REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 284 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

PRINCIPAL SECRETARY, STATE DEPARTMENT

OF INTERIOR, MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....INTERESTED PARTY

AND

CMC MOTORS GROUP LIMITED.....EX PARTE APPLICANT

JUDGMENT

The Parties

1. The applicant, CMC Motors Group Limited is a limited liability company incorporated 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 Interested Party, the Principal Secretary in charge of the State Department of Interior, Ministry of Interior and Co-ordination of National Government, is an office in the public service established under Article 155 of the Constitution.

Guiding legal principles

4. The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the State procurement process is Article **277 (1)** of the Constitution. The Article provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

5. The national legislation prescribing the framework within which procurement policy must be implemented is the *Public Procurement and Asset Disposal Act*[3] (herein after referred to as the Act) and *The Public Procurement and Disposal Regulations, 2006* (hereinafter referred to as the Regulations). A decision to award a tender constitutes administrative action so the provisions of Article **47** of the Constitution and the Fair Administrative Action Act[4] (herein after referred to as the FAA Act), from which a cause of action for the Judicial Review of administrative action arises, apply to the process.[5]

6. Section **3** of the Act provides that Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—***(a)*** *the national values and principles provided for under Article 10;* ***(b)*** *the equality and freedom from discrimination provided for under Article 27;****(c)*** *affirmative action programmes provided for under for under Articles 55 and 56;* ***(d)*** *principles of integrity under the Leadership and Integrity Act, 2012;* ***(d)*** *the principles of public finance under Article 201;* ***(e)*** *the values and principles of public service as provided for under Article 232;* ***(e)*** *principles governing procurement profession, international norms;* ***(f)*** *maximization of value for money;* ***(g)*** *…and ….*

7. An administrative decision is flawed if it is illegal. A decision is illegal if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

8. Statutes do not exist in a vacuum.[6] They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.[7] The courts should therefore strive to interpret powers in accordance with these principles.

9. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ‘‘four corners’’ of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments.

10. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[8]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In other words as was appreciated by the Court of Appeal in *Kimutai vs. Lenyongopeta & 2 Others****[9]*** while citing Lord Denning:-[10]

> *“The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the “purposive approach”. In all cases now in the interpretation of statutes such a construction as will “promote the general legislative purpose” underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, “There is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.”(Emphasis added).*

11. It is now convenient to summarize the facts of this case as presented by the parties as a prelude to the court’s analysis and determination of the issues at the heart of the dispute.

Factual Matrix

12. The factual chronology of the events which triggered this judicial review application is essentially common cause or not disputed. *My reading of the respective parties’ pleadings is that the history of this dispute is uncontroverted. Notably, a preview of the background of the tender the subject of this case shows that it is characterized by two Request for Review applications, being Request for Review Number 69 of 2019 and Request for Review Number 99 of 2019.*

13. The applicant states that it submitted its bid following an advertisement by the Interested Party inviting bidders for the Leasing of Motor Vehicles Phase V through an Open National Tender No. MICNG/SDI/008/2018-2019. It further states that vide a letter dated 28th May 2019, the Interested Party invited it for a negotiation meeting for the said tender at Harambee House on 30th May 2019. It also states that it was notified that its bid was responsive in Lot 6, 7 and 8 and as such the meeting was to achieve a win-win situation whereby the Government of Kenya would get value for Tax payers’ money and high quality services. It also states that it acceded to the said demands thus paving way for execution of the contract and performance thereof.

14. In addition, the applicant states that on 11th June 2019, members of the Automotive Industry held a consultative meeting with the Interested Party, followed by their Statement addressed to the Interested Party Committing themselves individually and binding themselves to the vehicle leasing program.

15. The applicant states that the Interested Party, by a letter dated 25th June 2019 terminated the procurement proceedings on grounds that:- (a) the user needs have changed greatly and there is an urgent need to change the specifications of the motor vehicles in order to effectively and efficiently deal with emerging security needs among others; (b) the tender document for Leasing Motor Vehicles Phase V as advertised did not factor the local motor vehicle assembly and manufacturing; (c) the Government is implementing the Big 4 Agenda thus the Government Vehicle Leasing Programme should therefore be anchored on the Big 4 Agenda with particular focus on promoting local manufacturing and assembly.

16. Aggrieved by the termination, the applicant filed Request for Review Number 69 of 2019 and upon completion of hearing, the Respondent *inter alia* set aside the termination and directed the Procuring Entity to proceed with the procurement process to its logical conclusion.

17. The applicant further states that on 14th August 2019 it received a letter from the Interested Party terminating the tender again on grounds that the applicant had quoted Prices which were higher than the prevailing market prices contrary to section 63 (1) (d) of the act. Aggrieved by the termination, it filed Request for Review number 99 of 2019 citing the following grounds:- (a) the Interested Party did not provide evidence to prove that the applicant had quoted prices which were higher than prevailing market price; (b) that the Interested Party did not provide a proper actuarial price matrix that took into account all parameters of the lease program as required by section 63 (1) (d) of the act; (c) that such evidence would not have been in existence since the tender was for Motor vehicle leasing and not outright purchase wherein the distinction in prices is easily drawn; (d) that the bid prices are manufacture/dealer prices and are competitive in the market and not above market prices as alleged by the Respondent; (e) that the reason(s) for termination is the introduction of a fictitious reason that did not exist, hence, an afterthought aimed at blocking the applicant from being awarded the tender; (f) that the Interested Party did not comply with the orders issued in the first application; (g) and, that the issues raised by the Interested Party are *res judicata*, hence, it is estopped from pleading the same.

18. The applicant states that the Interested Party's response to the said Request for Review was that it terminated the tender since the prices quoted were higher than the market prices.

19. The applicant states that on 18th September 2019, the Respondent dismissed its Request for Review and held that the Interested Party was right in using Motor Vehicle Leasing Phase 11 prices for purposes of comparison of prices. The applicant further states that the Interested Party has already re-tendered the bid through restricted tendering before the expiry of the 14 days as provided under section 175 of the act.

Legal Foundation of the application

20. The applicant states that the scope of Judicial Review is no longer tied to matters of procedure but pursuant to Article 23 of Constitution and sections 7 and 8 of the FAA Act, it has been expanded to include substantive merits of a decision through legal concepts such as proportionality, or where the decision was materially influenced by an error of law, or taken in bad faith or where it is not rationally connected to the empowering provisions.

21. The applicant also states that in cases where the only remedy against an administrative action is through judicial review, the court has inherent powers to examine both the process and substantive merits of the decision. In addition, the applicant states that in arriving at the said decision, the Respondent did not take into account relevant considerations presented by the applicant, and, that, it acted unreasonably and failed to properly direct itself in law.

22. The applicant also states that the Respondent failed to appreciate that the Leasing of Motor Vehicles Phase 11 and Leasing of Motor Vehicles Phase V were mutually exclusive tenders with their unique set of requirements and specifications, and, that, it failed to appreciate that LOT 7 (Heavy Duty, Utility Passenger Vehicle, 4X4, LWB 2001-3000cc, Petrol) was not in Motor Vehicle Leasing Program Phase V and as such there was obviously going to be a difference in total leasing price between the two.

23. Further, the applicant states that the Respondent failed to take into account the issues raised by the applicant such as absence of a proper actuarial matrix that took into account all the parameters of the program which it was bound by law to consider, and, absence of a proper actuarial price matrix that took into account various parameters in motor vehicle leasing program such as motor vehicle specifications, insurance, driver training service centres, vehicle replacement and out of contract prices. It also states that the decision is unreasonable.

24. In addition, the applicant states that the Respondent committed material errors of law by failing to require parties to raise all the issues as opposed to raising piece meal issues[11]and deviated from good law.[12] It also states that the Respondent acted beyond jurisdiction by overturning good law laid down by the Court of Appeal and giving interpretation that has no basis in law, thus it acted *ultra vires*. It also states that the Respondent sat on an appeal on its own decision by altering the effects of its own orders in Request for Review Number 69 of 2019, hence, committing a material error of law.

25. The applicant also states that the Respondent rendered a decision that defeated Articles 227 and 47 of the Constitution and section 3 and 63 (1) (d) of the act and the FAA Act, and, that, the termination was not supported by evidence. It also states that the Respondent acted in bad faith in that it failed to take into consideration that the Leasing of Motor Vehicles Phase 11 did not have Lot 7 which ultimately affected the computation of the overall lease price.

26. The applicant also states that the impugned decision was not rationally connected with the information before it since it concluded that Leasing of motor Vehicles Phase 11 and Leasing of Motor Vehicles Phase V had the same quantity of vehicles which was not true.

