



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW MISCELLANEOUS CIVIL APPLICATION NO. 19 OF 2020**

**IN THE MATTER OF THE LAW REFORM ACT CAP 26**

**-AND-**

**IN THE MATTER OF THE FAIR ADMINSTRATION ACTION ACT NO. 4 OF 2015**

**-AND-**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSETS DISPOSALS ACT NO. 33 OF 2015**

**-AND-**

**IN THE MATTER OF AN APPLICATON BY THE ACCOUNTING OFFICER, KENYA PORTD AUTHORITY AND KENYA PORTS AUTHORITY FOR LEAVE TO APPLY FOR THE JUDICIAL REVIEW ORDER OF CERTIOARARI AGAINST THE DECISION OF THE PUBLIC PROCUREMENT ADMINSTRATIVE REVIEW BOARD MADE ON 30<sup>TH</sup> JUNE 2020 IN RESPECT OF REQUEST FOR REVIEW APPLICATION NUMBER 74 & 77 OF 2020.**

**-BETWEEN-**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**PUBLIC PROCUREMENT ADMINSTRATIVE REVIEW BOARD.....RESPONDENT**

**-AND-**

**THE ACCOUNTING OFFICER, KENYA PORTS AUTHORITY.....1<sup>ST</sup> EX PARTE APPLICANT**

**KENYA PORTS AUTHORITY.....2<sup>ND</sup> EX PARTE APPLICANT**

**FCM TRAVEL SOLUTIONS T/A CHARLESTON TRAVEL LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**KILINDINI TRAVEL CENTER LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**MAGICAL HOLIDAYS LIMITED.....3<sup>RD</sup> INTERESTED PARTY**

**REGAL TOURS AND TRAVEL LIMITED.....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

**The Application**

1. The *Ex parte* Applicants' case for Judicial Review orders is contained in the Notice of Motion dated 13<sup>th</sup> July, 2020 and filed in court on 14<sup>th</sup> July, 2020 pursuant to leave given by the court on 10<sup>th</sup> July, 2020. The motion prays for the following orders:

**a. That the Application be certified urgent and the same be heard and determined within the statutory timelines of 45 days of the date of filing this application as provided for under Section 175 (3) of the Public Procurement and Asset Disposal Act No. 33 of 2015.**

**b. This Honourable Court be pleased grant a judicial review order of *Certiorari* to remove to this Honourable Court for purposes of quashing the decision of the Public Procurement Administrative Review Board, the Respondent herein, made on 30<sup>th</sup> June, 2020 under the Request for Review Application No. 74 and 77 of 2020-FCM Travel solutions T/A Charleston Travel Limited and Kilindini Travel Centre Limited vs The Accounting Officer Kenya Ports Authority and Kenya Ports Authority regarding the Tender No. KPA/111/2019-20/PSM for the Provision of Air Travel Agency Services.**

**c. That each party bears its own costs in line with the provisions of Section 175 (7) of the Public Procurement and Asset Disposal Act, 2015.**

2. The motion is premised on the grounds set out therein and is supported by other documents as follows:

a. Verifying Affidavit deponed on 7<sup>th</sup> July, 2020

b. Statutory statement dated 7<sup>th</sup> July, 2020.

3. The *Ex parte* Applicants' case is that on 4<sup>th</sup> February, 2020 they placed an advertisement notice for various notices which included Tender No. **KPA/111/2019-20/PSM** Contract for provision of Air Travel Agency Services. The said tender was opened on 3<sup>rd</sup> March, 2020 at 1000hrs. A total of 21 firms submitted their bid proposals and following a detailed technical and financial evaluation, the 3<sup>rd</sup> interested party was awarded the Tender and letters of Notification were sent out to all the bidders on 26<sup>th</sup> May, 2020 in accordance with Section 87(3) of the Public Procurement and Asset Disposal Act of 2015.

4. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties filed Applications for Request for review before the Public Procurement Administrative Review Board (*the respondent herein*) being Public Procurement Administrative Review Board Application no. 74 of 2020 and 77 of 2020, filed on the 9<sup>th</sup> June, 2020 and 10<sup>th</sup> June, 2020 respectively. The two applications were grounded on the allegation that the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* applicants' unfairly disqualified their bid and declared them non-responsive for failing to paginate the entire document.

