



**THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 56 OF 2019

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDER OF CERTIORARI

=AND=

IN THE MATTER OF: THE DECISION MADE BY THE PUBLIC PROCUREMENT BOARD ON 19TH NOVEMBER, 2019 THAT THE REQUEST FOR REVIEW FILED ON 29TH OCTOBER, 2019 WITH RESPECT TO TENDER NO. KPA/129/2018-19/PDM FOR REMOVAL OF ASBESTOS, RE-ROOFING, DEMOLITIONS, RAIN WATER HARVESTING, SOLAR BACK-UP SYSTEM AND ASSOCIATED WORKS AT THE PORT OF MOMBASA, BE DISMISSED

=AND=

IN THE MATTER OF: THE SAID DECISION BY THE RESPONDENT AMOUNTING TO A CONTRADICTION AND FAILING TO ADHERE TO THE PRINCIPLE OF ENSURING THAT TRANSPARENCY, ACCOUNTABILITY AND CREDIBILITY WAS UPHELD IN THE TENDERING PROCESS AS REQUIRED BY ARTICLES 10, 47, 201 AND 227 OF THE CONSTITUTION OF KENYA, 2010

AND ALSO THE PUBLIC PROCUREMENT AND ASSETS DISPOSAL ACT

=AND=

IN THE MATTER OF: THE SAID DECISION BY THE RESPONDENT FAILING TO RESPECT THE PRINCIPLE THAT DECISIONS MADE BY JUDICIAL TRIBUNALS UPHOLD THE PRINCIPLE OF REASONABLENESS IN THAT HAVING FOUND THAT THE SECOND MANDATORY SITE VISIT WAS NOT CONDUCTED, IT WAS INCONCIVABLE FOR THE RESPONDENT IN THE SAME

BREATH TO DISMISS THE APPLICANT'S REQUEST FOR REVIEW

=AND=

IN THE MATTER OF: THE APPLICANT'S EXERCISE OF A STUTORY RIGHT GRANTED

A JUDICIAL REVIEW APPLICATION FOLLOWING THE APPLICANT HAVING BEEN

AGGRIEVED BY THE DECISION MADE BY THE RESPONDENT

= BETWEEN =

ISLAND HOMES DEVELOPERS LIMITED.....APPLICANT

=VERSUS=

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

=AND=

KENYA PORTS AUTHORITY.....ST INTERESTED PARTY

DANIEL MANDUKU, ACCOUNTING OFFICER

KENYA PORTS AUTHORITY.....^{2ND} INTERESTED PARTY

WILFAK ENGINEERING LIMITED.....^{3RD} INTERESTED PARTY

RULING

The Application

1. Pursuant to leave granted on 5.12.10.2019, the ex-parte applicant filed a Notice of Motion dated 9.12. 2019 seeking the following orders:

a) An order of Certiorari be issued to quash the decision made on 19.11.2019 by the Respondent in Public Procurement Administrative Review Board Review Application No. 129 of 2019 between the Applicant herein versus the 1st and 2nd Interested parties herein whereby the Respondent dismissed the Applicant's Request for review filed on 29.10.019 with respect to Tender No. KPA/129/2018-2019/PDM for Removal of Asbestos, Re-Roofing, Demolitions, Rain Water Harvesting, Solar Back-Up System and Associated Works at the Port of Mombasa despite having made a finding that the Respondent did not conduct the second mandatory site visit thus rendering the entire tendering process a nullity. For avoidance of doubt, the 1st and 2nd Interested parties be directed to undertake a fresh tendering process with respect to the removal of Asbestos, Re-Roofing, Demolitions, Rain Water Harvesting, Solar Back –Up System and Associated works at the port of Mombasa.

b) Costs of the Application be provided for.

Ex-parte Applicant's case

2. The application is premised upon the grounds set out therein and in the Statement and the accompanying Verifying Affidavit of Mr. **Kibe Nguje** who is the ex-parte Applicant's Managing Director, sworn on 2.12.2019.

