



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E057 OF 2021

IN THE MATTER OF AN APPLICATION FOR

ORDERS OF CERTIORARI AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD..... RESPONDENT

AND

THE ACCOUNTING OFFICER, DEPARTMENT OF HEALTH SERVICES,

COUNTY GOVERNMENT OF UASIN GISHU....1ST INTERESTED PARTY

COUNTY GOVERNMENT OF UASIN GISHU...2ND INTERESTED PARTY

MEDIONICS HEALTHCARE LIMITED.....3RD INTERESTED PARTY

EX PARTE:.....BIOMED HEALTHCARE LIMITED

JUDGMENT

The Application

1. On 16th February 2021, Biomed Healthcare Limited, the *ex parte* Applicant herein, filed a Request for Review with the Public Procurement Administrative Review Board (the Respondent herein), being PPARB Application No. 45 of 2021, with respect to Tender Number UGC/HLTH/001/2020-2021 for the Supply and Delivery of Medical Equipment for Mitigation against Covid-19 Pandemic (hereinafter “the Tender”), and on which the Respondent made the following orders on 26th April 2021:

1. The Request for Review dated 5th April 2021 and filed on 6th April 2021 with respect to Tender No. UGC/HLTH/T/001/2020-2021 for Supply and Delivery of Medical Equipment for Mitigation against Covid-19 Pandemic, be and is hereby struck out for want of jurisdiction.

2. Each party shall bear their own costs in the Request for Review.

2. The *ex parte* Applicant is aggrieved by the Respondent’s decision, and consequently filed an application by way of a Notice of Motion dated 7th May 2021, seeking the following orders:

1. An Order of Certiorari to bring into this Court for purposes of being quashed the entire decision of The Public Procurement Administrative Review Board, the Respondent herein, in Application Number 45 of 2021, dated 26th April, 2021.

2. An Order of Mandamus compelling the Respondent to re-hear and determine the Request for Review, Number 45 of 2021 on merits.

3. Cost incidental to the Application be in the cause.

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 28th April 2021, a verifying affidavit sworn on the same date, and a supplementary affidavit sworn on 25th May 2021 by Kelly Nandasaba Watimah, the *ex parte* Applicant's Project Manager. The *ex parte* Applicant averred that the main contention by the Applicant in the Request for Review 45 of 2021 before the Respondent was that there was a breach of the procurement process leading to the unjustified award of the Tender by the 1st and 2nd Interested Parties to the 3rd Interested Party herein. Further, that the 3rd Interested Party's failure to provide a dully filled price schedule, made their bid unresponsive and ought not to have been further evaluated by the procuring entity.

4. The *ex parte* Applicant's case is that Respondent had a constitutional duty to adhere to the provisions of Article 47 (1) of the Constitution when making the impugned decision and that its decision of striking out the *ex parte* Applicants' Request for Review Application number 45 of 2021, denied the applicant the right to a fair hearing. Further that it is irrational for the Respondent to make a finding that the request for review dated 1st April 2021 and filed on 6th April 2021 was outside the statutory timelines without considering that 2nd to 5th April 2021 was an Easter holiday period, and also failed to consider the fact that there was a fumigation exercise on its premises on 1st April 2021, and the *ex parte* Applicant was directed to pay the fees and present documents for reception at the registry on 6th April 2021 an official working day.

5. Therefore, that the Respondent decision was materially influenced by an error of law in its finding that the *ex parte* Applicant failed to comply with the statutory period of lodging a request for review specified under section 167 (1) of the Public Procurement and Disposal Act, and by stating that it lacked jurisdiction. In addition, that the *ex parte* Applicant had a legitimate expectation that the process leading to the Respondent's decision will take into consideration all relevant material information.

6. Lastly, the *ex parte* Applicant contended that the execution of a contract with respect to the Tender by the Interested Parties prior to the expiry of 14 days demonstrates the procuring entity's determination to unjustly deny it the fruit of its responsive bid, and that an illegal contract cannot be a bar to a determination of the *ex parte* Applicant's claim on merit.

