



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPLICATION NO. 123 OF 2019

REPUBLIC.....APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD....1ST RESPONDENT

MINISTRY OF INTERIOR &

COORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

AND

TROPICAL TECHNOLOGY LIMITED.....EX-PARTE APPLICANT

JUDGMENT

The parties

1. The applicant, Tropical Technology Limited is a limited liability company incorporated and registered in Kenya under the Companies Act. [\[1\]](#)
2. The Respondent, the Public Procurement Administrative Review Board, is a central independent procurement appeals review board established under section 27 of the Public Procurement and Asset Disposal Act^[2] (herein after referred to as the act). Its functions pursuant to section 28 of the act are reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to it by the Act, Regulations or any other written law.
3. The second Respondent, the Ministry of Interior and Co-ordination of National Government, is a State Department established under Article 155 of the Constitution.

Factual Matrix

4. The factual chronology of the events which triggered this case is essentially common cause or not disputed. The history of this dispute is uncontroverted. On 4th February 2015, the second Respondent advertised tender numbers KPS/ICB/T/10/2014-2017 for the supply and delivery of motorized vehicles number plate blanks and KDS/ICD/T11/2014-2017 for supply and delivery of motorized vehicle plate hot stamping foils, but the applicant's bids for both tenders were unsuccessful.
5. Aggrieved by the bid outcome, it filed Request for Review number 46 of 2015, *Tropical Technology Limited v Ministry of Interior & others* which was allowed, and, the applicant was awarded tender number KPS/T/10/2015 on 29th September 2016 while some items in tender number KPS/T/11/2015 were awarded to MIG International Limited. An application to review the said decision was dismissed, thus the Respondent's decision dated 20th September 2016 stood. The second Respondent's Principal Secretary sought and obtained the Attorney General's legal opinion and the second Respondent signed the contracts with the winning firms. On 16th October 2017, the second Respondent issued the Notification of Award to the applicant who accepted the award on 17th October 2017 and the applicant states that the contract was signed on 7th November 2017.
6. Pursuant to the contract, the Ministry has since issued various Local Purchase Orders and the applicant has since delivered two 40 feet containers of blank number plates. The applicant states that on or about the 13th March 2019, it came across an advertisement by the second

Respondent in the local dailies for the supply and delivery of number plate raw materials and fabric materials. As a result, it formed the opinion that the said advertisement was illegal, irregular and amounted to direct infringement of its contractual rights reserved by the existing contract between itself and the second Respondent. It also states that it was aggrieved by the said advertisement because it has a similar contract with the applicant, hence, it filed a Request for Review, but it was dismissed and the first Respondent directed the second Respondent to proceed with the tender process.

Legal foundation of the application

7. The applicant states that the impugned decision is unreasonable, based on extraneous, irrelevant and unlawful considerations, arbitrary, *ultra vires* and in excess of jurisdiction. It also states that the first Respondent ignored or failed to consider and apply express provisions of the law which were raised by the applicant and further, it failed to take into account relevant and important factors and instead it took into account extraneous and irrelevant considerations.

8. The applicant also states that the first Respondent acted in breach of Regulation 40 as read with section 97 (1) (2) of the act by opening the tenders before the expiry of the statutory 14 days, because, the tender was advertised on 13th March 2019 and it was opened on 26th March 2019 allowing only a period of 12 days. The applicant also states that the second Respondent went against the first Respondent's stay orders issued on 21st March 2019 by opening the tenders on 26th March 2019.

9. In addition, the applicant states that there was in force a contract between itself and the second Respondent, hence, by purporting to advertise the new tender, the second Respondent effectively and illegally terminated the applicant's existing tender contrary to section 63 of the act as read with Regulation 32 (1)(2). The applicant also states that by allowing the second Respondent to proceed with the new tender while it had already contracted the applicant for the supply of materials for the same or similar purposes, the first Respondent derogated from its statutory and constitutional mandate as set out under section 3 (e) (h) of the act and Article 201 (d) of the Constitution.