3. The *Ex-parte* Applicant states that it was one of the bidders in Tender no. KPA/129/2018/PDM advertised by the 1st Interested Party. The *Ex-parte* Applicant lost the bid to the 3rd Interested Party. Being dissatisfied with the said award, the Applicant filed an Application for review no. 129 of 2016 before the Respondent.

4. The Applicant avers that on the 19.11.2019 the Respondent delivered its ruling dismissing the Applicant's Application for review despite finding that a second mandatory site visit had not been conducted because the 1st and 2nd Interested Parties failed to prove that the site visit occurred, and that all the parties attended the visit. Consequently, the only reasonable conclusion would have been to nullify the award to the 3rd Interested Party.

5. The Applicant further avers that the Respondent relied on a document referred to as "site visit Attendance Register of 21.6.2019" yet the document was sent to it after the close of the hearing. As a result, the *Ex-parte* Applicant avers that there was procedural impropriety on the part of the Respondent, for condemning the *Ex-parte* Applicant unheard.

The Response

6. The Respondent opposed the Application through a Replying Affidavit sworn by **Mr. Henock Kirungu**, the Board Secretary, on the 18th December 2019. The Respondent avers that the review board's decision was arrived at after considering evidence placed before it by the parties and after considering the original documents pertaining to the procurement process of the subject tender pursuant to Section 67(3) (e) of the Act. It delivered its decision on the 19.11.2019 dismissing the request for review by the Applicant.

7. The Respondent further avers that its decision was in exercise of its statutory mandate under Section 28 read together with Section 173 of the public procurement and disposal Act, 2015. Therefore, it was valid, reasonable and impartial.

8. The Respondent averred that the Applicant failed to comply with a mandatory requirement of the tender document in so far as the criterion of pagination of the bid document was concerned, and as a result, failed to meet the threshold of Sections 79(1) and 80(2) of the Act which deal with the responsiveness of bids hence the Applicant's bid could not be subjected to further evaluation.

9. The 1st & 2nd Interested Parties opposed the Application dated 9.12.2019 through Grounds of Opposition dated 18.12.2019 in which, in a nutshell, it is stated that the Applicant's Application is statutorily time barred as it was required to file the present Judicial Review Application within 14 days from the date of the Review Board's decision (19.11.2019) yet by close of business on the 3.12.2019, the Ex-parte Applicant had not filed its Application for Judicial Review orders.

10. In response to the 1st & 2nd interested parties Grounds of Opposition, the Ex-parte Applicant filed an Application dated 19.12.2019 seeking the following orders.

1. Spent.

2. THAT the court be pleased to extend the fourteen (14) days period that is allowed for filing of the Chamber Summons Application dated 2nd December, 2019 by one (1) day so that the Chamber Summons filed in these proceedings dated 2nd December, 2019 is deemed to have been filed within time.

3. THAT the court grants such further or other reliefs it may deem just and expedient to grant.

4. THAT the costs of this application be in the cause.

11. The Application was premised on the grounds set out therein and on the Affidavit sworn by Mr. **Gikandi Ngibuini** on the 19.12.2019. Mr. **Gikandi** Learned Counsel for the Ex-parte Applicant averred that he applied for certified copies of proceedings and Judgment of the Review Board on the 19.11.2019, but the same were supplied on the 26.11. 2019. As such, even though the Respondent had 14 days within which to prepare and file the chamber summons, seven (7) days were taken by the Respondent in preparation of the certified copies of proceedings and judgment. Therefore, the Respondent by its own action contributed to the said delay and is estopped from using delay as a bar to these proceedings. In any event, **Mr. Gikandi** averred the delay of one (1) day is not inordinate, and that it is in the interest of justice that the court exercises its discretion to extend the time for filing the Chamber Summons.

12. The 1st and 2nd Interested Parties opposed the ex-parte Applicant's Application dated 9.12.2019, through a Replying Affidavit sworn on the 3.1.2020 by **Mr. Aza Dzeno** who is the 2nd Interested Party's acting head of procurement and supplies. He averred that after advertisement of the subject tender on the 16.4.2019 prospective bidders were advised to keep looking out for additional information on the 2nd Interested Party's website and subsequently three addendums were issued to the tender and out of the seven bidders, it was only the 3rd Interested Party's tender document that was found to have been responsive after the preliminary evaluation, and proceeded for a detailed technical evaluation, financial evaluation and eventually emerged as the successful tenderer and was awarded the tender.

