



SIEMENS AKTIENGESLELLSCHAGTAPPLICANT

Versus

KENYA POWER & LIGHTING COMPANY LIMITED.....1ST RESPONDENT

PERMANENT SECRETARY MINISTRY OF ENERGY.....2ND RESPONDENT

JUDGMENT

The Notice of Motion, the subject of this judgment is dated and filed in court on 26th February 2007. The Applicant, Siemens Aktiengesellschaft seeks the following orders:-

- (a) An order of certiorari removing to this court for purposes of being quashed, the decision of the Tender Committee of the Procuring Entity, the Kenya Power & Lighting Co. Ltd. (KP&L Co. Ltd) contained in the letter dated 12th January 2007 written by Dr. D.K. Macharia and addressed to the Applicant;
- (b) An order of prohibition to prohibit the Respondents from awarding the contract and or tender to any other bidder other than the Applicant herein;
- (c) An order of prohibition to prohibit the Respondents or any of their agents, officers, or any person acting on behalf of the Respondents from entering into, continuing or otherwise entertaining contract negotiations, signing, performing or undertaking any part of their obligations with regard to the contract with any other bidder other than the Applicant;
- (d) In addition to prayer (c) an order of certiorari removing into this court for purposes of being quashed any contract that may have been entered into by the Respondents with the successful bidder with regard to this matter;
- (e) An order of mandamus directed to the Respondent compelling them to award the tender to the Applicant and perform and complete the contract with the Applicant.

The Application is supported by a Statutory Statement dated 21st February 2007 and a Verifying Affidavit sworn by Kobus Ackermann the Regional Director and Division General Manager of the Applicant, dated and filed in court on 21st February 2007.

The 1st Respondent is the Kenya Power and Lighting Co. Ltd.(KP & L Co. Ltd.) who are the procuring entity while the 2nd Respondent is the Permanent Secretary Ministry of Energy, a Government Ministry said to be sponsoring the project undertaken by the KP & Co. Ltd. and the loan taken to undertake will be paid by the Government. The Respondents opposed the Application.

The 1st Respondent had filed the Notice of Motion dated 24th April 2007 seeking to set aside the decree and stay orders granted on 26th February 2007; an Affidavit sworn by Beatrice Meso Mundo dated 26th April 2007, a Supplementary Affidavit sworn by Kiragu Kimani, Counsel for the 1st Respondent dated

27th April 2007 and skeleton arguments filed on 31st May 2007.

The 2nd Respondent in opposing the Application filed skeleton arguments on 21st June 2007 and a Preliminary objection.

ABB Kenya, one of the Tenderers in the Tender Process was joined to the proceedings as an Interested Party (1st I P) and Trevor Taljoard, the Technical specialist of the company filed a replying affidavit in opposition to the Application. It is dated 3rd April 2007 and filed in court on 4th April 2007. They also filed skeleton arguments on 30th May 2007.

The 2nd Interested Party is Areva – Viscas Consortium who filed skeleton arguments on 30th May 2007. The parties also filed lists of authorities. The Application was argued by the following counsel;

Mr. Allen Gichuhi for the Applicant,

Mr. Kiragu Kimani – 1st Respondent,

Mr. Waigi Kamau for the 2nd Respondent,

Mr. Mwaura for the 1st Interested Party and

Mr. Gachuhi for the 2nd Interested Party.

The brief facts leading to these proceedings are that the Applicant is one of the bidders in a tender advertised by the 1st Respondents in May/June 2006. After evaluation of the bids the Applicant was notified by letter of 12th January 2007 that their bid was not successful as it was not the lowest evaluated bid. The Respondent thereafter lodged an appeal with the Appeals Review Board but on 21st February 2007 the Board declined to hear the appeal on account of lack of jurisdiction.

The Applicant contends that the Respondents erred in its decision as it used a criteria that was not prescribed by the tender documents because it failed to consider part of the radio portion; failed to consider all parts of the radio portion, accepted another operating system other than UNIX/POSIX; failed to seek classification from the Applicant on its bid. I think it is necessary at this stage to set out verbatim the grounds upon which the Judicial Review Application is grounded as per the statement of facts filed by the Applicant.

