



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 96 OF 2020

IN THE MATTER OF AN APPLICATION FOR

ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

PREMIER VERIFICATION QUALITY

SERVICES (PVQS) LTD.....APPLICANT

VERSUS

PUBLIC PROCUREMENT REGULATORY AUTHORITY.....RESPONDENT

AND

KENYA BUREAU OF STANDARDS..... INTERESTED PARTY

JUDGMENT

The Application

1. Premier Verification Quality Services (PVQS) Limited, the *ex parte* Applicant herein, participated in, and was one of the successful bidders in a tender advertised by the Kenya Bureaus Standards, which is joined as an Interested Party herein. The subject tender was Pre-Export Verification Of Conformity (PVOC) To Standard Services- Tender No. Keps/T009/2019-2021. The *ex parte* Applicant is aggrieved by an investigation report dated 29th April 2020 undertaken by the Public Procurement Regulatory Authority on the procurement of the said tender, and has brought these proceedings against the said Authority, which is sued as the Respondent herein.

2. The *ex parte* Applicant is seeking the following orders in its application, which is brought by way of a Notice of Motion dated 20th May 2020:

1. An Order of Certiorari to remove into this Court the Investigations Report by the respondent dated 29th April 2020 on the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services Tender No. KEBS/T009/2019-2021, and any additional report or finding founded upon the said report, and any decision to interfere with or to terminate the contract between the applicant and the interested party that shall result from that procurement process, for purposes of quashing it, and to quash it.

2. An order of Prohibition stopping the Respondent from continuing with its investigations into the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services Tender No. KEBS/T009/2019-2021 and further from barring or interfering with the entry into a contract between the applicant and the interested party arising from the aforesaid procurement, and further from adopting, effecting, executing, enforcing or causing the adoption, effectuation, execution and enforcement of its investigations report dated 29th April 2020 and or of any other report or recommendations founded upon the said investigations report dated 29th April 2020, targeting the said procurement process and resultant contract, by itself or through any department, agency or body of the Government of Kenya.

3. That Costs be to the applicant.

4. Any other order that is just and equitable.

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 8th April 2020, and a verifying affidavit sworn on the same date by Abdiwali Ali Mohammed, the *ex parte* Applicant's manager. In summary, the Applicant alleges that the impugned investigations report dated 29th April 2020 by the Respondent were to come into effect on 11th May 2020, having been served upon the Interested Party on the 4th May 2020.

4. Further, that the said report indicates that it is conclusive and that the Respondent shall terminate the subject procurement process, despite the said tender having been the subject of a determination by the Public Procurement Administrative Review Board in Application No. 14 of 2020, and of High Court Judicial Review Application No. 60 of 2020. Lastly, that the Respondent is barred from undertaking such investigations under section 40(1) Public Procurement Asset Disposal Act 2015.

5. The *ex parte* Applicant in this respect averred that the Interested Party herein advertised the Pre-Export Verification of Conformity (PVOC) To Standard Services- Tender No. KEBS/T009/2019-2021, in which the *ex parte* Applicant participated and emerged as one of two successful bidders. It contended that the procurement was challenged by a Request For Review Application No. 14 of 2020 before the Public Procurement Administrative Review Board which was heard on merit and determined by the partial dismissal of the said application, and an order being given that the Interested Party proceeds to conclude the procurement, upon which the aggrieved party lodged a Judicial Review Application No. 60 of 2020 against the award of the review board, which was pending in this Court.

6. It was further deponed that the Respondent is investigating the same issues raised before the public procurement administrative review board in Application No. 14 of 2020, which is also still the subject of Judicial Review Application No. 60 of 2020, despite being barred or precluded from undertaking such investigations under section 40(1) of the Public Procurement Asset Disposal Act 2015. Therefore, that to the extent that the Act barred the Respondent from so investigating the procurement herein, which had been reviewed by the review board, the Respondent acted ultra vires section 40(1) of the Act by commencing, continuing with such investigations, and in its investigations report dated 29th April, 2020. Further, that the said investigations report would result in the termination of the contract between the *ex parte* Applicant and the Interested Party, and or into orders adverse to the legal and vested contractual rights of the *ex parte* Applicant.