10. The applicant also states that the first Respondent failed to appreciate its mandate as set out under the act, that is, to ensure accountability and transparency in the tender process and to enhance fair competition in the tender process. The applicant also states that in arriving at the impugned decision, the first Respondent made grave errors of law in failing to apply mandatory provisions of the act thereby arriving at an erroneous decision, and, that it committed grave errors of law and fact which took the decision outside its legitimate jurisdiction thus rendering it illegal. It also states that the Respondent's actions are *ultra vires*, unlawful, arbitrary, malicious, capricious, based on wrong interpretation of the law, unreasonable, discriminatory, actuated by bad faith, based on extraneous considerations and against the applicant's lawful, legitimate and rightful expectation and breach of the rules of fair play.

The Reliefs sought

11. As a consequence of the foregoing, the applicant seeks the following orders:-

a. An order of Certiorari to quash the decision made by the Public Procurement Administrative Review Board in Request for Review Number 32 of 2019, Tropical Technology Limited v Ministry of Interior & Co-ordination of National Government.

b. An order of prohibition prohibiting the second Respondent from acting upon and or executing the directions made by the first Respondent vide its decision of 3rd April 2019.

c. The costs of this application be awarded to the applicant.

The first Respondent

12. The first Respondent did not file any response to the application.

The second Respondent

13. Joel Ngolekong, the second Respondent's Procurement Officer swore the Replying Affidavit dated 17th June 2019. He deposed that on 4th February 2015, the second Respondent advertised in the print media tender numbers KPS/ICH/T/10/2014-2017 for the supply and delivery of motorized vehicle number plate blanks and tender number KDS/ICB/T11/2014-2017 for supply and delivery of motorized plate hot stamping foils. He averred that the applicant submitted its bids for both tenders, and, that, after evaluation, the applicant's bid was unsuccessful. He deposed that the applicant challenged the awards before the Respondent in Request for Review number 46 of 2015, and, that, the Respondent allowed the Request for Review and ordered that the applicant be awarded the tender numbers KPS/T/2015 on 29th September 2016, and, some items in KPS/T/2015 were awarded to MIG International Limited.

14. Mr. Ngolekong also deposed that the second Respondent sought an advisory opinion from the Hon. Attorney General who advised the Ministry to sign the contracts with the firms that were awarded the tenders, and, that, the applicant entered into a three year contract with the Ministry for the supply and delivery of motorized vehicle number plate blanks tender number JKPS/T/ICB/IO/2014-2017, and, that the said contract is still valid and running.

15. He also deposed that on 18th September 2018, the second Respondent advertised in the local dailies tender number SCD/48/2018-2021 for supply and delivery of Number plate raw materials which was closed on 26th March 2019. He averred that the applicant bought the tender documents but it did not return their bid for the tender thus they were locked out.

16. He deposed that the applicant filed Request for Review number 32 of 2019 before the second Respondent and that the Respondent noted

that it was not disputed by the parties that the two tenders were not the same, and, that, it rendered its decision on 10th April 2019 in which it noted that the applicant was accorded an opportunity to participate in the tender, but it opted to file the Request for Review.

17. He further averred owing to the fact that another contract existed the Respondent acknowledged the provisions of section 167 (4) of the act which deprives it the locus to interrogate matters where a contract has been entered into. He also deposed that the Review Board noted that the applicant was not denied an opportunity to benefit in the subject tender in accordance with section 3 of the act and Article 227 (1) of the Constitution, and, thus, the applicant failed to demonstrate the prejudice caused by the Procuring Entity advertising the subject tender.

18. He further deposed that the tender advertised in the local dailies on 13th March 2019 was for supply of different goods from the ones the applicant had been contracted to supply. He averred that the contract is for supply of materials for digitized number plates while the advertised tender is for non-digitized number plates. He deposed that the current tender is aimed at ensuring that there is continuous production of number plates so as not to disadvantage the public pending transition to digitized number plates. He also averred that the advertised tender will not interfere with the already existing contract between the second Respondent and the applicant, hence there is no basis for this court to grant the orders sought.

