set out in clause 2.24 of the tender documents and upon the completion of the evaluation the 2nd Respondent awarded the tender for printing supply and delivery of self adhesive excise stamps for wines and spirits to Madras Security Printers Ltd at their bid of Ksh.153,488,804.98 (US2,431,566.00) against the Applicant Company bid price of Ksh.161,082,247.16 (GBP) 1,275,000.18).

In respect of scenario two with the applicant manufacturing the goods locally from an EPZ Zone at which point a 2.5% surcharge is levied the applicant company bid was Ksh.182,999,624.94 against Madras Security Printers Ltd of Ksh.196,117,634.62.

The Applicant had indicated in its tender that the origin of the goods would be UK/Kenya.

6. The Applicant was not entitled to any margin of preference.

7. That although the respondent conceded that it violated the provision of S. 66(6) of the Act in awarding the tender outside the stipulated period of 30 days, it contends that the applicant suffered no prejudice. The respondent relied on the authors of **GENERAL PRINCIPLES OF CONSTITUTIONAL AND ADMINISTRATION LAW (4th Edition at page 387)** by John Alder where the principle is stated as follows;

“Courts will only set a decision aside for procedural irregularity only if the harm or injustice caused to

applicant by the procedural flaw outweighs the inconvenience to the Government . . .”

8. The Respondent had not made any promise or representation to the applicant that could result in legitimate expectation as regards the margin of preference and further the award should not be interfered with by the court because a Judicial Review court is only concerned with the decision making process and not with the decision itself.

9. The interested party adopted the above ground and further contended that certiorari was not sought against the 2nd Respondent when the matter was at the Board level and therefore fresh evidence is being unlawfully allowed.

On the point of preference the Interest Party contended that the Applicant did not provide evidence of eligibility and that citizenship was an important criteria. Finally that it had not been demonstrated that the decision of the respondent was Wednesbury unreasonable because any other body would have reached the same decision as the Respondent and further there was no failure on the part of the respondent in exercising its public or statutory duty so as to attract the orders of prohibitory and mandamus. They could only issue if unreasonableness, bad faith, malice or illegality were established against the respondents.

FINDINGS

After carefully considering the submissions, the court makes the following findings:-

1. Failure to consider relevant factors.

At page 15 of the Board’s holdings it is clear to the court that on the issue of preference the Board relied wholly on Regulation 28(1) which states:-

“For the purposes of section 39(8) of the Act the threshold below which exclusive preference shall be given to citizens of Kenya, shall be the sum of (a) fifty million shillings for procurements in respect of goods or services.

b)”

It is clear to the court that the Board did not examine the effect of S.39(8) (b) (i) which reads;

“(b) A prescribed margin of preference may be given in evaluation of bids to candidates offering goods manufactured, mined extracted and grown in Kenya”

Regulation 28(2) states;

“The margin of preference for the purposes of Section 39(8) (b) (i) of the Act, shall be fifteen percent of the evaluated price of tender”.

The Board concluded that because the tender was above the prescribed threshold reserved for citizens it held that the Procuring Entity was entitled to ignore the issue of the second margin of preference. In other words the Board failed to distinguish the two categories of statutory margins of preferences namely the exclusive preference upon which the board proceeded to make its holdings and a margin of preference in specified circumstances set out in Section 39(8) (b) (i) and Regulation 28(2) (a) which the Board did not address at all. I find that the second category of preference was a relevant consideration which the Board ignored and instead relied wholly on the Regulation 28(1) (a) cited above. The margin of preference consideration was a statutory one and although in the Act the provision is couched in discretionary terms due to the use of the word “may”, in the Regulation 28(2) (a) the preference is couched in mandatory terms and therefore forms part of the substantive law on procurement. The Procuring entity was clearly in violation of Regulation 28(2) (a) and so is the Board. This category of preference is also incorporated in the tender documents in mandatory terms.

I find and hold that the Board did fail to address itself correctly on the applicable law. I further find that the Procuring entity is in breach of a legitimate expectation, since the promise of preference was contained in the tender documents. An express promise cannot be thwarted.

When the Regulation 28(2) is read together with Section 39 (8)(b) (i) it is clear that this category of margin of preference is applied to goods manufactured in Kenya whereas the Board decision was on the basis that any preference can only be to a Kenyan citizen and only in cases below the minimum threshold of Kshs.50 million. This category of preference had nothing to do with citizenship.

I find that the Procuring entity and the Board committed an error of law apparent on the face of both the decision and the ruling and that the error constituted a jurisdictional error. The Procuring entity's own tender documents paragraph 2.25.1 states;

“Preference where allowed in the evaluation of tenders shall not exceed 15%”.