5. The 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* applicants' filed responses to the two review applications on 15<sup>th</sup> June, 2020 as well as affidavits in support of the response deponed by Mr. Moses Sirgoi. That the 4<sup>th</sup> interested party filed an affidavit in support of Review Application No. 77 of 2020. Thereafter the *ex parte* applicants' filed a further affidavit in response to the 4<sup>th</sup> interested party's Affidavit.

6. It is averred that in line with the guidelines issued by the respondent on 24<sup>th</sup> March, 2020 under the title **Procurement Administrative Review circular No. 02/2020-Administrative and Contingency Management Plan to mitigate COVID-19 at the Public Procurement Administrative Board Review**, the *ex parte* Applicants' filed submissions on 26<sup>th</sup> July, 2020 which was within 3 days of service of the written submissions of the 1<sup>st</sup> interested party's written submissions.

7. It is the *ex-parte* applicants' case that despite the fact that they duly filed and served their responses in good time, the respondent failed to acknowledge their written submissions and make reference to them, and proceeded to render its decision in blatant disregard of the holding in the Authorities provided by the *ex-parte* applicants.

8. The respondent rendered its decision on 30<sup>th</sup> June, 2020, where it directed it cancelled and set aside the letters of notification of unsuccessful bid dated 26<sup>th</sup> May, 2020 addressed to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties and the letter of notification of award dated 26<sup>th</sup> May, 2020 addressed to the 3<sup>rd</sup> interested party with respect to KPA/111/2019-20/PSM-Contract for provision of air travel agency services. The respondent further direct the 1<sup>st</sup> respondent to re-admit all the bids from the disqualified bidders and conduct a re-evaluation at the preliminary evaluation stage and proceed with the procurement process to its logical conclusion.

9. According to the Applicant pursuant to Section 80 (1) of the PPAD 2015 and regulation 75(1) of the Public Procurement and Asset Disposal Regulations 2020, the financial evaluation is conducted only on bid documents that are found to be responsive. That the respondent's decision was illegal since in publishing the prices on page 5 of its decision, it is giving undue advantage to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties as well as all bidders whose bid was rejected, thus compromising the integrity and transparency of the process.

10. That pursuant to the provisions of Section 87 of the PPAD 2015, the *ex-parte* applicants' are required to return the financial bids for the unsuccessful bidders unopened when issuing the letter of notification of award. That the respondent's decision is therefore marred with unreasonableness and irrationality since it requires the *ex-parte* applicants' to re-admit unresponsive bids into the procurement process. It is the *ex-parte* applicants' case that it is therefore absurd to readmit returned bids to evaluation where the Respondent has disclosed financial quotes of other bidders and where the tender has already been awarded to the lowest evaluated bidder.

11. The *ex-parte* applicants' aver that the respondent acted *ultra vires* its mandate in purporting to take on the role of the technical evaluation committee, by applying a criterion that is not provided for in the tender document and that contravenes the express provisions of Section 74 (1) (i) of the PPAD 2015.

12. The 4<sup>th</sup> interested party partially supported the application by filing a replying affidavit sworn by **Margaret Mwanzia** on 11<sup>th</sup> August, 2020. The 4<sup>th</sup> interested party states that the decision by the board to direct continuance of the tender process is tainted and marred with unreasonableness, irrationality and illegality.

13. The 4<sup>th</sup> respondent avers that the decision by the board particularly the finding that the 1<sup>st</sup> Applicant's decision was unlawful was within the confines of the jurisdiction of the board. However in arriving at its decision, the respondent published confidential information *inter alia* the prices quoted by other bidders among whom, was the successful bidder, the 3<sup>rd</sup> interested party who passed the financial evaluation for having quoted the lowest price. Therefore the Board's directives were in utter disregard of the fact that the re-admission of the disqualified bidders would require re-submission of the financial submission which had been returned to the bidders unopened.

14. The 4<sup>th</sup> interested party avers that pursuant to the provisions of section 67 of the PPAD Act of 2015, the disclosure of the said confidential information was unlawful. That the 4<sup>th</sup> interested party maintains that it agrees with the ex parte applicant to the extent that the decision of the Board with respect to the continuance of the tendering process was marred with illegality and therefore the Judicial Review application, to the extent that the decision of the Board should be quashed for being unreasonable and marred with illegality as it seeks to contravene the provisions of the Act.

### **The Response**

15. The motion is opposed by the Respondent vide a replying affidavit sworn by Henock K. Irungu on 21<sup>st</sup> August, 2020.