The Responses

7. The Respondent and 3rd Interested Party did not file any response to the application. Nevertheless, during the hearing of the application, Mr. Kiugu, the 3rd Interested Party's counsel, associated himself with the 1st and 2nd Interested Parties' case, while Mr. Munene, the counsel for the Respondent, indicated that the Respondent would not take any sides in this matter.

8. The 1st and 2nd Interested Parties on their part filed a replying affidavit sworn on 18th May 2021 by Dr. Joseph Morogo, the Chief Officer of the Department of Health Services and the Accounting Officer of the County Government of Uasin Gishu. The 1st and 2nd Interested Parties oppose the instant application on the grounds that the *ex parte* Applicant had filed the Request for Review beyond the statutory period specified in section 167(1) of the Public Procurement and Asset Disposal Act to invoke the jurisdiction of the Respondent herein.

9. The 1st and 2nd Interested Parties averred that the Procurement Process was done in compliance with the requirements of the Public Procurement and Asset Disposal Act, and explained that the 2nd Interested Party's Evaluation Committee conducted a price comparison of the 4 bidders who qualified for the financial evaluation stage of the Tender, and noted that the 3rd Interested Party had submitted the lowest bid at and hence was declared the successful bidder. Further, that the said Committee subsequently sought a clarification from the 3rd Interested Party if the tender price quoted was inclusive of the items whose prices had not been quoted, pursuant to the provisions of section 81 of the of the Public Procurement and Assets Disposal Act 2015. According to the 1st and 2nd Interested Parties, the said clarification from a tenderer to assist in evaluation and the comparison of the tenders is permissible under the provisions of section 81 of the Act, and that the clarification sought did not alter the terms of the tender in any manner.

10. Additionally, that the Professional Opinion conducted by the 2nd Interested Party's Head of Supply Chain Management which recommended that the 3rd Interested Party, having met both the technical and financial specifications and further being the lowest bidder, be awarded the Tender. Consequently, that the 3rd Interested Party was awarded the Tender vide a Letter of Notification of Award dated 19th March 2021, and that that the Letters of Regret were also simultaneously sent out to the unsuccessful bidders on the same date. In addition, that the said tender has already been implemented, since a Contract for the supply and delivery of medical equipment for mitigation of Covid-19 Pandemic under the tender number JM/HLTH/T/001/2020-2021 has been entered into on 28th April 2021, the said medical equipment delivered and invoices for the said supplies raised. Accordingly, that the appropriate forum in which to raise any complaint regarding the execution of the contract or the manner in which the said contract was entered into is the Public Procurement Regulatory Authority.

11. Therefore, that going by the date of issuance of the letter of 19th March 2021, the time within which to lodge a Request for Review against the said award of contract, would start running from 20th March 2021 and lapse on 2nd April 2021, as guided by the provisions of section 167(1) of the Public Procurement and Assets Disposal Act 2015. Furthermore, that the Respondent, pursuant to Circular No. 2/2020 dated 24th March 2020, which detailed its administrative and contingency management plan to mitigate the effects of the COVID-19 pandemic, provided that the its office will only be open for filing of pleadings and confidential documents, which were to be deemed to be properly filed if they bore the Respondent's official stamp. In addition, that an electronic copy of the said pleadings would also be shared with the Respondent.

12. According to the 1st and 2nd Interested Parties, the *ex parte* Applicant having confirmed visiting the Respondent's registry on 1st April 2021, and having had its application assessed and directed to pay the fees, was an indication that the Registry was open as indicated in Circular No. 2 of 2020, and no proof has in any event been provided that the Respondent's Registry was conducting a fumigation exercise. Likewise, that the *ex parte* Applicant has equally failed to demonstrate that it lodged an electronic copy of the Request for Review with the Respondent as required under Circular No. 2 of 2020. Accordingly, that the *ex parte* Applicant's Request for Review was thus lodged on 6th April 2020, beyond the statutory period of 14 days specified in section 167(1) of the Public Procurement and Asset Disposal Act and in further contravention of Circular No. 2 of 2020, and it is accurate that the Respondent was thereby deprived of jurisdiction.

13. In conclusion, the 1st and 2nd Interested Parties contended that in as much as the *ex parte* Applicant avers that it had met all the specifications required in the Tender document, it did not offer the lowest financial bid and hence did not qualify for the award of the tender. The said parties annexed various documents in support of their case.