The applicant's advocate's submissions

19. The applicant's counsel cited Regulation 40 as read with section 97 (1) (2) of the act and argued that by opening the tender before the expiry of the statutory 14 days, it violated the law, and, that, the Procuring Entity went against the first Respondent's own stay order on 21st March 2019 when it proceeded to open the tenders on 26th March 2019. He also argued that by advertising a fresh tender while it had already contracted the applicant, the second Respondent was illegally terminating the applicant's contract contrary to section 63 of act and Regulation 32 (1) (2), and, that, by directing the second Respondent to proceed with the tender, the first Respondent derogated from its statutory and constitutional mandate required of it under section 3 (e) (h) of the act and Article 201 (d) of the Constitution.

20. He also argued that the first Respondent acted irrationally and without jurisdiction by failing to interrogate and make findings on the breaches of the act as required by section 167 (1) of the act. To buttress his argument, counsel relied on a passage from *Halsbury's Laws of England*.

21. The applicant's counsel also argued that the first Respondent failed to take into account relevant factors and instead took into account extraneous and irrelevant considerations. He argued that the applicant failed to consider breaches of the act and Regulations. He took issue with the first Respondent's two grounds upon which it premised its decision, namely, the applicant's failure to demonstrate prejudice and that the existing contract was not affected, and submitted that the first Respondent failed to consider glaring breaches of the law. He relied on *Secretary of State for Education v Tameside Metropolitan Borough Council*^[3] and *Roberts v Howood & others*^[4] and argued that by ignoring the said issues, the first Respondent acted unreasonably and irrationally.

22. In addition, counsel cited *R v The Commissioner of Coop ex parte Kirinyaga Tea Growers Coop Savings and Credit Society Ltd*^[5] for the proposition that statutory powers can only be exercised validly if they are exercised reasonably. He also relied on *Zhongman Petroleum & Natural Gas Group Company Limited v The Public Procurement and Administrative Review Board & 3 others*^[6] for the holding that by failing to consider relevant issues, the Respondent fell into error. Lastly, counsel submitted that the applicant has demonstrated sufficient reasons to warrant the orders sought.

The Respondent's Advocate's submissions

23. None of the Respondents filed submissions despite being granted time to do so.

Determination

24. It is important to point out that even though the impugned decision in Request for Review number 32 of 2019 was rendered on 10th April 2019, the applicant seeks to quash a decision rendered on 3rd April 2019.

25. The core ground cited by the applicant in support of their attack on the impugned decision is that the Respondent failed to take into account relevant considerations and took into account irrelevant considerations.

26. It is useful to state that arriving at a decision on the basis of irrelevant considerations, or by disregarding relevant considerations, is one of the manifestations of irrationality. As stated in *R v Secretary of State for Social Services, ex parte Wellcome Foundation Ltd*,^[7] it is a reviewable error either to take into account irrelevant considerations or to ignore relevant ones, provided that if the relevant matter had been considered or the irrelevant one had been ignored, a different decision or rule might (but not necessarily would) have been made. Many errors of law and fact involve ignoring relevant matters or taking into account of irrelevant ones. Ignoring relevant considerations or taking account irrelevant ones may make a decision, or rule unreasonable.

27. As Cooke J pointed out in *Ashby v. Minister of Immigration*^[8] considerations may be obligatory i.e. those which the Act expressly or impliedly requires the Tribunal to take into account and permissible considerations i.e. those which can properly be taken into account, but do not have to be.^[9] Where the decision-maker fails to consider those obligatory considerations expressed or implied in the act, the decision has to be invalidated. Whereas, in the case of permissive considerations, the decision-maker is not required to strictly abide to such considerations. Rather, the decision-maker is left at discretion to take the relevant considerations having regard to the particular circumstances of the case by ignoring those irrelevant ones from consideration. The number and scope of the considerations relevant to any particular decision or rule will depend very much on the nature of the decision or rule.

28. All that the courts do is to decide whether the particular consideration(s) specified by the complainant ought or ought not to have been

taken into account.^[10] In effect, under this head the courts only require the decision-maker to show that specified considerations were or were not adverted to. In technical terms, the burden of proof is on the applicant, but the respondent will have to provide a greater or less amount of evidence as to what factors were or were not considered and how they affected the decision. A mere catalogue of factors ignored or considered may not be enough.^[11] It is suffice to say that where the decision-maker fails to take relevant considerations into account but takes those irrelevant ones, there is high probability that the outcome of the decision may be affected by defects than not. So, the interference of the court to review such kind of decisions seems justifiable.