16. The Respondent's case is that it received the 1<sup>st</sup> interested party's request for review, being request for review 74/2020 on 9<sup>th</sup> June, 2020 in the matter of the tender KPA/111/2019-20/PSM, Contract for provision of Air Travel Agency service. That it also received the 1<sup>st</sup> interested party's written submissions on 24<sup>th</sup> June, 2020. That the respondent also received the *ex parte* applicant's and the 3<sup>rd</sup> interested party's responses to the said review dated 12<sup>th</sup> June, 2020 and 17<sup>th</sup> June, 2020 respectively.

17. The Respondent avers that it received the 2<sup>nd</sup> interested party's request for review, being request for review 77/2020 on 10<sup>th</sup> June, 2020 in the matter of the subject tender. That the respondent also received the *ex parte* applicant's and the 3<sup>rd</sup> interested party's responses to the said review dated 12<sup>th</sup> June, 2020 and 23<sup>rd</sup> June, 2020 respectively. That the 4<sup>th</sup> interested party lodged an affidavit in support of the request for review sworn on 18<sup>th</sup> June, 2020 and that the 1<sup>st</sup> ex parte applicant filed its written submissions on 23<sup>rd</sup> June, 2020.

18. The respondent consolidated requests for review 74/2020 and 77/2020 under regulation 82 of the Public Procurement and Disposal Regulations, 2006.

19. The respondent further avers that its decision was informed by its finding of the 1<sup>st</sup> and 2<sup>nd</sup> Applicant's erroneous interpretation of Section 74 (1) (i) and regulation 74 (1) (b) of the 2006 regulations on serialization and the Applicant's non-uniformity and inconsistently, not classifying deviations on the numbering of a cover page and table of contents in bidders' applications as minor deviations as per regulation 75 (2). The respondent stated that its 5<sup>th</sup> order was for a re-evaluation of bidders applications subject to the respondent's directions on the proper interpretation of serialization of tender documents.

20. It is the respondent's case that in arriving at its decision, it was alive to all the issues raised by the parties.

21. The 1<sup>st</sup> interested party opposed the application vide a replying affidavit sworn by **Hamisi Hassan** on 16<sup>th</sup> November, 2020. The 1<sup>st</sup> interested party stated that the 2<sup>nd</sup> Applicant by way of advertisement invited bids for tender No. KPA/111/2019-20/PSM, Contract for provision of Air Travel Agency service and the 1<sup>st</sup> interested party submitted its bid for the said tender to the procuring entity in the prescribed form within the stipulated time.

22. The 1<sup>st</sup> interested party stated that on 27<sup>th</sup> May, 2020, it received a letter dated 26<sup>th</sup> May, 2020 advising that its bid was non-responsive since it did not page number the whole document as the first page of the bid was not page numbered. That at the end of the evaluation process, the tender was awarded to the 3<sup>rd</sup> interested party by the procuring entity.

23. The 1<sup>st</sup> interested party avers that its bid was unfairly and unreasonably declared non-responsive as the same was duly paginated in accordance to the law. It further avers that its bid was for all intents and purposes compliant with the tender document. That the applicant's actions of declaring the 1<sup>st</sup> interested party's bid unresponsive, breached Article 201 and 227 of the Constitution, Section 3, 74, 79 (1) and (2) of the PPAD Act of 2015.

24. That being dissatisfied with the applicants' decision, the 1<sup>st</sup> interested party filed a request for Review Application in the form of, Request for review application No. 74 of 2020. That subsequently all parties filed their responses to the application together with their written submissions and thereafter the respondent delivered its ruling on 30<sup>th</sup> June, 2020 where it allowed the 1<sup>st</sup> interested party's application.

25. The 1<sup>st</sup> interested party contends that judicial review process is only concerned with the decision-making process and not the merits of the decision itself and that it is to ensure that a party receives fair treatment in the hands of a public body. The 1<sup>st</sup> interested party avers that the applicants have not disputed the manner in which the respondent arrived at its decision but instead they are challenging the merits of the respondent's decision.

26. It is the 1<sup>st</sup> interested party's case that the applicant's allegations that the respondent erred in publishing the prices quoted by the two remaining bidders after the technical evaluation is misconceived in law since the applicant vide Section 78 (6) of the PPAD Act of 2015 is mandatorily required to read out loud before the bidders and record in the tender opening register, the total price of the tender during the tender opening. That further Clause 2.19.2 of the tender document required the tender prices to be announced at the tender opening, a step that precedes the technical and financial evaluation process.