7. The *ex parte* Applicant annexed copies of the Respondent's report on corruption and irregularities in the procurement of the tender for Pre-Export Verification of Conformity (PVOC) to Standard Services which is dated 29th April 2020, and of the pleadings filed and orders made in Request for Review No. 14 of 2020 before the Public Procurement Administrative Review Board and in Judicial Review Application No. 60 of 2020 which was before this Court.

The Responses

The Respondent's Response

8. The Respondent opposed the application in a replying affidavit sworn on 28th May 2020 by Maurice Juma, its Director General, wherein it was averred that the Respondent is a regulatory authority established under section 8 of the Public Procurement and Assets Disposal Act, 2015, and has a statutory mandate to ensure that procurement procedures established under the Act are complied with. Further, that one of its mandate is to carry out investigations as provided for in section 35 of the Act.

9. According to the Respondent, the issues it is investigating as captured by the impugned report dated 29th April 2020 are totally different from the issues that were being considered by the Public Procurement Administrative Review Board in Application No. 14 of 2020, and were geared toward finding out whether the Interested Party herein followed the due process as outlined in the Act in the entire procurement process. Further, that among the interim findings and observations by the Respondent are that the subject procurement was not based on indicative or approved budget contrary to section 53(5)(8) of the Act, that the procurement was done without a purchase requisition contrary to section 73 of the Act, that the Standard Tender Document contained information that did not allow competition, that amongst many other finding.

10. The Respondent pointed out that the issues raised in the application before the Review Board were different from the ones it was investigating, and it is on that basis they found it fit to carry out the subject investigation upon complaints by a whistle blower on 20th December, 2019 and a complaint by Naivana Agencies Limited on 2nd March, 2020. Therefore, that it is in the public interest for the entire procurement process in Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services Tender No. KEBS/T009/2019-2021 be subjected to an inquiry to determine whether the Interested Party complied with the law and the tender requirements in the award of the tender to the *ex parte* Applicant.

11. In addition, that the *ex parte* Applicant admits that the report dated 29th April, 2020 is a preliminary one, and that the Director General has not yet made any order under section 38 (1) of the Act. Therefore, that the *ex parte* Applicant appears to have jumped before the ship by preempting the probabilities of them being accorded an opportunity to make representations. The Respondent denied breaching any of the provisions of the Fair Administrative Action Act, since no administration action has so far been taken against the *ex parte* Applicant nor the Interested Party. Accordingly, that the *ex parte* Applicant's application is premature, misleading and amounts to an abuse of the court process.

The Interested Party's Response

12. The Interested Party filed a replying affidavit in support of the application, which was sworn on 4th June 2020 by Bernard N. Njiraini, its Managing Director. Its position is that the Respondent had no powers under Section 40(1) of the Public Procurement and Asset Disposal Act, 2015 to proceed with its investigations after 18th February 2020 when the Procurement Board made its decision in **Request for Review Application No. 14 of 2020- Tuv Austria Turk vs Accounting Officer Kenya Bureau Of Standards**. Further, that the existence of **Judicial Review Application No. 60 Of 2020- Tuv A Ustria Turk vs Public Procurement Administrative Review Board & The Accounting Officer Kenya Bureau Of Standards** consequently precludes the Respondent from investigating the procurement process in Tender No. Pre-Export Verification of Conformity (PVOC) To Standards Services Tender No. KEBS T009/2019-2021.

13. Hence, that the Respondent's decision to investigate, its Investigations Report REF: PPRA/CIED/4/30/65 VOL. IV (70) dated 29th April 2020 and any consequential report is *ultra vires* and offends the provisions of section 40 of the Public Procurement and Asset Disposal Act. In addition, that the Respondent could have proceeded with such investigations only with the direction of the Review Board under Section 40(2) of the Public Procurement and Asset Disposal Act 2015, and only if new issues emerged after the determination of the **Request for Review Application No. 14 of 2020- Tuv Austria Turk vs Accounting Officer Kenya Bureau Of Standards**, which have been brought to the attention of the Review Board.