13. The deponent averred that the Technical Committee conducted a preliminary evaluation based on mandatory requirements and the Applicant's bid was found to be non-responsive for reasons that its tender document was not paginated in the correct sequence as some pages were not numbered, while the contractor's Annual Practising Licence and NCA Certificate of registration were also not paginated. Secondly, the ex-parte Applicant did not sign the site visit attendance register as evidence of having participated in the second mandatory site visit as provided in addendum No. 3.

14. It is also deponed that the Board of the 2nd Interested Party in a meeting held on the 4.12.2019 observed that the tender had been floated in the absence of a budgetary provision and consequently the implementation of the project was put off on the basis that it was irregular to proceed with the same under the Act and whatever outcome of the present Application the 1st and 2nd Interested Parties do not have the capacity to enter into a contract with the successful bidder.

15. The 3rd interested party in response to the ex-parte Applicant's Application dated 9.12.2019 filed a Replying Affidavit sworn on the 23.12.2019 by Mr. Albert Kamau who is its director. He avers that the Ex-parte Applicant's Application is incompetent for having been filed contrary to Section 175(1) of the Act

16. On the issue of the mandatory site visit, it was averred that all the bidders were invited for the second mandatory meeting vide addendum 3 dated 13.6.2019 and it is not in dispute that the visit took place, and that in any event the ex-parte Applicant was not prejudiced in any way as the Respondent held that relying on the site visit register filed after hearing of the review would prejudice the ex-parte Applicant.

17. The 3rd interested party avers that application No. 129 of 2019 was dismissed because the ex-parte Applicant's documents were improperly paginated and as a result failed to meet the mandatory requirement of Section 79(1) and 80(2) of the Act and since the Respondent's decision is within its mandate, this Court ought not to interfere with the Respondent's mandate.

18. In response to the 1st and 2nd Interested Parties Replying Affidavit sworn on the 3.1.2020 by **Mr. Aza Dzeno**, the Ex-parte Applicant filed a Further Affidavit sworn on the 7.1.2019 by **Mr. Kibe Nguje** in which it is averred that there was a budgetary allocation for the subject tender as was advertised sometime in the year 2017 and as such **Mr. Aza Dzeno** had committed perjury by stating on oath that there was no budgetary allocation for the subject tender.

19. The Ex-parte Applicant states that its tender document was duly paginated as evidenced on the duplicate tender document annexed in its Chamber Summons filed at the leave stage and therefore, the issue of pagination is just a creation of the 1st and 2nd Interested parties to advance their illegal actions of not giving it an opportunity to explain itself before its bid was cancelled.

20. The Ex-parte Applicant stated that the Respondent's decision was contradictory and failed to give reason as to why it allowed the award to stand in light of glaring evidence that a second mandatory site visit never took place. It further urged this Court to direct the 1st and 2nd Interested parties to re-tender for the said service afresh.

Submissions

21. Parties filed submissions pursuant to the Court's directions. The ex-parte applicant submissions are dated 23.12.2019; the 1st and 2nd Interested Parties submissions are dated 24.12.2019; while the 3rd interested party filed its list of authorities dated 23.12.2019.

22. **Mr. Gikandi** Learned Counsel for the Ex-parte applicant on the issue of extension of time within which to file the Chamber Summons dated 2nd December, 2019 submitted that he was supplied with the certified copies of proceedings and judgment on 26th November, 2019 and a delay of one (1) day is not inordinate. He urged the Court to exercise its discretion in favour of the applicant. Reliance was placed on the decision in ***Pithon W. Maina vs. Thuku Mugeria*** as affirmed in ***Kenya Bureau of Standards & 3 others vs. Kenya Maritime Authority Ex parte Car Importers Association [2014] eKLR*** where the court held that the mistakes of an advocate should not be visited on his/her client

23. **Mr. Gikandi** submitted that it was procedurally improper for the Respondent in its decision to have relied on a document that was filed after the close of the parties' respective cases, and further that it was irrational for the Respondent to sustain the award made to the 3rd Interested Party yet a second site visit was not conducted.

