



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO. E011 OF 2021
(CONSOLIDATED WITH JUDICIAL REVIEW APP. NO. E012 OF 2021)

IN THE MATTER OF:

THE LAW REFORM ACT CAP 26

AND

IN THE MATTER OF:

THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF:

THE PUBLIC PROCUREMENT AND ASSETS DISPOSAL ACT NO.33 OF 2015

AND

IN THE MATTER OF:

**AN APPLICATION BY THE KENYA PORTS AUTHORITY &
ACCOUNTING OFFICER OF THE KENYA PORTS AUTHORITY
FOR THE JUDICIAL REVIEW ORDER OF CERTIORARI AGAINST
THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD MADE ON 9TH MARCH, 2021 IN RESPECT OF REQUEST FOR REVIEW
APPLICATION NUMBER 27 OF 2021**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

AND

KENYA PORTS AUTHORITY.....1ST EX PARTE APPLICANT

THE ACCOUNTING OFFICER, KENYA

PORTS AUTHORITY.....2ND EX PARTE APPLICANT

AND

RHOMBUS CONSTRUCTION

COMPANY LIMITED.....INTERESTED PARTY

RULING

1. Pursuant to leave herein granted on 23/3/2021 the *Ex parte* Applicant filed the **Notice of Motion** herein dated 29/3/2021 which prays for the following orders:

1. That the Application be certified and heard and determined within the statutory timelines of 45 days from the date of filing this Application in accordance with Section 175 (3) of the Public Procurement and Assets Disposal Act, 2015.

2. An Order of certiorari be issued to remove to this Honorable Court for purposes of quashing the decision and orders of the Public Procurement Administrative Review Board, the Respondent herein, made on 9th March 2021 under the Request for review Application No. 27 of 2021 – Rhombus Construction Company Limited Vs the Accounting Officer Kenya Ports Authority & Kenya Ports Authority regarding the Tender No. KPA/093/2020-21/TE for the Design, Manufacture, Supply, Test and Commissioning of Four (4) Empty Container Handlers (Reach stacker Type).

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

2. The motion is premised on the grounds set out therein and is supported by Verifying Affidavit sworn my **Cosmas Makori** on 19/3/2021.

3. The *ex parte* applicant's case is that the Applicants openly advertised the **Tender No.KPA/093/2020-21/TE for the Design, Manufacture, Supply, Test and Commissioning of Four (4) Empty Container Handlers (Reach stacker Type)** [hereinafter "the Tender"] through an advertisement published in the Nation and Standard Newspapers editions of 3rd December 2020 as well as in the Lloyd's List on 15th December, 2020. The deadline for submission of bids was initially fixed for 28th January, 2021 but was later extended vide Addendum No.1 to 18th February, 2021 at **1000HRS**. However, vide an email dated 18th February 2021 received at **0823HRS** approximately one and a half hours before the submissions deadline and tender opening, the Applicants were notified by the Respondent's Secretariat that the Request for Review No. 27 of 2021 had been filed by the Interested Party. Therefore, the Applicants were required to suspend all proceedings in respect of the Tender in accordance with the provisions of Section 168 of the PPAD Act. In compliance, the Tender was not opened at 1000hrs as scheduled.

4. The Applicant's case is that it is apparent the Interested Party's Request was premised on allegations that by advertising the Tender the subject matter of these proceedings, the Applicants were in contempt of Court and of the Respondent, because the equipment being procured in the Tender was similar to the equipment being procured in a previous tender of the Applicants, Tender No. KPA/121/2019-20/TE – Supply & Commissioning of 5 New Empty Container Handlers (Reach Stacker Type), which was advertised openly earlier on 3rd March, 2020. That said previous tender was challenged by the Interested Party and it is currently pending before the High Court at Nairobi under Nai HC JR No.E1106 of 2020.

5. The Applicants filed their Response to the Request for Review on 24th February, 2021 stating *Inter alia* that the two aforementioned tenders are separate, distinct and independent of each other having been planned and budgeted for by the Applicants in two different financial years with two separate approved budgets, and that all equipment acquisition or disposals implemented by the 1st Applicant in any financial year, are informed purely by its statutory obligations, operational needs for efficiency, business growth forecast and market demands among other technical factors; that the foregoing parameters are among what strictly inform the 1st Applicant's Continuous planning for maintenance, repairs, procurement and/or disposal of its various equipment in accordance with the provisions of the Constitution of Kenya and the prevailing laws governing public procurement and finance.