The Determination

14. Chege and Sang Company Advocates, who are on record for the *ex parte* Applicant, filed submissions dated 7th May 2021 in support of the instant application, while GA Advocates LLP for the 1st and 2nd Interested Parties filed submissions dated 25th May 2021. A number of preliminary observations about the issues urged by the parties are pertinent at this stage.

15. It is notable in this regard that the decision that is sought to be reviewed by the *ex parte* Applicant in the instant application is the Respondent's decision of 26th April 2021 that it had no jurisdiction to hear and determine the *ex parte* Applicant's Request for Review No. 45 of 2021 dated 1st April 2021. This decision was made by the Respondent upon hearing a Notice of Preliminary Objection dated and filed on 16th April 2021 by the 3rd Interested Party herein.

16. It is thus evident that from these facts, that the issues urged by the *ex parte* Applicant as regards the substance and merits of its Request for Review, and in particular as to whether the Respondent took into account all the relevant material information and submissions by the *ex parte* Applicant as regards the award of the tender to the 3rd Interested Party, are non-issues, given that the main import of the ruling was that the Respondent could not engage in such an exercise. The effect of such a finding was correctly noted by the Respondent at page of 16 of its ruling, as follows:

"It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited [1989] eKLR, Nyarangi JA stated as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." [Emphasis added]"

17. This preliminary observation equally applies to arguments made on the legitimate expectation that the material information would be taken into account, since no such legitimate expectation can arise where a body finds that it has no jurisdiction to hear and determine a matter in the first place. Such a finding is essentially an express negation of such an expectation. As held by the Supreme Court of Kenya in **Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others, (2014) e KLR**, an instance of legitimate expectation arises when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil.

18. The issues properly raised in the present application are therefore as follows:

- a) Whether the Respondent was in error of law in finding that it had no jurisdiction to hear and determine the *ex parte* Applicant's Request for Review.
- b) Whether the said decision by the Respondent was irrational and unreasonable.
- c) Whether the *ex parte* Applicant is entitled to the reliefs sought.

Whether the Respondent was in Error of Law

19. The *ex parte* Applicant submitted that the Respondent's decision was materially influenced by an error of law in the finding that there was no compliance with the statutory period of lodging a request for review specified under section 167 (1) of the Public Procurement and Disposal Act, and that it thereby lacked jurisdiction to analyze the evaluation process and determine whether the same was in compliance with the tender document.

20. Reliance was placed on section 57 of the Interpretation and General provisions Act, and the decision in **Republic v Public Procurement Administrative Review Board; Leeds Equipments & Systems Limited (Interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR** for the submission that the next working day after the Easter holiday ought to have been 6th April 2021.

21. While citing excerpts from the text by Michael Fordham, QC in **Judicial Review Handbook, 5th Edition**, at page 463, and the decision by the Court of Appeal in the case of **Kenya Pipeline Company Ltd v Hyosung Ebara Company Limited & 2 Others**, the 1st and 2nd

Interested Parties on their part submitted that that a judicial review Court will not review decisions based on the exercise of discretion, judgement, policy or assessment of facts, which are the remit of the public body entrusted with the mandate to decide the matter in question, due to their specialty in the area in question. Therefore, that in the exercise of its legitimate jurisdiction, the Respondent found that the *ex parte* Applicant's Request for Review had been filed out of time thus failing to invoke its jurisdiction.

22. The main question to be answered in deciding the present issue, is whether the Respondent erred in law finding it had no jurisdiction to entertain the *ex parte* Applicant's Request for Review. This Court is guided by the circumstances when a public body shall be deemed to have made an error of law as expounded in Halsbury's Laws of England, 4th Edition at paragraph 77 as follows:

"... A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power."

23. This Court is further guided by the often cited decision of the Court of Appeal in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 reproduced hereinabove, and the statutory provisions on the Respondent's jurisdiction. Specifically on the timelines within which to invoke the Respondent's jurisdiction to review procurement processes, section 167(1) of the Public Procurement and Asset Disposal Act (hereinafter "the Act") states as follows:-

"(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.

(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act."