27. The 1<sup>st</sup> interested party stated that the prices of the bid after their submission are confidential information contemplated under section 67 of the PPAD Act. That the respondent is allowed under section 173 (b) and (c) of the PPAD Act to give direction to the accounting officer of a procuring entity on anything to be done in a procurement process thus the respondents decision directing the applicants to admit the 1<sup>st</sup> and 2<sup>nd</sup> interested party's bids alongside all other bidders who were disqualified is not illegal, ultra vires or unreasonable.

28. The 1<sup>st</sup> interested party further avers that the applicants action of hurriedly returning the unopened financial proposals of unsuccessful bidders before expiry of the 14 days within which a party is entitled to challenge the decision of the Applicant's was calculated to unfairly deny the unsuccessful bidders a chance to challenge successfully the decision of the Applicants.

29. The 1<sup>st</sup> interested party maintains that the Applicants have failed to meet the threshold to warrant a grant of judicial review orders sought and therefore the respondent's decision dated 30<sup>th</sup> June, 2020 should be upheld.

30. The 2<sup>nd</sup> interested party opposed the application vide a replying affidavit sworn by **Pascal Maithya Mwasa** on 12<sup>th</sup> August, 2020. It is the 2<sup>nd</sup> interested party's case that on 26<sup>th</sup> May, 2020 it received a regret letter informing it that its bid was unresponsive owing to the fact that they did not paginate the whole document. That the 1<sup>st</sup> Applicant unlawfully and unfairly disqualified the 2<sup>nd</sup> interested party at the preliminary stage of evaluation by declaring its bid unresponsive for failure to paginate two pages that constituted the Table of Contents.

31. The 2<sup>nd</sup> interested party avers that failure to paginate the table of contents amounted to an oversight that could be corrected without affecting the substance of the tender thus the criteria adopted by the 1<sup>st</sup> applicant failed to meet the requirements set out in section 79 of the Act. That having been aggrieved by the applicant's decision, the 2<sup>nd</sup> interested party filed a request for review application in the form of, Request for Review Application No. 77 of 2020. The respondent delivered its ruling on 30<sup>th</sup> June, 2020 in favour of the 2<sup>nd</sup> interested party.

32. The 2<sup>nd</sup> interested party further avers that the applicants' allegations of *ultra vires*, illegality and unreasonableness and irrationality are mere allegations that do not meet the required threshold. It is also the 2<sup>nd</sup> interested party's case that the respondent had jurisdiction to hear and determine the request for review and to hold as it did.

33. The 2<sup>nd</sup> interested party contends that a judicial review application is only concerned with the decision-making process and not the merits of the decision itself. Therefore the Applicant has failed to meet the threshold to warrant a grant of judicial review orders sought thus the applicants application should be dismissed.

34. That the 5<sup>th</sup> interested party opposed the motion by filing a replying affidavit deposed by **Fatma Mohamed** on 10<sup>th</sup> August, 2020. The 5<sup>th</sup> Interested party avers that the respondent having cancelled and set aside the award given to the 3<sup>rd</sup> interested party it should have made an order that the 5<sup>th</sup> interested party being second in the bid, be granted the award.

35. The 5<sup>th</sup> Interested party further avers that the respondent did not take into account the provisions of the Public Procurement & Disposal (Preference & Reservation) Regulations 2011. The 5<sup>th</sup> interested party therefore states that the application for judicial review is malafides, unmeritorious and should be dismissed with costs.

### **Submissions.**

36. The application was canvassed through written submissions. The *Ex parte* applicants filed submissions on **21<sup>st</sup> August, 2020**; the 1<sup>st</sup> interested party filed submissions on **26<sup>th</sup> November, 2020**; the 2<sup>nd</sup> interested party filed submissions on **14<sup>th</sup> September, 2020**; while the 4<sup>th</sup> interested party's submissions were filed on **15<sup>th</sup> September, 2020**

### **Determination**

37. In the case of **Republic v Public Procurement and Administrative Review Board & another; Dochar Construction and Trade Inc Ltd (Interested Party) Ex Parte Xtreme Engineering Services Limited [2019] eKLR** the court observed that;