“4 (a) The respondents failed to fully evaluate the Applicant’s bid in failing to consider parts of the Applicants bid for evaluation with respect to the Radio portion and thereby erred in concluding that the Applicant’s bid was not the lowest evaluated bid price, contrary to the provisions of the Exchequer and Audit (Public Procurement), Regulations, 2001 as well as the World Bank Guidelines. According to the Tender Documents, the radio connection network for data and voice to selected outstations was a main item. The Radio portion represented about 10% of the overall project and was therefore a major part of the project which touched on the substance of the Tender;

(b) Had the Respondents considered all parts of the bids for the evaluation, including the Radio portion, the Respondents would have found the Applicant’s bid to have been the lowest evaluated bid;

(c) The Respondents failed to seek clarification on crucial issues from the Applicant. The lack of clarification led to the Applicant’s bid being rejected. Clarification should have been sought as required under Tender Documents, World Bank Guidelines as well as the Regulations, failure to do so on the part of the Respondents was a clear breach of the terms of the tender process;

(d) In accepting any other operating system other than UNIX/POSIX for example, LINUX OR WINDOWS, the Respondents utilized a different evaluation criteria from that specified in the Tender Documents. The Applicant offered UNIX/POSIX operating system as far as the Tender Documents for the price submitted;

(e) The Applicant complied with all the Technical and Commercial requirements as stipulated in the Tender Documents;

(f) On the whole, and taking into account all the tender documents, the bid documents as well as the Guidelines, the Respondents had no justifiable reason to reject the Applicant's bid."

In addition to the above grounds, Mr. Gichuhi submitted that though it was the Applicant's legitimate expectation that the Respondents would act fairly, they demonstrated bias in their decision so that though there was clear evidence that the Applicant's bid was technically superior, it was ignored for no apparent reason. Counsel referred the court to a document showing what points were earned by the different bidders where ABB failed to meet the mandatory requirements of the tender. That ABB offered a system that was not compliant but it was accepted. That though Siemens was radio compliant it was ignored. In support of the allegation of bias, Counsel exhibited a letter dated 10th October 2006 from KP & L Co. Ltd to one Stanley Mtwiri and sent to them via e-mail. That the letter indicated that they had complied with the bid but yet the tender was not awarded to them.

It was also the Applicants contention that the law that applies to these proceedings is the Exchequer and Audit (Public Procurement) Regulations, 2001 but not the Public Procurement and Disposal Act, 2005 because at the time the tender was advertised in 2005, the 2001 Regulations was the law in force and the Act of 2005 only commenced on 1st January 2007. He referred to schedule 3 of the 2005 Act which contains Transitional Provisions and that Regulation 3(1) provides that the law applicable is that in operation at the time the tender process took place and that therefore the limitation under S.100 of the 2005. Act, that the court's decision should be rendered within 30 days of the decision of the Appeal Board's decision does not apply. And further that a contract cannot have been signed before the decision of the court is made because the court granted a stay order before the 21 days expired in terms of Section 33 (1) of the Regulations made in 2001.

In respect of the matter pending before the Appeals Board, it was the Applicants submission that it does not concern the Applicants since the Board gave its ruling declining to hear the appeal and they proceeded to this court with the present Application.

Mr. Gichuhi dealt at length on the Applicants Verifying Affidavits whose contents he said have not been controverted as regards the responsiveness of their bids and the law and the fact that the Respondents were biased in awarding the bid to another ie 1st Interested Party.

In opposing the Application, Mr. Kiragu Counsel for the 1st Respondent submitted that both the 2001 Exchequer and Audit Regulations and the Exchequer and Audit Disposal Act, 2005, apply to these proceedings before the court. He said that Rule 11 of the 2005 Act applies parts VII and VIII of the 3rd schedule of the Act to procurement proceedings, that commenced before the Act came into force on 1st January 2007 and that therefore S. 100 (4) of the 2005 Act applies to these proceedings so that if this court's decision is not rendered within 30 days of filing the Judicial Review Application,, the decision of the Review Board takes effect.