The Applicant was entitled to a preference per the existing law and consequently the Board did commit a fundamental error of law in not addressing this at all.

I further find that the error went to jurisdiction as explained in the **ANISMINIC LTD V FOREIGN COMPENSATION COMMISSION [1969] AC 147**. In this regard I fully endorse the authorities cited by **Mr. Njogu** counsel for the applicant on the point:-

(a) **R V NORTHUMBERLAND COMPENSATIONS APPEAL TRIBUNAL ex parte SHAIN [1952] 1 ALL ER 122** in which the court held that an inferior tribunal had made an error in computing the compensation payable to the applicant. The tribunal computation was held by the court not have been in accordance with the statutory regulations and the decision was quashed. I find and hold that the misinterpretation and misdirection in this case are on all fours with the cited case.

(b) **HALSBURYS LAWS OF ENGLAND VOL 1(1)** states;

“In most cases any error of law will take an inferior tribunal outside its jurisdiction so that its decision may be quashed”.

Perhaps it is significant to observe at this stage that the origin of the goods to be supplied by the Applicant was clearly set out in the documents provided by the Applicant in its technical tender. Information that the Applicant was a local company proposing to supply the goods from its factory in Kenya. All the other details provided by the Applicant were only consistent with the goods being manufactured in Kenya namely;

- (i) The incorporation documents of a Kenya company.
- (ii) ISO certificates for a Kenyan factory.
- (iii) A lease for premises in Ruaraka.
- (iv) Utility bills for the factory in Ruaraka.

In addition Exhibit GM 19 of the 2nd Respondent's replying affidavit makes it clear that the Applicant's financial bid was ex-works. The Ruaraka factory and the Applicant did not quote any bid or prices from any other location. Note 2 of the same exhibit makes it clear that the Applicant's bid was based on the goods being manufactured in Kenya and that it wished to maximize use of its local facilities and create employment for local staff. The evaluation and comparison should have used the procedure and criteria set out in the tender documents as per Section 66(2) of the Procurement and Disposal Act 2005.

The court finds it difficult to accept the Respondent's contention that there was no evidence supplied concerning eligibility for a margin of preference in the face of the documentary evidence availed to them

as per the tender documents and as outlined above.

For this reason I find and hold that both the Procuring entity and the Board had overlooked important factual matters because the establishment of the origin of goods and where manufactured were important precedent facts to the application of the correct margin of preference.

I endorse the applicant's contention that for the Procuring entity to unilaterally and without inquiring decide that the Kenyan Applicant company was producing goods in the UK because the reference of UK/Kenya in one sentence even in the face of the above details on the origin of goods and then proceed to evaluate the tender on the basis of this unilateral and wholly mistaken assumption is an egregious breach of good governance, rule of law and contravenes the provisions of the tender documents, the Procurement Act and the Regulations.

In a situation such as this case where the decision makers have gotten materials facts and law wrong, I find and hold that the court is entitled to review both facts and law. This option is set out in **Michael Fordham JUDICIAL REVIEW HANDBOOK** paragraph 38-39;

“In relation to factual matters, intervention by the reviewing court is warranted where there is:

- (1) an incorrect finding as to precedent fact; or**
- (2) an irrational conclusion of fact”.**

Generally speaking factual questions are seen alongside questions of discretion) as matters within the public body's field of judgement, to be subjected only to soft review. This stance is fortified by the realization that public bodies are perfectly well-equipped to deal with questions fact; and that the legislature has entrusted such matters to them. As always, however, all is not deference. In the first place, the infirmities of the fact/law distinction no doubt provide ready scope for a reviewing court anxious to intervene. There are even hits of factual error being characterized as ‘ultra vires’. More respectably perhaps, the critical balance is found in a traditional two-tiered review whereby a factual matter may be either be: (a) a hard-edged question which the body is not entitled to get wrong (precedent fact); or (b) a soft question which the body is not entitled to get badly wrong (irrationality)”.

Having gotten facts which it was not entitled to get wrong (precedent fact) and also getting facts concerning origin of goods badly wrong this did constitute (irrationality) hence this court is entitled to intervene.

I now wish to turn to the Export Processing Zone issue. The thrust of the Respondent's submissions are that the Applicant's goods were considered by the Procuring entity as coming from the U. K. despite the Procuring entity's own financial evaluation report which showed that the authority was aware that the goods were coming from the Applicant's factory at Ruaraka Kenya and the reason why the Procuring entity and the Board regarded the goods as not coming from Kenya was because the factory is located in an EPZ area. See Exhibit GM 11 at pages 63 and 65 of the second Respondent's replying affidavit.