14. However, that no such new issue has been referred to in the Investigations Report REF: PPRA/CIED/4/30/65 VOL. IV (70) dated 29th April, 2020. Consequently, that the Respondent is barred from investigating the procurement in Tender No. Pre-Export Verification Of Conformity (PVOC) to Standards Services-Tender No. KEBS T009/2019-2021 , and it is only right and fair that the Interested Party be given an opportunity to proceed with the procurement process to its logical conclusion.

The Determination

15. Andrew Ombwayo & Co Advocates, the *ex parte* Applicant's counsel, filed submissions dated 29th June 2020 wherein it was stated that the *ex parte* Applicant had challenged the Respondent's Investigations Report dated 29th April, 2020 on three broad grounds, namely:

a) *That it is ultra vires section 40 of the Public Procurement Asset Disposal Act 2015 on two fronts:-*

(i) *By commencing or continuing investigations of a procurement process that had been reviewed by the Public Procurement Administrative Review Board contrary to section. 40(1) of the Act; and*

(ii) *By commencing or continuing investigations into a procurement process already reviewed by the Review Board without reference to, or authority of, the said Review Board, contrary to section 40(2) of the Act 2015.*

b) *That though fronted as a Preliminary Investigations Report, the Respondent's Investigations Report dated 29th April, 2020 is a final report prepared for submission to 'relevant' government authorities for action under S. 38(1)(c) of the Act without according the ex parte Applicant, whose legal rights would be adversely affected by the same investigations, an opportunity to be heard and to make representations contrary to the mandatory provisions of S. 38(2)(b) of the Act;*

c) *That the investigations are malicious and are being used to pursue matters extraneous to the initial complaints, which the Respondent has departed from and never investigated, are biased and unreasonable, and have violated the rights of the ex parte Applicant to fair administrative action, and that these investigations ought not to stand at all, and further that the investigations are a continuation of concerted efforts to impugn the tender process.*

16. It is notable in this respect that this Court as a judicial review Court cannot interrogate the contents, justification and scope of the Respondent's report as these are issues that go to its merits. The remit of this Court's jurisdiction including that of merit review is set out in the cases of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** and **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR**. The arguments raised by the *ex parte* Applicant that are therefore properly within the ambit of this Court's jurisdiction are whether the Respondent acted *ultra vires*, and whether it violate the *ex parte* Applicant's right to fair administrative action.

17. On these two aspects, the *ex parte* Applicant submitted that the Application for Review No. 14 of 2020 before the Review Board shows that the applicant therein, Tuv Austria Turk, had challenged the procurement tender no. KEBS/T009/2019-2020, the same tender that the Respondent was purporting to investigate, on the bases of the law, the Constitution and the provisions of the tender document which the Review Board considered and rejected. Therefore, that the Respondent's investigations thus fell squarely within the provisions of section 40(1) of the Act which bars it from investigating issues that a review board is reviewing or has reviewed, and were thus in excess of jurisdiction.

18. In addition, that it is only the Review Board which can sanction any investigations on the tender, and only as regards new information, not the re-review of the entire tender as the Respondent had purported to do. Reliance was placed on the decision in **Fursys (K) Limited vs Public Procurement Oversight Authority & 2 Others, [2015] eKLR**, where the Court set aside debarment proceedings that had been commenced by the procurement regulatory authority over a tender that had already been reviewed before the Review Board (twice) and the High Court.

19. On the violation of the *ex parte* Applicant's right to fair administrative action, it was submitted that the *ex parte* Applicant had the right to be heard and to make representations prior to effecting the investigations report under section 38(2)(b) of the Act. However, that the Respondent had no intention of according the *ex parte* Applicant a hearing or an opportunity to make representations before enforcing the Investigations Report dated 29th April, 2020, which it had copied to government authorities and agencies it had deemed relevant. The counsel submitted that the Respondent had also expressly reiterated in its letter dated 29th April, 2020 that it only gave the Interested Party the opportunity to make representations before forwarding its investigations report to relevant authorities.