27. In addition, the applicant states that the Respondent watered down the standards for termination of tenders by failing to consider all the relevant factors, and, that the decision contravened section 80(4) of the act as read with Regulation 16 (10) by holding that the Interested Party could terminate the tender. It also states that the decision was influenced by a material error of the law, that, it failed to weigh the aim of the Constitution, the act and the Regulations against protecting bidders from termination of tenders based of flimsy grounds.

28. Lastly, the applicant states that the Respondent acted unreasonably, irrationally, disproportionate, hence, the impugned decision is unlawful, illegal and lacks basis in law.

The Reliefs sought

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

> *a. An order of **Certiorari** to quash the determination and orders of the Respondent in Public Procurement Administrative Review application Number 99 of 2019 delivered on 18th September 2019.*

*b. An order of **Prohibition** to stop the Interested Party from advertising, inviting, accepting, evaluating bids and or awarding contracts for Tender No. MICNG/SDI/004/2019-20220 for Leasing of Motor Vehicles from local Assemblies.*

c. That a declaration do issue that the ex parte applicant's right and legitimate expectation for the award of Tender No. MICNG/SD1/008/2018-2019 Leasing of Motor Vehicles Phase V was breached by the Respondent and the Interested Party.

d. That costs of this application be provided for.

e. An order that the costs of this application be awarded to the ex parte applicant.

Respondent's Replying Affidavit

30. Mr. Henock Kirungu, the Respondent's Secretary swore the Replying Affidavit dated 15th October 2019. He deposed that the Respondent received the applicant's Request for Review in respect of Tender Number MICNG/SD1/008/2018-2019 for Leasing of Motor Vehicles Phase V on 28th August 2019, and, that, the Respondent considered the pleadings filed and the parties' oral and written submissions and delivered its decision on 18th September 2019 dismissing the Request for Review and upholding the Procuring Entity's decision to terminate the tender as set out in the termination letter dated 14th August 2019 with respect to lots 1,2,3,6,7 and 8. Further, he deposed that the Respondent upheld the Notification of the award to Toyota (K) Limited dated 14th August 2019 and directed each party to bear its costs for the Request for Review.

31. Mr. Kirungu further averred that the Respondent considered the original tender documents, the evaluation reports and other documents supplied to it by the applicant and framed the following issues, namely, whether the Procuring Entity terminated or cancelled the procurement proceedings in accordance with section 63 (1) of act and thus ousting the Respondent's jurisdiction, and whether the Procuring Entity complied with the Respondent's orders in the decision rendered on 25th July 2019 in Request for Review No. 69 of 2019.

32. He further deposed that in arriving at the said decision, the Respondent took into consideration the facts and issues raised by the parties, the applicable provisions of the law and that it observed the rules of natural justice. He averred that the Respondent acted lawfully and reasonably in exercise of its statutory mandate. He also deposed that the Respondent upon studying the evaluation report, market survey report, professional opinion, the tender documents and the report of the Director General, Public Procurement Regulatory Authority pertaining to the subject tender, made the finding that the Procuring Entity's market survey was conducted in accordance with Regulation 8 (3) (z), 10 (2) (e) and 22 (2) read together with Articles 201(d) and 227 (1) of the Constitution. In addition he averred that a report of the market survey demonstrates the Procuring Entity obtained real and tangible evidence that informed its decision to terminate the tender under section 63(1) (d) of the act.

33. In addition, Mr. Kirungu averred that the Respondent was persuaded that in investigating the prevailing market prices, the Procuring Entity adhered to the provisions of section 3 of the act and Article 227(1) of the Constitution in order to maximize on value for money and to ensure that it undertakes its procurement process in a system that is cost effective. He also averred that the Respondent noted the Secretariat Comments by the Procuring Entity's head of Procurement function, that a cumulative amount of Kenya Shillings One Billion, Eighty Nine Million, One Hundred and Thirty Eight Thousand, Two Hundred and Ninety Four and Thirty Six Cents (Kshs. 1,089,138,294.36) will be lost by the Kenyan tax payer, if the Procuring Entity procures the items at the amounts quoted by the bidders recommended for award in Lots 1,2,3,6,7 and 8 in the procurement process. He also averred that the Respondent considered all the relevant factors and evidence before it in arriving at its decision, and, that, the decision was reasonable, rational and lawful. He further averred that the application has been brought in bad faith.

The Interested Party's Replying Affidavit

34. Stephen G. Wamae, a Deputy Director, Supply Chain Management Services (DD/SCMS) in the State Department of Interior & Citizen Services, Ministry of Interior & Co-ordination of National Government and the head the Procurement Department in the State Department of Interior swore the Replying Affidavit dated 15th October 2019 in opposition to the application. He averred that the Interested Party advertised tender No. **MICNG/SDI/008/2018-2019** for leasing of motor vehicles Phase V on 9th April, 2019 and closed/opened on 3rd May, 2019 inviting bids for leasing of motor vehicles which are for use by various national government (Executive) Administration at the County levels as well as the National Police Service for enhanced national administration and security operations in the entire Country.

35. He deposed that this was a fresh tender known as tender No. **MICNG/SDI/008/2018-2019** for leasing of motor vehicles Phase V on 9th April, 2019 Phase V which is henceforth to be managed and undertaken by the State Department of Interior as the National Government has since year 2014 leased motor vehicles under the sole the management of the National Treasury.

36. He further deposed that the National Treasury has since inception of the above motor vehicle leasing program managed four (4) phases, with the last phase ending on April 2019 but was extended up to 15th October 2019 to enable the State Department of Interior take up the management of the program as the end user Department.

37. Mr. Wamae averred that the Accounting Officer of the Interested Party proceeded and duly appointed the Tender Opening Committee and also the Tender Evaluation Committee as envisaged by Section 46 of the Act, and, that, the Evaluation Committee proceeded and did the evaluation in strict compliance with the provisions of Section 46 of the Act, prepared its evaluation report containing a summary of the evaluation and comparison of tenders and submitted the report to him as the Interested Party's Head of Procurement as required by Section 80(4) of the Act.

38. He averred that in line with his mandate and functions, he appointed a team of qualified officers from the Ministry to proceed and carry out a market survey exercise using the requirements of tender **No. MICNG/SDI/008/2018-2019** for leasing of motor vehicles Phase V and

submit the report in order to inform the award of the tender in accordance with Regulation 8(z).

39. He also averred that Section 54(2) of the Act requires that standard goods, services and works with known market prices be procured at the prevailing market price, and, that, the import and intent of the functions of a Tender Committee established under Regulation 10(2) (e) is to ensure that the procuring entity *does not pay in excess of* prevailing market prices.

40. Mr. Wamae also averred that Regulation 22(2) on estimating the value of the goods, works or services), casts the duty upon the procuring entity to ensure that the estimate is realistic and based on up-to-date information on economic and market conditions. In addition, he averred that the provisions of Regulation 8(z**)** allows the Interested Party to carry out market surveys at any time before the issuance of a professional opinion by the Head of Procurement and/or the notification of tender award, and, that is the law that informed the market survey process the department undertook and ultimately will save the Kenyan taxpayers over **Ksh. 1,000,000,000/=.**

41. He averred that upon receipt of the market survey report as the Interested Party's Head of Procurement, he prepared his professional opinion as mandated by Section 84 (1) of the Act and subsequently submitted the same to the Accounting Officer who proceeded to terminate the tender under **Section 63(1) (d) of the Act** since there was ample evidence that prices of the bids were above market prices.

42. Mr. Wamae averred that the Accounting Officer in rejecting the award and/or terminating Tender Number **MICNG/SDI/008/2018-2019** was mandated to take into account the views of the head of the Procurement in the signed professional opinion as per section 84 (3) of the act and as a result of the termination of the tender, the bidders were informed of the termination on 14th August, 2019 within the period stipulated in the Act.

43. He deposed that from his own personal knowledge and information in rejecting the award of Tender Number **MICNG/SDI/008/2018-2019,** the Interested Party acted in a fair, equitable, transparent, competitive and cost-effective manner which saved the taxpayer over **Ksh. 1,046,990,029/=.**

44. He also averred that the Applicant was aggrieved by the Interested Party's decision to terminate the tender and thereafter filed Application Number 99 *CMC Motor Limited v The Principal Secretary, State Department of Interior* before the Respondent and, that, the impugned decision was well reasoned, fair and meritorious, and, that, after the Respondent's decision, the Interested Party was at liberty to proceed and re-tender, accept, evaluate and award since there were no subsisting orders barring the re-tendering.