**“I'm alive to the fact that the purpose of the remedy of judicial review has long been settled. Going by the decision of the House of Lords in R v Chief Constable of North Wales, ex p. Evans [1982] UKHL 10 (22 July 1982), the remedy of judicial review was said to be available for the purposes of preventing excessive exercise of power by administrative bodies or officials; to ensure that an individual is given fair treatment by administrative authorities; to keep administrative excesses in check, that is to check maladministration; and to provide remedy to those aggrieved as a result of excessive exercise of power by administrative bodies. (See Republic vs Public Procurement Administrative Review Board & 2 Others (2015) eKLR JR Case No. 21 of 2015).”**

38. That Judicial Review proceedings are not concerned with the merits of the decision but rather with the decision making process. In the case of **Cortec Mining Kenya Limited vs. Cabinet Secretary, Attorney General & 8 others [2015] eKLR** the Court of Appeal discussed

the judicial review remedies as follows:

**“...certiorari issues to quash decisions for errors of law in making such decisions or for failure to act fairly towards the person who may be adversely affected by such decision. Prohibition is directed to an inferior tribunal or body from continuing proceedings in excess of its jurisdiction or in contravention of the laws of the land. The order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same.”**

39. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties contend that the *ex parte* applicants’ application does not meet the threshold of a judicial review application since the application seems to suggest that the *ex parte* applicants are dissatisfied with the decision of the respondent and not how the respondent arrived at its decision, and hence these proceedings are not concerned with the merits of the decision but rather with the decision making process.

40. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties further contend that the application herein disguised as a judicial review application seeks to have this Court operate as an appellate court. That with the ratification of the Constitution of Kenya in the year 2010, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that *Article 47* of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act brings forth new jurisprudence in judicial review in that judicial review henceforth include aspects of merit review of administrative action. *However the reviewing court has no authority to substitute its own decision for that of the administrator.*

41. I find that Section 7 of the Fair Administration Act provides for other grounds for judicial review other than the jurisdictional and procedural aspects of decision making. These grounds include the rationality and reasonableness of a decision, its proportionality, whether legitimate expectations have been violated by the decision, and whether the decision was made for proper or improper purposes.

42. I have carefully considered the application and the written submissions. In a nutshell, the *Ex parte* applicants’ being aggrieved by the decision of the respondent has filed the instant proceedings herein. From the statutory statement and the verifying affidavit filed on behalf of the *ex parte* applicants, the *ex parte* applicants seek relief on the basis that the Board acted *ultra vires* powers granted to it under Section 173 of the Public Procurement Asset and Disposal Act of 2015. In my view, the issues that arise for determination are as follows:

**i. Whether the Respondent acted *ultra vires* in arriving at its decision that was rendered on 30<sup>th</sup> June, 2020.**

**ii. Whether the *Ex parte* applicants are entitled to the reliefs sought.**

43. In the Ugandan case of **Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300**, Justice Kasule stated:

**“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**

**Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”**

**i. Whether the Respondent acted *ultra vires* in arriving at its decision that was rendered on 30<sup>th</sup> June, 2020.**

44. From the record, it is clear that the 1<sup>st</sup> interested party’s bid was found to be non-responsive at the preliminary stage by failing to paginate the whole document, while the 2<sup>nd</sup> interested party’s bid was found to be non-responsive by failing to paginate the whole bid document as the page with the table of contents was not page numbered.

45. I have looked at the *ex parte* applicants’ tender document annexed as “AD1” in the verifying Affidavit sworn by **Aza Dzengo** and particularly at Clause 2.15 and 2.16 and I find that it is neither clearly stated nor implied that the *bidders must serialize each and every page of the bid document submitted, as alluded to by the ex parte applicants. However, pursuant to section 74 (1) (i) of the Public Procurement and Asset Disposal Act, serialization of a bid document is a requirement set by law.*

46. section 74 (1)(i) of the Public Procurement and Asset Disposal Act provides as follows:-

“(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

- (a) the name and address of the procuring entity;
- (b) the tender number assigned to the procurement proceedings by the procuring entity;
- (c) a brief description of the goods, works or services being procured including the time limit for delivery or completion;
- (d) an explanation of how to obtain the tender documents, including the amount of any fee, if any;
- (e) an explanation of where and when tenders shall be submitted and where and when the tenders shall be opened;
- (f) a statement that those submitting tenders or their representatives may attend the opening of tenders;
- (g) applicable preferences and reservations pursuant to this Act;
- (h) a declaration that the tender is only open to those who meet the requirements for eligibility;
- (i) requirement of serialisation of pages by the bidder for each bid submitted; and
- (j) any other requirement as may be prescribed.