As to whether or not the Applicant is part of the Appeal process pending before the Appeals Board, Counsel submitted that the Board dealt with appeals filed by the Applicant and Areva, the 2nd Interested Party and Areva filed a Judicial Review Application in HC Misc 193/07 in which the decision of the Appeals Board was quashed and the matter was referred back to the Board to consider the appeals on merit and that it is therefore wrong for the matter to be before two different forums at the same time and that is why the 1st Respondent had sought to have the leave and stay granted herein set aside in their Application dated 25th April 2007 which is being considered along with this Notice of Motion. It is the

Counsels view that the Applicants are abusing the court process as they should elect what forum to pursue as it cannot be both the Appeals Board and the court.

Counsel also observed that in their submissions, the Applicants have departed from the grounds contained in their Statement. That though the Applicants raised the ground of bias in their submissions, it is not one of the grounds contained in the Statement but that what is contained in the statement are the grounds that were raised in the appeal before the Appeals Board. That the law has set up specialized Tribunals to deal with issues of the tender process which is technical and require expertise and the court cannot deal with such a task. That it is therefore not the duty of this court to deal with the merits of the tender process. That the court can deal with the process by which the decision was arrived at and it is not proper for the Applicant to invite the court to look at the comparative table on evaluation of the tenders. That what the Applicants have placed before the court as grounds are no grounds to support the Judicial Review Application but they can support an appeal. That the court is being asked to assume the role of the tender committee which is not this court's role.

Mr. Waigi Kamau, Counsel for the 2nd Respondent supported submissions made on behalf of the 1st Respondent and added that the 2nd Respondent is non suited as no allegation has been levelled against the Permanent Secretary. That though the court obtained financial arrangement for a loan, it did enter into another contract with the 1st Respondent and the Government never advertised the tenders nor was it involved in the decision making process and that the decision sought to be quashed was made by D.K. Macharia of the 1st Respondent. Counsel further urged that in light of the decision of **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/1996**, there is no basis for grant of the prayers sought and that the duty of the court is to supervise the Tribunal but not take over its functions.

Mr Mwaura, Counsel for the 1st Interested Party also opposed the Application. Like Mr. Kiragu, Counsel argued that the Applicants are attacking the merits of the award of the Tender instead of attacking the process by which the decision was arrived at. That if the court goes into the technical aspects of the Tender, it would be usurping the powers of the Tender Committee. Counsel further argued that Applicant's Counsel's submissions on bias and unfairness is an ambush as they were not pleaded. He agreed with Mr. Kiragu that both the 2001 and 2005 Regulations and Act apply to these proceedings.

Mr. Gachuhi, Counsel for 2nd Interested Party submitted that the court should take into account the pending appeal before the Appeals Board as a result of this court's ruling in **MISC APPLICATION 193/07** so as not to prejudice the 2nd Interested Party's position. Counsel requested that if the court finds merit in this Application, then there should be fresh tendering. Counsel also agreed with the other Counsel that this Application is based on technical issues which are the subject of appeal.

Some of the authorities cited considered are as hereunder:-

- 1) The Public Procurement Disposal Act No. 3 of 2005;
- 2) The Exchequer and Audit (Public Procurement) Regulations, 2001
- 3) Law Reform Act
- 4) Civil Procedure Act
- 5) Kenya National Examination Council v Rep CA 266/96
- 6) Njuguna v Minister for Agriculture (2001) IEA 184
- 7) Total Kenya Ltd. v The Permanent Secretary Ministry of Energy Misc Application 1638/04
- 8) Grain Bulk Handler Ltd. v J.B. Maina CA 295/03

9) Judicial Commission of Inquiry into the Goldenberg Affairs v Kilach (2003) KLR 249.

This court has taken into account all the submissions by Counsel, the statutory Statement, the Affidavits filed herein, the skeleton arguments and authorities cited by Counsel.

But before I delve into the merits of the Application for Judicial Review, in contention was the law that is applicable to these proceedings. Whereas the Applicants contended that only the Exchequer and Audit (Public Procurement) Regulations, 2001 apply, the Respondents and Interested Parties are of a different view, that both the 2001 Regulations and the Public Procurement and Disposal Act, 2005 apply to these proceedings. The 2005 Act commenced on 1st January 2007.