6. The Applicants aver that Whereas the previous tender (KPA/121/2019-20/TE) which is currently pending before the High Court at Nairobi was planned for and approved in the 1st Applicant's approved procurement plan and budget for the financial year 2019/2020; the current tender (KPA/093/2020-21/TE), the subject matter of these proceedings, is in respect of a separate and distinct approved procurement plan and budget of the 1st Applicant for the financial year 2020/2021. Therefore, the applicants aver that Whether or not the ongoing judicial proceedings at Nairobi in relation to the previous Tender No. (KPA/121/2019-20/TE) were instituted, the Applicants would still have advertised the current Tender No. 093/2020-21/TE which was planned, budgeted for and approved separately and independently to satisfy the 1st Applicant's equipment and operational needs. Further, upon completion of the ongoing judicial proceedings with respect to each of the two tenders, the Applicants are in a position to ensure progress and completion of the two tendering processes separately and independently. Pending the conclusion of the ongoing Court proceedings before the High Court at Nairobi, the procurement process in the previous tender in which the Interested Party participated is currently suspended.

7. The Applicants state that despite explaining their position, the Respondent delivered its decision on 9th March 2021 wherein it allowed the Interested Party's Request for Review, cancelled and set aside the Applicant's advertisement of the Tender No. 093/2020-21/TE and condemned the Applicants to pay costs of Kshs. 95,000/= to the Interested Party.

8. The Applicants aver that in reaching its impugned decision, the Respondent acted unreasonably, irrationally and failed to consider the pleadings and averments of the Applicants, thereby causing grief to the applicants. The Applicants state that in absolute disregard of the Applicants' pleadings, specific averments and the confidential documents supplied to it, the Respondent held that the procurement plan and approved budget for the subject tender No. 093/2020-21/TE which was made in the Financial Year 2020/2021 is mischievous and meant to frustrate the procurement process in the previous Tender No. 121/2019-20 which was planned and approved separately in the financial year 2019/2020.

9. For these reasons the Exparte Applicants prays for the orders sought herein.

The Response

10. The Respondent opposed the application through Replying Affidavit sworn by **Philip Okumu** on 4/5/2021. The deponent is the Acting Board Secretary of the Respondent. In the said Replying Affidavit the Respondent refers to the history of Tender No. KPA/121/2019-20 which is currently in Judicial Review Court in Nairobi. It is the Respondent's case that the Ex parte Application proceeded to issue an advertisement for Tender No. KPA/093/2020-21/TE (this tender) over the same subject matter as Tender No. KPA/121/2019-20/TE without cancelling the previous tender process, and contrary to the Respondent's decision in Review No.118/2020. This action aggrieved the Interested Party who then on 17/2/2021, filed an application for review No.27 of 2021 dated 16/2/2021 seeking to set aside the procurement proceedings in Tender No. KPA/093/2020-21/TE.

11. The respondent avers that having considered each of the parties' pleadings filed before it and confidential documents submitted by the Exparte Applicants herein pursuant to Section 67(3)(e) of the Act, the Respondent framed the following issue for determination;

a) Whether the Accounting Officer of the Procuring Entity's Tender Notice of Tender No.KPA/093/2020-21/TE for Supply and Commissioning of 4 New Empty Container Handlers (Reachstacker Type) published in the Daily Nation Newspaper and the Procuring Entity's Website on 3.12.2020 and on the Lloyd's List on 15.12.2020 is lawful.