29. If, in the exercise of its discretion on a public duty, an authority takes into account considerations which the courts consider not to be proper, then in the eyes of the law it has not exercised its discretion legally. On the other hand, considerations that are relevant to a public authority's decision are of two kinds: there are mandatory relevant considerations (that is, considerations that the statute empowering the authority expressly or impliedly identifies as those that must be taken into account), and discretionary relevant considerations (those which the authority may take into account if it regards them as appropriate). If a decision-maker has determined that a particular consideration is relevant to its decision, it is entitled to attribute to it whatever weight it thinks fit, and the courts will not interfere unless it has acted in a Wednesbury-unreasonable manner. This is consistent with the principle that the courts are generally only concerned with the legality of decisions and not their merits.

30. When determining if a decision-maker has failed to take into account mandatory relevant considerations, the courts tend to inquire into the manner in which the decision-maker balances the considerations. However, once the decision-maker has taken into account the relevant considerations, the courts are reluctant to scrutinize the manner in which the decision-maker balances the considerations. This can be gleaned from the case of *R. v. Boundary Commission for England, ex parte Foot* (1983),^[12] where the Court of Appeal of England and Wales was unwilling to overrule certain recommendations of the Commission as it had rightfully taken all the correct considerations laid down in the relevant statute. The court emphasized that the weighing of those relevant considerations was a matter for the decision maker, not the courts.^[13]

31. The above statement of law was endorsed in *Tesco Stores Ltd. v. Secretary of State for the Environment* (1995),^[14] a planning law case. Lord Hoffmann discussed the "distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority".^[15] His Lordship stated:-

"Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all."

32. When exercising a discretionary power a decision-maker may take into account a range of lawful considerations. Some of these are specified in the statute as matters to which regard may be had. Others are specified as matters to which regard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully take into account.^[16] If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised.

33. It may be immaterial that an authority has considered irrelevant matters in arriving at its decision if it has not allowed itself to be influenced by those matters^[17] and it may be right to overlook a minor error of this kind even if it has affected an aspect of the decision.^[18] However, if the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence. As a general rule it is enough to prove that their influence was material or substantial. For this reason there may be a practical advantage in founding a challenge to the validity of a discretionary act on the basis of irrelevant considerations rather than extraneous purpose, though the line of demarcation between the two grounds of invalidity is often imperceptible.^[19]

34. If the ground of challenge is that relevant considerations have not been taken into account, the court will normally try to assess the actual or potential importance of the factor that was overlooked,^[20] even though this may entail a degree of speculation. The question is whether the validity of the decision is contingent on strict observance of antecedent requirements. In determining what factors may or must be taken into account by the authority, the courts are again faced with problems of statutory interpretation. If relevant factors are specified in the enabling Act it is for the courts to determine whether they are factors to which the authority is compelled to have regard.^[21] If so, may other, non-specified considerations be taken into account or are the specified, considerations to be construed as being exhaustive?

35. A decision may be invalid (where an irrelevant consideration has been taken into account by a decision-maker. Two issues commonly arise in applying this criterion; one what matters were taken into account by a decision-maker? This is primarily an issue of fact, to be answered by analysis of evidence; and, two, were any of the matters that were taken into account an irrelevant consideration? This is commonly an issue of law, resolved by construction of the statute that confers a power. A criteria of relevance may also be found outside a statute, by reference to other aspects of the legal framework within which decision-making occurs.

36. A court will be **cautious** in deciding that an issue that was taken into account was irrelevant. In the simplest scenario, the legislation will exhaustively list the considerations or factors that can be taken into account. However, more often it will be necessary to draw inferences from other features of the legislation, including; Language of the statute, Purpose or object, the subject matter of the statute, the nature of the power being exercised and the nature of the office held by the decision-maker.