45. In addition, he averred that as a result of the foregoing, the Ministry invited bids for Tender Number **MICNG/SDI/004/2019-2020** through restricted tendering on 20th September, 2019 and the bids were to be submitted by 10am on 30th September, 2019, and, that, the Applicant was also invited by letter to participate in the said Tender.

46. He averred that after Tender Number **MICNG/SDI/004/2019-2020** was closed on 30th September, 2019, the tenders were opened and evaluation commended on the same date, and that, the tender evaluation committee worked tirelessly on 30th September, 2019 and 1st October, 2019 both days inclusive in order to deliver a credible evaluation report due to the fact that the contract is set to lapse mid-October, 2019 (now past) having been extended to give time to the procuring entity to finalize the contract.

47. Mr. Wamae deposed that as the Head of the Interested Party's procurement department, he received an evaluation report from the Evaluation Committee for Tender Number **MICNG/SDI/004/2019-2020** on 1st October, 2019 and thereafter prepared his professional opinion to the Accounting Officer who awarded the tender on the same date and in full compliance with Section 87 of the Act, the participating tenderers were on 2nd October, 2019 notified accordingly.

48. In addition, he averred that the instant application was filed on 30th September, 2019 and *ex parte* orders staying the re-tendering, acceptance, evaluation and/or award of Tender Number **MICNG/SDI/004/2019-2020** were issued on 1st October 2019 and service was effected upon the Ministry on 2nd October, 2019.

49. He further deposed that by the time the court order was served upon the Legal Unit of the Ministry on 2nd October, 2019 at 4pm and received by one Prisca, Senior State Counsel it was long after Tender Number **MICNG/SDI/004/2019-2020** had been issued, opened, tenders evaluated and successful bidders notified, hence, the court order had been overtaken by the events.

50. He further averred that the effect of the dismissal of application Nos. 99 & 100 of 2019 was that there was nothing to restrain and or stop the re-tendering, acceptance, evaluation and/or award/ of a new tender by the Interested Party and the provisions of Section 175 of the Act, were not applicable and did not bar the Interested Party from issuing a new tender so long as there was no appeal.

51. He further averred that the subsequent invitation for Tender Number **MICNG/SDI/004/2019-2020** was done with utmost good faith, fairness, transparency and public interest since the current contract for the motor vehicles to be replaced is expiring at the mid of October, 2019 (now past) and therefore the Interested Party had to move with alacrity and invite tenders for the new contract noting that the motor vehicles are to be used for security operations all over the country and there would definitely be catastrophic consequences should the security apparatus in the country grind to a halt due to lack of motor vehicles.

52. He deposed that the applicants application is mischievous, misconceived and the orders sought ought not to be granted because the applicant has absolutely no *locus standi* in these proceedings, and, that, the order granted on 1/10/2019 and issued on 2/10/2019 and served upon the same day had been overtaken by the events, and, that, the Interested Party did not have knowledge of the proceedings or order until after service on 2/10/2019.

53. He further deposed that the order of Prohibition sought lacks merits and it is not efficacious, it has been overtaken by the events because

the processes being challenged have been undertaken by events, and, that, the applicant is on a fishing expedition, and, that the declaratory order sought ought not to issues because public interest overrides private sectarian interests.

54. He also averred that the Respondent's ruling in application number in No 69 of 2019 could not direct the procuring entity to award the tender to the applicant, but simply directed the Interested Party to proceed to the logical conclusion, hence, it did not evince the award of the tender to the Applicant.

55. Mr. Wamae also deposed that the applicant did not participate in the Tender Number **MICNG/SDI/004/2019-2020** though invited, and, that this application is an afterthought, malicious, vindictive and with the sole intent of derailing the Interested Party from taking full charge and or control of the motor vehicle leasing program as the end user and for the benefit of the people of Kenya in the provision of enhanced security.

56. He further deposed that the applicant is on a fishing expedition as it has also filed before the Public Procurement Administrative Review Board, Application **No 119 of 2019** being a purported request for review of Tender No **MICNG/SDI/004/2019-2020** for Leasing of Motor Vehicles from local Assemblers.

57. Mr. Wamae deposed that the phase V Leasing program is the first one to be managed by the end user, the State Department of Interior, and the Kenyan tax payer will be saved an approximately Ksh **1, 046, 990,029/=.** He also averred that phase IV Leasing program terminated in April 2019 but was extended up to and including mid-October, 2019 (now past) and there is real danger that by dint of expiry of the Motor Vehicle Leasing contract by effluxion of time, the leased vehicles shall now be recalled by the various lessors including the applicant thereby putting in serious jeopardy the provision of security country wide. He also deposed that another grave consequence is the fact that the Insurance policies for the motor vehicles are set to expire with the lapse of the contract and this will expose the users in the national Government administration, the civilian and police drivers, public officers using the vehicles to the perils of using uninsured vehicles yet they will be discharging a vital public service duty. He deposed that on a balance of probability, the grant of the orders sought militate against the applicant.

58. He further averred that the Interested Party has confidential evidence that prices of the bids received in Tender Number MICNG/SDI/008/2018-2019 were above market prices and therefore the procurement proceedings in the tender were terminated under Section 63(1) (d) of the Act. In addition, he deposed that Article 201 (d) of the Constitution evinces that public money/funds be used in a prudent and responsible manner, hence, the Interested Party as the Accounting Officer has a sacrosanct duty to safeguard public money which duty necessitated the termination of the tender since the prices of the bids were above market prices and any award of the tender despite the overwhelming evidence of high bid prices would be contrary to constitutional tenets of good governance and amount to imprudent use of taxpayer's money.

59. He also averred that Article 227 of the Constitution requires the Interested Party to contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, and, that it is against this backdrop that the Interested Party's Accounting Officer terminated Tender Number MICNG/SDI/008/2018-2019 since it was not cost-effective as there was adequate/ample evidence that the prices of the bids were above market prices and awarding the same despite having prior knowledge that the prices were high would amount to a gross violation of Constitutional dictates and imprudent use of public finances.

60. He further deposed that the orders of Judicial Review sought must of necessity be mirrored to the specific Constitutional provisions including the national values and principles of governance enunciated under Article 10 among others, and, that, in any activity respecting public procurement and disposal, the starting point is the Constitutional tenets espoused under the Constitution and a procurement process must ordinarily, before any other consideration is taken into account whether in the parent legislation or the rules and regulations made thereunder; meet the constitutional threshold of fairness, equity, competitiveness and cost-effectiveness. He deposed that these are the very values and principles that informed the Respondent's Accounting Officer's decision to reject the award of tender.

61. Mr. Wamae also averred that Section 3 of the Act requires the Interested Party to ensure that there is maximization of value for money whenever it procures for goods and services which is one of the guiding principles that informed the cancellation of the tendering process in Tender Number MICNG/SDI/008/2018-2019 by the Interested Party. He also deposed that the Interested Party has the responsibility to comply with the provisions of Regulation 8(3) (z), 10(2) (e) and 22(2), as read with Articles 201 (d) and 227 (1) of the Constitution, and therefore the Ministry cannot be faulted for establishing the prevailing market prices under which to procure items for the benefit of saving taxpayers' money, and added that the applicants application has no merits.

Issues for determination

62. Upon analyzing the party's diametrically opposed positions, I find that the following issues distil themselves for determination:-

a. Whether this court can venture in to a merit review.

b. Whether the tender was lawfully terminated.

c. Whether the impugned decision is tainted with unreasonableness, irrationality and bad faith.

d. Whether the Interested Party could legally re-advertise the tender before the expiry of 14 days after the date of the impugned decision.

e. What are the appropriate reliefs in the circumstances of this case.

a. Whether this court can venture in to a merit review.

63. The applicant's counsel Mr. Oganda submitted that the scope of judicial review prior to the Constitution 2010 was an exclusive purview of writs of *mandamus, certiorari prohibition,* and, that, the contention that issues touching on merit cannot be raised in judicial review proceedings was the position of the law then, through the *Law Reform Act.**[13]*** He argued that the law has since changed and the provisions of Articles 22, 23 (3) of the Constitution as read with Article 47 of the Constitution and Sections 5 (2) (b) and (c) and Section 7 (1) (a) and (2) of the FAA Act raise Judicial review to a stature where fundamental rights affecting decision making and the legitimate expectations thereof can be examined by the court.