12. The Respondent avers that in assessing the lawfulness of the Ex parte Applicants' subsequent Tender Notice the Board considered the provisions of Article 227(1) of the Constitution, Sections 63 and 135(2) of the Act, and held that the 2nd Ex parte Applicant's advertisement of Tender No. KPA/093/2021-21/TE was unlawful and should therefore be set aside and cancelled. The Respondent's case is that the action of advertising the subject tender that clearly emanates from Tender No.121/2020 which was never concluded, demonstrates lack of Fair Administrative Action envisaged by Article 47(1) of the Constitution. It is the Respondent's case that the Exparte Applicant's action was meant to circumvent the principles that guide public procurement under Article 227(1) of the Constitution, including the requirement that the Exparte Applicants should act in a fair manner and bring the Tender Process in No.121/2020 to an end. Further, the Respondent avers that this action demonstrates that the Exparte Applicants made a calculated move to undermine judicial process at the High Court in Review E1106/2020 and the process of Review before the Respondent. The Respondent avers that a procurement process can only be concluded through notification of bidders and signing of a contract pursuant to Section 135(2) of the Act or through termination provided the statutory pre-conditions for termination of a tender specified in Section 63 of the act are satisfied, none of which had been the case in this matter. In the circumstances the Respondent states that the Exparte Applicant is not entitled to the reliefs sought in the Notice of Motion application herein.

13. On its part the Interested Party opposed the application through Grounds of Opposition filed herein on 6/5/2021. The Interested Party's case is that the Exparte Applicants have neither pleaded nor shown themselves as 'persons aggrieved' within the meaning of section 175(1) of the Public Procurement and Asset Disposal Act hence the Exparte Applicants lack *locus standi* to institute and continue the instant Judicial Review application; that the purported suit herein is hopelessly incompetent and bad in law as the Respondent lacks legal capacity to be sued in its own name having regard to the express provisions of Section 27(1) of the Public Procurement and Asset Disposal Act; that this Court lacks the requisite jurisdiction to take cognizance of, hear and determine the Exparte Applicants' application as filed herein; that the Exparte Applicants' application has been filed and served contrary to the express provisions of Order 53 Rule 3(2) of the Civil Procedure Rules (as amended); and that the Exparte Applicants have fatally failed to demonstrate circumstances which warrant the Court to exercise its judicial discretion in favour of granting the Judicial Review Orders of Certiorari sought herein by the Exparte Applicants.

Submissions

14. The application was canvassed through oral submissions on 6/5/2021. **Mr. Paul Munyao** and **Mr. Ngoya**, learned counsel submitted for the Ex parte Applicants. **Mr. Munyao** submitted that the ex-parte Applicants' case is premised on the grounds of unreasonableness, irrationality, illegality and breach of natural justice.

15. Counsel submitted that the Public Procurement and Asset Disposal Act 2015 (the Act) provides means of disposing off public assets. That Section 53 of the Act provides for procurement and assets disposal plan. It requires the accounting officer for public entity to prepare an annual procurement plan within approved budget prior to commencement of each year. For the Kenya Ports Authority(KPA), the 1st ex parte Applicant herein, that plan is thereafter approved by the Cabinet Secretary for Finance. This procurement Plan is made for every year and is geared to facilitate KPA to run its obligations and to deliver on its mandate. To do this KPA must ensure it has the resources, equipment and personnel. It is a continuous process and must happen every financial year.

16. Counsel submitted that during the financial year 2019/2020 KPA advertised tender No.KPA/121/2019/20/TE/ - (Tender No.121) for supply and commissioning of 5 new empty container handlers (Reach Stacker type). After evaluation of this tender, the interested party lodged a request for review before the Respondent which was determined but the interested party was dissatisfied. It then filed a Judicial

Review application in Nairobi being E1106/2020 in September 2020. This application is still pending and so procurement No. 121 is still on hold. **Mr. Munyao** submitted that in Financial year 2020/2020, the Engineering Corporation and other technical departments of KPA identified the need to procure 4 new empty container handlers (Reach Stacker Type), and so a procurement tender No.093/2021-2021 (this tender) was advertised for the procurement of the same. So in total there are two tenders that have not been awarded, No.121 and No.93

17. Counsel submitted that these two tenders are separate. None of them extinguishes or even dilutes the other. These two tenders have been captured in Financial Tenders and Budgets for the two financial years and are therefore meant to run their own separate courses.

18. The Ex parte Applicants avers that the Interested Party participated in the first tender No.121 – which now cannot proceed until litigations is over. However, when tender No.93 was advertised, the Interested Party requested for a review a day before the opening of tender. Due to this request the bids were never opened so nobody is able to know whether the Interested Party participated in that tendering process. On 9/3/2021 the Respondent made its decision allowing a request for review by the Interested party. Thereafter KPA filed the current judicial review seeking to quash the said decision of the Respondent on the grounds already stated. Counsel submitted that this Court has the inherent jurisdiction to supervise the working of inferior courts and tribunals such as the Respondent so that it does not act illegally, unreasonably or in excess of jurisdiction.