37. The principal focus will always be the words of the statute but other legal assumptions may be taken into account by the court, such as: A general legal presumption that legislation can never be administered to advance the personal interests of the decision-maker; International conventions; Humanitarian considerations; Racial and sexual bias would be an irrelevant consideration as a result of anti-discrimination legislation and Serious factual errors may be equated with irrelevant considerations. A conclusion that a particular matter was considered can often be drawn from such evidence as:-A statement of reasons; Contemporaneous administrative decisions; Reliance by the decision maker upon an irrelevant policy statement.

38. *Turning to the facts of this case*, it is common ground that the applicant entered into a three year contract with the second Respondent for the supply and delivery of motorized vehicle number plate blanks for tender number JKPS/T/ICB/IO/2014-2017. It is undisputed that the said contract is still valid and running. It has not been disrupted or terminated. The second Respondent admits advertising tender number SCD/48/2018-2021 for supply and delivery of Number plate raw materials which was closed on 26th March 2019. It has been stated that the second tender is for completely different materials.

39. I note that in the impugned decision, the first Respondent noted that the parties did not dispute that the two tenders were not the same. The fact that the two tenders are not the same, and considering the fact that the applicant's contract is still running, one wonders how the first Respondent considered irrelevant matters. Studying the facts of this case, I do not see how a different tribunal faced with the same set of facts and circumstances could have arrived at a different position.

40. The fact that the tender advertised on 13th March 2019 was for supply of different goods from the ones the applicant had been contracted to supply renders the applicant's argument legally frail and unsustainable. The difference between the two tenders was given. The contract held by the applicant is for supply of materials for digitized number plates while the advertised tender was for non-digitized number plates.

41. The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion. [22] The law remains, as I see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he/it acts in good faith (and reasonably and rationally) a court of law cannot interfere.

42. The applicant's counsel also argued that the decision is unreasonable. Reasonableness, as a ground for the review of an administrative action is dealt with in Section 7 (2) (k) of the Fair Administrative Action Act. [23] A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [24] O'Regan J approved the reasonableness test which was stated as follows by Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*. [25]

"The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock... as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. ... Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him."

43. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be "*objectively so devoid of any plausible justification that no reasonable body of persons could have reached it*" [26] and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated.* [27] In *Prasad v Minister for Immigration*, [28] the Federal Court of Australia held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt, and when "looked at objectively... so devoid of any plausible justification that no reasonable body of persons could have reached them".

44. A decision which fails to give proper weight to a relevant factors may also be challenged as being unreasonable. [29] It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated. [30] Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Differently stated, the following propositions can offer guidance on what constitutes unreasonableness:-

i. Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;

ii. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;

iii. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it;

45. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

46. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others. [31]

47. The court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might

differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

48. I have carefully examined the impugned decision. I have also considered the final orders made. There is nothing to show that a reasonable Tribunal, faced with the same set of facts and the law would have arrived at a different conclusion. In other words, applying the above tests of unreasonableness and irrationality, I find that the applicant has not demonstrated that the decision is tainted with unreasonableness or irrationality.

49. It has been said repeatedly that^[32] The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. From the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.

50. An administrative functionary that is vested by statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.

51. The essence of a discretion in the true sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a court would have preferred him to have followed a different course among those available to him. A discretion in the true sense is found where the functionary has a wide range of equally permissible options available to it. There is no argument before me that the Respondent abused its discretion or acted outside its permissible range of discretion. In contrast, where a body has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, a discretion in the loose sense – means no more than that the body is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.

52. When a tribunal exercises a discretion in the true sense, it would ordinarily be inappropriate for a Review court to interfere unless it is satisfied that this discretion was not exercised – “judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a body or tribunal properly directing itself to all the relevant facts and principles.

53. A Judicial Review court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the tribunal court. Where a tribunal is granted wide decision-making powers with a number of options or variables, a judicial review court may not interfere unless it is clear that the choice the tribunal has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, a Judicial Review court may not interfere only because it favours a different option within the range.

54. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter. *No illegality, irrationality or procedural impropriety has been established in the manner in which the Board approached and determined the issues before it.* An administrative decision can only be challenged for **illegality, irrationality and procedural impropriety**. A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the Respondent. A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

55. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

56. The applicant also seek an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established nor has it been established that the Respondents acted illegally or in excess of their powers nor has the decision been shown to be illegal, *ultra vires*, irrational or a nullity.

57. In view of my analysis of the issues discussed herein above and my conclusions, I find that the applicant has not demonstrated any grounds for this court to grant the orders sought. Accordingly, I dismiss the applicant's application dated 26th April 2019 with no orders as to costs.

Orders accordingly.

Signed and Dated and Delivered at Nairobi this 17th day of January, 2020.

John M. Mativo

Judge

- [1] Act No. 17 of 2015.
- [2] Act No. 33 of 2015.
- [3] {1977} AC 1014.
- [4] {1925} AC 578.
- [5] {1991} 1 EA 245.
- [6] Misc. App No. 53 of 2010.
- [7] {1987} 1 WLR 1166.
- [8] {1981} 1 NZLR 222 at 224.
- [9] See Wade & Forsyth, p.381.
- [10] See *Cannock Chase DC v Kelly* [1978] 1 All ER 152.
- [11] *R v Lancashire CC, ex parte Huddleston* [1986] 2 All ER 941
- [12] *R. v. Boundary Commission for England, ex parte Foot* [1983] EWCA Civ 10, [1983] Q.B. 600, C.A. (England and Wales).
- [13] Ibid.
- [14] *Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] UKHL 22, [1995] 1 W.L.R. 759, H.L. (UK).
- [15] Ibid.
- [16] These three considerations were set out by Simon Brown L.J. in *R. v Somerset CC Ex p. Fewings* [1995] 1 W.L.R. 1037, at 1049.
- [17] *R. v London (Bishop)* (1890) 24 Q.B.D. 213 at 226–227 (affd. on grounds not identical, sub nom. *Allcroft v Bishop of London* [1891] A.C. 666); *Ex p. Rice*; *Re Hawkins* (1957) 74 W.N. (N.S.W) 7, 14; *Hanks v Minister of Housing and Local Government* [1963] 1 Q.B. 999 at 1018–1020; *Re Hurle-Hobbs' Decision* [1944] 1 All E.R. 249
- [18] *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch. 233, 271; *R. v Barnet & Camden Rent Tribunal Ex p. Frey Investments Ltd* [1972] 2 Q.B. 342; *Bristol DC v Clark* [1975] 1 W.L.R. 1443 at 1449–1450 (Lawton L.J.); *Asher v Secretary of State for the Environment* [1974] Ch. 208 at 221, 227.
- [19] *Marshall v Blackpool Corp* [1935] A.C. 16; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; *R. v Rochdale MBC Ex p. Cromer Ring Mill Ltd* [1992] 2 All E.R. 761.
- [20] *R. v London (Bishop)* (1890) 24 Q.B.D. at 266–227, 237, 244; *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] A.C. 663 at 693 (Lord Denning); *R. v Paddington Valuation Officer Ex p. Peachey Property Corp Ltd* [1966] 1 Q.B. 380.
- [21] On mandatory and directory considerations, see 5–049; e.g. *Yorkshire Copper Works Ltd v Registrar of Trade Marks* [1954] 1 W.L.R. 554 (HL held that the Registrar was bound to have regard to specific factors to which he was prima facie empowered to have regard); *R. v Shadow Education Committee of Greenwich BC Ex p. Governors of John Ball Primary School* (1989) 88 L.G.R. 589 (failure to have regard to parental preferences).
- [22] Lawrence Baxter *Administrative Law* 1ed (1984) at 505.
- [23] Act No. 4 of 2015.
- [24] {2004} ZACC 15; 2004 (4) SA 490 CC at 512, para 44.
- [25] {1995} 1 All ER 129 (HL) at 157.
- [26] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821]).

[27] *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

[28] {1985} 6 FCR 155

[29] *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 per Mason J (at 41).

[30] See *Patel vs Witbank Town Council* 1931 TPD 284 Tindall J said (at 290);

[31] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) *Administrative Justice and its Availability* (Federation Press, 2015) 37.

[32] *Supra*.