64. Mr. Oganda submitted that the common law principles previously encumbering judicial review for administrative actions have now been included under Article 47 Constitution and Section 7 of the FAA Act. In his view, there is not a bilateral system of law regulating administrative actions which are the common law and the Constitution but only one system grounded in the Constitution. He submitted that the courts' power to statutorily review administrative action no longer flows directly from the common law, but *inter alia* from the constitutionally mandated FAA Act and Article 47 of the Constitution. He urged that the scope of Judicial Review is not exclusively founded on the common law principles of prerogative writs but on a higher principle which is the Constitution as read with the FAA Act which deduces action reviewable by this court to subscribe to a minimum threshold built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision making process. To buttress his argument he cited *Republic v Public Procurement Administrative Review Board Ex-parte Syner- Chemie Limited**[14]*** for the proposition that Judicial Review is now a constitutional tool for the vindication of fundamental rights and freedoms, more specifically, the right to fair administrative action, and, any conflict between sections 8 and 9 and of Law Reform Act[15] and the FAA Act must be resolved in favour of the latter Act which directly implements the constitutionally guaranteed rights.

65. He also placed reliance on *Republic v The Public Procurement Administrative Review Board Ex-Parte Kenyatta National Hospital* [16]for the holding that it is the duty of the court to investigate whether the principles in Article 227 of the Constitution have been adhered to in public procurement.

66. The Respondent and the Interested Party's counsel Mr. Munene, submitted that the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies, but not to ensure the public body reaches a conclusion which is correct in the eyes of the court, and, that this court is not empowered to venture into correcting the impugned decision on the merits. He argued that this application is an appeal disguised as a Judicial Review Application. He relied on *Municipal Council of Mombasa v Republic & another**[17]*** which held that in judicial review:-

"*The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters of did he take into account irrelevant matters? These are the kind of the questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was ore there was not sufficient evidence to support the decision –and that, as we have, is not the province of judicial review."*

67. He argued that the settled criteria for issuance of judicial review orders include illegality, impropriety of procedure and irrationality.[18] He relied on *Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited**[19]*** for the holding that the remedy of judicial review is concerned with reviewing not the merits of the decision but the decision making process itself. He also relied on *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another**[20]*** which held that the purpose judicial review proceedings is to ensure that the individual is given fair treatment by the authority to which he has been subjected and not to ensure that the authority reaches a conclusion which is correct in the eyes of the court.

68. Mr. Oganda's submissions brings into sharp focus what has now been described as the changing character of judicial review jurisdiction. I have on numerous occasions had the opportunity to address the changing character of judicial review. In this regard, I can do no better than to profitably reproduce what I stated in *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another**[21]*** thus:-

> "***Mr. Mwenda,*** *counsel for the Respondents' submission on this ground was that "no decision had been made to be subjected to Judicial Review proceedings." He invited this court to decline jurisdiction on this ground.*

*The applicants' application is expressed under sections **8** and **9** of the Law Reform Act**[22]** and Order **53** Rules **1 (2), (2), (3),** & **(4), 3 (1)** of the Civil Procedure Rules. These provisions require an application for Judicial Review to be brought to challenge a decision, an order or proceedings. It should be recalled that sections **8** and **9** of the Law Reform Act**[23]** are borrowed from common law principles which traditionally governed exercise of Judicial Review jurisdiction. Consistent with these common law principles, my understanding of **Mr. Mwendwa's** argument is that the letter complained of is not a decision, but a mere invitation to the Respondents' to appear before the committee to provide the required information.*

*In my view, **Mr. Mwendwa's** argument can hold sway if we are to determine the issue before me based on traditional common law Judicial Review principles. The Constitution of Kenya, 2010, fundamentally changed the legal landscape in this country. However, this court cannot shut its eyes on express constitutional dictates as discussed below and determine a matter purely on common law principles.*

*Article **47** provides for the right to a fair Administrative Action. To give effect to Article **47**, Parliament enacted the Fair Administrative Action Act.**[24]** Section **2** of the act defines an **"administrative action"** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or 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.*

*On the face of the above constitutional provision and the right to access justice guaranteed under Articles **48**, the right to enforcement of the Bill of Rights under Article **22,** and the authority of the court to uphold and enforce the Bill of Rights under **23**, the question that arises is whether a citizen citing violation or threat of rights is requires to wait until the violation occurs.*

*Section **7 (1)** of Part two of the sixth schedule to the Constitution provides that:-*

> *(1) "All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."*

*All law must conform to the constitutional edifice. It follows that the provisions of sections **8** and **9** of the Law Reform Act**[25]** and Order **53** of the Civil Procedure Rules must be conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution.*

*As the Supreme Court of Appeal of South Africa observed**[26]** "All statutes must be interpreted through the prism of the Bill of Rights."This statement is true of decisions made by statutory bodies and State organs. The governing statute and the resultant decision must be interpreted through the prism of Article **47** of the Constitution. It is beyond argument that Article **47** codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**[27]** Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations.*

*Judicial Review in now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where the South African Court held in Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others**[28]** that "the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts." The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.*

*The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. First, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Second, the right to access the Court is now constitutionally guaranteed. This makes the requirement for the existence of a decision, order or proceedings should be read to include any administrative action as defined in section **2** of the Fair Administrative Action Act.**[29]**Third, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article **23(3) (f).** Fourth, section **7** of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section **7 (2)** of the act provides for grounds for applying for Judicial Review.*

*Court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a constitutional supervision of public authorities involving a challenge to the legal validity of the decision.**[30]** Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution.*

Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

*It is therefore my conclusion that all that an applicant is required to do is to demonstrate that the impugned decision whether it is a letter order or proceedings violates or threatens to violate the Bill of Rights or violation of the Constitution. No matter how noble and worthy of admiration the common law principles are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail. Suffice to say that the ex parte applicants have in the recitals in the heading to their application invoked Articles **21 (1), 23 (3) (f), 25 (c), 27 (1), 47 (1), 49 (1) (d) & 50 (2)** of the Constitution.*

*It is my conclusion that the letter complained of falls within the ambit of an administrative decision as defined section **2** of the Fair Administrative Action Act,**[31]** a legislation that was enacted to give effect to Article **47** of the Constitution. To that extent, the application before me is well grounded on the law and since letter is capable of being quashed should the court find that it was issued in a manner inconsistent with the law or in violation of Article **47** of the Constitution and the Fair Administrative Action Act.**[32]**"*

69. A reading of the above excerpt leaves me with no doubt that Mr. Oganda's argument is outside the ambit of the changing character of judicial review jurisdiction. His argument collapses on not one but ***six*** fronts. ***First***, as ably expounded in the above excerpt, the entrenchment of the power of Judicial Review, as a constitutional principle has of necessity expanded the scope of the remedy. For example, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy can now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights.

70. *Second*, unlike under the regime of sections 8 and 9 of *the Law Reform Act* and Order 53 of the Civil Procedure Rules, 2010, which makes it mandatory for a litigant seeking judicial review remedies to seek and obtain the courts leave, the right to access the court is now constitutionally guaranteed under Articles 22, 23, 48 and 258 rendering the requirement for leave unnecessary.

71. *Third*, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3) (f) of the

Constitution, hence, it is no longer a prerogative relief under the common law.

72. *Fourth,* section 7 of the FAA Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7 (2) of the act provides for grounds for applying for Judicial Review. The implication is that judicial review is now provided under the act.

73. *Fifth,* section 12 of the FAA Act imports the common law principles governing judicial review into the act. The section provides that:-

12. This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.

74. The FAA Act did not oust the common law. By dint of the above provision, the principles still apply.

75. Mr. Oganda's argument as I understood it is that this court can now venture into merit review while considering judicial review applications. He cited section 5 (2) of the FAA Act which provides that nothing in this section shall limit the power of any person to apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the Constitution or any written law or institute such legal proceedings for such remedies as may be available under any written law. I find no contest in the above provision nor is it a contested issue in this case. In fact it is consistent with my earlier observation that access to court is now constitutionally guaranteed.

76. However, Mr. Oganda proceeded to persuade the court that the changing character of judicial review now permits this court to venture into a merit review. Lucky for me, the Court of Appeal has had the opportunity to address the issue and this leads me to the next point.