19. **Mr. Munyao** submitted that in all pleadings before the Respondent the Interested Party never averred to be a candidate or a tenderer in respect to the current tender they were challenging. So the jurisdiction of the Board was never properly invoked. Counsel submitted that by entertaining the Interested Party, the Respondent committed an illegality.

20. Counsel further submitted that the request for review should have been made within 14 days of the date of notification of award or the date of breach. Here the breach complained of is the advertisement carried out on 3/12/2020 in **Daily Nation** and **The Standard** and on **Lloyd List** on 15/12/2020. The request for review was filed on 17/2/2021, two months after the alleged breach. The Respondent was alive to this fact, as indicated on page 11 of its decision where it set out the only issue for determination as being whether the accounting officer acted unlawfully when he published the advertisement notice on 3/12/2020 and 15/12/2020. Therefore, counsel submitted, the Respondent committed an illegality, and on that ground alone, their decision cannot stand and should be quashed by an order of this court.

21. **Mr. Munyao** submitted that material was placed before the Respondent to demonstrate why the two tenders herein were separate, planned for and budgeted for separately and the equipment to be used in separate sections of the port. That it was also demonstrated that if the current tender was awarded, the previous tender would still not be nullified and would still continue. However, Counsel submitted that the Respondent ignored all these material. The respondent decided that the current tender was meant to avoid or circumvent the tender No.121 that was subject to litigation. This finding was unreasonable. The respondent was also unreasonable in finding that the Exparte Applicant was in contempt of court by advertising for the current tender when the tender No.121 was still alive in court. Counsel submitted that the Respondent failed to appreciate that the KPA must of necessity have equipment for carrying out its work, continuously, and in various sections of the port. Further, Counsel submitted that it was disclosed that this was open tender and anybody would be at liberty to tender and no bidder had been disenfranchised. Hence the decision was irrational, and was meant to micromanage the procurement processes.

22. Lastly **Mr. Munyao** submitted that there was also the issue of failure to grant natural justice. That the respondent's decision was manifestly unjust, and that the Applicants were condemned unheard – which is a breach of natural justice; that KPA had clearly stated that they had the capacity to carry out the two tenders to their logical conclusion.

Mr. Munyao dismissed the grounds of opposition filed by the Interested Party, together with the Replying Affidavit filed by the respondent and urged the court to grant the application.

23. **M/S Kiti** learned counsel for the Respondent relied on the Supporting Affidavit sworn by the Respondent on 4/5/2021 and urged the court to dismiss the application saying that the respondent's decision was lawful.

24. **Mr. Omolo**, learned counsel for the Interested Party submitted that, under Section 167 – a candidate or a tenderer may apply for review. Section 2(1) of the Act defines a candidate as a person who has obtained the tender document from a public entity pursuant to an invitation notice by a procuring entity. The tender document can be downloaded from the procurement entity's website at no pay. So the Interested Party was a candidate. Counsel submitted that Section 167 of the Act provides that a request for review may be made within 14 days from notification of award or of breach at any stage of the procurement process. Counsel contended that what the Interested Party complained of was a continuing breach, for as long as the tender was floated. Therefore, a request could be made at any time and that the Interested Party was not limited to the said 14 days.

25. **Mr. Omolo** further submitted that this Court lacks the jurisdictions to entertain this application since the applicant has not shown that they are aggrieved party. Counsel submitted that without "grief" on the part of the applicant, this court has no jurisdiction.

26. **Mr. Omolo** further submitted that Section 27(1) of the Act established the Respondent Board as an unincorporated entity, and therefore lacks legal personality, and cannot be sued in its own name. This means that it can only sue by its officials. However, this is not the case in the matter herein where the Board has been sued in its name. Counsel submitted that this failure goes to the jurisdiction of this Court to entertain this matter, and that there is no such jurisdiction. Counsel submitted that Order 53 Rule 3(2) requires that the Respondent should be served by copy of these proceedings, and that since the Chairman of the Respondent has not been served with this application, the same is therefore incompetent and should be struck out.