24. On the issue of failure by the Ex-parte applicant to paginate its documents, Counsel submitted that the officers of the procurement entity are bound by Article 47 of the Constitution and it was reckless for the said officers to find the applicant's tender document non-responsive when the applicant's bid was 400,000,000/= less than the 3rd interested party's bid.

25. **Mr. Cheruiyot** Learned Counsel for the 1st and 2nd Interested Parties submitted that the Ex-parte Applicant's application was statute barred for being filed out of time. Counsel further submitted that the Applicant's financial bid was returned unopened after its bid was found as unresponsive and that the Respondent's decision was solely based on the ground of pagination. Reliance was placed on the decision of ***Republic vs. Public Procurement Administrative Review Board & another; Mer Security & Communications System Ltd/Megason Electronics & Control 1978 (JV) & another (Interested Parties); Ex-parte Magal Security Systems Ltd/Firefox Kenya Limited (JV) [2019] eKLR***

26. **M/s. Waiganjo** Learned Counsel for the 3rd Interested party submitted that the Applicant did not paginate its document and therefore the procurement entity properly evaluated the Ex-parte Applicant's tender document.

The Determination

27. I have considered the Application before the Court and submissions made thereon by parties, together with authority's cited. I have framed the following issues for determination.

- 1. Whether the judicial Review application is statute barred.***
- 2. Whether the Review Board's decision was irrational and unreasonable.***
- 3. Whether the 2nd Interested party can cancel the tender award for lack of budgetary provision.***

1. Whether the judicial Review application is statute barred

28. This Court has considered the application dated 19.12.19. I note that the ex-parte applicant was candid. It explained that it received the proceedings and judgment from the respondent on the 26.11.2019 which meant that the Respondent ate into seven (7) of its fourteen 14 days and that the delay of one (1) day in filing an application for review dated 2.12.2019 is not inordinate. I am persuaded that it has established sufficient cause. There will be no prejudice to be suffered by the Respondent and the Interested Parties. Judicial review remedies are the product of procedural Justice. It is the finding hereof that for substantive Justice to be realized in this matter, the extension of time by the Ex-parte Applicant should be allowed, as I hereby do.

2. Whether the Review Board's decision was irrational and unreasonable.

29. Article 47(3) of the Constitution gives this Court the mandate to review the decision of an administrative body (the review board) if it fails to take into account material factors or if it takes into account irrelevant factors. Section 7(2) as read with Section 11(1) (e) of the Fair Administrative Act provides for grounds for quashing of decisions. They include the grounds of relevant and irrelevant considerations in a decision, the rationality and reasonableness of a decision, its proportionality, whether legitimate expectations have been violated by the decision, and whether the decision was made for proper or improper purposes.

30. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of ***Pasteli vs. Kabala District Local***

Government Council & Others [2008] 2 EA 300 at pages 303 to 304 thus:

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

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

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

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

31. The Court of Appeal in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR said that *Article 47* of the Constitution as read with the grounds for review provided by Section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.

32. In determining whether or not the Respondent in this regard acted irrationally in dismissing the Applicant’s Application for review, it is necessary to establish whether the conditions in the tender document were correctly interpreted. According to Clause 4 at page 23 of the Tender Document it is stated as follows:

“A planned Mandatory site visit has been scheduled for TUESDAY 7th MAY, 2019 from 1000 Hours. Interested and eligible candidates shall be required to gather at the Kenya Ports Procurement Conference Room, Mombasa. Non-attendance will lead to automatic disqualification. Prospective candidates (each partner in consortium) shall be required to sign a site visit attendance register as evidence of having participated in the site visit.”