77. *Sixth* the Court of Appeal has had the opportunity to address the same issue in several decisions. In *OJSC Power Machines Limited, Transcentrury Limited & Civicon Limited (Consortium) vs. Public Procurement Administrative Review Board & 2 Others* ***[33]*** it was stated that:-

> *"Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. See East African Railways Corp. vs. Anthony Sefu Far-Es-Salaam (1973) EA 327."*

(See also the Court of Appeal decisions in *Biren Amritlal Shah & Anor v Republic & 3 Others*[34]and *Energy Regulatory Commission v SGS Kenya Limited & 2 Others)* ***[35]***

78. The above excerpt explains in clear terms that it is only limited cases where a judicial review court can venture into merits as explained later. (See paragraph 114 below).There is a long-established and fundamental distinction between an appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in judicial review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

79. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

80. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. This position was best explained in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji:-* ***[36]***

> *"Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having*

the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant...."

81. As aptly put by Lord Hail sham L.C. in *Chief Constable of North Wales Police vs Evans*,[37] judicial review is concerned with reviewing, not the merits of the decision the application relates to, but rather the decision - making process. Judicial review is available where a decision making authority exceeds it powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers. The Criteria for administrative review are legality, procedural fairness and rationality.[38] It follows that Mr. Oganda's invitation to this court to venture into a merit review citing the expanded scope of judicial review jurisdiction is an invitation to this court to enter into the forbidden terrain of exercising appellate jurisdiction. I decline the said invitation.

b. Whether the tender was lawfully terminated.

82. This is the sole ground upon which the tender was terminated. Either party's case will either stand or fall on this ground. It is the gravamen of the Respective party's cases. Mr. Oganda anchored his submission on *Republic v Public Procurement Administrative Review Board & another Ex-Parte SGS Kenya Limited**[39]*** which held that:-

40. It is my view that section 63 of the Act imposes a statutory obligation upon the first interested party to terminate the tender award only on any of the grounds stated therein, and that those grounds are not stated therein for cosmetic purposes.

41. In order to discharge its burden under section 63 of the Act, the interested party must provide evidence that there is real and substantial technological change. The proper approach to the question whether a party invoking the said provision has discharged its burden under section 63 is therefore to ask whether the such a party has put forward sufficient evidence for a court to conclude that, on the probabilities, the technological change cited is of such a nature that it renders it imprudent for the contract to proceed on the original terms and the nature of the change and how is substantially affects the contract ought to be clearly stated. To me, that was the intention of the draftsman and the scheme and architecture of the Act so as to prevent or protect innocent bidders from being unfairly disadvantaged or deprived of the tender on flimsy grounds.

83. Mr. Oganda submitted that the Respondent deviated from the purpose of Sections 3 and 63(1) (d) of the Act which requires sufficient evidence in support of any termination. He argued that the Respondent watered the standard requirements for termination of tenders established by jurisprudence. He also argued that the Respondent failed to call to its attention that LOT 7 (Heavy Duty, Utility Passenger Vehicle, 4x4, L.W.B., 2001-3000cc, Diesel) was not in Motor Vehicle Leasing program Phase II but was introduced in Motor Vehicle Leasing program Phase V and as such there was obviously going to be a difference in total leasing price between the two. He further argued that the Respondent proceeded to make a finding that Interested Party's termination of Tender No. MICNG/SDI/008/2018-2019 Leasing of Motor Vehicles Phase V on the ground that the quoted prices were higher than the market prices was valid.

84. Mr. Oganda argued that the Respondent failed to take into consideration that there was no proper actuarial price matrix that took into account various parameters in motor vehicle leasing program such as motor vehicle specifications, insurance, driver training service centres, vehicle replacements and out of contract prices. As a consequence, he argued that Respondent's determination that the tender was validly terminated is not rationally connected to the reasons for it since the Respondent took notice of the fact that Leasing of Motor Vehicles Phase II lacked Lot 7 but went ahead to allow comparison of the same to Leasing of Motor Vehicles Phase V.

85. He placed reliance on *JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 Others**[40]*** for the holding that the Respondents powers are not unlimited.

86. Mr. Munene, counsel for the Respondent and the Interested Party submitted that the termination of the tender is valid and that it will save Kenya taxpayers over Ksh.1,046,990.29, consistent with Article 201 (d) and 227 of the Constitution. He argued that the termination was cost-ineffective, reasonable and legal.

87. Article 227 of the Constitution lays down minimum requirements for a valid tender process. The Article requires that the tender process preceding the conclusion of contracts for the supply of goods and services must be fair, equitable, transparent, competitive and cost-effective. As the decision to award a tender constitutes administrative action, it follows that the provisions of FAA Act applies to the process.

88. A decision to award a procurement contract by an organ of state is a matter of public law and it is governed by the Constitution, and the power to award such procurement contract is constrained by the principle that the organ of state must exercise no power and perform no function beyond that conferred on it by law. The Constitution is the repository of all state power. That power is distributed by the Constitution – directly and indirectly – amongst the various institutions of state and other public bodies and functionaries and its exercise is subject to inherent constitutional constraint – if only for legality – the extent of which varies according to the nature of the power that is being exercised.

89. These constitutional requirements in Article 227(1) of the Constitution must inspire all aspects of the process including termination. A policy, a tender process, or a decision terminating a tender process, which clashes with the requirements in Article 227, would be unconstitutional, and therefore legally invalid. It is for this reason that the Constitution obliges organs of state to ensure that a procurement process is fair, equitable, transparent, competitive and cost-effective. Where the procurement process including a termination of a tender process is shown not to be so, courts have the power to intervene.

90. As a State organ, the Interested Party is required to ensure compliance with the Constitution and the procurement legislation. A procuring entity is not allowed to act beyond the provisions of the procurement legislation. The exercise of all public power must be in accordance with the law. Organs of state may exercise no power and perform no function beyond that conferred upon them by law. It is central to the conception of our constitutional order that those who exercise public power, are constrained by the principle that they may exercise only

those powers and perform only those functions which are conferred upon them by the law. Their sole claim to the exercise of lawful authority rests in the powers allocated to them under the law. The common law principle of *ultra vires* is now underpinned by the constitutional doctrine of legality, which is an aspect of the rule of law. Thus, what would have been *ultra vires* under the common law by reason of a public official exceeding a statutory power is now invalid according to the doctrine of legality.[41]

91. It follows that if an organ of state fails to heed the provisions of the procurement laws and or a policy, it would be acting unlawfully and any of its decision, as a result thereof, would be open to an attack. As an administrative authority, therefore its action will be in conflict with the rule of law and the principle of legality, which requires that the organ of state to exercise only public power conferred on them and nothing more.

92. The national legislation prescribing the framework within which procurement policy must be implemented is the Act and the Regulations. Section **3** of the Act provides that Public procurement and asset disposal by State organs and public entities shall be guided by the values and principles laid down in Article 227 of the Constitution and relevant legislation. At the centre of the impugned decision is Section **63** of the act which provides for termination or cancellation of procurement and asset disposal proceedings in the following words:-

> *(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;*
>
> *(f) all evaluated tenders are non-responsive;*
>
> *(g) force majeure;*
>
> *(h) civil commotion, hostilities or an act of war; or*
>
> *(i) upon receiving subsequent evidence of engagement in fraudulent or*
>
> *corrupt practices by the tenderer.*
>
> *(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.*
>
> *(3) A report under subsection (2) shall include the reasons for the termination.*
>
> *(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.*

93. What must be borne in mind is that public procurement has a constitutional underpinning as clearly stated in Article 227. In addition, the scheme of the act is such that procurement process including cancellation of the tender process must strictly conform to the constitutional dictates of transparency, openness, accountability, fairness and generally the rule of law and such rights cannot be narrowly-construed.

94. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity, if established, must be evaluated to determine whether it amounts to a ground of review. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the requirements, before concluding that a review ground has been established.

95. Consistent with this above approach, the first question is whether an irregularity occurred in this case. Section 63 of the act constrains the discretion afforded an organ of state by the terms of the tender and that a tender could only be cancelled if one of the grounds set out in the said section exists. The section is couched in permissive, not mandatory, terms. However, it must be remembered that the decision to terminate or proceed with the tender must meet the attributes of Article 227 and 201 of the Constitution.

96. The reason given for the termination of the tender is provided for in section 63(d) which provides that there is evidence that prices of the bids are above market prices. The Interested Party terminated the procurement process citing this provision.

97. I have severally in my determinations argued that there is a need to appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender. I am conscious of the ever-flexible duty of a procurement entity to act fairly, and that fairness must be decided on the circumstances of each case. In the instant, there is evidence of price difference. A significant amount has been cited. The applicant invites us to find that the price difference is not rationally connected to the purpose and that it is unreasonable. Unfortunately, this invitation is in my view a ground for appeal as opposed to judicial review. It will require as merit review which is outside the scope of judicial review jurisdiction. The concern of this case is simple, whether the reason given falls within the ambit of section 63 (d) of the act.