20. He added that the Respondent has failed to give the *ex parte* Applicant any reasons for its investigations and was equally under a mandatory obligation to give the *ex parte* Applicant adequate notice of such investigations, in default of which the Respondent violated the its right to fair administrative action protected under section 4(3)(a) of the Fair Administrative Action Act 2015. He further contended that Respondent failed to accord the Applicant an opportunity to be heard in its defence or to make representations against those investigations, all in violation of S. 4(3)(b) Fair Administrative Action Act 2015.

21. The Interested Party's Counsel, Muchemi & Co. Advocates, filed submissions dated 20th July, 2020, and reiterated that the Respondent proceeded with undertaking investigations into the subject Tender contrary to the provisions of Section 40(1) of the Public Procurement and Asset Disposal Act, 2015 Counsel contended that the issue that arose for determination was whether the Respondent's impugned Investigation Report is enforceable, and that while the action by the Respondent to investigate complaints received with respect to the Subject Tender was not disputed as it falls within the ambits of its functions in section 9 (h) of the Public Procurement Asset and Disposal Act, section 40(1) of the Public Procurement and Asset Disposal Act, 2015 states that: *"No investigation shall be commenced or continued under this Part, and no order shall be made under this Part, in relation to an issue that the Review Board is reviewing or has reviewed under the relevant provisions of this Act."*

22. Therefore, that the Respondent had no powers under section 40(1) of the Public Procurement and Asset Disposal Act, 2015 to proceed with its investigations even after 18th February, 2020 when the Procurement Board made its decision in in **Request for Review Application No. 14 of 2020 - Tuv Austria Turk vs Accounting Officer Kenya Bureau Of Standards**. The decisions in **R vs Hull University Visitor, ex parte Page [1993] AC 682, John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Anor, (2016) e KLR and Associated Provincial Picture Houses Ltd vs Wednesbury Corporation, [1948] 1 KB 223** were cited for the proposition that Courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully, fairly and reasonably.

23. On his part, Raphael M. Ngalatu, the Respondent's counsel, filed submissions dated 28th July, 2020 and reiterated that the issues being investigated by the Respondent as captured in the Report dated 29th April, 2020 are totally different from the issues that were being considered by the Public Procurement Administrative Review Board in Application No. 14 of 2020. Counsel further submitted that contrary to the issues dealt with in PPARB Application no. 14 of 2020, it was evident that the investigations carried out by the authority were geared towards finding out whether the Interested Party herein followed the due process as outlined in the Act in the entire procurement process. On the allegation that the Respondent violated the *ex parte* Applicant's right to fair administrative action, the counsel submitted that the report dated 29th April, 2020 was a preliminary one and that it was also evident that the Director-General had not yet made any order under Section 38 (1) of the Act.

24. I have considered the submissions made by the parties herein. The first issue in dispute that arising for determination is whether the investigations on Export Verification of Conformity (PVOC) To Standard Services- Tender No. KEBS/T009/2019-2021 and report on corruption and irregularities in the procurement of the tender for Pre-Export Verification of Conformity (PVOC) to Standard Services dated 29th April 2020 by the Public Procurement Regulatory Authority were *ultra vires*. The second issue is whether the Respondent acted fairly in undertaking the said investigations and report.

On the legality of the Respondent's Investigation and Report

25. It is in this regard not disputed that the Public Procurement Regulatory Authority, the Respondent herein, is established under section 8 of the Public Procurement and Asset Disposal Act, 2015, and its functions under section 9(h) of the Act include to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review.

26. In addition, the investigatory powers of the Respondent are expounded on in section 35 of the Act as follows:

(1) The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceeding or contract with respect to a procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been a breach of this Act or the Regulations made thereunder.

(2) An investigation under sub-section (1) may be initiated by the Authority or on request in writing by a public institution or any other person.