(2) All tender documents shall be sent out to eligible bidders by recorded delivery.”

47. In *Republic v Public Procurement Administrative Review Board; Nairobi City Water & Sewerage Company Limited & another (Interested Parties) Ex parte Four way Construction Company Limited* [2019] eKLR the court observed that;

“The ordinary meaning of serialisation is to **publish** or **present** something in the form of a **serial**. The **Concise Oxford English Dictionary** defines a serial as “consisting of, forming part of, or taking place in a series” and further defines “to serialise” as “to arrange in a series”. A “series” is on the other hand defined as “a number of similar or related things coming one after another”. Therefore the ordinary meaning and interpretation of serialization of pages is that each page must be arranged and presented in a manner that it is evident that a page is coming after another page.

48. The court went further to state;

“For a purposive interpretation of the provisions of the law regarding serialisation of the pages of bid documents, one needs to consider the principles and objectives underlying public procurement law, which are stipulated under both under the Constitution and the Act. Article 227(1) of the Constitution in this regard provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Section 3 of the Act provides for the guiding principles of public procurement as follows:

“Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

- a. the national values and principles provided for under Article 10;
- b. the equality and freedom from discrimination provided for under Article 27;
- c. affirmative action programmes provided for under Articles 55 and 56;
- d. principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);
- e. the principles of public finance under Article 201;
- f. the values and principles of public service as provided for under Article 232;
- g. principles governing the procurement profession, international norms;
- h. maximisation of value for money;
- i. promotion of local industry, sustainable development and protection of the environment; and
- j. promotion of citizen contractors.”

49. In light of the foregoing, it becomes apparent to this court that the aspect of serialisation of each and every page of a bid document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with discrimination. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and it shall also encourage abuse of power and disregard of the law by not only bidders but also procuring entities.

50. I therefore find that despite the fact that serialisation was not a mandatory requirement in the *ex-parte* applicants tender document, it is a mandatory requirement under section 74 of the PPAD Act of 2015 and all bidders ought to have fully complied.

51. Section 79 of the PPAD Act of 2015 gives instances where a responsive tender shall not be affected. The said section reads as follows:

**“(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.**

**(2) A responsive tender shall not be affected by—**

**(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or**

**(b) errors or oversights that can be corrected without affecting the substance of the tender.**

**(3) A deviation described in subsection (2) (a) shall—**

**(a) be quantified to the extent possible; and**

**(b) be taken into account in the evaluation and comparison of tenders.**

52. That failure to serialise each and every page of a tender document cannot translate to a minor deviation from the laid down principles set down in law as explained hereinabove. It is my finding that the decision by the respondent directing the *ex-parte* applicants’ to re-admit non-responsive bids is in contravention with the provisions of section 74 and 79 of the PPAD Act of 2015 and thus *ultra vires*.

**Whether the Ex parte applicants are entitled to the reliefs sought.**

53. The *ex parte* applicants are seeking for a judicial review order of certiorari in the motion before this court. The Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** as follows as regards the orders of Judicial Review:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to 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 on the merits of the proceedings....Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

54. That in finding that the respondent acted *ultra vires* Section 74 and 79 of the PPAD Act of 2015, the *ex parte* applicants are entitled to the orders of certiorari sought to quash the impugned decision by the respondent rendered on 30<sup>th</sup> June, 2020.

55. I accordingly find that the Applicant’s Notice of Motion dated 16<sup>th</sup> August 2018 is merited to the extent of the following orders:

**i. An order for Certiorari be and is hereby issued to remove into this Honourable Court for purposes of quashing the decision of the Public Procurement Administrative Review Board, the Respondent herein, made on 30<sup>th</sup> June, 2020 under the Request for Review Application No. 74 and 77 of 2020-FCM Travel solutions T/A Charleston Travel Limited and Kilindini Travel Centre Limited vs The Accounting Officer Kenya Ports Authority and Kenya Ports Authority regarding the Tender No. KPA/111/2019-20/PSM for the Provision of Air Travel Agency Services.**

**ii. Each Party shall bear its own costs of the Motion dated 13<sup>th</sup> July, 2020.**

56. It is so ordered.

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**E. K. OGOLA**

**JUDGE**

**DATED, SIGNED and DELIVERED at MOMBASA on this 4<sup>th</sup> day of February, 2021.**

**NOTE:**

In view of the declaration of measures restricting court operations due to

the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.