98. The Respondent had no power or discretion to substitute the proof of price difference. On the contrary, it was for the applicant to prove that its prices were not above the market prices. Instead of proving the foregoing, it dwelt on discrediting the price different tendered by the Procuring Entity and forgot to prove its prices were actually not above the market prices. The set bar cannot be lowered to enable a tenderer to jump over.

99. A distinction should be drawn between a material factor and the evidence needed to prove that factor. Regard must be had to the facts as a whole in the context of the applicable legislation and the principles involved; and the words "acceptable tender" which involves a consideration of the degree of compliance with tender conditions, the act and the Regulations. The act here refers to the requirements of section 63 of the act. Essentially, a failure to comply with prescribed conditions in section 63 of the act will result in a tender being terminated unless those conditions are immaterial, unreasonable or unconstitutional.

100. As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so. When Parliament enacted the act, it was complying with the obligation imposed by Article 227 of the Constitution which requires that legislation be passed in order to give effect to the implementation of a procurement policy referred to in the Article. Therefore the procurement process in the statute must be construed within the context of the entire Article 227 while striving for an interpretation which promotes 'the spirit, purport and objects of the Article. A tender may be regarded as acceptable, only if it does not offend section 63 of the act. A tender shall be terminated on any of the grounds stated in section 63 of the act.

101. A proper construction of the impugned decision, the bid documents and the law leaves me with no doubt that the procuring entity's decision to terminate the tender was in conformity with the law. Put differently, the applicant has demonstrated that the Respondent acted *ultra vires* by terminating the tender.

102. The law as I understand is that a Procuring Entity is obliged to give sufficient reasons to the bidder(s) for the termination. It is also obliged to submit a report to the Public Procurement Regulatory Authority stating the reasons for the termination. Here is a case where the Procuring Entity communicated the reason for the termination to the applicant. The reason for the termination is provided under the enabling section. The applicant provided details of the price difference and the amount to be saved. I find and hold that the decision for the termination is consistent with section 63 of the act, articles 201 and 227 of the Constitution and the provisions of the Public Finance Management Act. A party invoking section 63 must put forward sufficient evidence for a court to conclude that, on the probabilities, the price quoted is higher than the market price. I find and hold that this requirement was satisfied. Differently put, the Respondent properly construed the law governing termination of tender processes.

f. Whether the impugned decision is tainted with unreasonableness, irrationality and bad faith

103. Mr. Oganda submitted that the impugned decision is unreasonable, irrational and made in bad faith. He argued that the Respondent failed to consider matters it was bound to consider before and while making its determination, hence, it acted unreasonably. He submitted that the Respondent was presented with uncontroverted evidence showing that Leasing of Motor Vehicle Phase II did not contain Lot 7 which was introduced in Leasing of Motor Vehicle Phase V therefore causing a price difference in the two phases. He also argued that the Respondent's decision was not rationally connected with the information before the Respondent since they concluded that Leasing of Motor Vehicles Phase II and Leasing of Motor Vehicles Phase V had the same quantity of vehicles which was not true since Leasing of Motor Vehicles Phase V had an additional 250 vehicles.

104. To buttress his argument, counsel relied on *Zachariah Wagunza & Another v Office of the Registrar Academic Kenyatta University & 2 Others**[42]* which held that where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. He cited Section 7(2) (f) of the FAA Act and argued that the Respondent wholly omitted to take into account the distinctions in Leasing of Motor Vehicles Phase II and Leasing of Motor Vehicles Phase V which was evidently clear since Phase II lacked Lot 7 that made the supposed difference, and described the Respondent's conduct as a misdirection of law, unreasonableness, irrationality and bad faith.

105. Mr. Munene relied on *Republic v Kenya Power & Lighting Company Limited & Another**[43]* for the proposition that the Board may have been wrong in its decision but this court would be usurping its statutory function were it to substitute its own views for those of the Board. In addition, Mr. Munene relied on *Kenya Pipeline Company Limited V Hyosung Ebara Company Limited & 2 Others**[44]* drew the boundaries for reviewing the decisions of the Review Board as follows:-

> *"The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity…S.98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procuring 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 that the High Court to handle disputes relating to breach of duty of the procuring entity .it follows that its decision in matters within its jurisdiction should not be lightly interfered with."*

106. Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus

take it outside the permissible parameters of the power.

107. A power is exercised fraudulently if its repository intends for an improper purpose, for example dishonestly, to achieve an object other than that which he claims to be seeking. The intention may be to promote another public interest or private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise.

108. Bad faith has been defined rarely, but an Australian case defined it as ‘‘a lack of honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker.’’[45] Recklessness was held not to involve bad faith.[46] Bad faith is a serious allegation which attracts a heavy burden of proof.[47] As the Supreme Court of Kenya in *Hon. Lady Justice Kalpana Rawal vs Judicial Service Commission & Anther*[48] citing Professor Groves M. in *"The Rule Against Bias*"[49]which stated that-*"*… claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case a hand." As the House of Lords stated, in formulating the appropriate test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man.”[50]The Lords also made clear that the standard was one of a “real danger” as opposed to a “real likelihood” or “real suspicion.” In a subsequent decision, the House of Lords also affirmed that the fair-minded observer would take account of the circumstances of the case at hand.[51]

109. Reasonableness, within the context administrative law cannot be imbued with a single meaning,[52] but the first element of a reasonable administrative action is rationality, and the second proportionality. Rationality means that evidence and information must support a decision an administrator takes.[53] The purpose of rationality is to avoid an imbalance between the adverse and beneficial effects and to consider using less drastic means to achieve the desired goal.

110. It is common ground that unreasonableness and irrationality are grounds for Judicial Review. Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of Fair Administrative Action[54] which provides that:-“ *A court or tribunal under subsection (1) may review an administrative action or decision, if- (i) the administrative action or decision is not rationally connected to- a) the purpose for which it was taken; (b) the purpose of the empowering provision;(c) the information before the administrator; or (d) the reasons given for it by the administrator*.” The test for rationality was stated as follows*:-**[55]***

> “*The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.”*

111. In the application of that test, the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at.[56] Contextualizing the impugned decision with the circumstances under which it was made leaves the court with the irresistible conclusion that the decision was not influenced by other considerations nor was it was made in utter abuse of power and discretion. It cannot be said that it was not connected or related to the purpose of the statute. There is no evidence that it was influenced by extraneous circumstances not rationally connected to the purpose of the statute or the discretion given under the act.

112. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the FAA Act. 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. 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[57] as ‘conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.’ Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.[58]

113. In determining whether a decision is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the ‘merits’ in some way or another. As long as the judge determining the issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.***[59]*** In this regard, the court notes the explanation on the market price difference offered by the Interested Party and the need for prudent use of public resources including the communication for the termination. Above all, the fact that the reason offered is provided under section 63(d) of the act and finds that the alleged unreasonableness or irrationality cannot stand.

114. 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****[60]*** and that the *impugned decision had to be “verging on absurdity” in order for it to be vitiated*.[61]This stringent test has been applied in Australia[62] where the court 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, is so devoid of any plausible justification that no reasonable body of persons could have reached them.” Given the facts of this case, I am not persuaded that a different tribunal properly addressing itself to the same facts and circumstances could have arrived at a different conclusion. In fact, the applicant never advanced this argument despite citing unreasonableness.

115. 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 weather the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Put differently, no argument was advanced before me that the decision falls outside the range of possible acceptable outcomes applying the same set of facts and the law. 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;

116. 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.

117. 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.[63] The *ex parte* applicant has not demonstrated any of the above requirements for legal unreasonableness.

118. 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.

119. 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, or where the decision maker failed to apply his mind to the matter.

120. Safeguarding legality is the most important purpose for the judicial review of administrative actions. Thus, in most administrative law systems, a person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be judicially challenged. In one sense, there must always be the premise of "want of legality."

121. In response to a challenge to the legality of administrative action, courts generally need to consider the compliance of administrators with both substantive and procedural legal rules. This is because any administrative decision making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures. The most basic rules of administrative law are first that decision makers may exercise only those powers which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators comply with these two rules, their decisions are safe. From the perspective of administrators and statutory bodies, this fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision or decisions rendered by Tribunals can be judicially challenged on grounds that the administrative decision does not comply with the above mentioned basic requirements of legality.