24. It is notable from an ordinary reading of section 167(1) of the Act, that there are two instances when time will start to run for purposes of filing a request for review with the Respondent. These are the date of notification of the award, or the date of occurrence of the alleged breach at any stage of the procurement process or disposal process.

25. One of the grounds of the 3rd Interested Party's preliminary objection to the *ex parte* Applicant's Request for Review No. 45 of 2021 was that the Respondent had no jurisdiction to entertain it. On the issue of its jurisdiction, and specifically on whether the said Request for Review was filed within time, the Respondent found as follows as regards when time started to run at pages 21 to 22 of its ruling:

"We now return to the question whether the Request for Review was filed within time. The 14 days period under Section 167 of the Act and Regulation 203 of Regulations 2020 is computed from the date of receipt of the letter of award or regret. The Procuring Entity stated that the notification of award and regret letters were issued on 19th March 2021. The Applicant did not controvert the Procuring Entity's allegation that the Applicant's letter was served upon it on 19th March 2021. In fact, the Applicant was silent regarding the date it received the letter of notification.

That notwithstanding, the Applicant's letter of notification contains the Procuring Entity's receiving stamp dated 19th March 2021 on the face of the letter. Furthermore in a letter dated 22nd March 2021, the Applicant requested for information on evaluation of the subject tender, through its Advocates, Chege & Sang Company Advocates (Applicant's Exhibit "KNW 1"). By requesting for information of the evaluation process, the Applicant must have received the letter of notification dated 19th March 2021."

26. A reading of the grounds in the *ex parte* Applicant's Request for Review, a copy of which it annexed, shows that the *ex parte* Applicant was aggrieved by the entire tender evaluation process, and specifically stated that the tender by the successful tender was not responsive under sections 79(1) of the Public Procurement and Assets Disposal Act of 2015.

27. Therefore, the relevant act when time started to run for purposes of the filing of the *ex parte* Applicant's Request for Review was when it was notified of the outcome of the tender evaluation process which was by a letter of regret dated 19th March 2021. The *ex parte* Applicant did not controvert receipt of this letter on that date. It is also not disputed by the parties that the *ex parte* Applicant filed its Request for Review with the Respondent on 6th April 2021.

28. As regards the actual computation of time, the Respondent found as follows at page 22 of its ruling:

“In computing time, the Board is guided by section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which provides as follows:-

"In computing time for the purposes of a written law unless the contrary intention appears, a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done."

Going with the date of 19th March 2021, computing from 20th March 2021, the 14 days lapsed on 2nd April 2021. Even if we consider the date of 22nd March 2021, and we start computing time from 23rd March 2021, 14 days lapse on 5th April 2021. The Request for Review was filed on 6th April 2021.

In both scenarios, the Applicant's Request for Review filed on 6th April 2021, is clearly outside the statutory period of 14 days specified in section 167 (1) of the Act”

29. Article 259(5) of the Constitution in this regard provides that:

“ in calculating time between two events or any purpose under this constitution, if the time is expressed;

(a) as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included,....”

30. This position is also restated in section 57 of Interpretation and General Provisions Act, which provides as follows as regards computation of time:

“ In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”

31. If one applies the above provisions of the law to the *ex parte* Applicant's Request for Review, time started to run on 20th March 2021, and the 14th day thereafter was on 2nd April 2021. It is not contested that 2nd April 2021 and 5th April 2021 were Good Friday and Easter Monday respectively, and public holidays. The two Easter holiday days were therefore excluded days, for purposes of the date on which an act under the law is supposed to be done. The next day which was not an excluded day in the circumstances was 6th April 2021, as 3rd and 4th April 2021 were a Saturday and Sunday and not official working days, and were therefore also excluded days within the meaning of section 57 (c) and (d) of Interpretation and General Provisions Act.

32. Even if time was to be computed from 23rd March 2021 as suggested by the Respondent in its ruling, the 14th day would have been 5th April 2021 which was Easter Monday and an excluded day. Thus, 6th April 2021 was legally the deadline for filing of the *ex parte* Applicant's Request for Review, and the *ex parte* Applicant was therefore within time when it filed its Request for Review with the Respondent on that date. It is consequently the finding of this Court that the Respondent was thus in error of law in its computation of time, and in thereby finding that it had no jurisdiction to hear and determine the *ex parte* Applicant's Request for Review.