The definition of EPZ under Section 2 of the Act is;

“a designated part of Kenya where any goods introduced are generally regarded, in so far as import duties and taxes are concerned as being outside the customs territory but are restricted by controlled access and wherein the benefits provided under the Act apply”.

From the definition and contrary to the Procuring entity's and Board's findings on this, the significance of the goods having an EPZ origin is as regards import duties and taxes plus the restriction and the benefits under the EPZ Act. Any such goods must and should be taken to have been manufactured in a designated part of Kenya and they cannot be regarded as foreign goods. Section 2 of the EPZ Act defines the word 'import' as;

“To bring or cause to be brought into the customs territory from a foreign country or from an Export Processing Zone”.

Oxford Advanced Learners Dictionary of Current English A. S. Hornby 5th Edition has defined the word import;

- (1) “to bring goods services ideas etc from a foreign country into ones own country”**
- (2) Goods, services, ideas etc. brought from a foreign country into ones own country”.**

These two definitions represent the ordinary English meaning of the word “import”. The EPZ Act has under Section 2 given the term import as special meaning for the EPZ Act purposes only and in particular duty and taxes namely – (goods from an Export Processing Zone). For the purpose of customs duties and taxes the issue of importation is defined with reference to goods that come from a foreign country or from an EPZ inside Kenya – (clearly EPZ Zone is not a foreign country). Had this been the intention of Parliament the draughtsman could just having provided that such goods from EPZ shall be regarded as coming from a foreign country. However, the draughtsman provided the two definitions for the purpose of duty and taxes. I find and hold that meaning of “import” under the EPZ Act only applies in relation to the Act and has no general application. Moreover the definition in Section 2 of EPZ Act clearly acknowledges it is a designated part of Kenya.

It follows from the above analysis that the decision by the 2nd Respondent was arrived at by using the wrong interpretation of the law.

The court is clear that the EPZ goods located in an EPZ Zone in the country are manufactured in Kenya and not in foreign countries and are only regarded as imports for the special purposes of EPZ Act. The other difference is that internally, such goods are restricted and they attract different duties and taxes which any tenderer would have to pay even if the tender was to be awarded locally, but this should not disadvantage such a tenderer in terms of margins preference based on local manufacture.

I find that the use of the term ‘import’ as specially used in the EPZ Act should not have been applied to a general situation where goods manufactured in an EPZ Zone in Kenya were to be regarded as imports for the purposes of the Procurement and Disposal Act.

I find both the Entity and the Board misdirected themselves on the law in using the special meaning of “import” in the EPZ Act to interpret the provisions of the Public Procurement Act and Regulations. The use of the special meaning of “import” in the EPZ Act led to the Authority to reach an incorrect decision in law by equating Kenyan territory with a foreign country.

In this regard I accept the case of **BRUTUS V COZENS 2 ALL ER 1297 at 1299** cited by the Applicant’s counsel where the court held the meaning of an ordinary word of the English language is not a question of law whereas the proper construction of a statute is. A court will determine in cases where the said word is contended to be used in an unusual sense what that sense is. This explains why I have had to consider as a matter of construction of EPZ Act the meaning of the word “import” and its ordinary meaning which should be applied as regards any other Act such as the Procurement and Disposal Act where it has not been given unusual meaning and where its ordinary meaning should prevail.

It would be irrational to regard Kenyan territory as foreign country except for the special meaning in the EPZ Act for purposes of duty and taxes. I further accept the Applicant’s powerful submission in paragraph 6.1.1.11 of its written submissions where it has submitted that the rationale of the EPZ Act 1990 is to provide for the promotion and facilitation of export oriented investments and that the EPZ Authority Client Service Charter provides that the objectives of the E.P.Z. are inter alia, to encourage direct investment in the country, employment creation, increase in productive investment, technological transfer and creation of linkages with the customs territory.

Effect of errors of law and misinterpretation of the law.

The misinterpretation or misdirection touching on the law as regards margin of preference and the origin of goods, in the view of the court, led the Procuring entity and the Board to asking and answering the wrong question, taking irrelevant factors and failing to take relevant ones into account. All these situations invite a judicial review court's intervention whether singly or cumulatively.

In addition, the court is satisfied that the applicant had in its financial bid clearly demonstrated it was a Kenyan company producing goods in Kenya and had a manufacturing capability at its Ruaraka factory. The arbitrary branding of the goods as imports by the respondents was to my mind unreasonable and irrational, given the documentation available in the evaluation process.

Both the Procuring entity and the Board had a responsibility to correctly apply the law and did not unfortunately do so.