(3) Investigation shall be conducted by an investigator appointed for the purpose by the Authority.

27. The *ex parte* Applicant has relied on the provisions of section 40 of the Public Procurement and Asset Disposal Act, 2015 which provides as follows:

(1) No investigation shall be commenced or continued under this Part, and no order shall be made under this Part, in relation to an issue that the Review Board is reviewing or has reviewed under the relevant provisions of this Act.

(2) Subsection (1) ceases to apply if, after the Review Board has completed its review, information comes to the attention of the Board that was not brought before the Review Board in the course of its review.

28. In determining whether or not the Respondents acted outside their powers, regard is made to the description of illegality by Lord Diplock in **Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410** as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law. In addition, in **Anisminic vs Foreign Compensation Commission (1969) 1 All ER 208 at 233**, Lord Pearce held as follows on when a public body may lack jurisdiction:

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was

not directed to take into account. Thereby it would step out of its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

29. It is therefore necessary when deciding whether a statutory power or duty has been lawfully exercised or performed, to identify the scope of that power and duty, and which involves construing the legislation that confers the power and duty. In the present application it is evident from a plain readings and literal construction of the applicable statutory provisions, that there is a statutory precondition that requires to be satisfied before the exercise of the Respondent's investigatory powers, which is that the Respondent is required to confirm that there are no review proceedings with respect to the matter being investigated. This is clearly set out in section 9(h) of the Act in relation to the Respondents functions, and in section 40 of the Act specifically in relation to the exercise of its investigatory powers.

30. Where a statutory precondition for the exercise of power exists, the repository of the power is required to firstly properly direct itself as to the meaning of the statutory precondition, and secondly be satisfied that of the existence of the relevant factual situation, before exercise of the power. Failure to do so will render any actions undertaken in the exercise of that power unlawful. I am in this respect also guided by the holding of the Supreme Court of the United Kingdom in **R (A) vs Croydon LBC (2009) 1 WLR 2557**, that where a statutory provisions gives rise to an issue of precedent fact, the determining factor is the intention of Parliament, and in particular whether Parliament intended to place a limit on the exercise of the relevant power by the public body.

31. The Courts will in this respect have regard to the legislative and administrative context in order to divine the intention of Parliament, including the relevant legislative scheme as a whole, and the nature and importance of the power to which the factual precondition relates. In the present case, the statutory precondition set out in section 9(h) and 40 of the Act are that the "procurement proceedings that are not subject of administrative review", and "an issue that the Review Board is reviewing or has reviewed under the relevant provisions of this Act". It is not in dispute in this respect that Pre-Export Verification Of Conformity (PVOC) to Standards Services-Tender No. KEBS T009/2019-2021 was the subject of the proceedings in **Request for Review Application No. 14 of 2020 - Tuv Austria Turk vs Accounting Officer Kenya Bureau Of Standards** before the Public Procurement Administrative Review Board.

32. The Respondent has in this respect urged that the issues covered in its investigations and interim report were not in issue in the Request for Review before the Review Board, and that its investigations and interim report were geared toward finding out whether the Interested Party herein followed the due process as outlined in the Act in the entire procurement process. The legislative intention of the provisions limiting the Respondent's investigation powers in matters under review by the Review Board are clear firstly from the power architecture and arrangements between the various actors in the procurement process in the Act, with the powers of regulatory bodies including the Respondent and Review Board being specifically provided for in Part II of the Act, and section 28 therein provides very wide powers to the Review Board to review, hear and determine tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act.

33. Secondly the intention in specifically exempting a matter under review from the powers to be exercised by the Respondent, is to prevent multiple proceedings and conflicting decisions on the same tender proceedings, and as can be garnered by provisions of review of a tender in sections 167 to 175 of the Act a clear timetable and progression of review proceedings from the Review Board upto the Court of Appeal is provided for to prevent this eventuality. Lastly, the argument that the Respondent was investigating issues which were not covered by the Review Board in **Request for Review Application No. 14 of 2020 - Tuv Austria Turk vs Accounting Officer Kenya Bureau Of Standards** is also addressed by section 40(2) of the Act, which provides that such a course of action must be done at the instance of, and with the concurrence with the Review Board, for the same reason. Such concurrence was not demonstrated by the Respondent.