On Whether the Respondent's decision was Irrational and Unreasonable

33. The *ex parte* Applicant reiterated that it is irrational for the Respondent to make a finding that the request for review dated 1st April 2021 and filed on 6th April 2021 was outside the statutory timelines without considering that 2nd to 5th April was an Easter holiday period. In addition, that Further the Respondent also failed to consider the fact that there was a fumigation exercise on its premises on 1st April 2021 and the *ex parte* Applicant was directed to pay the assessed fees and present documents at the registry on 6th April 2021, as exhibited by then payment slip.

34. The 1st and 2nd Interested Parties relied on the exposition on Wednesbury unreasonableness in **De Smith's Judicial Review, 6th Edition** at page 551, that the Courts can only interfere if a decision 'is so unreasonable that no reasonable authority could ever come to it, and the decision to this effect in the case of **Republic v Public Procurement Administrative Review Board and 3 Others ex parte Olive Telecommunications PVT Ltd [2014] e KLR**. It was their submission that the Respondent's decision was not irrational or unreasonable, as

the Respondent found that it lacked the jurisdiction to hear and determine the *ex parte* Applicant's Request for Review, for reasons that the *ex parte* Applicant failed to move it within the time set by statute.

35. This court in this regard has power to set aside a decision on the ground that the decision is irrational in its defiance of logic or of accepted standards, that no sensible person who had applied his mind to the question to be decided could have arrived at it. This principle was settled by the decisions in **Associated Provincial Picture Houses vs Wednesbury Corporation (1948) 1 KB 223** and **Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374**. This ground was also explained in **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300**, and is also provided for in section 7 of the Fair Administrative Action Act.

36. In the present case it is evident that the Respondent did not take into account the fact that there were certain excluded days in the computation of time due to the Easter holiday on 2nd and 5th of April 2021, and to this extent its decision failed to take into account relevant factors, and fell short of the accepted standards in computation of time, and was thereby irrational and unreasonable.

On Whether the Relief sought is merited.

37. The *ex parte* Applicant has sought the remedies of certiorari and mandamus. An order certiorari nullifies an unlawful decision or enactment, while an order of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct. Mandamus on the other hand requires a public body to do some particular act as specified in the order, to enforce public law duties.

38. The Court of Appeal in the case of **Republic v Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which these orders can issue, and they are available where unlawful conduct or a breach of duty has been demonstrated on the party of a public body or official. Section 11 (1) of the Fair Administrative Action Act also provides for additional orders that this Court can make in judicial review proceedings, which have now been greatly expanded.

39. In the present case, the ruling delivered by the Respondent on 26th April 2021 on PPARB Application No. 45 of 2021 has been found to have been made in error of law, irrational and unreasonable, and to this extent, the remedy of certiorari sought is therefore merited, to expunge the unlawful decision.

40. On the order of mandamus to rehear the Request for Review, the 1st and 2nd Interested Parties have averred that the contract was signed with the 3rd Interested Party on 28th April 2021, two days after the decision of the Respondent's decision that it had no jurisdiction, and that the only remedy available to the *ex parte* Applicant is to lodge a complaint with the Public Procurement Regulatory Authority under section 8 and 9 of the Public Procurement and Assets Disposal Act of 2015.

41. It was held in **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441**, that an order of mandamus compels a public officer to act in accordance with the law. The main principles that apply therefore for an order of mandamus to issue are firstly, that the Court will only issue a mandatory order if it concludes that it is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right.

42. It is notable in this regard that in addition to the standstill period of fourteen days of before a contract can be concluded under section 135 of the Public Procurement and Assets Disposal Act of 2015 that is triggered by the date of notification of award, there are standstill periods provided for in section 168 of the Act, which provides for suspension of procurement proceedings once a Request for Review is filed with the Respondent, and in section 175(1) of the Act which provides as follows once the Respondent renders its decision on a Request for Review:

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

43. Similar provisions are provided with respect to the decisions made by the High Court and Court of Appeal in section 175 (4) and (5). Therefore, a decision by the Respondent is not final until fourteen days have lapsed, and the reasons for the standstill periods is to allow for challenges to the procuring entity's and Respondent's and Courts' decisions before an award is concluded, and for an effective remedy to be available an aggrieved participant in the event that the procurement process is irregular and unlawful. The entering into a contract on 28th April 2021 by the Interested Parties before the lapse of the standstill period in section 175(1) was therefore manifestly illegal, and this Court has the powers to declare it as such.