122. The most obvious example of illegality is where a body acts beyond the powers which are prescribed for it. In other words, it acts *ultra vires*. Decisions taken for improper purposes may also be illegal. Illegality also extends to circumstances where the decision-maker misdirects itself in law. When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. If the exercise of the 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, a court will normally find that the power had been exercised illegally.

123. Guided by the foregoing tested legal principles and applying the same to the circumstances of this case, I find that the allegations of unreasonableness, irrationality and bias fails.

d. Whether the Interested Party could legally re-advertise the tender before the expiry of 14 days after the date of the impugned decision.

124. Mr. Oganda argued that the applicant committed an illegality by re-advertising the tender in contravention of Section 175 of the Act. He submitted that the Respondent's decision does not become final until after the expiry of the 14 days allowed for any party to institute Judicial Review, and, that, no action can be undertaken until the decision becomes final and binding. Mr. Oganda urged that this is a ground for the court to intervene and safeguard the interests of Justice. He relied on Lord Denning's statement in *Macfoy v United Africa Co. Ltd**[64]** that:-

"…if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

125. Mr. Munene's rejoinder was that the urgency of the matter necessitated the re-advertisement. He argued that the invitation to Tender was done in utmost good faith, fairness, transparency and public interest since the current contract for the motor vehicles to be replaced was due to expire mid-October, 2019 and therefore the Interested party had to move with speed and invite tenders for the new contract. He argued that the vehicles were to be used for security operations all over the country and there would be catastrophic consequences should the security apparatus in the country grind to a halt due to lack of motor vehicles. He stated that the applicant was invited to bid.

126. The impugned decision was rendered on 18th September 2019. The applicant approached this court on 20th September 2019 and obtained interim orders staying the impugned decision. On 23rd September 2019, the Interested Party re-tendered the subject tender and awarded it on 1st October 2019.

127. The Interested Party admits awarding the contract, but explains that this was done before the stay orders were served upon it. This explanation was not contested, hence I find no difficulty accepting it. The major challenge is the admission that the re-tendering was done before the expiry of 14 days.

128. Our jurisprudence is awash with decisions by our superior courts addressing similar situations and restating the consequences that flow from failure to observe the 14 day period provided for review. In *Republic v Public Procurement Administrative Review Board & 2 Others ex parte Adan Osman Godana t/a Eldoret Standard Butchery*[65] the court was emphatic that the decision of the Review Board only becomes binding upon the parties as final if no judicial review is filed to the High Court within 14 days. The court also stated that the law does not contemplate that a procuring entity would enter into a contract with the successful bidder before the elapse of 14 days from the date of the decision by the Review Board.

129. In *Republic v Public Procurement Administrative Review Board & 3 Others ex parte Furniture Elegance Limited*[66] the court stated that a party aggrieved by the decision of the Review Board has an automatic stay or the decision remains frozen for 14 days to enable the aggrieved party to challenge the decision by way of judicial review or by other means. In the same vein, the court was emphatic that the rushed contract was no contract at all and that a tribunal or an administrative body has no inherent power to direct the performance of a contract outside the stipulated statutory timelines.

130. In *Lordship Africa Limited v Public Procurement Administrative Review Board & 2 Others,*[67] the court stated that any party who partakes of an illegal contract while knowing that it ought to have known that it was illegal to enter into such an illegal contract cannot be forgiven for partaking in such an illegality. The court in the said case also stated that such a party would suffer the perils of the doctrine of *volenti non fit injuria* because all the parties are presumed to know the law.

131. It would be fruitful to consider the broad principles that underlie the importance of lawful conduct on the part of public bodies when discharging their public duties. In this regard, a brief survey of the applicable constitutional and legislative principles underscoring the importance of a transparent and open public tender process is merited. In *Head of Department, Department of Education, Free State Province v Welkom High School,**[68]* the Constitutional court of South Africa emphasized the importance of lawful conduct on the part of public bodies. It enunciated the underlying principles as follows:-

> *"State functionaries, no matter how well intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law."*

132. The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process. The foregoing principles are premised on the supremacy of the Constitution and the rule of law. The principle of legality is an aspect of the rule of law and the exercise of public power is only legitimate where lawful.

133. The principle of legality requires that the exercise of public power must be rationally related to the purpose for which the power was given.[69] This lies at the heart of the rationality test. Our courts have consistently held that rationality is a minimum requirement applicable to the exercise of public power in that decisions must be rationally related to the purpose for which the power is given otherwise they are in effect arbitrary and inconsistent with the requirement of rationality. The rational connection means that objectively viewed, a link is required between the means adopted by the person exercising the power and the end sought to be achieved. The test therefore in relation to rationality requirements is twofold. *First*, the decision-maker must act within the law and in a manner consistent with the Constitution. The decision maker must not misconstrue the nature of his or her powers. *Second*, the decision must be rationally related to the purpose for which the power was conferred. This is because if it were not, the exercise of power would, in effect, be arbitrary and at odds with the rule of law.[70]

134. Article 227 of the Constitution is the source of the powers and function of organs of state in procurement of goods and services. The Article provides that where an organ of state or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This requirement must be understood together with the constitutional precepts on administrative justice in Article 47 of the Constitution and the basic values and principles governing public service in Article 232 of the Constitution.

135. Thus, the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is Article 227 of the Constitution. To achieve the constitutional imperative in relation to procurement, Parliament enacted the *Public Procurement and Asset Disposal Act, the Regulations made thereunder* and the *Public Finance Management Act.* The object of these legislations is to give effect to the constitutional provisions in securing transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions to which it applies. One of the primary reasons for the express inclusion of the principles in Article 227 of the Constitution is to safeguard the integrity of the government procurement process.

136. Section 173 of the act provides that upon completing a review, the Review Board may do any one or more of the following:-

i. Annul anything the Procuring Entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety;

ii. Give directions to the Procuring Entity with respect to anything to be done or redone in the procurement proceedings;

iii. Substitute the decision of the Review Board for any decision of the Procuring Entity in the procurement proceedings;

iv. Order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

v. Order termination of the procurement process and commencement of a new procurement process.

137. The person submitting the successful tender and the Procuring Entity shall enter into a written contract based on the tender documents, any clarifications and any corrections of arithmetic errors made therein, within the period specified in the notification but not until at least fourteen (14) days have elapsed following the giving of that notification. (See section 135 (5) of the act reproduced later).

138. The question here is whether a procuring entity can validly re-tender the award and purport to enter into a contract with another party before the expiry of 14 days from the date of the decision of the Review Board. As state above, I am travelling on a path that has been trodden by others before me. In this regard, the authorities cited above are to the point. It will add no value for me to rehash the principles laid down in the said cases. I can usefully add that it is the duty of courts of justice to try to get the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

139. As a general proposition, the courts will apply that construction which best carries into effect the purpose of the statute under consideration. To this end, the court may inquire into the purpose behind the enactment of the legislation, requiring construction as one of the first steps in treating the problem. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. The drafters of the act deliberately granted an aggrieved party the opportunity to challenge the decision within 14 days.

140. Article 227 emphasis on fairness on government procurement process. The process of procurement has a value in itself, which must lead to invalidity if the process is flawed irrespective of whether the flaw has consequences. The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of Article 47 of the Constitution and the FAA Act, which guarantee every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

141. The right to apply for Judicial Review under section 175 of the act is not only a statutory remedy but also it is a constitutional remedy underpinned by Articles 22, 23(f) and 165(6) of the Constitution. If a procuring entity mischievously decides to sign a contract with the successful tenderer before the expiry of the statutory provided period to seek judicial review, the signing of the contract will automatically and unfairly deprive the unsuccessful tenderer of the remedy under the said provisions. It will be a direct affront to the said provisions. Similarly, if decides to re-start the procurement process before the lapse of the 14 days period, the same will be an affront to the above provisions and the ensuing process will have been deprived the attributes of fairness require by Article 227 of the Constitution.

142. It is safe to state that the drafters of the act where careful to afford an aggrieved party the opportunity to challenge the decision at any stage of the procurement process. This is evident from a reading of section 167 (1) of the act. In addition, section 135 (3) of the act provides for creation of procurement contracts in the following words:-

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

143. The above provision is clear. After the Notification of the successful bidder, the procuring entity cannot enter into a contract with the successful bidder or purport to re-tender the same procurement before the expiry of 14 days. This period is accorded to the aggrieved party to challenge the decision before the Review Board.