34. It is thus my finding from the foregoing reasons that in the present case, the Respondents acted unlawfully and *ultra vires* in undertaking investigations into, and a report on Pre-Export Verification Of Conformity (PVOC) to Standards Services Tender No. KEBS T009/2019-2021, which was the subject of the review proceedings in **Request for Review Application No. 14 Of 2020 - Tuv Austria Turk vs Accounting Officer Kenya Bureau Of Standards before the Public Procurement Administrative Review Board**, as its powers in this regard were limited and excepted by section 9(h) and section 40 of the Public Procurement and Asset Disposal Act, 2015.

On Whether the Respondent acted fairly and procedurally

35. The *ex parte* Applicant submitted in this respect that he was not given notice of, or an opportunity to be heard in relation to the investigations and report by the Respondent on the subject tender. The Respondent justifies this omission by stating that it was preparing an interim report and no final orders are yet to be given. The right to fair administrative action is clearly set out in Article 47 of the Constitution, and the provisions of the Fair Administrative Act, which import and imply a duty to act fairly by a decision maker in any administrative action. The Fair Administrative Action Act defines an administrative action to include - (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Therefore, the Respondent had a duty to act fairly in relation to the *ex parte* Applicant, as also provided by section 38 of the

36. The content of the right and duty to act fairly are set out in section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

37. The core of the duty to act fairly therefore is the need to ensure that a person affected by a decision is given notice and has an effective opportunity to make representations before the subject action is taken or decision is made, and not thereafter, as urged by the Respondent. In this respect it is not in dispute that the *ex parte* Applicant interests a successful bidder were likely to be affected by the said investigations and report on the Export Verification of Conformity (PVOC) To Standard Services Tender No. KEBS/T009/2019-2021. The Respondent has also not provided any evidence of the procedure it adopted to rebut the *ex parte* Applicant’s averments.

38. To this extent, it is my finding that not only was the *ex parte* Applicant not accorded an opportunity to be heard, but also that the Respondent investigations and report were also procedurally unfair.

The Disposition.

39. The *ex parte* Applicant has sought the remedies of certiorari and prohibition. 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. 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 the orders of prohibition and certiorari can issue as follows: -

“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.”

40. In the present case, the decision and actions of the Respondent to undertake investigations into, the Export Verification of Conformity (PVOC) To Standard Services- Tender No. KEBS/T009/2019-2021 and its report on corruption and irregularities in the procurement of the tender for Pre-Export Verification of Conformity (PVOC) to Standard Services dated 29th April 2020 have been found to be ultra vires and procedurally unfair. To this extent, the remedies of certiorari and prohibition are merited, to ensure that the due process according to the law is employed by the Respondent, and prevent it from continuing with this illegality.

41. It is however necessary to point out that the orders sought in this regard with respect to the contract between the *ex parte* applicant and the Interested Party cannot lie, since the said contract was not pleaded, nor the subject of these proceedings.

42. The *ex parte* Applicants’ Notice of Motion application dated 20th May 2020 is accordingly 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 Investigations Report by the Respondent dated 29th April 2020 on the Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services Tender No. KEBS/T009/2019-2021, and any additional report or finding founded upon the said report.

II. An order of Prohibition be and is hereby issued stopping the Respondent from continuing with its investigations into the Pre-Export Verification of Conformity (PVOC) to Standards Services Tender No. KEBS/T009/2019-2021, and from implementing, dopting, effecting, executing, enforcing or causing the adoption, effectuation, execution and enforcement of the investigations report dated 29th April 2020 and or of any other report or recommendations founded upon the said

investigations report .

III. The Respondent shall bear the *ex parte* Applicant's and Interested Party's costs of the Notice of Motion dated 20th May 2020.

43. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF OCTOBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER 2021

J. NGAAH

JUDGE