The Transitional Provisions are found in the third schedule of the 2005 Act. Rule 3 of the 3rd schedule provides that Procurement proceedings commenced before this Act came into operation shall be continued in accordance with the law applicable before this Act came into operation. Rule 11 then provides that Parts VII and VIII will apply with necessary modifications with respect to procurement proceedings commenced before this Act came into operation. Part VII of the 2005 Act deals with review of procurement proceedings. In the 2005 Act, Section 100 (4) now provides that the decision of the Review Board shall take effect if the High Court does not declare its decision within 30 days from the date of filing.

The limitation of 30 days is a new inclusion in the 2005 Regulations on administrative review and my understanding of Rule 11 of the 3rd Schedule is that S.100 (4) of the 2005 Act is applicable to the Review Process arising from Tender processes commenced under the 2001 Regulations because Section 100 falls under Part VII of the 2005 Act which is supposed to apply with the necessary modifications.

However, I do note that Section 100 (4) cannot be invoked under the circumstances because this court having ordered the Appeals Board to hear appeals arising from the Tender process, and so far there is no decision of the Appeals Board which has been rendered, there is nothing to take effect after 30 days. Had there been a decision of the Appeals Board, these proceedings would have been a nullity once the thirty days had expired after the filing of Judicial Review Proceedings.

These are Judicial Review proceedings and I think it proper at this stage to consider what the scope of Judicial Review is. The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the Application for Judicial Review is made, but the decision making process itself. In the case of the **CHIEF CONSTABLE OF NORTH WALES POLICE V EVAN (1982) 1 WLR 155 pg 1160**, Lord Halsham L.C. said –

“It is important to remember in every case that the purpose of Judicial Review (the remedy of Judicial Review) is to ensure that the individual is given a fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.”

Again in Halsburys Laws of England Vol I (1) 4th Ed paragraph 60, it is stated of Judicial Review as follows:-

“60 The nature of Judicial Review is the review of the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi judicial functions or who are charged with the performance of Public duties.....”

The grounds upon which a decision of an inferior court or public authority may be reviewed can broadly be grouped into three:-

1) Illegality,

- 2) irrationality; and
- 3) procedural impropriety

Thus a decision of an inferior court or tribunal may be subject of review if the decision making body did not correctly apply the law relating to the decision making power or the decision that was reached is one which no reasonable tribunal could have reached or the tribunal failed to observe the rules that are expressly laid down in the document that grants it jurisdiction. Judicial Review jurisdiction will generally be invoked where the decision making body is alleged to have committed an error of law on the face of the record; where it breached rules of natural justice; acted without jurisdiction or exceeded jurisdiction or failed to act fairly. Judicial Review is not an appeal because an appeal deals with the merits of decision.

It is the Respondents and Interested Parties submission that the grounds raised by the Applicant do not invoke Judicial Review jurisdiction but are instead grounds of appeal which go to the merits of the decision of the Tender Committee.

Earlier in this judgment, I set out the grounds contained in the statutory statement upon which this Judicial Review Application is premised. I do agree with the Respondents and Interested Parties Counsel that the 5 grounds contained in the statement do not deal with the issue of Respondents having exceeded their jurisdiction; acted ultra vires that there is an error on the fact of the record; that the Respondents breached the Rules of natural justice or acted unfairly (bias). Order 53 R 4 Civil Procedure Rules restricts an Applicant to a Judicial Review Application to rely on grounds contained in the statement alone. It reads:-

“4(1) copies of the statement accompanying the Application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the Application for leave shall be served on demand and no grounds shall subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the notice except the grounds and relief set out in the said statement”

The above provision bars the Applicant from raising any other new grounds other than those contained in the Statement. The grounds in the statement filed by the Applicant do not include allegations of bias or unfair treatment, which Mr. Gichuhi dwelt on at length in his submissions. The Applicant never even sought the court’s leave to adduce new grounds when arguing the motion. The raising of new grounds in the submissions does amount to ambushing the other parties and offends the above rule and is unacceptable.

Did the grounds pleaded in the statutory statement invoke Judicial Review jurisdiction?

It was Mr. Kiragu’s submission that the grounds in the statement are the same ones which were contained in the Applicants appeal to the Appeals Board in Appeal 6/07. There is no dispute that the Applicants and the 2nd Interested Party had appealed to the Appeals Board challenging the Tender Committee’s decision. The Appeals Board declined to hear the appeals for the reason that the Board lacked jurisdiction. Areva Ltd. Filed a Judicial Review application challenging that decision and this court rendered its decision in Misc Application 193/07 in which the decision of the Appeals Board was quashed and the Board was ordered to hear the Appeals.