Determination

27. I have carefully considered the application before the Court and the opposition to it. I have also considered submissions by counsel and authorities relied on. In my view the following issues arise for determination.

(i) *Whether the Respondent has properly been sued to invoke the jurisdiction of this Court.*

(ii) *whether the Respondents' impugned decision was illegal, irrational, or unreasonable.*

(i) *Whether the Respondent has properly been sued.*

28. The determination of this matter goes to the jurisdiction of this Court to entertain this matter. Section 27(1) establishes the Public Procurement Administrative Review Board as an unincorporated board. **Mr. Omolo** argues that, that being so, the board can only be sued through its Chairperson and that in this matter, the unincorporated board has been sued instead. **Mr. Munyao**, apart from submitting that the suit was properly before the court, did not delve into the issue. This is an issue of jurisdiction and it must be dispensed with first.

29. In my view there are at least three reasons why **Mr. Omolo's** submissions cannot stand. The *first* is that Judicial Review proceedings are of a special nature, where parties seek substantive justice in proceedings which are highly condensed to be heard within a limited time line and with an attempt to arrest an alleged procedural injustice. Indeed judicial review proceedings, as often stated are not concerned with merits as such. Therefore, to purport to import Civil Procedures Rules into judicial review proceedings with the sole purpose of using the Civil Procedure Rules to frustrate judicial review proceedings would not succeed. In my view Civil Procedure Rules can only be imported into Judicial Review rules if the same support and improve operations of Judicial Review. *Secondly*, in my view, under Article 159 of the Constitution, this Court is now required to deliver substantive justice, and shall not be restrained by technicalities of procedure. The objection to jurisdiction by the Interested Party herein is based purely on technical consideration. It is my view that this Court cannot down its tool so that an injustice is encouraged. *Thirdly*, if there is any further doubt on this issue, it is my view that an Interested Party, as in this matter, would not have the leeway to have this Court down its tool herein. This is so because an Interested Party does not have the leeway to expand the case before this Court beyond what was pleaded in the response by the Respondent. An Interested Party's case must not depart from the case between the Ex-parte Applicants and the Respondent. An Interested Party cannot plead its own case different from the Respondent's. The Respondent has not raised the issue of jurisdiction with the capacity to strike out this application. Clearly the Interested Party is expanding the dispute beyond the pleadings as delimited by the Respondent.

30. **The Black's Law Dictionary 9th Edition**, at page 1232 defines an interested party as "a party who has a recognizable stake (and therefore standing) in the matter." It also defines a "Necessary Party" as "a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings."

31. In **Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others**, Supreme Court Petition No. 12 of 2013, [2015] eKLR (an application by Katiba Institute) the supreme Court stated:

"Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause".

32. Clearly the role of an interested party in proceedings is peripheral. In **Methodist Church in Kenya v Mohamed Fugicha & 3 others [2019] eKLR**, the Supreme Court was called upon to determine whether substantive orders could be granted in a matter where a cross-petition had been introduced to a constitutional matter by way of an affidavit by an interested party. In its majority decision, the Supreme Court stated as follows at paragraph 51-55:

"[51] The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the Constitution..."

[53] ... Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in Francis Kariuki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

"Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court...

[54] In like terms we thus observed in Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012 (paragraph 24):

"A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules,

under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong

party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.

33. What emerges from the above decisions is the principle established in our jurisprudence that an interested party is a peripheral party in a suit and cannot introduce new issues for determination by the Court. Further, that in determining the matters before it, the Court will only consider the issues raised in the pleadings by the principal parties.

34. From the foregoing it's the finding hereof that the Respondent is properly sued herein, and that the Respondent has not questioned the capacity in which it has been sued, or the jurisdiction of this Court to entertain this application. Therefore I find and hold that this Court has the jurisdiction to entertain this application.

ii) Whether the Respondents' impugned decision was illegal, irrational, or unreasonable.