44. Section 11 (1) (a) of the Fair Administrative Act in this respect empowers this Court to declare the rights of the parties in respect of any matter to which the administrative action relates, while section 11(e) and (h) of the said Act permits this court to remit a matter back to the decision maker for reconsideration, and the Respondent can therefore be compelled to determine the *ex parte* Applicant's Request for Review *de novo* and any other matter referred to it by this Court. The inherent powers of this Court also has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court are also expressly saved by section 3A of the Civil Procedure Act and Article 159 of the Constitution.

45. In addition, while section 167(4) specifically ousts the jurisdiction of the Respondent where a contract is signed in accordance with section 135 of the Act, the Respondent is still under a duty to interrogate the necessary pre-conditions under the section as to whether the contract in issue is validly signed in accordance with the provisions of the Public Procurement and Assets Disposal Act of 2015.

46. Notwithstanding the availability of this window to the Respondent, it is my finding that a declaration by this Court will be necessary, not only to provide the *ex parte* Applicant with an effective remedy in the circumstances, but to clarify the legal position on the signed

contract by the Interested Parties and the Respondents' duty to rehear the *ex parte* Applicant's Request for Review.

47. I am in this regard also persuaded by the holding by the European Court of Justice in **Alcatel Austria AG and Others vs Bundesministerium für Wissenschaft und Verkehr, Case C-81/98**. that provisions relating to the application of review procedures to the award of public supply and public works contracts must be interpreted as meaning that that the contracting authority's decision prior to the conclusion of the contract, is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages.

48. Lastly in this regard, it is notable that the *status quo* obtaining in this matter was spelt out by this Court in a ruling delivered herein on 30th April 2021, which stayed the implementation in any manner by the Respondent and Interested Parties of the Respondent's decision in Application Number 45 of 2021 dated 26th April 2021, including a stay of the signing, entering, and/or implementing of any contract between the 1st and 2nd Interested Parties with the 3rd Interested Party with respect to Tender Number UGC/HLTH/001/2020-2021 for the Supply and Delivery of Medical Equipment for Mitigation against Covid- 19 Pandemic, pending the hearing and determination of the *ex parte* Applicant's substantive Notice of Motion or until further orders of this Court.

The Disposition

49. In light of the foregoing observations and findings, the *ex parte* Applicants' Notice of Motion dated 7th May 2021 is found to be merited to the extent of the following orders:

I. An order of Certiorari be and is hereby issued to remove into this Court for purposes of quashing, the decision dated 26th April 2021 by the Public Procurement Administrative Review Board, the Respondent herein, in PPARB Application Number 45 of 2021.

II. A Declaration be and is hereby issued declaring the contract signed between the 1st and 2nd Interested Parties and the 3rd Interested Party on 28th April 2021 illegal, null and void.

III. An order of Mandamus be and is hereby issued compelling the Respondent to re-hear PPARB Case Number 45 of 2021 on its merits.

IV. The *ex parte* Applicants' Request for Review in PPARB Case Number 45 of 2021 be and is hereby remitted to the Respondent for re-hearing and determination, within thirty days of the date of this judgment.

V. An order of Prohibition be and is hereby issued prohibiting and restraining the 1st, 2nd and 3rd Interested Parties from entering into a contract over and /or concerning Tender Number UGC/HLTH/001/2020-2021 for the Supply and Delivery of Medical Equipment for Mitigation against Covid-19 Pandemic, pending the re-hearing and determination of the *ex parte* Applicant's Request for Review in PPARB Case Number 45 of 2021 by the Respondent.

VI. Each party shall bear its own costs of the Notice of Motion dated 7th May 2021.

50. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF JUNE 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2021

J. NGAAH

JUDGE