144. In the same vein, after the decision of the Review Board, an aggrieved party is granted 14 days within which to apply for Review in the High Court. Our courts have consistently held that the decision remains frozen for 14 days from the date of the decision. Transparency, which is at the core of public procurement law and Regulations, demands that the procurement procedure or the decision or action involved shall be subject to scrutiny and liable to challenge. The question whether any procurement is valid must be answered with reference to the Constitution, the governing legislation and Regulations. The enabling statute grants an aggrieved party the right to approach the High Court. The fairness contemplated under Article 227 of the Constitution cannot be realized where a procuring entity purports to sign a contract before the expiry of the 14 days nor decides to re-advertise the same procurement and purports to award it to beat the 14 days period.

145. Differently put, the procuring entity cannot enter into a valid contract before the expiry of the 14 days after the decision of the Review Board nor can it re-advertise the same procurement before the expiry of 14 days as happened in this case. It follows that the purported re-advertisement and the alleged Notification of the successful party or purported awarding of the tender by the Interested Party is illegal. The ensuing contract is therefore legally frail. Perhaps I should add that the Interested Party only stated that by the time the court order was served, the tender had been opened, evaluated and successful bidders notified. However, no documents were exhibited to support this averment nor was the alleged successful bidder disclosed or enjoined in these proceedings. However, there was no argument that a contract had been signed, even though such a contract, consistent with the jurisprudence discussed above would be a nullity. But more fundamental is the clear provisions of section 175 (6) of the act which provides that:-

(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in

breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

146. A clear reading of the above provision leaves me with no doubt that the purported re-tendering is null and void.

e. What are the appropriate reliefs in the circumstances of this case

147. Mr. Oganda cited *Republic v Chief Magistrate Makindu & another Ex-Parte Bernard Masau Mailu & 2 others**[71]*** which cited *Captain Geoffrey Kujoga Murungi vs Attorney General**[72]*** for the holding that *certiorari* deals with decisions already made and can only issue where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice; or contrary to law. In addition, he relied on *Okiya Omtatah Okoiti v Kenya Revenue Authority & 2 others**[73]*** in which the court cited *Law of Extraordinary Legal Remedies**[74]*** for the proposition that a writ of *prohibition* may not be used to usurp or perform the functions of an appeal, writ of error or certiorari, or to correct any mistakes, errors or irregularities in deciding any question of law or fact within its jurisdiction.

148. Mr. Oganda submitted that the writ of *prohibition* is intended to halt any or further proceedings being undertaken or are likely to be undertaken by an inferior tribunal or body since the proceedings if were to be allowed would be against the law of the land. He cited *Halburys Laws of England**[75]*** which states that prohibition is "directed to an inferior tribunal or body forbidding it to continue proceedings that are 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."

149. Mr. Oganda also relied on *Republic v Land Disputes Tribunal, Karuri & 2 others**[76]***for the proposition that a prohibiting order is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority or body which is susceptible to judicial review which forbids that court or tribunal or authority or body to act in excess of its jurisdiction or contrary to law. Prohibiting orders are concerned with those in the future.[77] He urged this court to grant an order of prohibition prohibiting the Interested Party from advertising, inviting, accepting, evaluating bids and /or awarding contracts for the Tender.

150. Mr. Munene cited section 173 of the Act, and argued that the Respondent in granting the orders herein remained faithful to its powers and mandate. Regarding the prayer for *certiorari*, he urged the court to remember that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself.[78] He submitted that for the applicant to qualify for the orders, he has to demonstrate that the Respondent committed an error of law or a mistake that goes to the jurisdiction of the tribunal and that misinterpretation of the law is not sufficient to move a judicial review application. On prohibition, Mr. Munene urged the court to be persuaded by *Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 others**[79]*** for the holding that *"an order of prohibition 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 herein lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. That is why it is said prohibition looks to the future so that if a tribunal were to arrange 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 ... an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made it can only prevent the making of a contemplated decision. There is nothing the respondents have failed to do, as matter of statute law or legal duty."*

151. In addition, Mr. Munene cited *Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others**[80]*** which held that:-

"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.....an order of prohibition.....cannot quash what has already been done…"

152. Further, Mr. Munene relied on the Court of Appeal decision in *Republic vs. University of Nairobi**[81]*** which held that as a matter of common-sense the judicial order of prohibition must be pre-emptive in nature, that is, it must be directed at preventing what has not been done. He also cited ***Okiya Omtatah Okoiti v Kenya Revenue Authority & 2 others**[82]*** **in which the court relied on** the court relied on *Law of Extraordinary Legal Remedies**[83]*** *which states that a writ of prohibition may not be used to usurp or perform the functions of an appeal, writ of error or certiorari, or to correct any mistakes, errors or irregularities in deciding any question of law or fact within its jurisdiction. Mr. Munene further relied on* ***Republic v Land Disputes Tribunal, Karuri & 2 others*** **(supra).**

153. He argued that the Interested Party had already re-tendered, accepted, evaluated and awarded the successful bidders on 2nd October 2019 and argued that the order of prohibition had been overtaken by events thus cannot issue in this circumstance. He placed reliance on *Republic vs. Cabinet Secretary, Ministry of Interior and Coordination of National Government & 2 Others ex parte Patricia Olga Howson **[84]***for the holding that declaratory orders cannot be issued in purely judicial review proceedings.

154. Lastly, he argued that judicial review orders of certiorari, mandamus and prohibition are public law remedies and the court has the ultimate discretion to either grant or not to grant the remedies to the successful applicant. He urged the court to decline the issuance of the orders sought in the circumstances of the present case and submitted that courts while exercising their judicial review jurisdiction have been

alive to considerations of public interests in declining the issuance of judicial review even where a party has made out a case of issuance of orders of judicial review. He argued that this matter torches on public interest since that tender being challenged is on leasing of Motor Vehicles for use by various National Government (Executive) Administration at the County levels as well as the National Police Service unit for enhanced national administration and security operations in the entire country thus halting the same will lead to insecurity in the Country.

155. I have already declined the applicant's counsel invitation to venture in to a merit review in this case. I have already concluded that the tender was lawfully terminated, hence, the Respondent did not error in dismissing the applicant's Request for Review. I have also held that the impugned decision is not tainted with unreasonableness, irrationality and bad faith. I have however held that the Interested Party could not legally re-advertise the tender before the expiry of 14 days after the date of the impugned decision, and, that, the purported re-advertisement of the tender prior to the expiry of the 14 days offends the act and the requirements of Article 227 of the Constitution. Simply put, the re-advertisement deprives the entire process the attributes of legality and fairness so cherished in public procurement.

156. The question that follows is what would be appropriate reliefs in the circumstances of this case. Having concluded as I have herein above, that the tender was validly terminated as provided under section 63 (d) of the act, this alone could have disposed this application in favour of the Respondent and the Interested Party. However, I have also held that the purported re-advertisement and any ensuing process emanating therefore is a nullity. It follows that no valid contract can be signed arising from such an illegality. This being the clear position of the law, then this is a proper case for this court to fashion appropriate reliefs. Indeed, this Court is empowered by Article 23(3) of the Constitution to grant appropriate reliefs.

157. Perhaps the most precise definition of "appropriate relief" is the one given by the South African Constitutional Court in *Minister of Health & Others v Treatment Action Campaign & Others*[85] thus:-

> *"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."*

158. I fully adopt this definition of "appropriate reliefs" and shall deploy it in my disposition of this judicial review application. Arising from the findings herein above enumerated, constitutional and statutory interpretations and various pronouncements of law, I have arrived at the following orders:-

> *a. **That** the Respondent's decision dated 18th September 2019 **was not** tainted with illegality, unreasonableness, irrationality, bias or procedural impropriety.*
>
> *b. **That** Interested decision to re-advertise the Tender Number MICNG/SD1/004/2019-2020 on 20th September 2019 prior to the expiry of the 14 days period from the date of Respondents decision dated 18th September 2019 offends the provisions of Articles 10, 201, 232 and 227 of the Constitution, section 3, 96, 135 (3),175 (1) of the Public Procurement and Asset Disposal Act, section 4 of the Fair Administrative Action Act and therefore the purported re-advertisement, evaluation and or Notification of award of the said tender and any other processes emanating therefrom are null and void for all purposes.*
>
> *c. **That** the Interested Party be and is hereby directed to re-advertise tender number MICNC/SDI/004/2019-2020 for Leasing of Motor Vehicles From Local Assemblies and award the same strictly in accordance with the provisions of Articles 201, 232 and 227 of the Constitution, section 3 of the Public Procurement and Asset Disposal Act, section of the Fair Administrative Action Act and the Public Finance Management Act.*
>
> *d. No orders as to costs.*

Orders accordingly.

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

John M. Mativo

Judge