35. The Respondent's impugned decision was that by advertising the tender No.093/2020-21/TE, the 1st Applicant was advertising for the procurement of new Empty Container Handlers (Reach stacker Type), yet there was a pending judicial processes at the High Court in Nairobi. That decision was reached despite evidence being placed before the Respondent board, that the two procurement processes were planned for separately based on the 1st Applicant's operational needs; were distinct and independent of each other and with separate approved budgets. The Tender No.093/2020-21/TE has no bearing whatsoever on the proceedings before the Court at Nairobi. Further, KPA is a strategic port facility in the East and Central African region. Its mandate must be carried out continuously and any procurement processes holding its operations must be reasonable. The proceedings before the Review Board show that the Exparte applicant explained to the Board that the two procurement processes were separate and independent; KPA explained that after the court process in Nairobi, the procurement process pending in that court would be completed to its logical conclusion. KPA explained that indeed it has the capacity to conclude that process. It is also explained that KPA required for its operations many more than the 5 Container Handlers, the subject matter of the court process in Nairobi. The Respondent at paragraph 11 of its Judgment stated: -

"A mischievous procuring entity, such as the 2nd Respondent herein would change the tender number, reduced the quantity of goods, works or services required and advertise a subsequent tender in a different financial year to simply disenfranchise bidders."

36. However, no evidence was produced to show that the Exparte Applicants were mischievous. The Respondent trivialized the Applicants' procurement planning and approval processes without considering the strategic mandate of KPA. Further, the Respondent failed to state and/or describe how any bidder was disenfranchised, if at all, by the second advertisement. The Respondent failed to take into consideration the relevant fact that any bidder was at liberty to compete in any or both of the two tenders which were advertised openly, separately and in successive financial years to satisfy the 1st Applicant's operational needs. The Respondent clearly disregarded and ignored the Applicants' pleadings that they are capable of implementing the two tenders separately and independently to their logical conclusion upon completion of the judicial process, and that none of the tenders was meant to extinguish the other. This is clear evidence that the Respondent condemned the Applicants unheard, on their capacity to conclude the two procurement processes.

37. It should be clear that any matter pending in court as a chose in action, is complete on its own. The court process has all the remedies for any aggrieved party before it. Therefore KPA cannot be stopped from carrying out its statutory obligations because of a pending matter in court. Parties are in court because they pursue particular remedies which the court should be able to grant to an aggrieved party. The Respondent Tribunal ought to have taken into account the particular mandate of KPA, its strategic importance in the region, and the need for its operations to continue 24 hours a day. The Respondent did not do this. It treated this strategic facility and its mandate, in a most casual way, and despite KPA informing the Review Board that it has the capacity for the two separate tenders, the board rejected this submission. I find and hold that this decision was irrational and unreasonable. The Respondent's decision amounted to a micromanagement of the procurement process.

38. Finally, under Section 167 of the Public Procurement and Assets Disposal Act, a request for review is to be made within 14 days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process. **Mr. Omolo** submitted that the breach of advertisement was a continuing breach and so, a request to the review board can be made at any time. However, **Mr. Munyao** contended that the request was made out of time because the said advertisements were carried out locally through the **Daily Nation** and **The Standard Newspaper** on 3/12/2020; and internationally on the Lloyd List on 15/12/2020. The request for review before the Respondents' Board was filed on 17/2/2021, 60 days after the aforesaid advertisements. Clearly, the requirement of filing a request within 14 days was breached by the Interested Party. It is the finding hereof that the Respondent erred in admitting the said request. There was therefore no valid request before the Respondent to begin with, and therefore any processes arising therefrom is null and void and illegal.

39. For the foregoing reasons, the Notice of Motion before the court is merited. The same is allowed as follows:-

1. An Order of Certiorari be and is hereby issued to remove to this Honorable Court for purposes of quashing the decision and orders of the Public Procurement Administrative Review Board, the Respondent herein, made on 9th March 2021 under the Request for review Application No. 27 of 2021 – Rhombus Construction Company Limited Vs the Accounting Officer Kenya Ports Authority & Kenya Ports Authority regarding the Tender No. KPA/093/2020-21/TE for the Design, Manufacture, Supply, Test and Commissioning of Four (4) Empty Container Handlers (Reach stacker Type).

2. Parties shall bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MAY, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Omolo for Interested Party

Mr. Munyao and Mr. Ngoya for Ex parte Applicants

Mr. Kiti for Respondent

Ms. Peris Court Assistant