33. I note that the Review Board in its decision delivered on the 19.11.2019 held as follows:

“a determination cannot be made to the detriment of the Applicant without conclusive evidence as to whether or not the Applicant attended the second visit. The only issue that is certain is that it never signed the second site attendance Register form since according to the Applicant it was not necessary to sign the said form if a bidder already signed the first site visit attendance register...the board finds that the procuring entity unfairly evaluated the Applicant on this criterion”

34. From the finding of the Respondent, on the second mandatory site visit, I am of the view that the same was rational and procedural as it declined to rely on the “site attendance register form” which was belatedly introduced into evidence after the hearing, even though there was evidence from the Ex-parte Applicant itself that its agent attended the second mandatory site visit but never signed the site attendance register form which according to Clause 4 at page 23 was a mandatory condition in the subject tender document.

35. On the second ground of pagination of the bid document in the proper form, **Mr. Gikandi** submitted that the Applicant tender document was duly paginated as evidenced on the duplicate annexed in its Chamber Summons filed at the leave stage. Counsel submitted that the issue of pagination is just a creation of the 1st and 2nd Interested parties to advance their illegal actions.

36. It is to be noted that the 1st and 2nd Interested parties communicated their decision to the Applicant vide letter dated 11.10.2019 and at paragraph 3 of the said letter it is stated as follows:

“your document was not numbered in the correct sequence I’e between page 4 and pages 10 some pages were not numbered, between pages 24 and 29 some pages were not numbered, between page 29 and page 32 NCA Contractors Annual Practicing License and NCA Certificate of Registration were not page numbered.”

37. Before the Respondent (Review board), the Applicant’s Counsel submitted that its bid was properly paginated save that no page numbers were given for pages that were blank and overleaf. The Respondent in its decision held as follows:

“the board finds that the Applicant failed to comply with the criterion on clause (ii) at page 24 of the Tender document by failing to paginate pages comprising of its company profile.

...the Applicant’s company profile runs through six pages. However, it is only one page and not the overleaf pages comprising of the Applicant’s company profile that is paginated.”

38. This Court did not have an opportunity to look at a copy of the ex-parte Applicant's original tender document as the same was not annexed herein by the parties in order to make its own independent findings on merit. The duplicate tender document submitted to this Court by the Applicant was unclear and the numbering on the tender document was illegible. Be that as it may, I note that the Applicant in response to the finding by the Respondent on pagination of its whole tender document issued a blanket statement that all its document was fully paginated, and did not respond specifically to the specific finding on pagination between pages 4 and page 10 (company profile); page 29 and 32 (NCA Registration Certificate and Practicing Licence).

39. Clause (ii) at page 24 of the Tender document states as follows:

i. Shall have a table of contents page clearly indicating Sections and Page Numbers (Mandatory).

ii. Shall have a table of contents page clearly indicating Sections and Page Numbers (Mandatory).

iii. ...

Note: Noncompliance with any MANDATORY requirement will automatically result in disqualification.

40. From the foregoing, it is clear that failure by any tenderer to comply with the provisions of the above stated clauses would lead to automatic disqualification which means that the tender will be marked as being non-responsive and would not pass the preliminary stage.

41. On responsiveness of a tender document, Section 79 of the Public Procurement and Asset Disposal Act provides as follows:

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

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

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

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

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

(a) be quantified to the extent possible; and

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

42. On evaluation of tender documents, Section 80(2) of the Public Procurement and Asset Disposal Act provides as follows:

(1) ...

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

43. In my view, the requirement for pagination was in the present case indicated to be a mandatory requirement in the 2nd Interested Party's tender document, and it was indicated that a tenderer lacking in any of the requirements would be automatically disqualified. Disqualification means that the tenderer would not progress to the Technical evaluation stage as Section 80(2) of the Act provides that the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and since the Applicant had failed to meet that mandatory requirement **under Clause (ii) at page 24** of the tender document, this meant that the Applicant tender would not have gone past the evaluation stage. See. **Republic v Public Procurement Administrative Review Board & 2 others Ex-parte BABS Security Services Limited [2018] eKLR** where it was held that...

“a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.”