I have seen a copy of the memorandum of appeal filed by the Applicants in that appeal. All the grounds relied upon to bring this Application are similar to those in the memorandum of appeal. Ground 4(a) and (b) of the Statement is similar to ground 1 and 5 of the Memorandum of Appeal which alleged that the Respondents failed to fully evaluate the Applicants bid by failing to evaluate the Radio portion.

Ground 4 (d) of the grounds in the Statement is similar to ground 3 of the memorandum of appeal which addressed the issue of the Respondents using different criteria from that specified in the Tender Documents.

Ground 4 (c) of the Statement is similar to ground 4 of the memorandum of appeal which addressed the

issue of the Respondents failing to seek clarification on crucial issues from the Applicant.

These are the grounds that the Appeals Board will be considering in the appeals pending before it. They cannot be the same grounds to be considered in a Judicial Review Application. I am in agreement with the Respondents and Interested Parties that the grounds that the Applicants have relied upon are really grounds of appeal which go to the merits of the tender process which is outside the purview of a Judicial Review Application.

Mr. Gichuhi went at length to demonstrate by way of a table how the different evaluation should have been done or how responsive their bids on some items were in comparison to the other bidders. That, in my view was going to the merits of the decision of the Tender Committee which is a duty carried out by technocrats well versed in the tender process which this court may not be equipped to deal with. Mr. Kiragu invited the court to look at the list of the members of the Board who are experts drawn from diverse sectors of the economy. Unfortunately, it is not indicated from the Board's composition what the qualifications of the members are. What is evident is the diversity of the persons that attended on behalf of the parties, they include technical people, engineers and lawyers.

The terms used in tendering are also technical and can only be understood by those well acquainted with the tendering process.

The issues raised in the grounds of the Statement are issues that can only be dealt with by the Appeals Board, a body set up under the Act and equipped with the necessary personnel and technical knowledge of the tendering process. I therefore hold and find that the Applicants have not raised any ground known in Judicial Review, to invoke the Court's jurisdiction to issue Judicial Review orders.

I have briefly dealt with question of the appeal pending before the Appeals Board, in this judgment. Whereas the Respondents and Interested Party contend that the decision of the Board will directly impact the decision of this court, the Applicant contends that they have nothing to do with the appeal. As earlier observed, the Applicant, with the 2nd Interested Party, Areva were dissatisfied with the decision of the Tender Committee. The court has since ordered the Review Board to hear and determine the Appeals following the Application made by Areva (2nd Interested Party) in H. Misc Application 193/07. Whatever decision the Board arrives at, it will impact the position of the Applicant. If for example, the Appeals Board finds that the Tender process was flawed and the process should be repeated then of course this Application would have been spent. On the other hand, if the Review Board upholds the decision of the Tender Committee, and this court finds otherwise, there will be two conflicting decisions, in respect of the tender. Likewise, if this court makes a decision before that of the Board, the same will impact on the decision of the Review Board in that the Board may be bound by it.

The decision of this court and the Appeal before the Appeals Board cannot be divorced from each other so that it would have been proper that these matters only proceed before one forum, the Review Board or this court.

The 2nd Respondent opposed these proceedings on the basis that they were non suited as the decision sought to be quashed was made by 1st Respondent and that the loan that the Government got was granted to the 1st Respondent who advertised the tender.

I do agree with the Respondent that they were not involved in the tendering process but having granted a loan to the 1st Respondent, to carry out a project for which the subject tender was advertised, I believe the 2nd Respondent would be interested in the manner in which the loan is applied and whether they would get results from the said Application of the loan. The 2nd Respondent cannot just sit back and see the loan money squandered or wasted. The 2nd Respondent is an Interested Party in this matter. The only mistake that the Applicant made is to join as a 2nd Respondent to these proceedings as a Respondent. Instead, the 2nd Respondent should have been enjoined to these proceedings as an Interested Party as the orders sought in this Notice of Motion cannot issue against the 2nd Respondent.

Are the orders of Judicial Review available to the Applicant?