Finally, the philosophy or rationale behind the grant of preference was an important relevant factor which both the Procuring entity and the Board ignored. I accept the contention of the Applicant counsel that the Ministry of Finance on 16th February 2007 did issue a policy paper on public procurement as to how and why preferences are generally granted in public procurement law. The grant of preferences is a socio-economic Government policy which is entrenched in the procurement law. The issue is not one solely to be determined by shillings, pence and pound since the Respondents had before them evidence of the Applicant's contribution to the Kenyan economy by virtue of taxes paid, people employed, corporate social responsibility activities, payment of various utilities including the potential for growth in order to create more employment. Disregarding these factors by the Respondent's denial of the preference to the applicant was in the circumstances unfair, unreasonable and irrational and an improper exercise of discretion especially where the law demands that preference be specifically accorded in the evaluation of procurement tenders.

Statutory impropriety and prejudice

Although the Board did make specific findings that the Procuring entity had breached Regulation 46 which provides for a period of thirty days for the evaluation of the tenders after tender opening and which is reiterated in clause 2.24 of the Tender documents, it all the same declined to intervene or attach importance to the breach on the ground that this did not cause any prejudice to the Applicant. Section 66(6) reads:

“The evaluation shall be carried out within such period as may be prescribed”.

It follows therefore that both the Regulation and the clause had a statutory underpinning in the section which in turn was intended to inject into the procurement system some safeguards intended to prevent abuse. It is clear to the court that the provision is worded in mandatory terms and is also clearly aimed at inter alia achieving both efficiency and transparency in the procurement procedures. The Board did not at all probe into why a longer period than that provided in the Statute was necessary notwithstanding the underlying information that an earlier similar tender had been cancelled and therefore vital information on procurement bids was now in the hands of the bidders including the two finally selected for evaluation. There were also the issue of the notification being filed and sent late to the Applicant. With respect the court is of the view that the Board should not have disregarded a mandatory provision. In addition on the issue of prejudice the court is of the view that prejudice could be presumed in the circumstances, in that taking longer than the period given does give rise to a long shadow touching on issues of impartiality and integrity of the evaluation process.

I therefore find that the Board did commit an error of law by failing to address mandatory provisions of the Procurement and Disposal Act intended to underpin the integrity of the evaluation process. A fundamental misdirection or failure to address the applicable law or a fundamental error of law in reaching a decision does render the decision reached by a decision maker devoid of legality and therefore void. By failing to respect clear statutory and mandatory provisions the Respondents were ultra vires both Section 66 of the Act and Section 2 objectives set out below.

While still on the topic, it is important for the court to observe that while particular statutory provisions constitute the bare minimum beacons for the purpose of interpreting procurement law, a decision maker in procurement matters should have regard at all the times, to the greater objectives of the procurement law as set out in the Act and the underlying ideals and values.

Objectives of Procurement Law

To my mind failure by the Respondents to have regard to mandatory provisions of the Act concerning procurement procedures including failure to give a margin of preference violated the purpose of the Act which is clearly stated in Section 2 as under;

- (a) To maximize economy and efficiency
- (b) To provide competition and ensure that competitors are treated fairly.
- (c) To promote the integrity and fairness of those procedures.
- (d) To increase transparency and accountability in those procedures and
- (e) To increase public confidence in those procedures.
- (f) To facilitate the promotion of local industry and economic development.

In particular failure on the part of the respondents to properly address the relevant law on margins of preference clearly violated objectives (b) and (f) above. I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives.

On the facts I am with respect, unable to follow the learned authors cited by **Ms Mwaniki**, the learned counsel for the second Respondent, namely **JOHN ALDER – General Principles of Constitutional and Administrative Law (4th Edition) at page 387** where the authors state;

“The courts will only set aside for procedural irregularity only if the harm or injustice caused to the Applicant by the procedural flaw outweighs the inconvenience to the Government”....

Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent’s counsel.

The job in my view was not complete or done by just coming up with the mathematically lowest tenderer on top of the pile. The integrity of reaching there is equally important to this court. In many cases it is procedural propriety which is the stamp of fairness. The promotion of local industries and economic development should have been a major factor in the evaluation of the tender. This is why the Procuring entity must be given a chance to reevaluate the two top tenders in accordance with the Procurement Act, Regulations and the tender documents. The court cannot make the decision for it. The court’s function is to quash wrong decisions so that they are remade by the decision maker in accordance with the law. Because of the importance of the goods to revenue collection the court’s expectation is that the ultimate decision will be in the public interest and in the interest of good and efficient public administration.

All in all I find and hold that the applicant is entitled to the reliefs claimed in the application except prayer (6). Judicial Orders shall forthwith issue in terms of prayer 1, 2, 3, 4 and 5 only.

In addition I award costs to the Applicant.

Dated and delivered at Nairobi this 18th day of December, 2008.

J. G. NYAMU

JUDGE