44. On invitation to tender, Section 74 of the Public Procurement and Asset Disposal Act provides as follows:

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

(a) the name and address of the procuring entity;

(b) ...

(i) requirement of serialization of pages by the bidder for each bid submitted; and

45. Pagination of tender documents is a mandatory requirement under Section 74 of the Act, and failure to paginate every page even the overleaf pages cannot therefore be interpreted as a minor deviation from the requirements set out in the tender documents, and cannot fall within the exceptions provided for in Section 79 of the Act. See **Republic vs Public Procurement Administrative Review Board & 3 Others Ex-parte Saracen Media Limited, (2018) eKLR** where it was held that it is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be registered as non-responsive and rejected without further consideration.

46. It is the finding of this Court that the Applicant's non-conformity with clause (ii) at page 24 of the tender document that required all the pages in the whole document to be numbered in the correct sequence was not a minor deviation. The deviation if allowed would undermine the underlying purpose of supplying information to bidders for the preparation of tenders, and would also amount to unfairness if some bidders were allowed to circumvent tender conditions.

3. Whether there was budgetary allocation for the awarded tender

47. The Ex-parte Applicant avers that there was a budgetary allocation for the subject tender as was advertised sometime in 2017, and as such **Mr. Aza Dzeno** has committed perjury by stating on oath that there was no budgetary allocation. On Procurement and asset disposal planning, Section 53(8) of the PPDA 2015 is in the following words;

“Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.”

48. In *Republic v Public Procurement Administrative Review Board; Leeds Equipments & Systems Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR* it was held as follows...

“It cannot therefore be open for a Procuring Entity to advertise for goods, works or services and then turn around at the end of the process and terminate a procurement process after tenders have been submitted, evaluated and a recommendation of award made. This view is further fortified by the fact that the budget available for any procurement is always known to the Procuring Entity way before an invitation for tenders is made public through advertisement.

The prices quoted by bidders are also known at the public opening of the tenders and what a prudent procuring entity ought to have done is to terminate the process immediately after tender opening in the event that the prices were above the available budgetary allocation but not to evaluate the tenders and terminate the procurement process upon the conclusion of the evaluation exercise

Secondly and notwithstanding the provisions of Section 53 of the Act, where the decision of a Procuring Entity to terminate a procurement process is challenged the Procuring Entity whose decision is challenged must provide sufficient evidence/material to justify the termination of the procurement process.

The Board has looked at all the evidence placed before it by the Procuring Entity to support the allegation of lack of sufficient funds to continue with the procurement process herein and finds on the basis of the material placed before it that the Procuring Entity did not place sufficient evidence before the Board to justify the termination.”

49. Indeed under Section 63(1) b of the Act, an accounting officer of a procurement entity has the power of terminating or cancelling a procurement proceeding.

Section 63(1) (b) provides as follows:

(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement have been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

50. This Court finds and holds that the averments made by **Mr. Aza Dzeno** in the 1st and 2nd Interested parties' Replying Affidavit with

regard to availability of funds to carry out the tender are mere allegations as they are not supported with any evidence. The minutes of the alleged meeting held on the 4.12.2019 by the 2nd Interested Party's Board holding that the tender was floated in the absence of a budgetary allocation have not been furnished to this Court. Consequently, this Court will not concern itself with the issue of availability or otherwise of budgetary allocation. In any event, this Court cannot take it upon itself to terminate the tender contract between the procuring entity and the award winner without hearing the award winner on the matter. If, however, the 1st and 2nd Interested Parties have become aware of their possible violation of the law relating to procurement in the current matter, it is upon them to solely decide whether or not they will continue with any such disobedience and/or violation of the law.

51. In the premises, I find and hold that the Applicant's Notice of Motion dated 9.12.2019 is not merited, and it accordingly fails. The same is hereby dismissed. Parties to bear own costs.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 14th day of January 2020.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Ondeng holding brief Mr. Gikandi for the Ex-parte Applicant

Mr. Mkok for the Respondent

Mr. Cheruiyot for the 1st & 2nd Interested Parties

M/s. Waiganjo for the 3rd Interested Party

Mr. Kaunda Court Assistant