In the first prayer, the Applicant seeks an order of certiorari to quash the decision of the Tender Committee dated 12th January 2007, in a letter written by D.K. Macharia.

In the well known case of **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/96**, the Court Appeal defined what the nature and scope of the three orders of Judicial Review, mandamus, certiorari and prohibition is;

In regard to certiorari, the court said:-

“Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

In this judgment I have endeavoured to show that the Applicant never pleaded any of the above grounds in their statement and did not demonstrate that the decision of the Tender Committee was made without, or in excess of jurisdiction or that rules of natural justice were flouted. The Applicant only attacked the merits of the Tender Committee’s decision which is outside the purview of Judicial Review.

Prayers (b) & (c) seek orders of prohibition. Again in the **KENYA EXAMINATION COUNCIL CASE** the Court of Appeal considered the scope of an order of prohibition. The Court said:

“what does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed at an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it, but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision or the merits of the proceedings. Prohibition is powerless against a decision which has already been made before such an order is issued.”

In the instant case, the Applicant did not demonstrate that the Tender Committee acted without or in excess of jurisdiction or flouted rules of natural justice. The court is being invited to correct a wrong decision of the Committee on the merits of the proceedings which is outside this court’s powers.

Prayer (d) seeks an order of certiorari to quash any contract that may have been entered into. Though there was mention of a contract having been signed pursuant to the Tender Committee’s decision, no evidence of that nature has been placed before the court. Even if it had, a prayer for certiorari would not be granted for the reasons given in respect of prayer (a) of this Notice of Motion that the court has not been properly moved and no grounds shown to the court as to why such an order can issue. The same would not be available.

Prayer (e) seeks an order of mandamus to direct the Respondents to award the tender to the Applicant. In considering the scope of an order of mandamus in the **KENYA EXAMINATION COUNCIL CASE**, the Court of Appeal cited **HALSBURY’S LAWS OF ENGLAND 4TH ED 1 VOL I pg 111 para 89** which reads:

“The order of mandamus is of a most extensive remedial nature, and is, in form a command issuing from the High Court of justice directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

Para 90

“The order must command no more than the party against whom the Application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

Even if the court quashed the Tender Committee’s decision, the order of mandamus cannot issue because this court cannot direct the Committee as to whom to award the tender contract. The court would be usurping and taking over the duties of the Committee which is outside the jurisdiction of this court. There are three parties interested in the award of the contract, the Applicant, 1st Interested Party and 2nd Interested Party. Both the Applicant and 2nd Interested Party are keen to have the Tender Committee’s decision set aside and the contract awarded to them. Besides, if the court were to make such an order, it would prejudice the rights of the 2nd Interested Party who is awaiting the decision of the Review Board. This court cannot be in a position to consider the tender on merit. It is only the Tender Committee which is equipped with the technical know how which can do it. Besides, there is a measure of exercise of discretion in the award of the tender where the Committee evaluates all the components of the tender, makes comparisons weights one against another and reaches a decision and the court is not vested with that discretion. The court cannot divest the Tender Committee of that statutory duty and discretion and clothe it upon itself. Lastly, there is no basis for the court to order the award of the contract.

In conclusion, I find that the Applicant has failed to demonstrate that they are entitled to the orders sought having not shown any basis for it. The **SUPREME COURT PRACTICE para 53/1-14/14** says the following of Judicial Review remedies:-

“Even if a case falls into one of the categories where Judicial Review will lie, the court is not bound to grant it; the jurisdiction to make any of the various orders available in Judicial Review proceedings is discretionary. What order or orders the court will make depends upon the circumstances of the particular case.”

So that even if the Applicants had proved that they were entitled to the orders sought, the same being discretionary remedies, this court may not have been in a position to make the said orders in light of the fact that the decision may conflict with that of the Appeals Board. The Applicant should have awaited the decision of the Appeals Board or the Applicant and Interested Parties should have agreed to proceed before the forum.

For all the above reasons, I dismiss the Notice of Motion dated 26th February 2007 with costs to the Respondents.

Dated and delivered this 3rd day of August 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:

Mr. Gichuhi for Applicants

Mr. Okumu for the 1st Respondent

Mr. Mwaura for Interested Party

Mr. Waki holding brief for Mr. Gachuhi for 2nd Respondent